

John H. Langbein, "The German Advantage in Civil Procedure"
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Our lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial. The shortcomings inhere in a system that leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.

We have comforted ourselves with the thought that a lawyerless system would be worse. The excesses of American adversary justice would seem to pale by comparison with a literally nonadversarial system—one in which litigants would be remitted to faceless bureaucratic adjudicators and denied the safeguards that flow from lawyerly intermediation.

The German advantage. The main theme of this article is drawn from Continental civil procedure, exemplified for me by the system that I know reasonably well, the West German. My theme is that, by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice. But I shall emphasize that the familiar contrast between our adversarial procedure and the supposedly nonadversarial procedure of the Continental tradition has been grossly overdrawn.

To be sure, since the greater responsibility of the bench for fact-gathering is what distinguishes the Continental tradition, a necessary (and welcome) correlative is that counsel's role in eliciting evidence is greatly restricted. Apart from fact-gathering, however, the lawyers for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure. 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. I shall urge that German experience shows that we would do better if we were greatly to restrict the adversaries' role in fact-gathering.

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Outline. After sketching the main features of German civil procedure (Part I), I contrast the striking shortcomings of American procedure: the wastefulness and complexity of our division into pretrial and trial procedure (Part II), and the truth-defeating distortions incident to our system of partisan preparation and production of witnesses (Part III) and experts. I devote special attention to the German practice in obtaining impartial expert testimony (Part IV). I pause to notice how flimsy are the theoretical justifications that have been advanced in support of adversary domination of fact-gathering in civil litigation (Part V). Because a more judge-centered fact-gathering process would direct attention to the powers of the bench, I describe the incentive structure of the German career judiciary (Part VI) and the appellate safeguards for litigants (Part VII)....

I. OVERVIEW OF GERMAN CIVIL PROCEDURE

There are two fundamental differences between German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the

lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require.

Initiation. The plaintiff's lawyer commences a lawsuit in Germany with a complaint. Like its American counterpart, the German complaint narrates the key facts, sets forth a legal theory, and asks for a remedy in damages or specific relief. Unlike an American complaint, however, the German document proposes means of proof for its main factual contentions. The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The defendant's answer follows the same pattern. It should be emphasized, however, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work of the judge.

Judicial preparation. The judge to whom the case is entrusted examines these pleadings and appended documents. He routinely sends for relevant public records. These materials form the beginnings of the official dossier, the court file. All subsequent submissions of counsel, and all subsequent evidence-gathering, will be entered in the dossier, which is open to counsel's inspection continuously.

When the judge develops a first sense of the dispute from these materials, he will schedule a hearing and notify the lawyers. He will often invite and sometimes summon the parties as well as their lawyers to this or subsequent hearings. If the pleadings have identified witnesses whose testimony seems central, the judge may summon them to the initial hearing as well.

Hearing. The circumstances of the case dictate the course of the hearing. Sometimes the court will be able to resolve the case by discussing it with the lawyers and parties and suggesting avenues of compromise. If the case remains contentious and witness testimony needs to be taken, the court will have learned enough about the case to determine a sequence for examining witnesses.

Examining and recording. The judge serves as the examiner-in-chief. At the conclusion of his interrogation of each witness, counsel for either party may pose additional questions, but counsel are not prominent as examiners. Witness testimony is seldom recorded verbatim; rather, the judge pauses from time to time to dictate a summary of the testimony into the dossier. The lawyers sometimes suggest improvements in the wording of these summaries, in order to preserve or to emphasize nuances important to one side or the other.

Since the proceedings in a difficult case may require several hearings extending across many months, these summaries of concluded testimony—by encapsulating succinctly the results of previous hearings—allow the court to refresh itself rapidly for subsequent hearings. The summaries also serve as building blocks from which the court will ultimately fashion the findings of fact for its written judgment. If the case is appealed, these concise summaries constitute the record for the reviewing court. (We shall see that the first appellate instance in German procedure involves review de novo, in which the appellate court can form its own view of the facts, both from the record and, if appropriate, by recalling witnesses or summoning new ones.

Anyone who has had to wade through the longwinded narrative of American pretrial depositions and trial transcripts (which preserve every inconsequential utterance, every false start, every stammer) will see at once the economy of the German approach to taking and preserving evidence. Our incentives run the other way; we pay court reporters by the page and lawyers mostly by the hour.

A related source of dispatch in German procedure is the virtual absence of any counterpart to the Anglo-American law of evidence. German law exhibits expansive notions of testimonial privilege, especially for potential witnesses drawn from the family. But German procedure functions without the main chapters of our law of evidence, those rules (such as hearsay) that exclude probative evidence for fear of the inability of the trier of fact to evaluate the evidence purposively. In civil litigation German judges sit without juries (a point to which this essay recurs); evidentiary shortcomings that would affect admissibility in our law affect weight or credit in German law.

Expertise. If an issue of technical difficulty arises on which the court or counsel wishes to obtain the views of an expert, the court—in consultation with counsel—will select the expert and define his role. (This aspect of the procedure I shall discuss particularly in Part IV below.)

Further contributions of counsel. After the court takes witness testimony or receives some other infusion of evidence, counsel have the opportunity to comment orally or in writing. Counsel use these submissions in order to suggest further proofs or to advance legal theories. Thus, nonadversarial proof-taking alternates with adversarial dialogue across as many hearings as are necessary. The process merges the investigatory function of our pretrial discovery and the evidence-presenting function of our trial. Another manifestation of the comparative efficiency of German procedure is that a witness is ordinarily examined only once. Contrast the American practice of partisan interview and preparation, pretrial deposition, preparation for trial, and examination and cross-examination at trial. These many steps take their toll in expense and irritation.

Judgment. After developing the facts and hearing the adversaries' views, the court decides the case in a written judgment that must contain full findings of fact and make reasoned application of the law.

II. JUDICIAL CONTROL OF SEQUENCE

From the standpoint of comparative civil procedure, the most important consequence of having judges direct fact-gathering in this episodic fashion is that German procedure functions without the sequence rules to which we are accustomed in the Anglo-American procedural world. The implications for procedural economy are large. The very concepts of “plaintiff's case” and “defendant's case” are unknown. In our system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case. Free of constraints that arise from party presentation of evidence, the court investigates the dispute in the fashion most likely to narrow the inquiry. A major job of counsel is to guide the search by directing the court's attention to particularly cogent lines of inquiry.

Suppose that the court has before it a contract case that involves complicated factual or legal issues about whether the contract was formed, and if so, what its precise terms were. But suppose further that the court quickly recognizes (or is led by submission of counsel to recognize) that some factual investigation might establish an affirmative defense—illegality, let

us say— that would vitiate the contract. Because the court functions without sequence rules, it can postpone any consideration of issues that we would think of as the plaintiff's case—here the questions concerning the formation and the terms of the contract. Instead, the court can concentrate the entire initial inquiry on what we would regard as a defense. If, in my example, the court were to unearth enough evidence to allow it to conclude that the contract was illegal, no investigation would ever be done on the issues of formation and terms. A defensive issue that could only surface in Anglo-American procedure following full pretrial and trial ventilation of the whole of the plaintiff's case can be brought to the fore in German procedure.

Part of what makes our discovery system so complex is that, on account of our division into pretrial and trial, we have to discover for the entire case. We investigate everything that could possibly come up at trial, because once we enter the trial phase we can seldom go back and search for further evidence. By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized. In the Anglo-American procedural world we value the early-disposition mechanism, especially summary judgment, for issues of law. But for factladen issues, our fixed-sequence rule (plaintiff's case before defendant's case) and our single-continuous-trial rule largely foreclose it.

The episodic character of German civil procedure—Benjamin Kaplan called it the “conference method” of adjudication—has other virtues: It lessens tension and theatrics, and it encourages settlement. Countless novels, movies, plays, and broadcast serials attest to the dramatic potential of the Anglo-American trial. The contest between opposing counsel; the potential for surprise witnesses who cannot be rebutted in time; the tricks of adversary examination and cross-examination; the concentration of proof-taking and verdict into a single, continuous proceeding; the unpredictability of juries and the mysterious opacity of their conclusory verdicts—these attributes of the Anglo-American trial make for good theatre. German civil proceedings have the tone not of the theatre, but of a routine business meeting—serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage, and the appearance of a surprise witness would simply lead to the scheduling of a further hearing. In a system that cannot distinguish between dress rehearsal and opening night, there is scant occasion for stage fright.

In this business-like system of civil procedure the tradition is strong that the court promotes compromise. The judge who gathers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved. As the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the likely outcome. He is, therefore, strongly positioned to encourage a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement. The loser pays system of allocating the costs of litigation gives the parties further incentive to settle short of judgment.

III. WITNESSES

Adversary control of fact-gathering in our procedure entails a high level of conflict between partisan advantage and orderly disclosure of the relevant information. Marvin Frankel

put this point crisply when he said that “it is the rare case in which either side yearns to have the witnesses, or anyone, give the whole truth.”

If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial. Jerome Frank described the problem a generation ago:

The witness often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed.

Thus, said Frank, “the partisan nature of trials tends to make partisans of the witnesses.”

Cross-examination at trial—our only substantial safeguard against this systematic bias in the testimony that reaches our courts—is a frail and fitful palliative. Cross-examination is too often ineffective to undo the consequences of skillful coaching. Further, because cross-examination allows so much latitude for bullying and other truth-defeating stratagems, it is frequently the source of fresh distortion when brought to bear against truthful testimony. As a leading litigator boasted recently in an ABA publication: “By a carefully planned and executed cross-examination, I can raise at least a slight question about the accuracy of an adverse witness's story, or question his motives or impartiality.”

When we cross the border into German civil procedure, we leave behind all traces of this system of partisan preparation, examination, and cross-examination of witnesses. German law distinguishes parties from witnesses. A German lawyer must necessarily discuss the facts with his client, and based on what his client tells him and on what the documentary record discloses, the lawyer will nominate witnesses whose testimony might turn out to be helpful to his client. As the proofs come in, they may reveal to the lawyer the need to nominate further witnesses for the court to examine. But the lawyer stops at nominating; virtually never will he have occasion for out-of-court contact with a witness. Not only would such contact be a serious ethical breach, it would be self-defeating. “German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel or who have consorted unduly with a party.”

No less a critic than Jerome Frank was prepared to concede that in American procedure the adversaries “sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked.” That is a telling argument for including adversaries in the fact-gathering process, but not for letting them run it. German civil procedure preserves party interests in fact-gathering. The lawyers nominate witnesses, attend and supplement court questioning, and develop adversary positions on the significance of the evidence. Yet German procedure totally avoids the distortions incident to our partisan witness practice.

IV. EXPERTS

The European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and

commissioned by the court, although with great attention to safeguarding party interests. In the German system, experts are not even called witnesses. They are thought of as “judges' aides.”

Perverse incentives. At the American trial bar, those of us who serve as expert witnesses are known as “saxophones.” This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. I sometimes serve as an expert in trust and pension cases, and I have experienced the subtle pressures to join the team—to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.

At trial, the battle of experts tends to baffle the trier, especially in jury courts. If the experts do not cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing. The system invites abusive cross-examination. Since each expert is party-selected and party-paid, he is vulnerable to attack on credibility regardless of the merits of his testimony. A defense lawyer recently bragged about his technique of cross-examining plaintiffs' experts in tort cases. Notice that nothing in his strategy varies with the truthfulness of the expert testimony he tries to discredit:

A mode of attack ripe with potential is to pursue a line of questions which, by their form and the jury's studied observation of the witness in response, will tend to cast the expert as a “professional witness.” By proceeding in this way, the cross-examiner will reap the benefit of a community attitude, certain to be present among several of the jurors, that bias can be purchased, almost like a commodity.

Thus, the systematic incentive in our procedure to distort expertise leads to a systematic distrust and devaluation of expertise. Short of forbidding the use of experts altogether, we probably could not have designed a procedure better suited to minimize the influence of expertise.

The Continental tradition. European legal systems are, by contrast, expert-prone. Expertise is frequently sought. The literature emphasizes the value attached to having expert assistance available to the courts in an age in which litigation involves facts of ever-greater technical difficulty. The essential insight of Continental civil procedure is that credible expertise must be neutral expertise. Thus, the responsibility for selecting and informing experts is placed upon the courts, although with important protections for party interests.

Selecting the expert. German courts obtain expert help in lawsuits the way Americans obtain expert help in business or personal affairs. If you need an architect, a dermatologist, or a plumber, you do not commission a pair of them to take preordained and opposing positions on your problem, although you do sometimes take a second opinion. Rather, you take care to find an expert who is qualified to advise you in an objective manner; you probe his advice as best you can; and if you find his advice persuasive, you follow it.

When in the course of winnowing the issues in a lawsuit a German court determines that expertise might help resolve the case, the court selects and instructs the expert. The court may decide to seek expertise on its own motion, or at the request of one of the parties. The code of civil procedure allows the court to request nominations from the parties —indeed, the code

requires the court to use any expert upon whom the parties agree—but neither practice is typical. In general, the court takes the initiative in nominating and selecting the expert.

The only respect in which the code of civil procedure purports to narrow the court's discretion to choose the expert is a provision whose significance is less than obvious: "If experts are officially designated for certain fields of expertise, other persons should be chosen only when special circumstances require." One looks outside the code of civil procedure, to the federal statutes regulating various professions and trades, for the particulars on official designation. For the professions, the statutes typically authorize the official licensing bodies to assemble lists of professionals deemed especially suited to serve as experts. In other fields, the state governments designate quasi-public bodies to compile such lists. For example, under section 36 of the federal code on trade regulation, the state governments empower the regional chambers of commerce and industry (*Industrie-und Handelskammern*) to identify experts in a wide variety of commercial and technical fields. That statute directs the empowered chamber to choose as experts persons who have exceptional knowledge of the particular specialty and to have these persons sworn to render professional and impartial expertise. The chamber circulates its lists of experts, organized by specialty and subspecialty, to the courts. German judges receive sheaves of these lists as the various issuing bodies update and recirculate them.

Current practice. In 1984 I spent a little time interviewing judges in Frankfurt about their practice in selecting experts. My sample of a handful of judges is not large enough to impress statisticians, but I think the picture that emerges from serious discussion with people who operate the system is worth reporting. Among the judges with whom I spoke, I found unanimity on the proposition that the most important factor predisposing a judge to select an expert is favorable experience with that expert in an earlier case. Experts thus build reputations with the bench. Someone who renders a careful, succinct, and well-substantiated report and who responds effectively to the subsequent questions of the court and the parties will be remembered when another case arises in his specialty. Again we notice that German civil procedure tracks the patterns of decision-making in ordinary business and personal affairs: If you get a plumber to fix your toilet and he does it well, you incline to hire him again.

When judges lack personal experience with appropriate experts, I am told, they turn to the authoritative lists described above. If expertise is needed in a field for which official lists are unavailing, the court is thrown upon its own devices. The German judge then gets on the phone, working from party suggestions and from the court's own research, much in the fashion of an American litigator hunting for expertise. In these cases there is a tendency to turn, first, to the bodies that prepare expert lists in cognate areas; or, if none, to the universities and technical institutes.

If enough potential experts are identified to allow for choice, the court will ordinarily consult party preferences. In such circumstances a litigant may ask the court to exclude an expert whose views proved contrary to his interests in previous litigation or whom he otherwise disdains. The court will try to oblige the parties' tastes when another qualified expert can be substituted. Nevertheless, a litigant can formally challenge an expert's appointment only on the narrow grounds for which a litigant could seek to recuse a judge.

Preparing the expert. The court that selects the expert instructs him, in the sense of propounding the facts that he is to assume or to investigate, and in framing the questions that the court wishes the expert to address. In formulating the expert's task, as in other important steps in the conduct of the case, the court welcomes adversary suggestions. If the expert should take a

view of premises (for example, in an accident case or a building-construction dispute), counsel for both sides will accompany him.

Safeguards. The expert is ordinarily instructed to prepare a written opinion. When the court receives the report, it is circulated to the litigants. The litigants commonly file written comments, to which the expert is asked to reply. The court on its own motion may also request the expert to amplify his views. If the expert's report remains in contention, the court will schedule a hearing at which counsel for a dissatisfied litigant can confront and interrogate the expert.

The code of civil procedure reserves to the court the power to order a further report by another expert if the court should deem the first report unsatisfactory. A litigant dissatisfied with the expert may encourage the court to invoke its power to name a second expert. The code of criminal procedure has a more explicit standard for such cases, which is worth noticing because the literature suggests that courts have similar instincts in civil procedure. The court may refuse a litigant's motion to engage a further expert in a criminal case, the code says,

if the contrary of the fact concerned has already been proved through the former expert opinion; this authority to refuse to appoint a further expert does not apply if the expertise of the former expert is doubted, if his report is based upon inaccurate factual presuppositions, if the report contains contradictions, or if the new expert has available means of research that appear superior to those of a former expert.

When, therefore, a litigant can persuade the court that an expert's report has been sloppy or partial, that it rests upon a view of the field that is not generally shared, or that the question referred to the expert is exceptionally difficult, the court will commission further expertise.

A litigant may also engage his own expert, much as is done in the Anglo-American procedural world, in order to rebut the court-appointed expert. The court will discount the views of a party-selected expert on account of his want of neutrality, but cases occur in which he nevertheless proves to be effective. Ordinarily, I am told, the court will not in such circumstances base its judgment directly upon the views of the party-selected expert; rather, the court will treat the rebuttal as ground for engaging a further court-appointed expert (called an *Oberexperte*, literally an "upper" or "superior" expert), whose opinion will take account of the rebuttal.

To conclude: In the use of expertise German civil procedure strikes an adroit balance between nonadversarial and adversarial values. Expertise is kept impartial, but litigants are protected against error or caprice through a variety of opportunities for consultation, confrontation, and rebuttal.

The American counterpart. It may seem curious that we make so little use of court-appointed experts in our civil practice, since "the inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned" and has been extended and codified in the Federal Rules of Evidence and the Uniform Rules of Evidence (Model Expert Testimony Act). The literature displays both widespread agreement that our courts virtually never exercise this authority, and a certain bafflement about why.

While "simple inertia" doubtless accounts for much (our judges "are accustomed to presiding over acts initiated by the parties"), comparative example points to a further explanation. The difficulty originates with the locktight segmentation of our procedure into pretrial and trial compartments, and with the tradition of partisan domination of the pretrial. Until lately, it was exceptional for the judge to have detailed acquaintance with the facts of the case until the parties presented their evidence at trial. By then the adversaries would have

engaged their own experts, and time would no longer allow a court-appointed expert to be located and prepared. Effective use of court-appointed experts as exemplified in German practice presupposes early and extensive judicial involvement in shaping the whole of the proofs. It seems possible that the rise of managerial judging (discussed below in Part VIII) may at last achieve that precondition for effective use of court-appointed experts in our system.

V. SHORTCOMINGS OF ADVERSARY THEORY

The case against adversary domination of fact-gathering is so compelling that we have cause to wonder why our system tolerates it. Because there is nothing to be said in support of coached witnesses, and very little to be said in favor of litigation-biased experts, defenders of the American status quo are left to argue that the advantages of our adversary procedure counterbalance these grievous, truth-defeating distortions. “You have to take the bad with the good; if you want adversary safeguards, you are stuck with adversary excesses.”

The false conflict. This all-or-nothing argument overlooks the fundamental distinction between fact-gathering and the rest of civil litigation. Outside the realm of fact-gathering, German civil procedure is about as adversarial as our own. Both systems welcome the lawyerly contribution to identifying legal issues and sharpening legal analysis. German civil procedure is materially less adversarial than our own only in the fact-gathering function, where partisanship has such potential to pollute the sources of truth.

Accordingly, the proper question is not whether to have lawyers, but how to use them; not whether to have an adversarial component to civil procedure, but how to prevent adversarial excesses. If we were to incorporate the essential lesson of the German system in our own procedure, we would still have a strongly adversarial civil procedure. We would not, however, have coached witnesses and litigation-biased experts.

The confusion with criminal procedure. Much of the rhetoric celebrating unrestrained adversary domination of judicial proceedings stems from the criminal process, where quite different policies are at work. It has been argued that partisan fact-gathering is appropriate to the special values of criminal procedure—the presumption of innocence, the beyond-reasonable-doubt standard of proof, and the privilege against self-incrimination. Bestowing upon the criminal accused the right to conduct his own fact-gathering, despite the risk that he may misuse this power in truth-defeating ways, can be understood as one more way of adjusting the scales to protect the accused. “The specter of capital punishment and the often barbaric conditions of our penal institutions in the past and present, as well as the unique stigma of conviction of a crime, have had a profound impact upon the protections accorded the defendant and the freedom of action accorded the defense lawyer in a criminal case.” While I happen to disagree that adversary procedure is a particularly effective way to implement our concern for safeguard in the criminal process, my present point is simply that regardless of right or wrong, that concern is absent in the world of civil procedure. In civil lawsuits we are not trying systematically to err in favor of one class of litigants.

Equality of representation. The German system gives us a good perspective on another great defect of adversary theory, the problem that the Germans call “Waffenungleichheit”—literally, inequality of weapons, or in this instance, inequality of counsel. In a fair fight the pugilists must be well matched. You cannot send me into a ring with Muhammed Ali if you expect a fair fight. The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation. Adversary theory thus presupposes a condition that

adversary practice achieves only indifferently. It is a rare litigator in the United States who has not witnessed the spectacle of a bumbling adversary whose poor discovery work or inability to present evidence at trial caused his client to lose a case that should have been won. Disparity in the quality of legal representation can make a difference in Germany, too, but the active role of the judge places major limits on the extent of the injury that bad lawyering can work on a litigant. In German procedure both parties get the same fact-gatherer—the judge. (I discuss below (in Part VI) the incentives and safeguards designed to attract and motivate able judges.)

Prejudgment. Perhaps the most influential justification for adversary domination of fact-gathering has been an argument put forward by Lon Fuller: Nonadversarial procedure risks prejudgment—that is, prematurity in judgment. Fuller worried that the judge would make up his mind too soon.

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. . . .

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

This passage obtains much of its force from the all-or-nothing contrast that so misdescribes German civil procedure. In a system like the German, which combines judicial fact-gathering with vigorous and continuing adversarial efforts in nominating lines of factual inquiry and analyzing factual and legal issues, the adversaries perform just the role that Fuller lauds, helping hold the decision in suspension while issues are framed and facts explored.

In German procedure counsel oversees and has means to prompt a flagging judicial inquiry; but quite apart from that protection, is it really true that a “familiar pattern” would otherwise beguile the judge into investigating too sparingly? If so, it seems odd that this asserted “natural human tendency” towards premature judgment does not show up in ordinary business and personal decision-making, whose patterns of inquiry resemble the fact-gathering process in German civil procedure. Since the decision-maker does his own investigating in most of life's decisions, it seems odd to despair of prematurity only when that normal mode of decision-making is found to operate in a courtroom. Accordingly, I think that Fuller overstates the danger of prematurity that inheres in allowing the decision-maker to conduct the fact-gathering; but to the extent that the danger is real, German civil procedure applies just the adversarial remedy that Fuller recommends.

Depth. Fuller's concern about prematurity shades into a different issue: how to achieve appropriate levels of depth in fact-gathering. Extra investment in search can almost always turn up further proofs that would be at least tenuously related to the case. Adversary domination of fact-gathering privatizes the decision about what level of resources to invest in the case. The litigants who are directly interested in the outcome decide how much to spend on search. In German procedure, by contrast, these partisan calculations of self-interest are subordinated, for a variety of reasons. The initiative in fact-gathering is shared with the judge; and the German system of reckoning and allocating the costs of litigation is less sensitive to the cost of incremental investigative steps than in our system where each side pays for the proofs that it orders. On the other hand, the German judge cannot refuse to investigate party-nominated

proofs without reason, and this measure of party control greatly narrows the difference between the two systems.

Writing in 1958, Kaplan and his co-authors recorded their “impression” that German civil “proceedings do not in practice serve as an engine of discovery comparable in strength to the modern American methods,” in part because German courts are hostile to fishing. Further, the authors worried that the technique of recording witness testimony in succinct summaries could bleach out “factual differentiations.” They found German procedure to be “far less preoccupied than the American with minute investigation of factual detail of reliability of individual witnesses.”

Defenders of the American status quo may take too much comfort from these observations. A main virtue of German civil procedure, we recall, is that the principle of judicial control of sequence works to confine the scope of fact-gathering to those avenues of inquiry deemed most likely to resolve the case. Fact-gathering occurs when the unfolding logic of the case dictates that investigation of particular issues is needed. That practice does indeed contrast markedly with the inclination of American litigators “to leave no stone unturned, provided, of course, they can charge by the stone.” The primary reason that German courts do less fact-gathering than American lawyers is that the Germans eliminate the waste. Likewise, when American observers notice that there is less harrying of witnesses with “those elaborate testings of credibility familiar to American courtrooms,” I incline to think that the balance of advantage rests with the Germans, since so much of what passes for cross-examination in our procedure is deliberately truth-defeating.

Interestingly, detractors of Continental procedure have also voiced the opposite criticism—complaining of excessive rather than inadequate depth. Stephan Landsman, for example, defending American adversary practice against the complaint that it sets too low a value on the discovery of material truth, warns against inquisitorial zeal. “The weakness of human perception, memory, and expression will often render the discovery of material truth impossible. To become preoccupied with truth may be both naive and futile. It is to the advantage of the adversary system that it does not define its objectives in such an absolute and unrealistic fashion.” This argument overlooks a crucial distinction—between the case with unknowable facts and the case in which the truth-defeating excesses of American adversary fact-gathering cause knowable facts to be obscured. The former scarcely excuses the latter. I side with Blackstone in thinking that fact-finding is the central task of civil litigation. “Experience will abundantly shew,” he wrote, “that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of.” Resolve the facts, resolve what actually happened, and the law usually takes care of itself.

The choice between adversarial and judicial conduct of fact-gathering need not correlate strongly with the level of search achieved in a legal system. Factors unrelated to that choice, such as the clarity of the substantive law or the attitude toward fishing, will influence the levels of search. If the Germans saw any virtue in the American practice of allowing the adversaries to cascade each other with undigested files and records, they could in principle incorporate our luxuriant fishing tradition into their procedure (perish the thought) while still preferring court-appointed experts and forbidding adversary contact with nonparty witnesses. Furthermore, within the realm of judge-conducted fact-gathering, we would expect the levels of search to vary significantly among legal systems, depending upon the incentives for judicial diligence, the scope of adversary oversight, and the effectiveness of appellate review.

VI. JUDICIAL INCENTIVES

Viewed comparatively from the Anglo-American perspective, the greater authority of the German judge over fact-gathering comes at the expense of the lawyers for the parties. Adversary influence on fact-gathering is deliberately restrained. Furthermore, in routine civil procedure, German judges do not share power with jurors. There is no civil jury.

Because German procedure places upon the judge the responsibility for fact-gathering, the danger arises that the job will not be done well. The American system of partisan fact-gathering has the virtue of its vices: It aligns responsibility with incentive. Each side gathers and presents proofs according to its own calculation of self-interest. This privatization is an undoubted safeguard against official sloth. After all, who among us has not been treated shabbily by some lazy bureaucrat in a government department? And who would want to have that ugly character in charge of one's lawsuit?

The answer to that concern in the German tradition is straightforward: The judicial career must be designed in a fashion that creates incentives for diligence and excellence. The idea is to attract very able people to the bench, and to make their path of career advancement congruent with the legitimate interests of the litigants.

The career judiciary. The distinguishing attribute of the bench in Germany (and virtually everywhere else in Europe) is that the profession of judging is separate from the profession of lawyering. Save in exceptional circumstances, the judge is not an ex-lawyer like his Anglo-American counterpart. Rather, he begins his professional career as a judge.

In Germany judges and lawyers undergo a common preparatory schooling. After completing a prescribed course of university legal education that lasts several years, the young jurist sits a first state examination. After passing this examination satisfactorily, he enters upon an apprenticeship that now lasts two and one-half years. He clerks for judges in the civil and criminal courts, assists in the prosecutor's office, and works in a lawyer's office. At the conclusion of this tour of duty, the young jurist sits a second state examination, remotely akin to our bar examination, which concludes the certification process. Thereafter, the career lines of judge and lawyer diverge.

Recruitment. Although West Germany is a federal state the state and federal courts comprise an integrated system. The courts of first instance and the first layer of appellate courts are state courts, while the second (and final) layer of appellate jurisdiction operates at the federal level. Thus, even though the basic codes of civil and criminal law and procedure are federal codes, the state courts have exclusive jurisdiction until the final appellate instance. It follows that most judges are state judges; and since appointment to the federal bench is by way of promotion from the state courts, all entry-level recruitment to the bench occurs at the state level.

In each of the eleven federal states, the ministry of justice is responsible for staffing the courts. Entry-level vacancies are advertised and applications entertained from young jurists. The judiciary is a prized career: influential, interesting, secure, and (by comparison with practice of the bar) prestigious and not badly compensated. "Only the graduates with the best examination results have any chance of entering the judicial corps."

Advancement. A candidate who is accepted begins serving as a judge without any prior legal-professional experience, typically in his late twenties. At the outset his position is probationary, although he must be promoted to tenure or dismissed within five years. His first assignment may be to a court of petty jurisdiction (Amtsgericht), or else he will become the junior member of a collegial chamber of the main court of general jurisdiction (Landgericht, hereafter LG), where he can receive guidance from experienced judges.

The work of a German judge is overseen and evaluated by his peers throughout his career, initially in connection with his tenure review, and thereafter for promotion through the several levels of judicial office and salary grades. A judge knows that his every step will be grist for the regular periodic reviews that will fill his life-long personnel file. His “efficiency rating” is based in part upon objective factors, such as caseload discharge rates and reversal rates, and in part on subjective peer evaluation. The presiding judge of a chamber has special responsibility for evaluating the work of the younger judges who serve with him, but the young judges are rotated through various chambers in the course of their careers, and this reduces the influence of an aberrant rating from any one presiding judge. These evaluations by senior judges pay particular regard to (1) a judge's effectiveness in conducting legal proceedings, including fact-gathering, and his treatment of witnesses and litigants; and (2) the quality of his opinions—his success in mastering and applying the law to his cases.

This meritocratic system of review and promotion is meant to motivate the judge to perform at his best. In the main first-instance court (LG), which is sectioned into many three-judge panels called chambers, the judge aspires to advance to the position of presiding judge of a chamber, a job of greater importance and status with corresponding salary improvement. From there the main career path leads to the first appellate instance (Ober-landesgericht, hereafter OLG), which is also divided into many chambers, each led by a presiding judge who is promoted to that job after distinguishing himself as an ordinary judge of the court. And the final appellate instance, the federal supreme court for nonconstitutional law (Bundesgerichtshof, hereafter BGH), is staffed almost entirely with judges who have been promoted from the OLG.

Meritocratic review and promotion are meant to reward and thereby to inspire judges to be diligent in fact-gathering, to stay current in the law, and to be fair and accurate in the conduct of hearings and the rendering of judgments.

Specialization. I have been speaking throughout this article of the ordinary courts. Of the 17,000 judges who were sitting in Germany as of 1983, the most recent year for which the statistics are published, 13,000 sat in the ordinary courts. The others served in the specialized court systems for administrative law, tax and fiscal matters, labor and employment law, and social security. Furthermore, the Germans operate a separate supreme constitutional court (Bundesverfassungsgericht), to which the other courts refer some contentious constitutional business. Appointment to the constitutional court is by design highly political; members are seldom part of the career judiciary that I have been describing.

The specialized courts and the constitutional court siphon off business that Americans would expect to see in the ordinary courts. Within the German ordinary courts of first instance there are special divisions that have counterparts in our tradition—for crime, for what we would call probate, for domestic relations. In addition, commercial law matters are removed to specialized chambers. Thus, the German ordinary courts of first instance have a somewhat narrower diet than our own.

At the appellate level, including the first appellate instance (OLG) that proceeds by review de novo, there is extensive specialization. An OLG is quite large by our standards, sometimes staffed with more than a hundred judges, who sit in chambers containing four or five judges. Cases are allocated among these chambers on the basis of subject matter. All the medical malpractice cases go to one chamber, the maritime cases to another, and so forth. This system permits the judges to develop over the years just that sort of expertise in legal subspecialties that we expect of lawyers, particularly lawyers in large-firm practice, in the United

States. The litigants get judges who know something about the field, in contradistinction to the calculated amateurism of our appellate tradition.

Political influence. Judicial appointments and promotions issue in the name of the state or federal minister of justice, who is an important political official, usually a member of the state or federal parliament and of the cabinet. The minister acts in consultation with an advisory commission of senior judges; in some of the German states that commission has a formal veto power.

Directly political concerns appear to be very subordinated in the selection and advancement of judges. Because this subject is not much ventilated in the literature, I have inquired about it when talking with German judges and legal academics. The impression I have gained is that political considerations do not materially affect appointment or promotion until the level of the federal supreme court (BGH). Party balance is given weight in BGH appointments, but political connections do not substitute for merit. Positions on the BGH go to judges who have distinguished themselves on the OLG.

We must remember that the decision to isolate important components of constitutional and administrative-law jurisdiction outside the ordinary courts in Germany lowers the political stakes in judicial office, by comparison with our system, in which every federal district judge (and for that matter, every state judge) purports to brandish the Constitution and thus to be able to wreak major social and institutional change.

American contrasts. If I were put to the choice of civil litigation under the German procedure that I have been praising in this article or under the American procedure that I have been criticizing, I might have qualms about choosing the German. 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.

German-style judicial responsibility for fact-gathering cannot be lodged with the Greylord judiciary. Remodeling of civil procedure is intimately connected to improvement in the selection of judges. I do not believe that we would have to institute a German-style career judiciary in order to reform American civil procedure along German lines, although I do think that Judge Frankel was right to “question whether we are wise” to disdain the Continental model, and to “wonder now whether we might benefit from some admixture of such career judge to leaven or test our trial benches of elderly lawyers.” The difference in quality between the state and federal trial benches in places like Cook County is sufficient to remind us that measures far short of adopting the Continental career judiciary can bring about material improvement.

Americans will long remain uncomfortable at the prospect of a more bureaucratic judiciary. We have not had good experience attracting and controlling an able career bureaucracy in the higher realms of public administration, although we have scarcely tried. Some observers point to that elusive construct, national character. Europeans in general and Germans in particular are thought to be more respectful of authority, hence better disposed toward the more bureaucratic mode of justice that judicialized fact-gathering entails.

Cultural differences surely do explain something of why institutional and procedural differences arise in different legal systems. The important question for present purposes is what

weight to attach to this factor, and my answer is, “Not much.” It is all too easy to allow the cry of “cultural differences” to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example. Cultural differences that help explain the origins of superior procedures need not restrict their spread. If Americans were to resolve to officialize the fact-gathering process while preserving the political prominence of the higher bench, we would probably turn initially to some combination of judges, magistrates, and masters for getting the job done. Over time, we would strike a new balance between bench and bar, and between higher and lower judicial office.

The rise of American managerial judging (discussed in Part VIII below) should put us on notice that we may no longer have the leisure to decide whether we want more judicial authority over civil litigation. If greater judicial control of civil proceedings is inevitable, greater attention to safeguarding litigants' interests against abuse of judicial power must follow. The German model should inspire attention to the way judicial career incentives (above all, meritocratic selection, review, and promotion) can serve as safeguards for litigants.

VII. APPELLATE REVIEW

Like the career incentives that encourage good judicial performance, the German appellate process is designed to protect litigants from caprice, error, or sloth. The adversarial component of lawyerly oversight, to which this article has so often referred, ultimately depends for its effectiveness upon the threat of appellate review. From the standpoint of comparison with American procedure, two attributes of German appellate practice appear especially noteworthy: (1) the requirement, meant to facilitate review, that the first-instance court disclose in writing its findings of fact and reasons of law; and (2) the *de novo* standard of review.

Disclosure of grounds. Unless the first instance court is successful in encouraging the parties to settle, it must decide the case by means of a written judgment containing findings of facts and rulings of law. The thoroughness of the German judgment is legendary. Empirical study has shown how seriously the first-instance courts take their judgment-writing responsibility. Judges know that they will be judged on the quality of their opinions. Good opinions reduce the reversal rate and win esteem in the peer evaluation process. Judges know that the reviewing court will have convenient access to the whole of the evidence and the submissions received at first-instance, since the dossier goes up with the appeal. Especially when coupled with searching review by an appellate court of great ability, the requirement of written findings and reasons is a bulwark against arbitrary or eccentric adjudication. In our system, by contrast, the conclusory general verdict of a jury is the antithesis of a reasoned judgment; nor do we insist on much better in the realm of bench trials. Fact-finding in American courts all too often resembles Caligula dealing with vanquished gladiators: thumbs up or thumbs down, yours but to wonder why.

Review de novo. Ultimately, it is the prospect of appellate review in German civil procedure that makes the other safeguards effective, both as deterrents and as correctives. The dissatisfied litigant has the right of appeal *de novo* (*Berufung*) in the first appellate instance (typically the OLG). No presumption of correctness attaches to the initial judgment. What makes this astonishingly liberal system of appellate review possible is the extreme economy of the technique, previously discussed, of recording in pithy summaries the evidence gathered at first instance. Retrial becomes for the most part only rereading.

The OLG “may choose to rehear evidence and is likely to do so when demeanor of a witness seems important or when the record fails to give sufficient detail.” The main task in

review de novo is not, however, gathering new evidence, but considering afresh the record and the judgment from below. OLG review guarantees to the dissatisfied litigant a second look by a panel of long-experienced judges on all matters of law and fact. In other words, for a litigant who wishes it, fact-finding will be reassigned from the court that did the primary fact-gathering (and this is another way in which German procedure may be said to respond to Lon Fuller's concern about the danger of prejudgment in the investigating court). OLG review is collegial; a panel of several judges decides the case. And because the OLG panels are specialized by subject matter, chances are that some of the judges who decide the case will be masters of the particular field of law.

From the OLG there is a further level of review (by the BGH) according to a standard of review (Revision) that approximates the Anglo-American notion of review for error. 2

Adequacy of safeguards. There is no denying the power of the German judge, yet complaints about the misuse of judicial power are extremely rare. The career incentives and the system of appellate review have been designed to deter and correct abuse. Experience suggests that they work.

VIII. AMERICAN MANAGERIAL JUDGING: CONVERGENCE? [Omitted]

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Questions to Think About

- 1) Are you convinced that German civil procedure is better than American civil procedure? Why or why not?
- 2) What aspects, if any, of German civil procedure do you think are superior to American civil procedure? Could we adopt them without changing other aspects of our procedure?
- 3) What aspects of American procedure do you think are superior to German civil procedure? Could they adopt them without changing other aspects of their procedure?
- 4) Do you think that US courts would need a larger or smaller number of judges if we were to adopt German civil procedure ?
- 5) Do you think a bad judge has a bigger negative effect in Germany or the U.S.?
- 6) Europeans are generally willing to pay higher taxes to fund higher quality public services. Can that help explain why Germany and the U.S. have different systems of civil procedure?