

Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems

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In the past, comparative law over-emphasized substantive law and was limited mostly to the area of private law. More recently, an effort has developed to study comparative aspects of various public law sectors that are beyond the realm of constitutional law in which the comparison of systems and specific institutions has a respectable tradition. Another clearly discernable trend in comparative law is a shift of focus from substantive law to procedural elements of the law. This trend includes comparative analyses of court systems, the education and the role of legal professionals, the access to justice by litigants, and other factors that inform the comparatist about the law-in-action to a greater extent than the approaches that were limited to substantive law.

These trends certainly enrich the discipline of comparative law. It seems, however, that they are fraught with greater risks of fundamental misunderstanding of foreign law than the comparative endeavors in substantive law because these trends lack a system-neutral conceptual framework and because some authors have not had first-hand experience with the various laws-in-action.

A case in point is the recent debate between Professors Langbein¹ and Gross² concerning the relative merits and demerits of the civil justice systems in the United States and West Germany. Presently, I do not intend to enter this debate on all scores; the purpose of this Article is more limited. I attempt to show that a potentially fruitful exchange of views is in grave danger of being hopelessly derailed because of

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¹ See Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

² See Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987).

traces of the fundamental misunderstandings mentioned before. Hopefully, this Article will put the discussion back on track.

In view of the limited purpose I pursue here, a comprehensive restatement of the views and arguments that Langbein and Gross propound is unnecessary. Rather, I present only the portions of their articles which in my view contain or are based on erroneous information and thus lead to an unfortunate mismatch likely to frustrate the potential benefits resulting from the mutual efforts of the authors and others joining in the debate.

I. ADVERSARIAL LITIGATION

Comparisons between the American and West German (or any other Continental) civil justice systems are commonly conceptualized by terming the American system "adversarial" and its counterpart "nonadversarial" or, worse, "inquisitorial." While the label "inquisitorial" should be avoided because it may evoke unwarranted reminiscences of unpleasant historical experiences like the Inquisition or the Star Chamber, it also should be avoided because it is completely inapposite to describe the Continental systems of civil procedure. To be sure, in criminal cases the adversarial role of defense lawyers and prosecutors is less prominent on the Continent than in the United States. But even so, anyone familiar with the history of criminal procedure knows that the times when the defendant was treated merely as an "*inquisitus*" — an object of the proceedings rather than as a party — have long passed. In the wake of the Enlightenment and the French Revolution, fundamental reforms replaced the old system with a European-style adversarial model of criminal justice.³ Since Professor Gross collapses much of his discussion into sweeping generalizations about both criminal and civil procedure, this point must be made to combat further confusion.

Actually, Professor Langbein's agenda involves only the comparison of certain aspects of civil procedure in the United States and West Germany. His issues are sharply focused; he is concise and concrete, as Professor Gross admits at the outset.⁴ On the other hand, Gross obfuscates the issues in many respects. His references to criminal law and criminal procedure obviously miss the mark when he discusses the advantages that a foreign system may hold for *civil* procedure.

Even more importantly, after Gross pays tribute to Langbein's conciseness and concreteness, he unfortunately fails to match his oppo-

³ See E. SCHMIDT, INTRODUCTION TO: THE GERMAN CODE OF CRIMINAL PROCEDURE 1-3, 5, 10, 18 (H. Niebler trans. 1965).

⁴ Gross, *supra* note 2, at 734.

ment's sharp focus. Langbein contrasts adversarial fact-gathering with judicial conduct of the fact-gathering process, which he believes is realized in West German civil procedure. Gross addresses the issue raised by Langbein in the second part of his article. However, notwithstanding the title, *Common Defenses of Adversary Fact-Finding*, only a small fraction of his discussion is devoted to the process of fact-gathering and fact-finding designed to establish a factual basis for dispute adjudication.⁵ The remainder of the discussion is simply a hodge-podge of arguments concerning something the author calls "adversarial litigation." Using this vague, undefined term, Gross, and those whose views he discusses, seem to assume that only the American and possibly other common-law systems of civil justice follow an adversarial model. This assumption appears to be completely misguided.

The Continental systems clearly comport with this model if one defines adversarial litigation as a civil justice system in which the lawyers determine the scope and course of the litigation by pleadings and through procedures such as appeals, admissions, settlement, and so on.⁶ Also, the Continental lawyer, especially the German lawyer, assumes all responsibilities associated with the adversarial role of his American counterpart regarding the *legal* issues of a dispute as well as the factual issues. As Langbein states:

There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigators suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from fact, they discuss and distinguish precedent, they interpret statutes, and they formulate views of the law that further the interests of their clients.⁷

In accordance with other authors, Langbein concludes that both the German and the American systems are adversary systems of civil procedure. No one with first-hand knowledge of Continental systems can disagree with this assessment. However, some American lawyers without a comparative background still suffer from parochial notions about the imagined uniqueness of certain features of their system which are not unique.

In short, all arguments generally praising the virtues of "adversarial litigation" or "*the*" adversary system cannot advance, even by an inch,

⁵ *Id.* at 742-48.

⁶ For a similar definition, see Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 768 n.124 (1986).

⁷ Langbein, *supra* note 1, at 824.

the comparative analysis of German and American civil procedure. Since both systems represent variants of the adversarial model, those arguments are worthless for present purposes. We need to be much more specific. The relative roles of litigants, lawyers, and decision makers (*i.e.*, judges and juries) in the process of fact-gathering and fact-finding must be addressed.

II. FACT-FINDING AND FACT-GATHERING

In virtually every civil case the litigants dispute the facts: each litigant tells a different story. Consequently, for a litigant to prevail she must convince the decision maker of the truth of her story.

Langbein argues that the German methods used to establish the truth of facts in civil cases are preferable to the American methods. He describes the German system in considerable detail and with great precision. I believe, however, that his analysis should be further developed and refined; I will make comments to this end below.

On the other hand, Gross establishes the role of the various actors in the truth-finding process under the heading *Superior Accuracy*.⁸ One argument involves the role of juries in criminal cases and thus has no relevance to civil procedure. Gross considers unpersuasive three further arguments which claim that "adversarial fact-finding" is more likely to yield accurate results than other forms of fact-finding. But the discussion is unsatisfactory because Gross never defines the term "adversarial fact-finding," nor does he explain the alternatives to this method of fact-finding.

Under the American system, fact-finding that makes an explicit or implicit authoritative statement about a judicial decision's factual basis is a power reserved exclusively to the decision maker. In most cases this power is reserved to the trial judge, or in the relatively rare case of a jury trial, to the jury. The litigants can submit only suggested findings of fact or, in their closing statements, urge the jury to find the facts in their favor. In this respect there is no essential difference between the American and the Continental civil justice systems. The absence of a civil jury in those systems is irrelevant. Viewed from the perspective of a functional comparative analysis, the important issue is that the decision makers, and not the adversaries, find the facts underlying the decision. To this extent the term "adversarial fact-finding" makes absolutely no sense. No such process exists under the systems being compared.

⁸ Gross, *supra* note 2, at 742-44.

I next consider that the process which precedes the actual fact-finding is designed to establish a factual basis for the judicial decision of a civil dispute. Langbein, in accordance with other authors, refers to this process as "fact-gathering."⁹ The pivotal point of his article demonstrates that in Germany the courts rather than the parties conduct fact-gathering, and this judicial fact-gathering constitutes the major German advantage in civil procedure as compared with the system prevailing in the United States.¹⁰

In my view it is *not* appropriate to describe the process leading to fact-finding under the German system as fact-gathering conducted by the court. This characterization of the process invites unfortunate misunderstandings. The risk of fostering such erroneous interpretations is compounded when Langbein (and others) depict the German judge in a civil case as someone assigned the task "to investigate the facts."¹¹ Gross elaborates on this theme when he writes:

The German system also requires advocates for the parties (as Langbein emphasizes), but in addition it includes another role with no American parallel, the investigating judge. This is a separate job with separate training and no overlap in personnel. In German criminal cases the roles of the advocates are also more differentiated than our own.¹²

The image of the German judge in a civil case as an investigator is a chimera. Nothing but grotesque misconceptions are bound to result from, and are in fact inherent in, statements like this.¹³ For the sake of clarification it must be emphasized categorically: Under the German and American systems, facts not in controversy between the parties are generally beyond the reach of judicial scrutiny. No formal admissions are required under the German law for this principle to apply.¹⁴ It is enough that certain allegations by one litigant are not specifically challenged (*substantiiert bestritten*) by the opponent.¹⁵ Even though the judge may believe the facts that the parties present are not true, he has

⁹ Langbein, *supra* note 1, at 825 *passim*; Gerber, *supra* note 6, at 752-55 (distinguishing fact-determination (which equals "fact-finding," as used in this Article) from fact-investigation and fact-presentation (which form the elements of "fact-gathering," as used in this Article)).

¹⁰ Langbein, *supra* note 1, at 825.

¹¹ *Id.* at 824.

¹² Gross, *supra* note 2, at 749.

¹³ For a simplifying and absolutely erroneous statement by an American "expert," see Gerber, *supra* note 6, at 756 n.49 (quoting Seidel, *Introduction and Overview*, in *EXTRATERRITORIAL DISCOVERY IN INTERNATIONAL LITIGATION* (1984)).

¹⁴ Zivilprozessordnung [ZPO] § 288 (W. Ger.) (Code of Civil Procedure).

¹⁵ ZPO § 138(III); BAUMBACH, *ZIVILPROZESSORDNUNG* § 138, 4(A) (43d ed. 1985).

no power to introduce evidence to establish the truth (exceptions apply in certain cases, such as family matters,¹⁶ and with respect to certain facts, such as those of public record¹⁷). The principle applicable to uncontroverted facts in civil procedure is called the principle of formal truth (*Prinzip der formellen Wahrheit*). It is contrasted with the principle of substantive truth (*Prinzip der materiellen Wahrheit*) in German criminal procedure which enables a judge to disregard any admissions and confessions (there is no plea by the criminal defendant in a technical sense)¹⁸ and to introduce any evidence independently, including witness testimony, to determine the true facts.¹⁹ The criminal judge's truly investigatory function, which provides maximum protection for defendant and public is unknown to German civil procedure.

Even when facts are in dispute between civil litigants, as they ordinarily are, the German judge is not free to establish the truth since her function in the fact-gathering process is strictly limited by the powers and responsibilities vested in the litigants. The process thus should be understood and described not as court-conducted, but as a process conducted jointly by the court on the one hand and by the parties and their attorneys on the other hand.

The structure of the civil process does not allow the court to call any witness unless a litigant has expressly named her in the proceeding²⁰ by identifying specific facts of which the witness is alleged to have knowledge.²¹ These facts (*das Beweisthema*, the theme of proof) are then identified in a court ruling (*Beweisbeschluss*) ordering the witness' testimony to be taken.²² When the witness is summoned (or subpoenaed), these alleged facts on which she testifies are disclosed in the summons.²³ When examining the witness, the court is strictly bound by the *Beweisthema* (theme of proof) originally determined by the litigant who called the witness. The court is prohibited from inducing the witness to testify on facts outside of the *Beweisthema*, and, of course, the witness is not permitted to volunteer such information.

In sum, the question of whether a particular witness can be called to

¹⁶ ZPO §§ 616, 617, 640d.

¹⁷ ZPO § 291; see also BAUMBACH, *supra* note 15, Uebers. § 373, 5).

¹⁸ J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 60, 73-74 (1977). *But see id.* at 96-98 (discussing the *Strafbefehl*).

¹⁹ Strafprozessordnung [StPO] §§ 155, 244(II) (W. Ger.) (Code of Criminal Procedure); see also E. SCHMIDT, *supra* note 3, at 14.

²⁰ ZPO § 373.

²¹ *Id.*

²² *Id.* § 359; BAUMBACH, *supra* note 15, § 359, 2) B.a).

²³ ZPO § 377 (II ziff.2).

testify and the scope of the potential testimony is exclusively within the control of litigants and litigators under the German system of civil procedure. Gross is again profoundly mistaken when he remarks that the German judge "will take evidence by calling those witnesses whose value is apparent from the outset of the dispute or who are suggested by the parties."²⁴ Once and for all: The German judge in a civil case can *only* call witnesses named by the parties.

The idea that German judges primarily control fact-gathering originated merely because of the judge's prominent role in the actual taking of evidence, especially the taking of witness testimony. Certain minds tend to seize only on things that are easily grasped. In this vein, no one can overlook the fact that in Germany it is obviously for the court to decide whether and when to hear testimony of a named witness. In other words, the naming of a witness in connection with a party's specific factual allegations is a necessary, but not a sufficient condition for the taking of that witness' testimony. The witness is heard only if the court grants the litigant's motion to do so. The court also functions as examiner-in-chief when a witness actually testifies.²⁵ In no case can the litigators make a witness testify in the form of a deposition; and under no circumstances can they take testimony or insist on its being taken in court if the judge decides not to take it at all or not at that time.

If properly made, the judge's rulings on these procedural issues are determined by a strict standard of relevancy²⁶ as well as by the principle that evidence is taken only to the extent necessary for the case's quick disposal. This feature of fact-gathering in German civil procedure together with the judge's role as examiner-in-chief is of course in marked contrast to American practices. However, the visibly powerful role the German judge plays in a particular phase of fact-gathering, that is, the actual taking of evidence, should not be overrated. It must not be permitted to cloud the larger picture in which the entire process of fact-gathering involves a more complex structure of roles, powers, and responsibilities than that which manifests itself in evidence-taking. Within this structure, as the foregoing brief outline demonstrated, the judge is just one among several powerful actors; the litigants and the litigators act as equally important checks and balances. The picture is

²⁴ Gross, *supra* note 2, at 735.

²⁵ ZPO §§ 394-397.

²⁶ On this standard in comparison to American law, see Gerber, *supra* note 6, at 761-63.

one of divided power and joint responsibility, not that of unrestricted dominance by a single actor: the judge.

Under German law, fact-gathering by means other than witness testimony evinces primarily the same pattern. However, the court can order an expert to be heard without a motion by the parties.²⁷ The inspection of a thing also can be ordered without such motion.²⁸

III. INEFFICIENCY

Restating Langbein's position, Gross claims that Langbein's view of the German advantage in civil procedure claims superior efficiency for the German in comparison to the American system. In a rather crude fashion, and expressly disregarding Pareto, Kaldor-Hicks, and others, Gross defines efficiency as "a measure of the relationship of a value or benefit to the cost of producing it; the higher the value per cost, the higher the efficiency."²⁹ This definition leaves so many questions unanswered that it would be hard to reason with the author if his views to any substantial degree depended upon the definition. Fortunately, this is not the case.

First, Gross agrees with Langbein that German litigation is cheaper and quicker than American litigation.³⁰ Probably no unbiased observer would disagree.

Second, Gross argues that the value of the product of litigation — the judgment — cannot be assessed by only considering the time within which it is obtained. Gross maintains that accuracy should also be considered: "an erroneous judgment has no value at all, or, more likely, negative value."³¹ This is a baffling statement and is difficult to reconcile with the universally accepted idea of *res judicata*, which in certain situations subordinates the accuracy of a judicial decision to other legal values, such as the finality and certainty of a dispute resolution. But Gross also points out that comparative data on the error rate of civil or criminal justice systems do not exist and are difficult (if not impossible) to gather so that the accuracy test is too "murky to call."³²

Finally, Gross asserts that the German civil justice system is more consistent than the American system.³³ As he uses the term, consistency

²⁷ See ZPO §§ 143, 144. For an extensive discussion of expert testimony in German civil procedure, see Langbein, *supra* note 1, at 835-41.

²⁸ ZPO § 144.

²⁹ Gross, *supra* note 2, at 738 n.20 and accompanying text.

³⁰ *Id.* at 739.

³¹ *Id.* at 740.

³² *Id.* at 741.

³³ *Id.* at 741-42.

involves the relationship between the legal results of cases with similar facts. Thus, it is an attribute of judicial decisions an observer finds to be present or not, *after* the facts are determined. Therefore, the methods used to gather and find the facts are not in issue when the legal results in a series of cases are assessed as more or less consistent.

In sum, Gross' discussion of efficiency of civil litigation in West Germany and the United States is inconclusive. The author, however, does not seem to be troubled by this preliminary outcome of his study. There are two good reasons why the reader also can be sanguine about the outcome.

First, Gross acts like the dog barking up the wrong tree when he talks to Langbein in terms of efficiency. He not only fails to provide a workable definition of this concept, he also fails to realize that Langbein never uses it. Avoiding broad generalizations about the systems of civil procedure in West Germany and the United States, Langbein does not attempt to evaluate either system in a sum total supposedly expressing the degree of its efficiency. On the contrary, Gross himself³⁴ concedes that Langbein shows very concisely and concretely how German civil procedure avoids the repetitiveness and often unnecessary complexity of fact-gathering inherent in the American system. Langbein holds that by reducing and sometimes completely eliminating waste in the process of fact-gathering, German civil procedure has an advantage over its American counterpart.³⁵ By restating Langbein's position in the sweeping language of efficiency, Gross is not responsive to the article that triggered his own.

The second reason concerns the last major part of the article that demonstrates Gross' disregard for efficiency in procedure.³⁶ He appears to assume, if only for the sake of argument, that American civil procedure *is* inefficient, whatever that means precisely. Rather than considering this as a vice, Gross believes it to be a virtue of the American system. From a comparative point of view his arguments hardly make any sense. But even in an exclusively American perspective they are quite unpersuasive.

Gross states that "[t]he most basic effect of inefficiency in a system of adjudication is that it deters litigation"³⁷ and then quickly asserts that the deterrent effect of the way the American system is run "is one of the chief complaints against our legal system. But it has advantages as

³⁴ *Id.* at 734.

³⁵ Langbein, *supra* note 1, at 846.

³⁶ Gross, *supra* note 2, at 752-57.

³⁷ *Id.* at 752.

well, the most obvious of which is the conservation of resources — fewer court cases cost less to handle.”³⁸ Without referring to Gross, Langbein partially answered the last point in a more recent article³⁹ which argues that the inefficiency of American civil procedure (in this article he uses inefficiency language) is the principal reason for the well-known prolixity of American contracts, when compared to contracts elsewhere including other common-law countries.

If the alleged causal connection is accepted, as I think it should be, then quite obviously the American civil justice system does not lead to a “conservation of resources” by deterring litigation. Rather than saving costs it merely externalizes them. The American-style contract generates more costs at the drafting stage in an attempt to avoid litigation. The office lawyer rather than the litigator cashes in. This, of course, increases the costs of doing business in *all* fairly important instances including the great majority of transactions that never cause serious performance problems so that they would never be litigated. In other words, the business community and the consumer subsidize the relatively small number of transactions in which serious performance problems arise, but litigation can be avoided because an American-style contract provides detailed rules for this contingency. Whose advantage after all?

Is the total of all transactions costs generated by fear of the American civil justice system lower than the cost of litigation in the few cases which would otherwise be litigated? In all likelihood this is an unanswerable question. But even if we knew the answer and even if it was affirmative, is it desirable to burden the many by costly American-style contracts to save a few from the horrors and expenses of American-style litigation? Gross does not address these questions. He has convinced himself that the effect of inefficient litigation is cost avoidance. The possibility of cost externalization is not discussed.

Next, Gross tells us that other substantial benefits result from procedural inefficiency. By discouraging potential litigants from utilizing the courts, the system, according to Gross, leaves a greater “zone of immunity” that formal legal rules do not penetrate.⁴⁰ As he sees it, the range of conduct beyond formal legal control is relatively large in this coun-

³⁸ *Id.*

³⁹ Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 AM. J. COMP. L. 381 (1987).

⁴⁰ See Gross, *supra* note 2, at 753.

try. Gross' examples include driving a car at five to ten miles above the legal maximum speed and paying bills one month late.⁴¹

It is difficult to think of less persuasive examples to support the point that procedural inefficiency has its advantages for American society. Anyone who has lived in countries other than the United States or who knows enough about societies of other countries, will wonder why Gross believes that paying bills late and disregarding speed limits with impunity (in most cases) constitutes a specifically American "zone of immunity" that cannot be found in countries with a different system of civil (and criminal) justice. He can be assured that such minor deviations from legal rules occur everywhere without even a remote possibility of a reaction from the legal system. Certainly there are countries in which more serious anti-social behavior usually does not cause such reaction. These behavioral patterns are rooted in the national culture, ethnicity, or religion, and are not easy to reach by the law, as reformers and revolutionary lawmakers learn all too frequently. Thus, it is virtually impossible that anything relating to "zones of immunity" would change in this country if its civil justice system is reformed in the direction of the "German advantage."

In a slightly different, but closely related vein, Gross suggests that the peculiar position of judges in America must be counter-balanced by procedural inefficiency. In this context he makes general statements about alleged differences between German and American judges:

The German judge *operates* the judicial machinery of his system. The American judge *presides* over his dominion; he has less control but more prestige and authority. He also has a wider range of powers and roles than his German counterpart, including uniquely American opportunities to act on matters of public policy. To the extent that this judicial policy-making role is valuable — and we seem to value it — an inefficient judicial system may be a necessity. It would be difficult to justify, or tolerate, allocating that sort of political power to judicial officials if they had the means to implement their policies directly and effectively.⁴²

Gross also stated: "It is clear that American judges have a greater range of powers — in particular equitable powers — than any European judges, including English common-law judges."⁴³

It seems to me that at the level of such sweeping generalities nothing is that clear. Consider for instance equitable powers. When equity first came into existence and throughout its first centuries of gradual unfolding, it is true that equitable powers were used in quite an innovative fashion. Today, however, equity is a well-structured body of doc-

⁴¹ *Id.*

⁴² *Id.* at 752 (emphasis in original).

⁴³ *Id.* at 746.

trines and rules. To be sure, many of these provide rather flexible standards to determine whether or not a specific rule applies. These standards look to good faith, honesty, and the like. Also, equitable remedies such as injunctions can be more flexible than common law remedies.

But this is by no means a feature peculiar to the American system, as every comparatist is likely to know. Germany and other civil law countries do have functional equivalents to equitable powers that are embodied in the codes' well-known general clauses, which also use standards like good faith, *boni mores*, and so on.⁴⁴ Some judicial remedies like the French *astreinte* are as flexible as equitable remedies in the United States.⁴⁵

German judges and judges in other civil law countries not only have the power to develop further and shape the law as they see fit, they also make constant and frequent use of this power. In some areas of the law, such as contracts, it can be argued that German courts have played a much more active role as innovators than American courts. In performing this role the judge under any system acts on matters of public policy. There is nothing "uniquely American" about this, as Gross asserts. Moreover, German judges have been criticized for their activism as much as their American brethren. Professor Dawson has painstakingly analyzed this, including some of the criticism which he embraces himself.⁴⁶ While Dawson was primarily concerned with German contract law, Professor Markesinis has conducted similar studies in German tort law.⁴⁷ He also is impressed with the boldness and creativity of German judges, which from another perspective must be seen as symptoms of the willingness to claim and to exercise considerable powers on the judiciary's part.⁴⁸

⁴⁴ See Bürgerliches Gesetzbuch [BGB] §§ 138, 157, 242, 826 (W. Ger.) (Civil Code).

⁴⁵ See Beardsley, *Compelling Contract Performance in France*, 1 HASTINGS INT'L & COMP. L. REV. 93, 95-102 (Spring 1977).

⁴⁶ Compare Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041 (1976); Dawson, *The General Clauses, Viewed from a Distance*, 41 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 441 (1977); Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U.L. REV. 1039 (1983) with Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1 (1984).

⁴⁷ B. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS (1986); Markesinis, *Conceptualism, Pragmatism, and Courage: A Common Lawyer Looks at Some Judgments of the German Federal Court*, 34 AM. J. COMP. L. 349 (1986) [hereafter Markesinis, *Conceptualism*].

⁴⁸ See Markesinis, *Conceptualism*, *supra* note 47, at 359-60, 367.

It follows once again that in developing an argument, Gross makes erroneous assumptions about foreign legal systems and on the basis of these assumptions attributes uniqueness to certain features of American law which are in fact anything but unique.⁴⁹ The tendency to view American institutions as entirely new, without antecedents or analogues outside of the country, is encountered in the media, popular culture, and politics. It may be a part of the American dream, of American ideology. In literary criticism it has been analyzed recently as a specific form of parochialism.⁵⁰ While many nations tend to think of themselves, their culture, etc., as the greatest, it is not as common to think of one's nation, culture, etc., as unique. Comparative law is a means to overcome false notions of unmatched greatness and uniqueness. Once this is accomplished, nations truly can learn from each other.

IV. FEASIBILITY

This is not to say that the German advantage in civil procedure, as described and analyzed by Langbein, already has been established beyond any doubt and should be adopted in this country. It is still possible to have serious doubts about the feasibility under American conditions of assigning judges a more active role in the process of fact-gathering.

It should be remembered, however, that adopting the German model would not involve a switch from one extreme to another. As practiced today, litigators almost exclusively control and conduct American-style fact-gathering. But the judge by no means exclusively controls and conducts German-style fact-gathering in civil procedure. Rather, as I have shown in part II above, the judge shares powers and responsibilities with the parties and their attorneys.

The most interesting part of Gross' article is his discussion of *Some Drawbacks of Efficient Systems*.⁵¹ Generally, Gross argues that although the German system works well in Germany, it might work poorly in America. In making this argument, he describes the German system of fact-gathering as centralized and based on specialization. This characterization appears to be another overstatement. Since judges share powers and responsibilities in German-style fact-gathering, there

⁴⁹ See *supra* text accompanying notes 5-6.

⁵⁰ T.J. Lears, *Provincialism and the Individual Talent: American Studies Since the Second World War*, Paper presented at conference, *Convergence in Crisis: Narratives of the History of Theory* at Duke University (Sept. 25, 1987) (on file with Professor Fredric Jameson, Duke University).

⁵¹ Gross, *supra* note 2, at 748-52.

is no centralization. As for specialization, it is true that in West Germany and other civil law countries, the judiciary consists primarily of professional judges who enter their roles as judges early in their professional lives. That includes the role German judges must play in fact-gathering. But obviously, most Americans are appointed to the bench usually after years of law practice; generally they experience no serious problems in adjusting and function well as judges. Why are they not also able to learn how to exercise the functions a judge must perform in German-style fact-gathering? There is absolutely nothing mysterious about the task of controlling the sequence of evidence-taking or of examining a witness in a non-partisan capacity. It can be learned fairly quickly.

Politicians and others in public life in the United States sometimes find they must master these tasks. The functions of fact-gathering and fact-finding in matters of public concern are routinely entrusted to innumerable committees and commissions. For example, the Warren Commission (investigating President Kennedy's assassination), the Rogers Commission (Challenger disaster), and the Tower Commission (Iran-Contra affair), had to evaluate and present facts of vital importance to the nation. In these and other cases, there is always likely to be criticism of the procedures that the committee or commission take or fail to take in discharging its fact-finding mission. But I know of no fundamental criticism arguing that there are no specialists trained in the kind of fact-gathering and fact-finding that the commissions or committees practice. Obviously, it is assumed that intelligent people learn the job quickly when the occasion arises. Why should this be different with judges? It follows that I am not at all persuaded by the argument that German-style fact-gathering could be made to work in the United States only if a German-style career judiciary is created.

The committees and commissions are noteworthy for another reason. Langbein reminds us that in ordinary business and personal decision making, the patterns of inquiry resemble the fact-gathering process in German civil procedure.⁵² He also mentions the method of fact-gathering in administrative decision making especially when adjudicating disability claims.⁵³ It is amazing that no one, not even Langbein, calls attention to the myriad of fact-finding committees and commissions

⁵² Langbein, *supra* note 1, at 844. *But see* Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1843-44 (1986).

⁵³ Langbein, *supra* note 1, at 861-62 n.138. Langbein relies on and quotes from a comprehensive recent study by Jerry L. Mashaw.

when the virtues of American-style fact-gathering in court proceedings are extolled by various authors.

Obviously, these tribunals, the committees and commissions, typically extend the interpretation and application of their legal powers. When it comes to fact-gathering, such tribunals do not follow the extreme American model; adversarial proof-taking by the parties does not occur. On the other hand, the methods of fact-gathering that the tribunals apply also differ from the German model of *civil* procedure. Under this system, as noted before, no witness can be heard unless a litigant has requested that she be heard. Once it is decided that the witness will be heard, her testimony can only be taken within the limitations imposed by the *Beweisthema*, in the *Beweisbeschluss*, originally determined by one of the parties at the time of nominating the witness.⁵⁴ In contrast, investigatory committees and commissions typically are free to decide what witnesses to call and examine and are free to determine the sequence in which witnesses are heard. In addition, tribunal members or lawyers who are assistants to the tribunal question the witnesses. This procedure resembles German-style fact-gathering in criminal cases as the tribunal is not dependent on a litigant's motion to call a witness. For the rest, the existing practices of fact-gathering by these tribunals are in line both with German criminal and civil procedure, whereas adversarial American-style fact-gathering simply is not practiced in these cases, some of which are extremely important to the public. If the American model of adversarial fact-gathering is dispensed with in these tribunals, how can it be argued that it is the universally superior method of establishing the truth?

At this point it might be claimed that committees and commissions cannot make use of the American method of fact-gathering because no individual parties are involved. Indeed, according to their mandate, tribunals like the Warren Commission, the Rogers Commission, and the Tower Commission are not designed to assess the personal responsibility of individuals or corporate entities. However, in carrying out their mandate, they often cannot avoid passing judgment on individual conduct. Thus, the roles of Lee Harvey Oswald, Morton Thiokol, Donald Regan, and John Poindexter, to name only a few, were obviously at stake when the three respective commissions investigated the events which brought them into existence.

These examples demonstrate that it is possible to apply American-style strictly adversarial fact-gathering to the tribunals. The individuals

⁵⁴ See *supra* text accompanying notes 20-23.

involved and their lawyers could be pitted against lawyers representing the public interest (somewhat like the prosecutor in a criminal case). Even in proceedings not involving any issue of individual responsibility, lawyers could be appointed to the roles of adversaries representing opposing views and the fact-gathering process, including witness examination, could be left to them. The fact that this is not done must be considered closely when German-style fact-gathering in civil procedure and its feasibility in an American environment is discussed further.

A final point relating to feasibility involves concerns over the trustworthiness of certain elements in the American judiciary. Langbein straightforwardly writes:

The likely venue of a lawsuit of mine would be the state court in Cook County, Illinois, and I must admit that I distrust the bench of that court. The judges are selected by a process in which the criterion of professional competence is at best an incidental value. Further, while decent people do reach the Cook County bench in surprising numbers, events have shown that some of their colleagues are crooks. If my lawsuit may fall into the hands of a dullard or a thug, I become queasy about increasing his authority over the proceedings.⁵⁵

Langbein does not suggest instituting a German-style career judiciary to remedy these shortcomings. He thinks less extreme measures could bring about material improvement, and he advocates above all an assimilation of state practices to federal practices in selecting judges and in determining their status.⁵⁶

The point raised must certainly be taken seriously in any further discussion. But how much weight does it actually carry? We have already seen that Gross is misjudging the German system of fact-gathering when he describes it as centralized and based on specialization, and thus considers its adoption in America a bad risk.⁵⁷ But even Langbein may overestimate the increase in power on the part of judges resulting from an adoption in the United States of the German fact-gathering method in civil cases. It is Langbein who describes the German system as "controlled" or "dominated" by the judge. I have tried to show in part II of this Article that the German fact-gathering method is not an extreme opposite of the American method applied in court proceedings. Rather, it is a system in which powers and responsibilities are shared by the court and the litigants and their lawyers. Judicial arbitrariness and abuse of judicial powers can of course occur, but there are checks

⁵⁵ Langbein, *supra* note 1, at 853-54 (footnote omitted).

⁵⁶ *Id.* at 854-55.

⁵⁷ Gross, *supra* note 2, at 751-52.

and balances which the parties can bring to bear on the misbehaving judge. In this context, more attention should be devoted to the possibility of intensifying and amplifying appellate review. Here, too, comparative law can make a contribution.⁵⁸ At any rate, the discussion should proceed.

⁵⁸ One aspect of appellate review, the finality principle, is dealt with in a comparative study. See Bernstein, *The Finality of a Judgment as a Requirement for Civil Appeals in Germany*, 47 *LAW & CONTEMP. PROBS.* 35 (Summer 1984).

