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Civil Justice Reform in the United States — Opportunity for Learning from 'Civilized' European Procedure Instead of Continued Isolation?

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Civil Justice Reform in the United States— Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?

European jurists have long urged that their American colleagues consider using continental approaches in dealing with the serious problems that afflict the American system of civil justice. A few years back, our colleague Kötz noted that “If there is a desire to reform American civil procedure, either by making changes within the adversary system or by developing alternative methods of dispute resolution, the Continental experience may be well worth studying.”¹

Today, agitation for civil justice reform in the United States is at a level not seen in a very long time.² Moreover, unlike previous periods of reform, proponents of reform have no clear direction. Thus today there could be an opportunity for Americans to learn from European experiences such as they have not before. In this article, we report on present and past efforts at civil justice reform in the United States and assess the opportunities for learning from Continental models.

I. THE THREE REFORMS IN AMERICA

The American system of civil justice is under attack now like never before in memory. President Bush charged that America, “The home of the free,” has become the “land of the lawsuit.”³ “Crazy” law-

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1. Kötz, “The Reform of the Adversary System,” 48 *U. Chi. L. Rev.* 478, 486 (1981). The French jurist, Pierre LePaulle, who after expressing “his amazement at the ineffective manner in which justice is administered. . . more like a high church ceremony than a business transaction,” asked “Why don’t you take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human experience?” Quoted in Sunderland, “Book Review,” 15 *A.B.A.J.* 35 (1929).

2. Civil justice reform in the United States can refer to both reform of civil procedure and to reform of substantive tort law. In this article we refer only to reform of civil procedure; our discussion of Continental procedure is limited to German procedure, which probably has been the most discussed of European procedures.

3. Address in Atlanta, February 29, 1992.

suits became a theme of the 1992 presidential election campaign. Vice President Quayle became known as the "scourge of the legal profession" for leading the campaign for reform.⁴ At the 1991 convention of the American Bar Association (ABA) he charged that "staggering expense and delay" make the American system "a self-inflicted competitive disadvantage" in the global economy.⁵ While the current campaign is new, discontent with the justice system has been growing steadily for at least a decade. In 1984, the then Chief Justice of the United States, Warren Burger, warned the ABA convention that "Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."⁶ According to a recent article in the *California Lawyer*, "Clients, lawyers, judges and the general public all seem to think that the cost of civil litigation in the United States is out of control."⁷

Until now, there have been two principal reforms of civil procedure in the United States: one, beginning in 1848, when New York adopted the so-called Field Code, and the other culminating in 1938, when the national government adopted the Federal Rules of Civil Procedure.⁸ Neither of these two reforms drew on Continental models of civil procedure or even gave foreign models meaningful consideration. But neither did they deliberately reject Continental models. Circumstances simply precluded real consideration of foreign alternatives.

1. *The First Reform, the Field Code of 1848*

The first great reform of American civil procedure presented no opportunity for reference to German models. As John Langbein has pointed out, German civil procedure then had not yet matured and consequently could not have presented an attractive model even if the reformers had been interested, which they were not. David Dudley Field, who engineered that reform in New York in 1848, was indeed aware of foreign law.⁹ Field, the great advocate of codification in America, drew much of his inspiration for codification as such from

4. *New York Times*, February 5, 1992, at A21.

5. Address in Atlanta, August 13, 1991, reprinted in *Washington Legal Times*, August 19, 1991, at 9.

6. Address, February 13, 1984, quoted in 52 *U.S. Law Week* 2471 (February 28, 1984).

7. Stone, "Telling the Truth About Discovery," 12 *California Lawyer*, No. 2 (February 1992) at 96.

8. See generally Bone, "Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules," 89 *Col. L. Rev.* 1 (1989).

9. Subrin, "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision," 6 *Law & Hist. Rev.* 311, 318 (1988). Field's international contacts extended to procedure. Maxeiner has a collection of five of Field's early procedural reform tracts inscribed from Field to C.F.A. Mittermaier, the great German comparativist of the 19th century.

Civil Law models, especially the French codes of Napoleon. His proposals for codification of the criminal law reported on developments in Europe. But when it came to procedure, Field was a reformer who "knew what was wrong with the existing procedural system and what should be done about it."¹⁰ David Clark has pointed out that Continental influences in Field's code of civil procedure are largely of French origin as transmitted through Livingston's code of civil procedure for Louisiana.¹¹

The Field approach to reform of civil procedure was historical, not philosophical; it chose to restate existing law rather than adopt a new system of law relying on foreign models.¹² What it did was to unify a wide variety of different procedures. It substantially loosened requirements for pleadings, which had required that the parties come to a single issue of law or fact. It required that testimony previously given in writing be given before a judge in open court.¹³

2. *The Second Reform, The 1938 Federal Rules of Civil Procedure*

There was a better opportunity for German civil procedure to influence developments in the United States in the second major reform that culminated in the introduction of the Federal Rules of Civil Procedure in 1938. That reform can be traced to an address Roscoe Pound delivered to the American Bar Association in 1906, "The Causes of the Popular Dissatisfaction with the Administration of Justice."¹⁴ Pound's address, besides being a clarion call for reform generally, is fairly regarded as an invitation to examine foreign solutions.¹⁵

The early years of the 20th century saw the beginnings of a significant study in the United States of foreign law in general and of German civil procedure in particular. Pound, the long time Dean of Harvard law School, was himself a tireless proponent and practitioner of comparative law. In the year following the address to the ABA, and despite the negative response the address received, the ABA established a Comparative Law Bureau. It was organized by Si-

10. Bone, *supra* n. 8, at 114.

11. Clark, "The Civil Law Influence on David Dudley Fields Code of Civil Procedure," in *The Reception of Continental Ideas in the Common Law World 1820-1920*, at 63-87 (Mathias Reimann ed. 1993).

12. Reppy, "The Field Codification Concept," in *David Dudley Field Centenary Essays 17*, at 29-30 (Alison Reppy ed. 1949). The Final Report of the Practice Commission did acknowledge one explicit borrowing from foreign law: § 511 governing the ethical duties of attorneys and counselors was taken from the laws of Geneva. 1 *Speeches, Arguments and Miscellaneous Papers of David Dudley Field* at 297 (1884). See Fisch, "The Influence of German Civil Procedural Thinking and the ZPO in the United States," in *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen 400*, at 405 (1991).

13. See Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 *U. Penn. L. Rev.* 908, at 931-39 (1987).

14. 40 *American L. Rev.* 729 (1906), reprinted in 35 *F.R.D.* 273 (1964).

15. See Maxeiner, "1992: High Time for American Lawyers to Learn from Europe, or Roscoe Pound's 1906 Address Revisited," 15 *Fordham Int'l L. J.* 1 (1991).

meon E. Baldwin, a former President of the ABA and a student of both U.S. and foreign civil justice systems who published a couple of articles on German civil procedure.¹⁶

Significant academic projects of the day included a procedural component. The leading proponent of comparative study of civil procedure was Robert Wyness Millar, professor at Northwestern University, who wrote a number of works on comparative civil procedure in the 1920s and 1930s. The most important of these was *A History of Continental Civil Procedure*, a volume in the Continental Legal History Series. In this book, Millar reprinted material that he had published elsewhere and translated a contemporary German book on civil procedure.¹⁷

The American legal community received Millar's book warmly. The two professors who in the next decade came to be the principal drafters of the Federal Rules of Civil Procedure, Charles Clark and Edson Sunderland, both praised Millar's book and encouraged future comparative study.¹⁸ In a review of Millar's book, Sunderland explained why foreign models of civil procedure had, until then, drawn scant attention: because of (1) "professional prejudice against new ideas, based on national conservatism and the monopolistic nature of judicial agencies"; and (2) "ignorance, because Americans aren't good linguists and relevant materials are not readily available in English". Yet despite the favorable reception of Millar's work, neither Clark nor Sunderland nor anyone else seems to have considered foreign solutions in the actual drafting of the rules.¹⁹

Even if American lawyers been able to overcome the twin obstacles of professional prejudice and linguistic ignorance, timing assured that German civil justice would not be a model. While Pound began the campaign for reform in 1906, Congress did not authorize it until 1934 and the reform was not adopted until 1938. By then Germany's

16. See Simeon Baldwin, *The American Judiciary* (1905); "A German Law Suit," 19 *Yale L.J.* 69-79 (1909); "The German Law Suit Without Lawyers," 9 *Mich. L. Rev.* 30-38 (1909).

17. See Robert W. Millar, *A History of Continental Civil Procedure* (Continental Legal History Series Vol. 7, 1927); "Formative Principles of German Procedure," 10 *A.B.A.J.* 703-09 (1924); "Some Comparative Aspects of Civil Pleading Under Anglo-American and Continental Systems," 12 *A.B.A.J.* 401 (1926); "The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure," 32 *Ill. L. Rev.* 261-94, 424-55 (1937). See also Robert W. Millar, *Civil Procedure of the Trial Court in Historical Perspective* (Judicial Administration Series) (1952).

18. Book reviews included, inter alia, Clark, 37 *Yale L.J.* 680-82; Sunderland, 15 *A.B.A.J.* 35-36; Blume, 27 *Mich. L. Rev.* 262-64; Lloyd, 76 *U. Penn. L. Rev.* 762-63.

19. Millar could hardly himself have brought about intensive study of foreign alternatives. According to Riesenfeld, Millar was more a sympathetic and sensitive recorder of advance than an apostle of reform. "Book Review," 41 *Cal. L. Rev.* 154 at 156 (1952). Millar's works, while technically accomplished, are dry scholarly works hardly suited to develop a following among colleagues and students.

judges had pinned swastikas on their robes and had sworn allegiance to Hitler, who had dismantled the Rechtsstaat.²⁰

Again, in 1938, as in 1848, it seems that the reformers knew what they wanted.²¹ They sought to restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in preparation for trial.²² They abolished a separate equity jurisdiction in federal courts but adopted equity procedures for general use. Equity procedures emphasized joining all relevant parties and issues, amassing all relevant data, and permitting the judge to order what was fair and just.²³ The 1938 Federal Rules introduced the wide-ranging, uncontrolled discovery now considered a feature of U.S. civil procedure. It has led to a system where applying law to facts is no longer the principal or even a main goal of the proceedings.²⁴

3. *The 1990s: Chance for a Third Reform?*

Pressure for reform of the U.S. civil justice system is greater today than at any time since the first third of this century. The pressure has been building since 1976 when then Chief Justice Warren Burger sponsored a conference to commemorate Pound's 1906 address.²⁵ Since that conference a number of ever-more distinguished and ever more visible special committees have called for action. These have included an ABA Commission in 1984 (1984 ABA Report),²⁶ the private Brookings Institution in 1989 (Brookings Report),²⁷ a Congressional Committee in 1990 (Federal Courts Study Committee),²⁸ a Presidential Commission chaired by Vice President Quayle (Quayle Report) in 1991,²⁹ and yet another ABA committee in

20. The decline in German influence set in much earlier; it was coincident with World War I. Mathias Reimann has observed: "Before 1914, praise of German legal scholars abounded in the American literature; by 1918 it had by and large disappeared. Within a few years, and in an uncompromising manner that Llewellyn deemed typical of common lawyers' attitude towards the civilian legal culture, American academics had lost interest in their German colleagues." Reimann, "A Career in Itself: The German Professoriate as a Model for American Legal Academia," in Reimann, *supra* n. 11, at 165, 194 (citation omitted).

21. Bone, *supra* n. 8, at 114.

22. *Hickman v. Taylor*, 329 U.S. 495 (1947).

23. Subrin, *supra* n. 13, at 968.

24. *Id.* at 989, 1001-02.

25. The proceedings are reported in A. Leo Levin & Russell Wheeler (eds.), *The Pound Conference: Perspectives on Justice in the Future* (1979). Critiques of the adversary system since 1906 are summarized in Franklin D. Streier & Edith Greene, *The Adversary System: An Annotated Bibliography* (1990).

26. American Bar Association, *Attacking Litigation Costs and Delay, Final Report of the Action Commission to Reduce Court Costs and Delays* (1984).

27. The Brookings Institution, *Justice for All, Reducing Costs and Delay in Civil Litigation, Report of a Task Force* (1989).

28. U.S. Congress, *Report of the Federal Courts Study Committee* (1990).

29. U.S. President, *Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America* (1991).

1992 responding to the Quayle Report (the ABA Blueprint).³⁰ Many of the Quayle Report proposals took legislative form in the shape of bills considered, but not passed, in Congress in 1992.³¹

All these reports, except the ABA Blueprint, agree that there is a crisis in the U.S. civil justice system brought on by excessive cost and delay. They concur in identifying the discovery phase of litigation as the principal cause of that delay and expense. In reaching these conclusions, the committees merely voice conclusions long obvious to most of the bar. In 1980, Justice Powell of the Supreme Court, joined by two other justices, dissented from approving amendments to the Federal Rules of Civil Procedure arguing that "the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue." According to the justices, "every judge and litigator knows" where the problem arises: "abuse of the discovery procedure available under the [Federal] Rules."³²

Unlike the other reports, the ABA Blueprint, while entitled "ABA Blueprint for Improving the Civil Justice System," is not so much a manifesto for change as an apology for the status quo. It advocates steps "to maintain and enhance the excellence of America's justice system."³³ The present crisis is not to be attributed to defects in the system, but to "the decay caused by long-term neglect and underfunding of the entire justice system" and by "the extent to which the civil justice system has been damaged by the increased burden on the criminal justice system."³⁴ The ABA Blueprint is typical of a number of recent works that deprecate criticism by observing that dissatisfaction with the legal system has always been with us or by purporting to show that problems are not as severe as claimed. But even the ABA Blueprint recognizes that there are serious problems that have to be fixed.

Lacking in any of the reform reports is a clear vision of what reforms to implement. While the reports recognize that more than "tinkering changes" are required,³⁵ they offer nothing more than minor corrections that leave the existing system, with all its defects, intact. None, for example, would fundamentally change discovery. The minimal nature of the changes proposed is apparent even to opponents of change. The ABA Blueprint criticizes the Quayle Report

30. American Bar Association, *ABA Blueprint to Improve the Civil Justice System* (1992).

31. 102d Congress, 2d Sess., S. 2180 and its companion bill, H.R. 4155, both to provide greater access to civil justice by reducing costs and delay, and for other purposes.

32. Reprinted at 28 U.S.C.A., Federal Rules of Civil Procedure, before Rule 1.

33. ABA Blueprint at xv.

34. *Id.* at 45.

35. Brookings Report at 9.

for being a "piecemeal collection of proposals" that "do not make a whole."³⁶

Three of the most discussed potential avenues of reform are: (1) to reduce demand for dispute resolution through the public civil justice system; (2) to increase judicial case management to improve efficiency; and (3) to alter the fee system to shift costs to the losing side. All of these avenues figured prominently in the Quayle Report, on which we focus here, since it has had the greatest political support. The Quayle Report also proposed expert evidence reform and restrictions on punitive damages.

Reducing demand for dispute resolution is a favored means of reform. This means increased use of so-called alternative dispute resolution (ADR).³⁷ Insofar as reforms concern the federal courts, it also means shifting the burden of litigation elsewhere, namely to state courts or to administrative agencies.³⁸ In the end, these proposals come down either to judges encouraging parties to settle or to directing parties to go elsewhere. Such proposals have little to do with a real reform of the civil justice system; they are additional recognition that the present system simply does not work.

Proposals for increased "case management" are a bit closer to real reform—at least in name. The Quayle Report calls on judges to "take a hands on approach to case management,"³⁹ which the ABA Blueprint supports.⁴⁰ Similarly, the Federal Courts Study Committee Report endorses "the trend toward more vigorous case management by district judges,"⁴¹ while the Brookings Report calls on judges to "take a more active role in managing their cases"⁴² and the 1984 ABA Report insists that "The judge must assume direct responsibility for the pace of litigation, actively monitoring or directing the scheduling of events in the life of the case."⁴³

Proposals for active case management are not the openings for significant change. They are more of a tinkering with existing ways of doing business than an introduction of meaningful new procedures. According to the ABA Blueprint: "At base, however, caseload management is a system controlled by the court that sets time limits for completion of all phases of the case from filing to conclusion, monitors

36. ABA Blueprint at vii.

37. See Quayle Report at 15-16; ABA Blueprint at 31-43, 64-68; Federal Courts Study Committee Report at 24-25; Brookings Report at 38.

38. See Quayle Report at 26-27; ABA Blueprint at 90-94; Federal Courts Study Committee Report at 35-68. Many academics and federal judges would like to see the federal courts operate as a system of constitutional courts and thus routinely oppose proposals to increase the number of federal judges. They see these proposals as diluting the power and majesty of this portion of the bench.

39. At 20.

40. At 77.

41. At 100.

42. At 3.

43. At 8-9.

each case to ensure that established deadlines are met, and enforces management solutions to get cases that have fallen off schedule back on track."⁴⁴

What active case management does not do is change fundamentally what happens in litigation. It does not require parties to focus their pleadings on the issues in dispute. It does not force parties to identify the evidence they intend to rely on to prove their case. It does not limit the parties in discovery to material facts actually in dispute. It does not restrict substantially the parties in making their discovery demands. It does not introduce a judge to conduct depositions or to oversee document disclosure. About all it does do is make the judge a glorified calendaring clerk.

The third major avenue of reform would permit movement toward imposing litigation costs on the losing side. This scheme—known in the United States as the “English Rule”—is highly controversial. It is so controversial that even the Quayle Report calls for its introduction in only a very limited number of situations.⁴⁵ The Federal Courts Study Committee Report opposes the English rule,⁴⁶ and the ABA has likewise been hostile toward it.⁴⁷ The existing rule is defended so as to prevent discouraging parties “with plausible but not clearly winning claims” (Federal Courts Study Committee). Prospects for adoption of fee-shifting do not seem good.

Continental models have had no significant role in the various reform proposals of the last decade and have achieved only the most fleeting of mentions in the various reports. The references are so fleeting and trivial that they can all be summarized here. The Quayle Report,⁴⁸ the ABA Blueprint and the 1984 ABA Report all make no references at all to Continental civil procedure. The Brookings Report merely notes in a single sentence that “[U.S. lawyers] who have litigated abroad perceive U.S. litigation costs to be substantially higher than those in foreign countries.”⁴⁹ The far longer Federal Courts Study Committee Report brings only a slightly greater comparative perspective: it rejects out of hand the use of specialized courts such as are found on the Continent (“most American lawyers find the ideal of specialized courts repugnant”). The Quayle Report does make one highly controversial reference to foreign systems: it claims that there are far more lawyers per capita in the United States than in other countries, e.g., 281 lawyers per 100,000 population in the U.S., but

44. At 77.

45. See i.e., discovery motions, at 18-19, and diversity cases (cases in federal court based on state law), at 24-25.

46. At 105.

47. See ABA Blueprint at 73, 87-88, Appendix at 5.

48. Parallels in the Quayle Report to foreign procedures have been noted. See Cortese, “Civil Justice Reform Speaks with a Foreign Accent,” 1991 *BNA Product Safety & Liability Reporter* 1193.

49. At 6.

only 111 in Germany.⁵⁰ It has engendered substantial discussion and criticism.⁵¹

II. THE CHALLENGE OF GERMAN CIVIL PROCEDURE

Knowledge of foreign law is at a very low level in the United States, not only among lawyers and judges, but even among academics. While there are a few academics knowledgeable in foreign law, the United States has nothing to compare to Germany's Max Planck Institutes.⁵² While the collapse of Communism has contributed to a new awareness among American lawyers of law in other countries, ironically, it has not led American lawyers to study foreign legal systems as an aid to reform their own. Instead, American lawyers are holding out their system as a model for the formerly Communist countries of Eastern Europe despite criticism of it at home. In the same issue of the *California Lawyer* that reports that costs of civil litigation are "out of control," the State Bar of California prescribes "Borrowing Knowledge from the U.S. Legal System!"⁵³ The same ABA president who rejected Quayle's criticism at the 1991 convention, states that legal reform in Russia presents "a historic challenge to the American legal profession—to lend support on a scale and depth that only our nation has the resources to provide."⁵⁴ Many American lawyers, even at the highest levels of the profession, believe that their system, despite its defects, is still the world's best.⁵⁵

Developing knowledge in the United States of the German civil justice system has been a slow process. The promising start in the first third of the century was hardly helped by the political disaster of the Nazi era. Even today, advocates of studying German civil proce-

50. At 2.

51. See, e.g., Galanter, Working Paper DPRP 10-10, "The Debased Debate on Civil Justice," at 10-19 (Madison WI: Institute for Legal Studies 1992); August, "The Mythical Kingdom of Lawyers: America Doesn't Have 70% of the Earth's Lawyers," *A.B.A.J.*, September 1992, at 72; Epp, "Let's Not Kill All the Lawyers," *Wall Street Journal*, July 9, 1992, at A15.

52. See Eric Stein's still current description of the dismal state of comparative studies in the United States in "Uses, Misuses and Nonuses of Comparative Law," 72 *Nw. U. L. Rev.* 198, 209-16 (1977). Max Rheinstein commented in this journal on the absence of Max Planck type institutes: "In the United States alone, no major research institute of the kind has yet been established; legal research, even where it is concerned with the role of legal institutions in society, is still carried on as if nothing could be gained from foreign phenomena and experiences." 5 *Am. J. Comp. L.* 185, at 194 (1955).

53. Stone, *supra* n. 7, at 64.

54. D'Alemberte, "Our Eastern European Challenge," *A.B.A.J.*, March 1992, at 8.

55. For example, Justice Scalia, who is sometimes regarded as the "intellectual" on the Supreme Court stated: "How else do you run a system? The only alternative [to the U.S. system] is to go to the inquisitorial system and have an investigating judge, And then you are going to lose or win depending on how good a judge you happen to have gotten." From "Ethics in America: Truth on Trial," recorded February 13, 1988 (Public Broadcasting System 1989).

cedure must reckon with dismissal as advocates of a Nazi-tainted system.

While in many respects, the forced relocation of many first-rate jurists that resulted from the turmoil in Europe enriched the American legal community, in the field of civil justice, no such enrichment is apparent. Whether the reason for this was because a thorough-going reform was too far along by the time the émigrés arrived in the 1930s or because civil procedure is more closely tied to the political system than is substantive law or for some other reason may be left unanswered here. The clear fact is that the émigré generation had no influence on comparative civil procedure. While the émigrés noted the defects of Common Law procedure, they shied away from active criticism.⁵⁶

1. *American Describers*

A gradual building of American knowledge of the German system began in the 25 years that followed the Second World War, when international studies in general enjoyed a boom in the United States. Comparative legal studies benefited from that boom and U.S. law professors turned their attention to how Continental legal systems handle civil procedure. Grounds for this foreign study were more understanding how U.S. trading partners operate and less a search for alternative solutions to American problems.⁵⁷ While United States interest in international affairs has been in decline for two decades, practical problems of civil procedure have worked to create some interest and knowledge of foreign procedure among a small circle of judges and internationally active lawyers.⁵⁸

56. See, e.g., Loewenstein, "Ketzerische Betrachtungen über die amerikanischen Verfassung," in *Der Staat als Aufgabe, Gedenkschrift für Max Imboden* 233-54, at 250 (1972) (U.S. system suffers "notorious deficiencies." "It is an open secret that the administration of justice is one of the least exemplary aspects of American civilization, even if the understandable class-interest of established jurists—judges as well as lawyers—precludes admitting it. Administration of justice is slow—it can be years before there is the first hearing in court,— permeated by superfluous barriers to proceeding and not infrequently takes place behind a wall of privileges for corporate interests." Authors' translation). For the influence of the émigrés generally, see Marcus Lutter, Ernst C. Stiefel & Michael H. Hoeflich (eds.), *Der Einfluss deutscher Emigranten auf die Rechtsentwicklungen in den USA und Deutschland* (1993).

57. Kaplan, von Mehren & Schaefer, "Phases of German Civil Procedure," 71 *Harv. L. Rev.* 1193-1268 (1958); Kaplan, "Civil Procedure: Reflections on the Comparison of Systems," 9 *Buffalo L. Rev.* 409 (1960); von Mehren, "Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules," 63 *Notre Dame L. Rev.* 609-27 (1988); The Columbia Project on International Civil Procedure (which produced books on civil procedure in France, Italy and Sweden; the book on Sweden was co-authored by the newest appointment to the Supreme Court, Ruth Bader Ginsburg).

58. See, e.g., Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States," 34 *Am. J. Comp. L.* 745 (1986); "International Discovery After *Aerospatiale*: The Quest for an Analytical Framework," 82 *Am. J. Int'l L.* 521 (1988); Shemanski, "Obtaining Evidence in the Federal Republic of

2. *Langbein's Challenge: The German Advantage*

In 1985, Professor Langbein, now of Yale University, published an article with the plainly provocative title: "The German Advantage in Civil Procedure."⁵⁹ Langbein challenges American lawyers to consider whether their cherished system is truly second best. Langbein in "The German Advantage" argues that the German system avoids the most troublesome aspects of American procedure by assigning judges rather than lawyers to investigate the facts. He contends that the United States should follow German experiences and restrict the lawyers' role in fact-gathering. He recommends that the United States introduce judicial control and eventually judicial conduct of fact-gathering.

Langbein in his article provides a straight-forward exposition of certain fundamentals of German civil procedure which he contrasts to their counterparts in American procedure. While Langbein's conclusions are purposely provocative and consequently controversial, the contrasts he makes should not be, for they are patent to anyone familiar with both systems. They are:

- a) In Germany, the court has main responsibility for gathering and evaluating evidence. The judge prepares the case, serves as principal examiner and summarizes testimony. In the United States, each side prepares its own case for presentation to the court. The judge remains passive, there is no judicial preparation of the case, the parties' lawyers serve as principal examiners, and there are verbatim transcripts of testimony.
- b) In Germany, the judge controls the sequence of the case and considers issues deemed central first. In the United States, each side's lawyers first investigate the case fully in the discovery stage. Then later, at trial, they present their cases in full, first plaintiff, then defendant.
- c) In Germany, witnesses are questioned for the first time by the judge. In the United States, lawyers for the parties prepare their witnesses prior to testimony.
- d) In Germany, expert witnesses are chosen by the judge and are supposed to be neutral. In the United States, expert witnesses are chosen by the parties and function as advocates.

3. *America Reacts to The German Advantage*

Reaction to Langbein's article has been largely negative: the German system, it is argued, may not be as good as claimed, or the U.S.

Germany," 17 *Int'l Lawyer* 465 (1983); *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. (1987). See Fisch, above n. 12, at 413.

59. Langbein, 52 *U. Chi. L. Rev.* 823 (1985).

approach has special advantages or, in any event, the German system would not work in the U.S.⁶⁰

a) First Reaction to the German Advantage: Skepticism

Professor Allen of Northwestern University is skeptical: he makes a plea to Langbein for "more details and fewer generalities."⁶¹ Allen criticizes Langbein for leaving his article at a high level of generality, but nonetheless acknowledges that "If the generalities that [Langbein] invokes are true, then he has made a powerful argument that the American system is decidedly inferior to the German system in certain important respects and that we would do well to embrace aspects of that system."

Allen complains that he cannot determine from Langbein's article the truth of Langbein's generalities. In particular, he is bothered by the lack of empirical works to support Langbein's claims, and suspects that Langbein has emphasized the most negative appraisals of the American system while relying on the most charitable appraisals of the German.

Allen in his criticism of "The German Advantage" never escapes from an American perspective. He repeatedly assumes—as is very easy to do—greater similarities in the two systems than actually exist because of parallels in the problems they treat. Allen challenges "The German Advantage" by pointing out that variations in the German approach to a particular problem parallel those in the American approach. What Allen overlooks, however, is that while problems in the two systems may parallel each other, the variations between the two systems are far more striking. This is apparent upon examination of several of Allen's principal criticisms:

Episodic or concentrated trial. Langbein writes about the problems that American procedure creates through use of a single, concentrated trial. The entire case must be fully discovered to avoid surprise at trial. Allen counters that "courts in the United States tend to deal with the matter. . . in a fashion at least somewhat analogous to Langbein's portrayal of the German response." Allen is right

60. Langbein had no reason to be surprised that there was no widespread acceptance of the German system. A decade earlier he and others attempted a similar campaign against U.S. criminal procedure which led to similar results. Cf. Schlesinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience," 26 *Buffalo L. Rev.* 361, 363 (1977) (U.S. lawyers are possessed by a feeling of superiority that seems to grow in direct proportion to the ever-increasing weight of the accumulating evidence demonstrating the total failure of our system of criminal justice). At about the same time as Langbein's civil procedure campaign, Maxeiner argued for a reform of the procedures for implementing antitrust law. *Policy and Methods in German and American Antitrust Law: A Comparative Study* (1986). While commended in reviews, Maxeiner's work was ignored.

61. Allen, Köck, Reichenberg & Rosen, "The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship," 82 *Nw. U. L. Rev.* 705 (1988).

that U.S. courts do sometimes grant continuances to deal with the unexpected, but the usual case is dealt with in one concentrated proceeding and it is the usual case for which the attorneys must prepare. A focused but limited inquiry is rarely possible under U.S. procedures.

Coached or unprepared witnesses. Allen makes much of the fact that the German prohibition on contacting witnesses has been loosened somewhat in recent years. This is true enough, but it does not affect the basic difference. Coaching, as known in the U.S., is unknown in Germany. In the United States, on the other hand, contact is the rule and coaching common.

Judicial control of fact-gathering. Allen acknowledges that the German judge is constrained by the principle of party-presentation (*Verhandlungsmaxim*) and by the principle of dispositive election (*Dispositionsmaxime*) [the translations are Millar's] which limit the judge's ability to control completely the gathering of facts. Allen is not prepared to consider, however, the substantial qualitative difference between the roles of German and American judges in gathering of facts. The German judge is active while the American is passive.

Experts. Allen states that he is unwilling to accept the anecdotal evidence that experts in the American system, who are selected and presented by the parties, do align themselves with whomever pays the fee. We think that the point is readily apparent to anyone involved in American litigation and requires no proof.⁶² Whether the German system works better through use, or as Allen argues nonuse, of court-appointed experts is another matter.

b) Second Reaction: The U.S. System Offers Unique Advantages

Professor Samuel R. Gross of the University of Michigan takes a different approach to "The German Advantage". He concedes readily, if perhaps only for sake of argument, that the German system of civil justice is cheaper, quicker and more predictable than the American. Calling those characteristics collectively efficiency, he then questions whether efficiency is a virtue in a legal system. In other words, Langbein's "German Advantage" is, after all, an illusion. Gross says the American advantage is the value of inefficient litigation.⁶³

Gross argues that there are drawbacks to efficient systems. According to Gross, an efficient system is necessarily more specialized and more difficult to operate than an inefficient one. "Completely cen-

62. See Walter K. Olson, *The Litigation Explosion, What Happened When America Unleashed the Lawsuit* (1991) at 157 (partisan reliability has to come first); Maxeiner, "The Expert in U.S. and German Patent Litigation," 1991 *IIC Int'l Rev. of Industrial Property & Copyright L.* 595.

63. "The American Advantage: The Value of Inefficient Litigation," 85 *Mich. L. Rev.* 734 (1987).

tralized systems are not only harder to set up and more likely to break down, but they break down more thoroughly.⁶⁴ Gross draws an analogy to the relationship between word processors and typewriters: the difficulties of setting up and using a word processor may mean a typewriter may serve a particular user better. Of course, Gross's argument works equally well against just about every advance of the modern era and fails just like his analogy—try to find a typewriter in production in the United States today.

Gross contends that there is positive value in an inefficient system. His argument is that laws are often bad. An inefficient system spares us from "the worst consequences of our foolishness."⁶⁵ In the realm of civil justice, this inefficiency has the supposed salutary effect of increasing the range of conduct that is, as a practical matter, beyond formal legal control.⁶⁶ Gross concedes that what he calls a virtue is often cited as the "essential vice" of the U.S. system.⁶⁷ The validity of much of this argument has been challenged elsewhere.⁶⁸ It is, in effect, an argument for a minimalist legal system. If that be the goal, then better that choice be made explicitly.

Gross makes an argument that there is a "parochial" advantage of inefficiency that concerns the peculiar position of judges in the United States:

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 to tolerate, allocating that sort of judicial power to judicial officials if they had the means to implement their policies directly and effectively.⁶⁹

Gross is certainly correct that American judges historically have a much greater role in policy-making than do any of their German counterparts except those judges on the German Constitutional Court. The tenacity with which American judges cling to that power is likely to inhibit any reform of the justice system which would cause judges to apply the law more and formulate it less.

64. *Id.* at 751.

65. *Id.* at 755.

66. *Id.* at 753.

67. *Id.* at 754.

68. See Bernstein, "Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems," 21 *U. Cal. Davis L. Rev.* 587, 596-98 (1988).

69. Gross, *supra* n. 63, at 752 (emphasis in original).

c) Third Reaction: The German Advantage Won't Work Here

Professor John Reitz of the University of Iowa explains "Why We Probably Cannot Adopt the German Advantage in Civil Procedure."⁷⁰ Reitz does not question Langbein's claimed advantages for German civil procedure, but argues that the U.S. could not adopt judicially dominated fact finding without changing other fundamental characteristics of U.S. civil procedure. He contends that cultural definitions of the role of lawyer and judge preclude such changes. Reitz states that "[U.S.] judges continue to view themselves as umpires between the contending parties, rather than government officials responsible for determining the truth of the allegations."⁷¹ Since these roles are dictated as much by "legal culture" as by positive law, they are, Reitz contends, peculiarly difficult to change.

Reitz identifies several specific institutions of the American "legal culture" which he believes make introduction of "The German Advantage" difficult if not impossible:

Jury. According to Reitz, an active judge is potentially antagonistic to an impartial jury in those cases where the parties do not waive trial by jury.

Judges. Reitz points out that the German system requires judges to prepare more for testimony than does the American system. To implement such a system in the United States would require a substantial increase in the number of judges. Leaving financial considerations aside, such an increase would, according to Reitz, make political control of the judiciary more difficult. American judges focus on their political, i.e., law making function, and not on court administration.

Discovery. Reitz considers the U.S. institution of discovery to be the strongest objection to the introduction of German style judicial domination of witness examination. According to Reitz, the American system of discovery puts the burden on the party opposing discovery to justify why specific discovery should not be had, whereas the German system puts the burden on the party seeking disclosure. Reitz states that maintaining discovery, but putting it under the control of the judge, would create an unacceptable risk of state abuse of discovery. The United States would face a danger of crusader judges. Judicial control of discovery would also, according to Reitz, create a danger of delay, since it would introduce another person into the proceedings whose schedule would have to be accommodated. Therefore, Reitz finds discovery the chief barrier to introduction of the German advantage.

It is ironic that Reitz finds discovery the principal barrier to adoption of the German advantage, for while the roles of judge and

70. Reitz, 75 *Iowa L. Rev.* 987 (1990).

71. *Id.* at 992.

jury are rooted deep in the history of the Anglo-American common law, centuries before the United States became a nation, the institution of discovery as presently known was put into place in the lives of U.S. lawyers practicing today. That that system—subject to such criticism today—should be spared change, suggests a remarkable lack of flexibility. In any event, the whole thrust of Reitz's argument—we just can't change—is a sad commentary on the openness of the American system to change.

IV. PROSPECTS FOR THE FUTURE

The prospects for civil justice reform in the future are clouded. The Republicans in the last election campaign tried to paint the Democrats as opposed to reform. Indeed, the American Trial Lawyers' Association—one of the groups that most vocally supports the status quo—was a major contributor to the Clinton campaign. Still, the Clinton presidency is not inalterably opposed to reform, as Dan Quayle himself has pointed out.⁷² Moreover, the present miserable state of American civil justice may be sufficiently intolerable to keep the political pressure for reform on.

But what kind of reform is likely to result? Without knowledge of European alternatives, reforms are likely to be piecemeal and minor, at best—say along the lines of the Quayle Report. The entrenched special interests are likely to see to that. Knowledge and interest in foreign solutions, although greater than before, remain at a low level. Very few American lawyers or law professors are able to deal with foreign language works or even have an interest in having colleagues who can. Not that much has changed since Karl Llewelyn told Stefan Riesenfeld when he arrived in American in January 1935 that to identify a legal idea as having a foreign origin is to give it the "kiss of death."⁷³ While U.S. lawyers may finally have recognized that they ought to have something different, they still have not accepted that that requires change and close examination of real alternatives. For the moment, the average U.S. lawyer is apt to respond to attacks on the legal system as did the ABA Section on Litigation, whose chairman-elect was quoted as saying: "Efforts to undermine confidence in our entire system of justice does [sic] the country a great disservice. We have at once the most emulated, thorough, democratic and fair system of justice in the world."⁷⁴

Ignorance is bliss.

72. Quayle, "Clinton is Right On Tort Reform, Wrong On Solution," *Wall Street Journal*, May 27, 1993.

73. Riesenfeld, "Statement at Comparative Law Section Program," 1987 Association of American Law Schools Annual Convention. See also Jutta Klapisch, *Der Einfluss der deutschen und österreichischen Emigranten auf contracts of adhesion and bargaining in good faith im US-amerikanischen Recht* at 63 (1992).

74. Robert N. Saylor quoted in "Section Responds to Attacks on Legal System," 18 ABA Section of Litigation, *Litigation News* 5 (October 1992).