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Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question

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JUSTICE AND ADVANTAGE IN CIVIL PROCEDURE: LANGBEIN'S CONCEPTION OF COMPARATIVE LAW AND PROCEDURAL JUSTICE IN QUESTION

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"Wigmore's celebrated panegyric – that cross-examination is 'the greatest legal engine ever invented for the discovery of truth' – is nothing more than an article of faith."
– John H. Langbein[1]

"The German achievement calls into question fundamental premises of our deeply flawed system of civil procedure."
– John H. Langbein[2]

"The German Advantage was meant to inspire serious discussion about issues of great magnitude in civil procedure."
– John H. Langbein[3]

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1. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833 n.31 (1985) (quoting 5 JOHN H. WIGMORE, EVIDENCE § 1367, at 29 (3d ed. 1940)).

2. John H. Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763, 783 (1988).

3. *Id.*

"Again and again in discussions about the shortcomings of the contemporary legal system I find when I draw upon foreign example[s] that I am met with responses such as, 'Before you go on telling me any more about the virtues of German civil procedure, please explain why they had Hitler and we did not."

– John H. Langbein[4]

"If the study of comparative law were to be banned from American law schools tomorrow morning, hardly anyone would notice."

– John H. Langbein[5]

"It is said that a drowning man may see his whole life flash before him. That may be his unconscious effort to find within his experience the resources to extricate himself from impending doom. So I have had to view the Western tradition of law and legality, of order and justice, in a very long historical perspective, from its beginnings, in order to find a way out of our present predicament.

That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not."

– Harold J. Berman[6]

I. INTRODUCTION

On numerous occasions I have been told by senior lawyers that a case is won or lost on the evidence, through the effective use of procedural motions. Indeed, evidence only comes into play by virtue of an effective use of such motions, and defenses to such motions. Many an excellent case has been lost long before its merits could be considered due to the out-maneuvering of opposing counsel. Knowing how to assemble, and oppose the assemblage, of evidence by knowing when to bring procedural motions is one of the most fundamental skills of the litigator.

Why, one might ask, is the attention to technicality, to maneuvering, to outsmarting the other side, and the virtues of battle given such awe-inspiring centrality in Anglo-American systems of law? Why does civil procedure come to take the position of an altar for adversarial legalism where warriors come to pay homage?

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4. John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 554 (1995).

5. *Id.* at 549.

6. HAROLD J. BERMAN, LAW AND REVOLUTION v (1983).

Perhaps we should slow down: what exactly *is* civil procedure such that we can understand it as distinct and related to a conception of justice in an important way?

Upon asking such questions in pursuit of the nature of civil procedure and its relation to a larger conception of justice as manifested in a legal system, in its ideal as well as in practice, we become tangled in questions of method and how to proceed: are we asking about philosophical conceptions of justice? Or are we concerned with understanding how a competitive and adversarial process brings about justice? How would we know if it did? But these questions leave us with more direct questions about what the particular rules in our system are for, and how effective they are (or not) at achieving their purpose: it is into this clearing of questions that John Langbein stepped in 1985 with his article *The German Advantage in Civil Procedure*.[7]

At once a powder keg, Langbein's article set off a debate in comparative law circles (and beyond) over how it was possible to conceive of another legal system's ways as somehow advantageous.[8] His argument is controversial because people are concerned about how such things could be imported. The argument predictably involved the degree to which it is possible to make sense of an advantage drawn from a legal system that is quite hierarchical in nature to be implemented in one that is understood as specifically not. The critics pointed out that to attempt to adopt such measures is culturally naive, politically not possible, and essentially un-American and hence undesirable. Langbein responded by saying that this is to throw the baby out with the bath water, to make a mockery of comparative analysis, and to demonstrate the smugness of American

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7. *See* Langbein, *supra* note 1.

8. *See generally* Ronald J. Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988) (response to John H. Langbein); Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988); Herbert L. Bernstein, *Whose Advantage after All?: A Comment on the Comparison of Civil Justice Systems*, 21 U.C. DAVIS L. REV. 587 (1988); Michael Bohlander, *The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties*, 13 TUL. EUR. & CIV. L. F. 25 (1998); Oscar Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861 (1997); Oscar Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997); Samuel Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990).

adversarial legalism. The debate ended up focusing on how one could make sense of such a "legal transplant."[9]

The claim that cultural differences are simply too different and, hence, too difficult to navigate in adopting the German advantage, or that culture is the sacred cow not to be altered or toyed with by its participants, sounds suspect unless we try to come to terms with the practices that constitute culture.

> Whatever the perspective, "the culture" is invoked as if it were a powerful, uniform, enveloping medium—as vast and impersonal as the galaxy, as inescapable as the laws of thermodynamics . . . .
>
> In some ways our thinking about nature on the one hand and "the culture" on the other has undergone a reversal within a matter of decades. It used to be that the cultural aspect of ordinary reality was, by definition, the part most amenable to human transformation, whereas the natural aspect was seen as having a dynamic of its own, which was largely out of our hands . . . . [N]ature as a sovereign power has given way to nature as a dependent ward of human custodians. Befouled and denuded, gutted and gouged, the natural world has become a thing of frailty. Even the most trivial of human interventions can spell catastrophe . . . .
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> "The culture" is today the more fearsome realm, or at any rate the more convenient scapegoat, and the notion that we have only limited influence over it appears to be widespread.[10]

Thus one way to ascertain whether there could be a German advantage in civil procedure would be to articulate those aspects of culture that seem to pose difficulties. Such a task requires understanding the method by which we will approach such a question.

What this debate demands, therefore, is a division of the issue into the two that comprise it, such that we can bring into question (i) the nature and role of comparative law, and (ii) the interpretation of historical traditions and the spirit of American adversarial legalism and its ability to incorporate change. Upon a consideration as to

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9. The term "transplants" is used widely in comparative law circles to designate the patchwork of legal institutions that have been "transplanted" from one time and domain to other times and domains. *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993).

10. Cullen Murphy, *The Culture Did It: A Semantic Innovation Gets Us All off the Hook*, THE ATLANTIC MONTHLY, Dec. 2000, at 18.

whether we can incorporate the German advantage into American law and legal practice, the issue is how it is possible to conceive of legal change and innovation both from the inside and the outside. Further, we will see that it most certainly is possible to speak of legal reform, of "legal transplants," precisely because the Law of laws in Western societies is first and foremost positive law. We understand law as something we use, something we create for ascertainable purposes, and as a tool that we use to achieve results, to render justice, or to settle disputes. We are no longer talking about a cosmic order or cultural practices that are somehow immune to observation and requiring technical anthropological insight into their depths: we are comparing civil procedure.

Law is never considered an end in itself, but rather it is a method of ordering conduct, preferences, and results. Thus Langbein is right that the U.S. could adopt the German Advantage: how could it not? In a very simple way, how could we make sense of an *advantage* in procedure if we did not already understand laws as something disposable, in the sense of always being replaceable by *better* laws? Because American law, indeed positive law after Austin, is conceived in terms of achieving an end, it is not unique among Western systems of law. In considering the two aspects of the question above, we will see that the controversy surrounding the article was at cross-purposes. The confusion about our own history, as reflected in the struggle between the common law and civilian tradition, does much to obscure the central unity of purpose behind the origins of the Western Legal Tradition. The concern over incorporating what appear to be quasi-inquisitorial institutions into an adversarial system need to be understood *in their entirety*, in terms of the history of such institutions and how they have come to be understood essentially. The judicial institution of the court is a much different one in common law countries than it is in its civilian counterparts, *but it is essential to see why it is different*. Any exercise that attempts to make sense of comparative legal institutions must be able to zero in on the essence of the differences that animate each if it is going to pursue questions of whether certain institutional arrangements would work elsewhere.[11] Thus, though the civilian tradition has been defined by

11. There are some excellent recent articles on the nature and purposes of comparative legal research and its agenda. *See* RENÉ DAVID & JOHN BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (2d ed. 1978); MIRJAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 1-47 (Tony Weir trans., Oxford University

codification and the common law by *stare decisis*, the fallout for a procedural conception of the law as expressed in American adversarial legalism is only clear after ascertaining the purpose inherent in comparative analysis: a comprehension of the historical tradition that informs each, and thereby understanding the spirit of the laws of each country. Only in this way can we make sense of what an advantage could be.

Put another way, it is clear that it is entirely consistent with the spirit of American laws and its pragmatic public philosophy that civil procedure is seen as institutional arrangements designed to facilitate a set of results. These results are what is considered crucial to the goal of justice in American legalism, and that it is *possible* to conceive of *improving* law: because law is positive law, it is always goal-directed, a means, a tool, and therefore, replaceable by any other set of laws that can achieve that goal in a better way. Thus the argument over the American advantage must be, first, about comparative law in its essence, and second, about the commensurability of legal practices across legal cultures as expressed by divergent histories. By undergoing such an analysis we would be able to veritably ask and answer whether an advantage in procedure is possible for America.

The answer, we will see, is that advantage only makes sense in a regime of positive law that sees the law as a tool (but in a rich way, in contrast to its end) posited by humans as a way of bringing about just results, said results being a proper ordering of human relations according to criteria chosen and/or expressed by the polity itself. As such (i.e. that law is a tool), procedural justice is defined not by what it is, but by what it can do, and it automatically speaks the language of advantage. Such an insight brings to Anglo-American jurisprudence and legal theory the realization that a concept of justice is tied to the way we conceive of what we are doing. Because the spirit of American law speaks so loudly about civil procedure as crucial to justice due to the way it focuses the court toward truth while safeguarding the rights of the parties, we most certainly can look to the German model. Langbein is right.

Press 3d ed. 1998); James Gordley, *Is Comparative Law a Distinct Discipline?*, 46 AM. J. COMP. L. 607 (1998); Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).

II. LANGBEIN ON THE GERMAN ADVANTAGE[12]

Langbein's argument is not simply that certain aspects of the modern German system of civil procedure are superior to American civil procedure, but that, in considering the totality of rules and processes, in a comparison that highlights the way these rules serve (or not) their purposes, it would be advantageous for American civil procedure to become more like its German counterpart with respect to the way such rules structure the fact-finding process. Now the question is: advantageous in what sense? Langbein is quite clear about this: "German civil procedure strikes a better balance between lawyerly and judicial responsibility in the conduct of civil justice."[13] This is not to say that lawyers in Germany do not play an important and instrumental role in fact-finding, and it is not to say that judges play no role in American civil procedure; rather, the key for Langbein is that the German balance it better.

The ultimate reason for Langbein's admiration of the German model is the procedural elements of the system allow for the finding of the truth to be uninhibited by the tactical maneuvering of the parties or lawyers. Rather than leave the *sole* responsibility for adducing evidence to the parties' lawyers, the German quasi-inquisitorial model gives judges the ability to call the evidence they think is needed. This is because in civil law countries, courts, not lawyers, are assigned the task of leading the investigation into matters of fact.[14] Entailed in this ability is also the court's jurisdiction over expert testimony: court appointed experts give testimony on issues that require it. This does not mean that there are no methods available to the parties to safeguard their interests in the selection of the expert; rather, it simply means they do not have the opportunity to *prepare* an expert of

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12. *See* John H. Langbein, *Comparative Civil Procedure and the Style of Complex Contracts*, 35 AM. J. COMP. L. 381 (1987); John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L & COMP. L. 41 (1997); John H. Langbein, *Will Contests*, 103 YALE L.J. 2039 (1994); Langbein, *supra* note 1; Langbein, *supra* note 2; Langbein, *supra* note 4. *See also* ROBERT COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979); FRANK DIEDRICH & HARALD KOCH, CIVIL PROCEDURE IN GERMANY (1998); NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS (3d ed. 2002); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); LAWRENCE M. FRIEDMAN, AMERICAN LAW (1984); Peter Gottwald, *Civil Procedure Reform in Germany*, 45 AM. J. COMP. L. 753 (1997); Benjamin Kaplan et al., & Rudolf Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958); ZWEIGERT & KÖTZ, *supra* note 11.

13. Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12, at 42.

14. Langbein, *supra* note 1, at 824; Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12, at 42.

their own choice.[15] Langbein argues that under the American model, where expert testimony is commissioned and prepared by the parties, "a systematic distrust and devaluation of expertise" arises.[16] Such devaluation arises ostensibly out of the fact that experts differ on various factual issues, thus begging the question of how "truthful" expert evidence can be.[17] As we will see, the greater degree of control over the fact-finding process by the judge rather than lawyer is where Langbein's conviction about the German advantage lies. American adversarialism champions advocacy, and as such, champions an adversarial understanding of truth, one that encourages a "truth through dialogue" understanding of how to proceed. Indeed, this is the bedrock for any adversarial system.[18]

The German system gives responsibility to the judges for determining the order of proof, providing for, calling, and carrying out the examination of witnesses, creating a compact record of the witnesses' testimony by dictating summaries of that testimony, and through the securing and examination of experts where required.[19] He notes that we must not think that the American model is really so different that an adoption of aspects of the German model would not make sense: "A high theme of recent American civil procedure

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15. Indeed, there is no "preparation" of witnesses or experts because there is no distinction between pre-trial and trial; because the judges control the fact-finding process, what need is there of pre-trial discovery?

16. Langbein, *supra* note 1, at 836.

17. This also has to do with the way "truth" and its value comes to be conceived historically under each system, something we will return to in Section 3(ii). *See* Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289 (1998).

18. It is not disputed that the major difference between adversarial and what are called "inquisitorial" systems is the way they understand truth to be properly elucidated. Even though properly speaking the German Civilian system is only inquisatorial in criminal matters, it is still, a question of the difference in such styles and whether the strength of such a difference makes discussion of an advantage functionally impossible. *See id.*; *see also* Daphne Barak-Erez, *Codification and Legal Culture: In Comparative Perspective*, 13 TUL. EUR. & CIV. L.F. 125 (1998); Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839 (1997); James Gordley, *Codification and Legal Scholarship*, 31 U.C. DAVIS L. REV. 735 (1998); James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555 (1995); Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L. L.J. 221 (1999); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997) (a wonderful article on legal transformation serves as a supplement to BERMAN, *supra* note 6).

19. Langbein, *supra* note 1, at 826-30.

scholarship is the recognition of the immense power over pretrial management that American judges have come to exercise, with scant safeguard for litigants."[20] Thus, on the one hand, Langbein demonstrates the centrality of the position of the judge to direct the way evidence is to be entered on the record (from witness and expert testimony to the production of the record), while on the other hand noting that the American model is not so anarchic as to be able to warrant giving American judges more control over the evidentiary process. What is remarkable is that Langbein, while championing the German model, eschews "managerial judging"[21] on the ground that it is governed by the whim of the judge, is merely an administrative attribute that usually attaches to complex cases, and does nothing to alter the institutional arrangements governing fact-finding, because it is fact-finding that is key.[22]

What happens to lawyers in the German model? Are they mere administrative specialists who do the court's bidding when asked? Not at all. The lawyers are required to provide documents and to identify the witnesses that the lawyer and client feel support their case. There is room here for effective lawyering that is not reducible to simple servitude or administration. "Outside the realm of fact-gathering, German civil procedure is about as adversarial as our own .... Accordingly, the proper question is not whether to have law-yers [sic], but how to use them; not whether to have an adversarial component . . . but how to prevent adversarial excesses."[23]

Once one considers what it is that Langbein thinks is at issue, the advantage of the German model is clear: the sheer difficulty for a court to determine what actually happened and what is at issue becomes, under the American model, clouded by lawyers who are only bringing forth the facts that fit their case, and leaving the rest for the

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20. Langbein, *Cultural Chauvinism in Comparative Law, supra* note 12, at 47. He is referring to the excellent scholarship on "managerial judging," much of which followed the pioneering works by Judith Resnick. *See* Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). This is definitely *not* the same argument regarding the expansion of the power of the judiciary. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

21. Refers to the increasing bureaucratic control exercised by judges in managing cases towards settlement, and the set of institutional practices that go along with such an increase. *See* Langbein, *supra* note 1, at 860-62.

22. "I side with Blackstone in thinking that fact-finding is the central task of civil litigation." *Id.* at 847.

23. *Id.* at 841-42.

other side or the court to figure out. The advantages of the German model are that it reduces the cost of litigation while enhancing the quality of testimony by reducing the opportunity for partisan lawyering. Partisan lawyering, he contends, places incentives on lawyers to not give the whole truth, but simply the truth that fits their side.[24] By focusing on the way that partisan lawyering, the essence of American adversialism, impedes the effective function of a court of justice, Langbein put his finger on an issue that was bound to create a reaction. First, his comparative analysis makes us wonder why the American focus on adversarialism has been privileged at all since it seems very irrational in the face of effective fact-finding. Second, Langbein's study begs the question (and suggests an answer) of why lawyers have come to assume such power and centrality in America, and makes it puzzling to understand how it is that lawyers actually do produce an adequate record for the court.[25] Finally, it also points to the fact that adversarialism is in some way part and parcel to the American tradition in a way that is not negligible—otherwise it would not be an issue of adopting the model but rather tweaking the rules.[26]

Langbein is, however, careful to distinguish such judicial control from "managerial judging" where judges get involved in a managerial way in order to expedite the process. The distinction, it seems, is critical. For it is here that he rests the case for an attempt to bring German elements into the American model. "[The trend toward managerial judging is] telling evidence for the proposition that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure."[27] Langbein is not saying that managerial judging looks like the German model, but rather that the American trend towards it demonstrates that the

24. Indeed, this is not simply an incentive, it is the lawyer's duty: one of the major issues for the professional responsibility of the lawyer is the contest between the fiduciary duty he/she has to the client, and the duty to not mislead the court. As most Codes of Professional Conduct across regions show, it is a lawyer's duty to recognize and balance the interests of the client and the court in each and every case.

25. *See* 1 ALEXIS TOCQUEVILLE, DEMOCRACY IN AMERICA 282-91 (Henry Reeve trans., Phillips Bradley ed., Vintage Books 1945) (1848).

26. *See* Langbein, *supra* note 1, at 841-43; *see also* Robert Kagan, *Adversarial Legalism and American Government*, 10 J. OF POL'Y ANALYSIS & MGMT. 369, 371-75, 378-79, 389-90 (1991) (discussing whether there are deeper institutional aspects that would need "tweaking").

27. Langbein, *supra* note 1, at 825.

American model is not as anti-authoritarian as many contend.[28] In addition to trends in managerial judging, one must contend with the superior political power that courts in America wield: a function of their lack of authoritarianism?[29]

III. THE RESULTING CRITICAL ENGAGEMENT

Even if Langbein's comment lumping 1000 years of British history into a sociological category without much worry in his identification of the "cult of the common law" was not enough, there was little doubt that his 1985 article would generate controversy. The most pointed response was from Ronald Allen and his colleagues.[30] They argued that Langbein's comparison was much too general a description of the differing traditions of procedure, and that in order to capture the essence of such differences, the exact difficulties and concrete examples of how the American adversarial process goes astray need to be given. In fact, Allen and his crew give many examples of how the American adversarial process functions to help with fact-finding, and the various mechanisms and procedural rules that are designed with the sole purpose of expediting pre-trial discovery and trial procedure in a fair way. With extensive literature and cases to back up their claims, Allen and his colleagues state that the American system works very efficiently towards settlement of disputes,[31] that there are problems with the German approach that the Germans themselves recognize,[32] that Langbein's article ignores the "big case" in favor of the "little case,"[33] that the discussion of experts is much too general to glean whether such a system is in fact advantageous,[34] that a professionally trained judiciary that is not selected from a large pool of seasoned lawyers is not demonstrably

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28. Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12, at 45-49.

29. *See* SHAPIRO, *supra* note 20.

30. *See* Allen et al., *supra* note 8.

31. *Id.* at 705-09. *See also* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Fiss argues that the goal of settling has nothing to do with the proper aim of the trial. It is interesting to consider that, in the vast majority of cases that are not settled, the major legal issue that confronts the court is not the main one that the parties identify; indeed, the entire body of caselaw on civil procedure is the result of procedural maneuvering that ended the dispute. This is certainly not the kind of justice that Fiss is arguing for, is it?

32. Allen et al., *supra* note 8, at 761.

33. *Id.* at 708-13.

34. *Id.* at 760.

better,[35] that the element of surprise in litigation does not operate as Langbein suggests because the rules of civil procedure and the discretion of the court operate to constrain it,[36] and that overall, one needs descriptive accuracy in order to justify such a broad claim as a German "advantage."[37] As they note, their article is aimed at looking at the details of legal practice and inquiring as to how such details could fit within Langbein's discussion: they contend that the details do not fit his characterization of the difference.[38]

Langbein's response was to note that the German system is still an adversarial system in that, though the court directs the finding of fact, the court's role is overseen by the counsel of each party.[39] Even so, in the German model there is no coaching of witnesses, and he asks, boldly, how such a practice can be defended in the name of "truth in adjudication."[40] With respect to the claim that surprise is minimal in America, Langbein repeats his previous admonishment that there certainly is surprise. To say that rules of procedure operate to diminish surprise is to miss the point, as Langbein is not referring to those episodes of pre-trial misbehavior.[41] Anyone who has ever taken a stroll through the floors of litigation departments across the country knows that surprise is indeed something that the trial lawyer strives for.[42] Uncompromisingly harsh, Langbein asserts that when we speak of a German advantage in comparative scholarship, we are trying to assess what we can do to understand ourselves and better equip our institutions to do the things we would hope they would.[43]

Another line of questioning asks whether it makes any sense to speak of "advantage" in comparative scholarship when we are confronted with those aspects of institutional arrangements that are fundamental to the nature of the system itself.[44] But how, it may be

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35. *Id.* at 745-61.

36. *Id.* at 720-30.

37. *Id.* at 707 n.8.

38. Allen et al., *supra* note 8, at 761-62.

39. Langbein, *supra* note 2, at 763.

40. *Id.* at 766.

41. *Id.* at 770.

42. *See* JAMES B. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS 245 (1983) (a tumultuous and warlike account of the law firm Kennecott, Sullivan & Cromwell); *cf.* Langbein, *Will Contests*, *supra* note 12 (description of a similar situation).

43. *See* Langbein, *supra* note 4.

44. *See* Bernstein, *supra* note 8; Reitz, *supra* note 8.

asked, can simple procedural rules regarding the finding of fact be central? What difference does it make if the judge asks the questions or if the lawyer prepares the witnesses for examination and cross-examination? Apparently it makes a great deal of difference. Oscar Chase has argued that even though the German model might appear to be more efficient, result in better fact-finding, and make sense, it is still contrary to the fundamental nature of American legal culture because it so intrinsically anti-authoritarian.[45] Having judges direct the process is simply contrary to the American spirit of the laws.[46] Langbein is unsympathetic to such an argument, claiming that to hide behind the veil of culture is not an explanation but a tautology: "[w]hat his argument boils down to is the claim that we Americans cannot aspire to such improvements because we are Americans and they are Germans."[47]

Though essentially the same argument, but articulated with more depth, John Reitz argues that we could not adopt the central aspect of German procedure, namely, a judicially dominated fact-finding process, "without changing many other fundamental characteristics of our modern civil procedure."[48] In a nutshell, the claim is that procedural justice is the heart of American legal culture. In order for justice to be done, the parties must have a fair chance at controlling the process by which the evidence on the record is produced either for them or against them.[49] Any institutional arrangement that gives the power to the judge to direct the production of evidence is necessarily at odds with the firmament of American law. Drawing on an example that Langbein himself uses, Reitz notes that even though Rule 614 of the Federal Rules of Evidence empowers the federal district court to call witnesses on its own motion, it is never done. Indeed, he notes that on the books the American judge appears to have more power than his or her German counterpart—a fact we should bear in mind—but that such power is circumscribed by the deep practice in American legal culture of parties directing the way their case will go.[50] Thus Reitz's argument

45. Chase, *Legal Processes and National Culture*, *supra* note 8.

46. We will consider in more detail below what could be meant by the American spirit of the laws.

47. Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12, at 45.

48. Reitz, *supra* note 8, at 988.

49. We will dig into aspects of this below when we consider the nature of the American tradition.

50. The same is true in Canada and England, where judges are empowered under rules of civil procedure to call and examine witnesses and to direct the production of

is that the control of the fact-finding process is not decisively with lawyers, but that American adversarialism has at its heart a commitment to let the parties succeed or fail on the merits of the evidence that they themselves have entered.[51] This argument thus finesses Chase's point, in essence also arguing that in the end the German model is not consistent with central traits of American legal culture.[52]

As Langbein fully admits, underlying this difference is the concept of civil procedure as a way of securing a particular vision of justice between parties—he recognizes that we are dealing with different legal cultures. We can imagine the set of questions that Langbein would pose: what significance can an explanation that draws on "culture" have unless we elaborate what we mean (i.e. particular constitutive practices as embodied in fundamental institutions)? Simply because we have come to do certain things in a way that has become customary (even "cultural"), can we not look to other traditions for advice, for innovation, for ways of improving? Can we make sense of improvement if the dead hand of culture is to be what we are resigned to? Should we not instead be wise to the lessons of elsewhere, not simply to understand why they do what they do, but to highlight why we do what we do?[53] Langbein's response to these lines of argument is as follows: he has indicted critics as cultural chauvinists, has called them members of the "cult of the common law,"[54] and has claimed that they have engaged in severe myopia in their rejection of veritable lessons to be learned from elsewhere.[55] To say that the fundamental barrier to legal change or to comparative analysis is "culture" is not to say very much.[56] Moreover, cultural practices are defined as different in kind rather than in degree, for if their difference is of degree, then we could conceivably adopt them. The argument from culture must therefore be one that claims the

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evidence all on their own motion. This is so rarely done, and when it is done, it is because the "proper" method has broken down.

51. This is important for historical reasons, as we will see.

52. *See* Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, *supra* note 8; Chase, *Legal Processes and National Culture*, *supra* note 8.

53. Langbein notes that we are taught Latin to learn English, and that in the same vein the study of comparative law allows us to see what we do more clearly by pointing to our practices as somehow contingent. Langbein, *supra* note 4, at 545.

54. *See* Langbein, *supra* note 2.

55. *See* Langbein, *supra* note 4; Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12.

56. Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12, at 41, 48.

ends of German and American justice to involve incommensurable ends. As above, culture "is today the . . . fearsome realm, or at any rate the . . . convenient scapegoat, and the notion that we have only limited influence over it appears to be widespread."[57] Indeed, much of Langbein's work would certainly have us reflect on the kinds of distinctions he draws, especially considering the breadth of his knowledge in comparative law. Note how this makes demands not just on procedure, but on the project of comparative scholarship.

Allen and his colleagues do not debunk comparative research, but the tenor of their response most certainly makes one wonder what form of comparative scholarship can properly yield examples of advantages. For if the German model is not advantageous, because they have not been able to find the data that suggests that judges act in the way that Langbein suggests. We are thus pushed back into questions of what would be proper for our tradition, and hence of how such advantages could be possible for us.

Langbein's response has a cross-purpose from that articulated by Allen: Allen wants data about what people believe is the case and how they act, and Langbein is looking to understand the larger institutional arrangements that give expression to the data. As such, each necessarily understands the other as coming at the issue entirely wrongly. But even when we ask whether it makes sense to speak of advantage in comparative procedure, we must see that the underlying question asks us to articulate the degree to which the legal practices of each country, as embodiments of two distinct traditions of justice, are different in their essence, i.e., incommensurable, or a difference that can be overcome: do these two legal systems point at the same thing? Are they both serving a justice that is commensurable? If not, then can we speak of an advantage? More importantly, even if their goals are entirely different, could we still nonetheless speak of an advantage? Indeed, to make sense of an advantage, must we not already be able to conceive of it being a matter where such a thing is possible? And in order for it to be possible, what other conditions must be true? Is it not the case that we could choose this or that set of procedural institutions to govern our affairs? Is it not true that we could have these procedural rules or other ones? So is Langbein's point not apt? If we are to traffic in the business of positive law, then *it always makes sense to speak of advantage since the actual content of the rules themselves no longer delineates a coherent historical tradition based on articulations of justice, but rather a patchwork of*

57. Murphy, *supra* note 10, at 18.

transplants of posited law understood as the tool of a society to solve disputes.[58] Is it really a question of the incommensurability of two competing systems that seeks to render a just result on disputes? Or have we assumed that these traditions differ more than they do? We are reminded, then, of the difficulty of comparative law, and of the importance of grappling with the historical tradition that informs each system in order to fully understand the content of these positive procedural laws.

This most certainly asks us to elaborate more clearly what it is we are after with comparative scholarship, how we substantiate it, and in what ways we would be able to understand the particular institutional arrangements of another state as somehow advantageous. By looking at the nature of comparative research, and by looking into the nature of the historical traditions and conceptions of justice that inform each system, we can come to an understanding of when it is possible to understand "advantage" by comprehending whether a given innovation speaks to the spirit of the law that is contained and expressed by the system itself. We will thus discuss the historical traditions and the spirit of American law in light of the insights provided by comparative law.

IV. DISCUSSION

We have seen that the issue of whether there could be a German advantage in civil procedure demands that we understand what possibilities arise in the study of comparative law, the historical depth that separates the German and American traditions, and the spirit of American legal institutions. In doing so we will see that the debate over the German advantage has indeed been at cross-purposes, and once we begin speaking of advantage it is possible to comprehend a German advantage for American civil procedure. First, we will ask what we can accomplish through the study of comparative law by grasping that at which it aims.[59] Second, we will ask the questions

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58. In this regard, I am indebted to the insights of Harold Berman and Alan Watson. *See* BERMAN, *supra* note 6; WATSON, *supra* note 9; ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY (1984).

59. *See* C.K. ALLEN, LAW IN THE MAKING (7th ed. 1964); PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987); BERMAN, *supra* note 6; DAMASKA, *supra* note 11; DAVID & BRIERLEY, *supra* note 11; CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., Hafner 1949) (1748); PHILLIPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW

that are at the base of this analysis: what are the historical and traditional aspects of these two systems that give rise to this debate? What are the presuppositions that each system works upon? What do the different methods of fact-finding signify? What are the variables that make each system work or not work? To answer these questions we need to understand the essential difference between the Germanic tradition and its turn towards codification and what is referred to as a more inquisitorial system. We also need to understand the common law's "successful" resistance to the codification movement. Thus, if, as it is said, we learn Latin to better learn English, so too we can learn from the German tradition insofar as what it says can and does speak to our own way of doing things.

In light of our brief historical sketch, what is it about the spirit of the law in America that conditions its adversarial legalism, and is there something about it that makes the idea of a German advantage not simply possible or even palatable, but realistic? The answer will lie in the positivistic nature of the two legal systems, and the underlying similarity in the conception of positive justice that has come to animate both systems. We turn first to understand the way the task of the study of comparative law is conceived.

A. Comparative Law

Langbein tells us that comparative law is dead, and that we have killed it.[60] He claims that nowhere else in the world is the study of other legal systems so absent as in America. One of the fundamentally most interesting branches of legal science practically does not exist—and Langbein wants to revive it.

Why? What is the task of comparative law and why does Langbein find it so compelling? "Foreign example teaches you about your own system, both by helping you ask important questions, and by suggesting other ways."[61] But if it is simply a matter of self-study, arguably we are more effective students of our own laws by simply studying our own legal conceptions and practice. This does not tell us *how* foreign examples teach, but highlights differences.

(1921); SHAPIRO, *supra* note 20; MICHAEL TIGAR & MADELEINE LEVY, LAW AND THE RISE OF CAPITALISM (1977); WATSON, *supra* note 9; WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY, *supra* note 58; ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); ZWIEGERT & KÖTZ, *supra* note 11; Barak-Erez, *supra* note 18; Gordley, *supra* note 11; Gordley, *supra* note 18; Mattei, *supra* note 11; Riles, *supra* note 18; Teitel, *supra* note 18.

60. *See* Langbein, *supra* note 4.

61. *Id.* at 545.

Though comparative law as a distinct branch of legal science has developed and changed its purposes, it has always focused on the study of legal systems, their similarities and differences in structure, rule, and purpose.[62] But as Kötz and Zweigert note, the underlying rationale has evolved. Initially, at the Paris Exhibition of 1900, where the International Congress for Comparative Law was founded, the understanding was that comparative law would effectively map the history of the human spirit, of its rational development towards a rational system of law across nations.[63] The spirit of progress intoxicated Western jurists:

> [C]omparative law must resolve the accidental and divisive differences in the laws of peoples at similar stages of cultural and economic development, and reduce the number of divergencies in law, attributable not to the political, moral, or social qualities of the different nations but to historical accident or to temporary or contingent circumstances.[64]

As the faith in progress waned through the century, a new understanding of comparative law came to dominate, that it is above all a field of knowledge that studies "not only the techniques of interpreting the texts, principles, rules, and standards of a national system, *but also the discovery of models for preventing or resolving social conflicts* . . . ."[65] It is commonly understood that such a study can provide a more robust account of methods for addressing and resolving social problems and conflicts. The law is understood as the expression of the way that a community chooses to organize itself vis-à-vis the social problems that arise.[66]

Thus comparative law understands law as a series of institutions through which we accomplish things in our various polities—and thus the discipline of comparative law is one of law's richest techniques for coming to understand differing ways to approach problems. "Comparative law is an *'école de vérité'* which extends and enriches the 'supply of solutions.'"[67] Indeed, Kötz and Zweigert go

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62. *See* ZWEIGERT & KÖTZ, *supra* note 11.

63. *Id.* at 2-4, 15-16, 50-62.

64. *Id.* at 3.

65. *Id.* at 15 (emphasis added).

66. *Compare* MONTESQUIEU, *supra* note 59, at 1-7, *with* ZWEIGERT & KÖTZ, *supra* note 11, at 1-17.

67. ZWEIGERT & KÖTZ, *supra* note 11, at 15. They further note that comparative law has proven "extremely useful" in Eastern Europe where legal systems are being re-

much further in this description, seeing law and its institutions as entirely driven by the needs of social practice:

> If comparative analysis suggests the adoption of a particular solution to a problem arrived at in another system one cannot reject the proposal simply because the solution is foreign and *ipso facto* unacceptable. To those who object to the 'foreignness' of importations, RUDOLPH V. JHERING has given the conclusive answer:
>
> > The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.[68]

If faith in progress waned throughout the century, then one could argue that it is alive and well in the domain of comparative law. Solutions from abroad are seen, above all, as *solutions*, which implies a whole host of things about what law is for and what a judicial decision is about.[69] We will return to this theme, but for now it is important to note that the underlying rationale in comparative law is that law is above all about solving conflicts, and that because the study of foreign ways of solving conflicts yields insight into our own way of solving conflicts, we are necessarily to be drawn to comparative study.

Some might object that to study other legal systems in order to find out what is "useful" for one's own system is to colonize, and to illegitimately make light of the fundamental differences that exist between nations. And yet, to object to the study of comparative law as somehow colonial in its focus on other ways of doing things as "useful" makes not only the study of comparative law seem ridiculous, but the study of anything other than a restricted range of material as near impossible. As Langbein wryly observes: "[t]o be sure, the fads of Continental philosophy have their innings; the cognoscenti invoke Foucault, Derrida, and Habermas. But the lessons of the Swiss Code or the work of the German *Verfassungsgericht* are simply unknown."[70] And further,

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designed from the ground up. *Id.* at 17. One wonders for whom it is useful: legislators?

68. *Id.* (quoting *Giest des römishcen Rechts*, Part I (9th edn., 1955) 8 f.).

69. *Cf.* Fiss, *supra* note 31.

70. Langbein, *supra* note 4, at 547.

> [i]f you have been trained to view legal doctrine as a pack of feeble or even dishonest excuses, excuses masking the real interests and forces that underlie and explain the work of the courts, you will not have much regard for the *Burgerliches Gesetzbuch* and for the style of legal reasoning that it embodies and fosters.[71]

Though perhaps somewhat unfair, indeed, as soon as we see law and judicial process as a function of power and interest, we wonder why we would replace one system of power and influence with another—but this is to miss the essence of the intended use of comparative law. The goal of comparative law is to understand law as a practical affair, of social interaction and institutional arrangement, all within a historical context that breathes meaning into the way things are done.

Perhaps more deeply, René David has pointed out that "comparative law is useful in pointing out the variations which exist in the very concept of law itself."[72] This is of interest because variations on the theme of law bring us to understand what the ideal of law must be, its expression of justice, and its centrality to the being of a people.[73] In this view, comparative analysis cannot be merely a sociology law, but must entail questions of normative import, questions which necessarily involve historical and philosophical aspects.[74]

> It has sometimes been noted that too narrow a view of law makes it impossible for scholars of other disciplines—historians, political scientists, sociologists, philosophers—to study it effectively. If law is treated merely as the prevailing rules, procedures, and techniques, it has little interest for social scientists or humanists.[75]

And so the question becomes if law is merely the rules and procedures we use to pursue ends, then why is it of less interest? Ostensibly because we cease to understand such rules as embodying social practices that signify more than an ordering of conduct.

> We need to overcome the reduction of law to a set of technical devices for getting things done; the separation of law from history; the identification of all our law with national law and of all our legal history with national legal history; the fallacies of an

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71. *Id.* at 551.

72. DAVID & BRIERLEY, *supra* note 11, at 5.

73. *See, e.g.*, GEORG WILHEM FRIEDERICH HEGEL, PHILOSOPHY OF RIGHT (Thomas Knox trans., 1952) (1821).

74. *See* DAVID & BRIERLEY, *supra* note 11, at 12-13.

75. BERMAN, *supra* note 6, at vii.

> exclusively political and analytical jurisprudence ("positivism"), or an exclusively philosophical and moral jurisprudence ("natural-law theory"), or an exclusively historical and social-economic jurisprudence ("the historical school," [or] "the social theory of law"). We need a jurisprudence that integrates the three traditional schools and goes beyond them. Such an integrative jurisprudence would emphasize that law has to be believed in or it will not work; it involves not only reason and will but also emotion, intuition, and faith. It involves a total social commitment.[76]

But such a task for comparative law seems pointed at the philosophical conception of law itself. For the comparativist the question, "what of the practice of comparative law," takes on a new richness: no longer shall we simply compare the technical rules and procedures, but rather the aims, purposes, methods, results, and above all, conceptions of law and justice. Langbein has provided us with some clues of what such an analysis looks like in practice.

Rather than looking to the particular details, date, and technicalities of rules as highlighted (by their absence) by Allen and his colleagues, Langbein draws our attention to the aims: the finding of facts, the production of evidence, and the way truth is to be revealed during a trial.[77] Nowhere in the American rules of evidence or civil procedure does it say that adversarialism is the way the system is to be characterized; rather, this is an *outcome* that is consciously sought through the construction of certain rules and procedures. Indeed, it too is an ideal type that can only be articulated and understood among those who sense that there is something to it. The way that fact-finding is perceived in terms of the concept of justice that it serves is something that is most certainly not put into the form of rules—though the rules must serve the larger purpose of attaining what everyone in the polity at some level understands as "justice." Thus, since all of these elements are to be grasped conceptually through an examination of the practice, we need to understand that practice conceptually.

For precisely this reason we can now understand Langbein's frustration with the default position of "culture" as a reason against adopting the German Advantage. Such an articulation makes it difficult to understand the nature of what rules are and what they are for. Indeed, an argument that uses "culture" in its explanation does not allow us to delve into the complexities of legal systems *as*

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76. *Id.* at vi-vii.

77. Langbein, *supra* note 2, at 763-64.

embodiments masking historical traditions, which is why comparativist studies necessarily place a heavy emphasis on the historical foundations that inform that tradition. This is very different than making an argument based on culture, because it gives a frame of reference, a way into the institutions to understand what they stand for and how they fit within the larger understanding of justice as a whole.

For this very reason, Langbein can concede that there are difficulties in importing certain rules and procedures into the American system, not simply because of its different legal culture, but because the very spirit of the American system involves layer upon layer of historical significance, and as Langbein notes, an unwillingness to borrow. It is as though the pragmatism that defines American political philosophy is itself a culprit here, giving rise to a certain unwillingness to import examples, but rather wanting to do things on its own—its own history is the history to be celebrated; there is nothing to fix.[78] The ethos of American pragmatism has always privileged "figuring it out on our own":

> But more than mere *Denkstil*, more than aversion to the conceptualism of Continental law, underlies the American disinterest in comparative law, particularly procedural law. There is a practical difficulty in using comparative example across the gulf that divides Anglo-American from Continental procedure. The extreme interconnectedness of the various attributes of a legal procedural system make it quite difficult to borrow selectively. This difficulty is then reinforced in the United States through a powerful ideology of celebration. This ideology, which asserts the superiority of Anglo-American legal procedure, I have taken to calling "The Cult of the Common Law."[79]

Thus for Langbein, the importance of understanding what law is, and what it is for, is critical in the enterprise of comparative law. He sees the rejection of the German Advantage not so much as an argument based on the relative merits and disadvantages,[80] but rather as a complete dismissal of it and of comparative law on the whole.[81] So when Langbein indicts his critics for citing Continental

78. This is well canvassed by 2 DANIEL BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 5-20 (1965).

79. Langbein, *supra* note 4, at 551.

80. *See* Langbein, *Cultural Chauvinism in Comparative Law*, *supra* note 12, at 783 (Langbein's appreciation of Gross's criticisms as compared to Allen).

81. *Id.*

philosophers disingenuously, he has a point: if the ultimate problem is with comparative analysis on the whole, then we should be making arguments about the possibility of cross-cultural interpretation, and basing our comparisons on historical analysis. If the ultimate problem is simply that looking for "advantage" in law is not what it is about, then we need to be discussing philosophically what justice requires. However, if we are rejecting the German advantage based on intangible elements of legal culture, then Langbein would question: what elements? In a sense, the difficulty of rejecting Langbein's argument requires us to understand that we need to rearticulate what is going on in comparative law, and once we have done that, we need to begin the substantive work of digging into the nature of the differences that divide the two legal systems.

There are incredible differences between the structures of German and American law, and as we have seen above, one of the critical tools of comparative analysis is understanding the historical traditions that inform each.[82] While we cannot do an exhaustive survey and in depth study of the rich and complex histories of these two systems, can sketch out some of the most salient historical details that allow us to better understand the fundamental nature of the differences and similarities between the two. As we will see, the historical contingencies defining the civil procedure of a legal system demonstrate the way that justice is to be an embodiment of such procedural principles in that polity.[83] A study of history explains the way abstract justice is embodied in procedural principles and in the actual practice of a legal system.

B. Interpretation of Different Traditions

This section will give a bare outline to the apparent conflict between the procedural elements of the common law and civil law as ways of getting at truth in a civil trial: what is the goal of each system? What are the procedural principles in each system about? What are they? How are they understood?

One of the first things that critics of the German advantage point to is the authoritarian nature of German legal culture as embodied in the procedural rules that call for the judge to direct the fact-finding process. It is clear that one of the fundamental common sources of law for both the Germanic and English traditions are Roman law and

82. Gordley, *supra* note 18, at 555-57.

83. An insight predicted by both Tocqueville and Montesquieu.

its incorporation into the Western tradition through Canon Law.[84] The significance of this common origin cannot be overstated, since the historical significance of the natural law tradition that resulted from these common origins, and the subsequent break with that tradition, both in England and in Germany, have been formative for the direction that legal institutions would take.[85] This is because Canon Law came to be reflected both in Germanic law and in common law first and foremost as a systematizing and rationalizing of legal elements,[86] and procedure was one of the main elements passed on to both.

> In civil cases not only the rigors of proof but also, and more especially, the complexities of taking evidence by written interrogatories, without participation of a judge, led inevitably to the widespread use of dilatory tactics by the lawyers. This, in turn, was counteracted by the establishment of a series of compulsory stages, with separate rulings by the judge at each stage. However, the system could not resist the pressure to allow appeals to be taken from the separate rulings, and then to require such appeals to be taken at the risk of waiver of the right to object to the rulings at a later stage. It is not surprising that some cases went on for years and even decades.[87]

Note that one of the fundamental differences between the two systems is the way the rule is ascertained to be applied. In England, courts have no authority to change the rules they made in earlier cases: the court will "stand by what they have decided," i.e. *stare decisis*. Only an Act of Parliament could change a rule established by precedent.[88] The decision itself should stand through time as a lesson from posterity, as something that comes from experience. The law is a living legacy of what we have learned. Hence:

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84. ALLEN, *supra* note 59, at 76-108; BERMAN, *supra* note 6, at 49-119, 199-224; JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 10-29, 134-213 (1991).

85. *See* Watson, *supra* note 58 (specifically chs. 2 & 4, although the whole book is a variation on this theme); BERMAN, *supra* note 6, at 214-229; *see also* DAVID & BRIERLEY, *supra* note 11, at 31-73; NIGEL FOSTER, GERMAN LEGAL SYSTEM & LAWS 14-23 (2d ed. 1996); ZWEIGERT & KÖTZ, *supra* note 11, at 100, 134, 194.

86. *See* GORDLEY, *supra* note 84, at 1-9.

87. BERMAN, *supra* note 6, at 252 (but see chs. 5 & 6 for the discussion on the Canon Law as formative to the English and German traditions).

88. *See* Fred W. Catlett, *The Development of the Doctrine of Stare Decisis*, 21 WASH. L. REV. 158 (1946).

> [a] solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case.[89]

This conditions the way that fact-finding is understood. By requiring that law be pleaded, and the central role of the pleadings in English law is perhaps one of the key differences between the two traditions. In Germany, the judge usurps the focus.[90]

The critic will argue that this is decisively not the case in Germany. Indeed, the entire rubric of fact-finding and the process is built on such an entirely different conception of what a rule is, and what it is for, that it is impossible to speak of a German advantage. But this misses the nuances of the German tradition. In Germany the focus is rationalistic. The rule is in itself a principle of reason, and this brings us to focus on the important difference between the common law traditions and civilian traditions: codification. But we must be clear on what this means, because in the common law tradition we now have quite a large body of statute law, and it appears that in many jurisdictions the actual volume of statute law is increasing. Though it falls on the court to interpret and apply it, it does in Germany as well.[91] The German trial has a particular disposition towards truth and "trying" it, and the methods that will produce it.

The birth of codification movements, and why they did not succeed in England but were definitive in Germany, is a late development in this history.[92] As we have seen, the purpose of the trial as a revelation of justice, as a way to see truth disclosed, had local variations, and such variations were conditioned by the way that the religious heritage had come to be implemented.[93] Thus, in Germany and other civilian countries, the rule stands and can cover all situations. It is the specialized judge's role to ensure that he or she understands *exactly* what the facts of the case are so that he or she can ensure that the correct rule is applied, for it is understood

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89. I KENT'S COMMENTARIES 476 (14th ed. 1896).

90. FOSTER, *supra* note 85, at 121-30.

91. *See* DAVID & BRIERLEY, *supra* note 11, at 86-93, 99, 378-82.

92. *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED (1989).

93. *See* WATSON, *supra* note 58, at 1-24.

that the rule book is itself exhaustive and that the judge simply applies it.

In England the judge allows the facts to come to be established on the record. However, it would be misleading to suggest that the judge plays no role, and the large corpus of evidentiary and procedural rules at common law attest to the judge's ability to act as trier of fact to limit the weight of evidence, to direct that motions be drafted for production of evidence, that pleadings be altered to address issues that seem to be arising,[94] and to force lawyers to be accountable when they try to enter evidence of questionable origin. Indeed, common law judges are the triers of fact in many cases, and as such must make determinations of fact.[95] In each instance, however, the judge is faced with a situation where he or she is involved in determining what indeed happened, and what is called for.

This suggests that the two traditions are not necessarily mutually exclusive in their approach to justice, but are, as it were, *variations on a theme*. Indeed, Alan Watson has argued that modern legal systems, because they are so evidently descendants of Rome, are strange mixtures of tradition, formed by power struggles, custom, and local exigencies.[96] His argument is that these legal systems are defined entirely by "legal transplants," that is, by foreign ways of doing things that have been taken on for one reason or another—and many have looked to this idea as a way to demonstrate that comparative law is the conscious reconstructive process of fashioning a legal system out of its own ruins.[97]

Common-law jurisdictions are often contrasted with civilian systems on the basis of the way the judge applies the law: *stare decisis* versus the civil code. But we have seen that the historical development does not necessitate placing too heavy an emphasis on the structural differences in the method of fact-finding and decision-making. The difference is not "culturally" insurmountable; one does not call in anthropologists to render interpretations on the practices of Germany, one calls lawyers. Indeed, the fact of the existence of private international law, and of conflicts law, speaks of the underlying unity of the understanding of what law is about in the

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94. I am lead to understand that this is actually quite common.

95. This admittedly ignores the challenge presented by juries as fact-finding entities.

96. *See* WATSON, *supra* note 9; WATSON, SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY, *supra* note 58, at 1-24.

97. *See, e.g.*, Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiements*, 45 AM. J. COMP. L. 839 (1997); GORDLEY, *supra* note 84, at 69-111; Riles, *supra* note 18, at 221-24.

Western Legal tradition. It is a deep structure that we put there to guide our own conduct and need not be more difficult.

And yet, our critic inquires that it would not be realistic to imagine that even if we adopted aspects of the German model, that American lawyers and specialists would work their magic to overcome this. Though we have seen that there are common elements to the traditions of the common law and its civilian counterpart, one could argue that since the early 1800s, American adversarial legalism has developed in distinct contrast to its colonial counterparts.[98] One could argue that adversarial legalism is not overcome by overhauling the rules of fact-finding, but rather by overhauling the legal profession, by uprooting legal institutions that favor it, which is to say, by uprooting those aspects of American legal tradition that have given rise to it. On this line of argument, there is something particularly distinct about American adversarial legalism that eschews the kind of model championed by Langbein. Can we say that American adversarial legalism is captured by the spirit of its procedural laws? Is it not that American adversarial legalism, with its very specific focus on fairness to each party, may in fact simply re-route any reforms, such that its adversary nature would be retained?

Langbein directs our attention to the rise of the managerial judge,[99] and he notes that even though the managerial judge is not the German judge, that the style of moving toward a "conferencing" model certainly demonstrates an ability within American legal institutions to respond to some of American adversarialism's excesses.[100] We can see that this is not an argument based on culture *per se*, but rather a complicated look at the nature of legal institutions in America, and the social practices that have come to support them as well as be defined by them.[101] Even though the American system is common law in origin, the legal institutions through which it is expressed are definitively federalist. Indeed, the adversarial nature of the original federalist design of the polity itself could be said to be constitutive of the politico-legal style of governance and political life.[102]

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98. *See* ATIYAH & SUMMERS, *supra* note 59.

99. *See* Resnick, *supra* note 20.

100. Langbein, *supra* note 1, at 858-66.

101. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 60-62 (1994).

102. *Compare* THE FEDERALIST PAPERS (Mentor 1999) (the classic statement by Alexander Hamilton, James Madison, and John Hay), *with* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 304-352 (Henry Reeve trans., Phillips Bradley ed., Vintage Books 1945) (1848).

In the civil tradition we do not see adversarialism to the same extent because the nature of political life is not taken as necessarily adversarial, but rather as consensual. We can understand this to be the case by contrasting the institutional design envisioned by the writers of the U.S. Constitution, as compared with the way the German polity was conceived in its transformation into a modern democracy. In America, the founding fathers envisioned a very adversarial firmament to political life, and as such, designed political and legal institutions that would ensure that no one could usurp power without adequate checks and balances. In Germany, the German diet expressly ensured that the judiciary was but an arm of the government, and denied the judiciary the ability to undertake the competence of the legislature or the executive. The civilian tradition finds its expression here, as the judiciary applies rules to concrete situations to solve disputes, and that is all. Thus, the style of the trial in the German model is much more oriented to resolving the dispute in a way that satisfies the parties; the American model sees a winner or a loser, and any compromise or settlement has no part in the justice of the dispute.

Compare the particular vision of what is required by justice as explicated by Owen Fiss against the German model. In the German model, consensus and settlement is one of the primary aims of the procedure, and the judge understands his or her role in terms of getting to a settlement. Fiss, on the other hand, sees justice frustrated by the agreement because the principle of justice in the case was not achieved. In the common law system, the justice of the dispute is found in the *ratio decidendi*, the rational principle, or "answer," to the problem, and as such, it serves as another monument of justice for the future. Justice is built. In Germany the settlement of the dispute for the parties results in no addition to the storehouse of law—law is given.

But the reason that compromise does not seem to figure prominently into the institutional design of American legal life is not simply an oversight: it has to do with the fundamental understanding of what the trial is for. The just trial in America is where each party has its say.[103] One way to understand this is through the conception

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103. Though a small sample size, I conducted an informal poll of as many of my American lawyer/law student colleagues as I could the following question: what makes a trial just? The overwhelming response was for each party to the dispute to have their say. This says nothing of the outcome. (Sample size: 12 lawyers/law students, 4 non-lawyers; all but 2 said, "fair say," was most important. The other two said, "win—you have to win.").

of the pleadings and their role. In Germany the pleadings are not ultimately that important, for even if they do not frame the proper issue in the dispute, the court will address it during one of the many "conferences."[104] Since the accumulation of evidence occurs at times between these conferences, the conferences become a time of active judicial direction toward settlement. There is not an overweening focus on ensuring that the parties had their turn to say their piece, but rather a quasi-inquisitorial attempt to ascertain the nature of the dispute and the possibility for compromise.[105]

Pleadings are of the utmost importance in common law jurisdictions,[106] and the American lawyer is taught at an early age that the pleadings set the groundwork for the trial because they form the basis for all evidentiary and procedural motions during the trial. In fact, summary judgments are often based on insufficient pleadings. If the young lawyer is continually reminded that procedural savvy is important for success, then the pleadings are the foundation upon which one builds. As such, the American system may not seem designed with compromise in mind, but rather with the struggle of factions, of difference, of the problem of any one mob getting too much control. In this important way, however, it is ultimately about compromise and settlement. If the system of checks and balances that underlies the American understanding of federalism is based on a belief that no one understanding should hold sway in political life, then *settlement is the rule*. Civil disputes are not about victory, but really about letting each party put forth their case so that they can direct the outcome all the more effectively, since the result is the one they each have to live with. Indeed, based on the fundamental role of pleadings, for example, or the underlying adversarialism of American federal institutions,[107] it is possible to see the adversarial model as more directed to settlement by virtue of the highly combative nature

104. *See* Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409 (1960).

105. The inquisatorial approach is generally present in Civilian criminal procedure and not civil procedure, though elements do appear to creep through. *See* FOSTER, *supra* note 85, at 121-30.

106. Referring only to Britain, Canada, and the U.S.

107. As is made apparent by the manner in which American federal institutions create statute law such that recourse to court is the only way to interpret law. *See* SVEN STEINMO, TAXATION AND DEMOCRACY 160-69 (1993).

of what occurs. It is about the parties and their positioning, not winning the day.[108]

Another way to grasp the important similarity here is to contrast Langbein's task with Fiss's task. Fiss is against settlement because of the effect it has on our public conception of justice as expressed through judicial opinion. Langbein seems to understand justice almost entirely in terms of the efficacy of the result, but an *efficacy conditioned by a belief* that in each case there is a result that is going to be reached, either by judgment or by settlement, and that result will invariably be understood as a "getting things done" or a "settling of accounts."

Therefore, if the pleadings and style of adversarial legalism deeply privileges the ability of the party to lead his or her own case and enter his or her own evidence, does this mean that the German advantage is not possible in America? Does adversarial legalism's focus on the parties' right to have their say mean that there is no room for judges to play an active role in the production of evidence and the procurement of settlement? Even Langbein notes that the importation of different types of legal institutions requires particular attention to the context and the way it would be carried out. Further, he is explicit that it is not about replacing adversarial legalism, but to "temper its excesses." Thus, one way to conceptualize how such a procedural transplant could be affected is to understand the underlying goal of each process.

In Germany we have seen that the active role of the judge in the fact-finding process is indeed geared towards early settlement and the procurement of a just result for the parties through the application of the appropriate principles. In order to find out which principles are appropriate, the judge must be actively involved in the way the trial will unfold so as to best understand the nature of the issue. In an American court, the parties must lead the right evidence, have the appropriate expert, and properly draft the pleadings in order to expedite the process towards settlement.

In each scenario we still understood the purpose of the procedural nexus as involving the resolving of disputes by an administrative body called the judiciary, where one model gives primacy to judicial direction, the other to the parties. Thus at one and the same time we can see that there are diverse elements that characterize the

108. Which is what makes Fiss so upset, as he would rather see the trial involve justice.

American spirit of the laws.[109] So even though Allen and his colleagues state that German judges are distrustful of democracy, it is clear that the American political tradition was founded on such distrust.[110] Further, any American lawyer knows that the lawyers do not "run the show" in an American courtroom, but rather the judge controls the courtroom.

To summarize the way we have come to grasp the aim of comparative scholarship coupled with the historical traditions we have briefly looked at, we can see that there must be two things that are already true about what justice requires, both *for* citizens and *of* courts in America and Germany if we are to make sense of advantage. First, we are all speaking the language of advantage, which is to say, that a Western world of legal transplants is already engaged in comparative legal design. Second, the goal of procedure in our polities is to help solve the coordination problems that arise upon the submission of evidence. Thus, the fundamental relationship between procedure and positive law is manifest by the fact that we understand our legal institutions not as immutable practices, as the sacred cow, but as institutions that we have designed purposefully to serve our interests.[111] Because the interests of the day involve first and foremost the solving of disputes in a way that is efficient and rational, it is difficult to see on what ground we can deny Langbein's advantage.

V. MAKING SENSE OF THIS ADVANTAGE AND ITS APPLICATION IN THE U.S. AND CANADA

One way into the phenomenon could be through the very mechanism that Langbein rejects as an example of increased judicial authority in the form of "managerial judging."[112] Though Canada offers some important differences, in the last eighteen years there has been an incredible increase in the adversarial nature of Canadian legal culture. One of the recent initiatives in British Columbia was a series of "soft" procedural pilot projects designed to "streamline" the system by attempting to focus the parties more effectively towards settlement. Interestingly, the ways that the committee in charge of

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109. It is important to see that the form of law also conditions a form of conduct. *See* TIGAR & LEVY, *supra* note 59, at 290-309; TOCQUEVILLE, *supra* note 25.

110. *See* Allen et al., *supra* note 8, at 757.

111. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1988).

112. *See* Resnick, *supra* note 20.

overseeing and implementing the project chose to proceed was to ensure that the same judge would hear all motions and aspects of the dispute. Previously, if a procedural motion was to be brought during the pre-trial phase of the case, it could be brought in front of a Master or Chambers judge, and it would simply be the Chambers judge that happened to be sitting in Chambers that day. Under the pilot project, the judge assigned to the case in the beginning must hear the motion, thus cutting down on judge shopping for a procedural motion, and bringing in the judge to "manage" the trial. Additionally, the pleadings have been significantly reduced in favor of an outline that sets out the nature of the dispute and the legal argument, cases, and precise evidence to be relied upon. This allows the judge the opportunity to assess the relative merits of the case the first time the case is filed, which reduces the opportunity for delay or other pre-trial tactics that degrade the efficacy of the system.

Initially the pilot project was adopted for one year, and only adopted in the Vancouver courts, but it has been continually renewed, and plans are in the works to see the project expanded to include the entire province. Such a piecemeal approach to procedural change, though seemingly benign, has had a dramatic influence over the caseload that the Vancouver courts of first instance were hearing, it has resulted in the production of more organized cases and better argumentation by virtue of the fact that the lawyers are forced to present everything at once. Though in Resnick's terms this fits the "managerial judging" model, it does put the onus on the judge to focus the parties towards the goal of settling their dispute, which is ostensibly the predisposition of the German model.

Thus, though there is always room for creative and effective lawyering, both in the German and American systems, there is always room for institutional design and procedural change, and the reason for this is that we no longer understand our legal processes as manifesting some divine being, but rather as ways of human action geared toward creating the conditions for two parties to come to agreement: *our institutions are ours to design.* Langbein is certainly not arguing for a wholesale discarding of American civil procedure and an adoption of the German model, but perhaps for a more modest demand of looking at the institutions of American adversarial legalism and assessing if there is some way that the procedures can be finessed or altered such that they are not self-defeating.

To conclude, there does therefore appear to be an advantage in a real sense; the excesses of American adversarial legalism are ours to temper, and we need to ask if we would like to do so. If we would,

then we need to look for ways to enhance the function of legal institutions. John Langbein has looked at the German model, and has suggested some reasonable ways that judges can be given a role that will dissuade unhelpful legal maneuvering on the part of the parties. He has helped to focus our sights on the fact that advantage is efficiency at getting to the heart of the matter, and it is formed by a concern for getting to justice and settling the dispute. The comparativist knows that such things are conditioned by history and the spirit of the laws, which is to say that it may not be easy or automatically commensurable with American pragmatism. But what would it have to be to be incommensurable? And what exactly would be incommensurable about it? The nature of law in the U.S. is tightly woven through with an adversarial legalism and procedural focus on justice, and to say that one could simply adopt the German advantage at once misses the complex way that such adoption of laws and systems as tools for the achievement of justice is a totalizing phenomenon: we are talking about piecemeal change. The differences between the American and German models are ones of design, not concept.

The comparativist studies the law elsewhere in order to learn about home; Langbein grasps the difficulties of application.[113] And not only is this not to make light of comparative research into the German model, it is to inquire about the possibility of law reform and how it is that we can effect change from within. Legal institutions are put there by us to effect ends we divine, hence we can change them if we find they do not suit our needs. Similarly, the German advantage is not an advantage for Germans, it simply is the way they see it. "Advantage" exists in terms of ends we seek to achieve, and the German advantage is construed in terms of our own tradition; it is an advantage *for* us. Langbein is not saying that we abandon what we do here, but rather that we attempt to make sense of the different styles in a way that makes sense *for us*. And so comparative law proceeds from the oft-grounded assumption that there is something of merit in looking to other legal traditions for an understanding of our own. The rich history of the German and American traditions, though manifesting different historical experiences, challenges, and successes, is nonetheless very Western and hence positivist. Finally, that the ethos of American adversarial legalism is of such a pragmatic kind that it most certainly would be able to make sense of an advantage in German civil procedure.

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113. Langbein, *supra* note 1, at 842.

VI. CONCLUSION: WHAT THIS ARGUMENT DOES NOT SAY, A PHILOSOPHICAL CAVEAT

The main point we have come to articulate is that if comparative law is possible, then the fruit of comparative law is also possible. The degree to which a given aspect of comparative legal research yields insight into the prospect of reform depends in large measure on the nature of the reform proposed. It most certainly makes sense to speak of a German advantage in civil procedure, and there are most certainly avenues for reform in adopting it. The reason for this is that the common heritage of the Western Legal Tradition speaks to a similar way of conceiving of the law as a particular means for settling disputes, of the court and the trial as a *procedure* for justice, and hence, necessarily positivist. The commonality in aim and history should not be over-emphasized to a degree that mocks the very important and significant essential differences in the conceptions that underpin each; however, I have argued that the differences between American and German civil procedure, though apparently different, are of the same ilk.

There are a number of things that follow from this, and for comparative law. However, there are a number of things that specifically do not follow from this, and I want to be clear about what has not been established by such research. By identifying and understanding modern civil procedure in Germany and America as having become largely positivist in its self-understanding, and thus amenable to reform, I am not saying that this is the way that we ought to think about law in its proper sense. I am also not saying that positive law or the rule of law, as put in place by office holders, is a well thought out, philosophically exhaustive account of the possibilities for polities. Rather, my account focuses exclusively on the way that American adversarial legalism and German procedural laws are contemporarily understood. To say that we ought to understand law in this way requires a philosophical approach to the existence of legal phenomena. I have shown that it is not at all ridiculous to speak of a German advantage in civil procedure given the contemporary understanding of law, its role and history, and its future in American adversarial legalism. If law is a means to an end, then it is something we can alter to fit our needs. As such, we certainly could adopt the German advantage. But if law is an end in itself, we need to address entirely different questions, and advantage

would not make sense among polities that understood law as such.[114] However, we are not faced with that here, or perhaps any longer.

114. In such a case one would look to Jean-Jacques Rousseau's *The Social Contract* and Immanuel Kant's *Groundwork of the Metaphysics of Morals* as places to begin.