

JUDGING FOREIGN JUDGES BADLY: NOSE COUNTING ISN'T ENOUGH

By John H. Langbein

In the Summer 1978 issue of *The Judges' Journal*, a pair of researchers published an article purporting to bring the lessons of comparative study to bear upon the question of whether Americans devote adequate resources to their court system. The authors, Earl Johnson and Ann Drew, announced their conclusion in the title: "This Nation Has Money for Everything—Except Its Courts."¹ Statistical evidence from "analogous industrial democracies,"² especially West Germany (one of "the two most economically analogous countries studied,"³) brought Johnson and Drew to decide that "it may be that the American judicial system . . . is currently being sabotaged by an inadequate public investment."⁴

The purpose of this article is to show that no such conclusion can be drawn from the evidence that Johnson and Drew report. My main point is that the authors have undertaken their comparison of American and European legal systems on a purely quantitative basis, disregarding the qualitative differences between our adversarial and the Europeans' nonadversarial procedures. These qualitative differences are the true source of the quantitative differences. Johnson and Drew derived erroneous implications for the manning of American courts because they ignored those characteristics of European procedure that explain European manpower levels.

The Findings. Here are the main findings reported by Johnson and Drew. They emphasize West German data in their article; for simplicity I shall limit my remarks to the German data.

(1) Judges: "The U.S. Judiciary seems to be undermanned relative to that in several comparable jurisdictions. For example, U.S. jurisdictions employed only one-third as many judges, per capita, as West Germany. . . ."⁵

(2) Lawyers: "Compared with foreign systems, the U.S. judiciary appears overwhelmed statistically by the size of the legal profession which constitutes one of its major 'input' (case generating) factors. The number of practicing lawyers for each judge in California is more than ten times West Germany's . . . ratio. . . ."⁶

(3) Money: "The U.S. Judiciary also appears underfinanced relative to several jurisdictions. Over the period studied, the United States spent about half as much on its courts per capita as West Germany. . . ."⁷

What Judges Do. The authors' premise in making these extrapolations from German to American data is that the two legal systems are what they call "comparable jurisdictions."⁸ For Johnson and Drew, a judge is a judge—no matter where he works or what he does—which is why they think to use German judicial manpower figures to show that Americans are "undermanned."⁹

In truth, the judicial function changes radically when we move from adversarial to nonadversarial procedural systems. In a nonadversarial system like the German, the bench has a more active (and time-consuming) role in the handling of litigation, and it is this—rather than German fiscal munificence—that explains the size of the German judicial corps.

German Civil Procedure. American civil procedure places upon the lawyers for the parties—our so-called adversaries—the tasks of gathering evidence, shaping the issues and presenting the evidence. Our lawyers conduct pretrial discovery, select and prepare witnesses, and examine and cross-examine at trial. We expect our judges to exercise important checks upon the conduct of the adversaries in pretrial and especially in trial procedure, but the responsibility for propulsion and the vast preponderance of the workload remains with the litigants' lawyers.

The German system, by contrast, allocates to the court the primary role in gathering the evidence and shaping the litigation. There is no litigant-conducted discovery procedure, indeed German law does not even recognize our division between pretrial and trial procedure. The German system does not expect its lawyers (in the phrase of a splendid English-language account of German civil procedure) to go "quarrying for the facts. It is the judges, primarily, who conduct the proof-takings. . . ."¹⁰ The court's investigation, guided by the motions of the parties, extends across a series of hearings—as many as the court finds necessary in order to frame the issues and to establish the facts. The court carefully records the results of these hearings in the official file that it keeps for the case. A case that goes to judgment requires the court to prepare a full written opinion of law and fact; the Germans have no counterpart to the American civil jury, hence no general verdict to spare the court the work of opinion writing.

In so brief a summary I have already said enough about German civil procedure for the reader to see why it is preposterous for Johnson and Drew to claim
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that American and German judicial manpower statistics are drawn from "comparable jurisdictions." The real reason that the Germans need more judges is the same reason that they need fewer lawyers: their civil procedure assigns to the judiciary much of the workload that we leave to private counsel.

Collegiality and Appeal. German civil procedure shares with the other Continental nonadversarial systems two further characteristics that dictate higher levels of judicial manpower. First, in cases above a relatively low jurisdictional amount, currently 3,000 marks or about \$1,600,¹¹ the German first-instance bench is collegial. A panel of three professional judges sits on each case (although one of the three customarily takes a more active role in the case¹²). In a system that does not have a civil jury trial, it is easy to understand why such a safeguard has been thought desirable, even though the cost in judicial resources is significant.

Another notable characteristic of Continental procedure is the extreme liberality of appeal. The German rule in civil matters (which is also applied to the largest portion of the criminal caseload¹³) is that the first-instance judgment is subject to full review *de novo*, with the taking of new evidence allowed.¹⁴ Needless to say, a system that so encourages appeal is required to maintain appellate benches that are enormous by our standards.¹⁵

The "Bottleneck." The Johnson and Drew article makes no mention of these traditional Continental practices of collegial first-instance staffing and liberal appellate review. The authors relegate to a footnote their admission that on account of procedural (and substantive-law) differences, "Judges may play a larger role and spend more time on each case in a country like West Germany than in the United States."¹⁶ Astonishingly, the authors dismiss these differences by likening them to those "among states within the United States."¹⁷

This insistence on treating European data as though it arose in American contexts leads the authors to mishandle their figures on the numbers of European lawyers. Their premise is that legal systems as disparate as the American and the German should somehow be expected to have constant per capita lawyer populations. Accordingly, when the authors discover that the number of practicing lawyers per judge in California is ten times that in West Germany,¹⁸ they infer that the American judiciary is being "overwhelmed" by the lawyers, who are seen as "input" (case generating) factors.¹⁹ These disproportionate lawyerly "inputs" must be leading to a "bottleneck"²⁰ in the courts.

What Lawyers Do. Part of the reason why this inference is fallacious has already been set forth. Americans allocate the workload in civil (and criminal)

procedure differently; when lawyers rather than judges do the basic investigative and forensic work in the legal system, more lawyers and fewer judges will be required than in a nonadversarial system like the German.

Johnson and Drew also ignored another factor that bears on the question of why the American legal system needs more practicing lawyers per capita than the German: Americans make somewhat larger use of private lawyers in preventive law. For example, will drafting and estate administration, which we think of as basic lawyerly functions, are rarely handled by lawyers in Germany, because of a variety of differences in the procedural and substantive law of testation.²¹ Similarly, in American business practice lawyers play a more central role in shaping and drafting transactions than do Continental commercial lawyers. For such reasons, said a Belgian law professor to an audience of New Yorkers, "Of all countries, the United States is the lawyers' paradise."²²

Case Duration. Another reason why Johnson and Drew fail in attempting to extrapolate an American "bottleneck" from German data is that they do not adjust for differences in the ways that the two legal systems define and dispatch their caseloads. For example, Johnson and Drew compute that "California's rate of dispositions per judge in 1975"²³ was 20 times that of West Germany, or six times if automobile-related offenses are set aside. However, this notion of "disposition per judge" conceals a host of variables.

Thus, the authors admit, but do not correct for, the fact that the Europeans tend to handle in specialized courts or nonjudicial tribunals matters that we process as lawsuits in our ordinary courts. The footnote that contains this admission invites readers to console themselves with the thought that something called the "law of large numbers" will cause these differences to "cancel themselves out..."²⁴ The authors also ignore differences in criminal procedures: American courts still process a host of petty and regulatory offenses that the Germans have long since decriminalized;²⁵ and American figures, which reflect our much higher rates of serious crime,²⁶ are deeply distorted by the pretrial diversion and plea bargaining process that is so strongly suppressed in West Germany.²⁷

In contrast, West Germany's nonadversarial procedure in both the civil and the criminal process appears extraordinarily efficient by comparison with our own. German law neatly avoids the profligacy of our discovery procedures; it knows no real counterpart to our complex motion practice and our law of evidence; and it taxes the costs of civil litigation (including attorney fees) in a manner meant to give constant incentive to litigants to abandon hopeless causes.²⁸

Learning from Others. I hope that the message of this article will not be mistaken. I do not mean to say that Americans have nothing to learn from the study of comparative legal institutions. I have elsewhere emphasized my belief that we can find suggestive models

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need for different methods to handle them becomes more evident.

To a certain extent the danger that use of some sort of independent expert to investigate scientific matters would unduly sway the trier of fact at trial can be mitigated by permitting thorough cross-examination of the persons or groups that have conducted the inquiry. The efficacy of the procedure would then depend in large measure upon the skillfulness of the cross-examination. Whether that dependence would be so great as to be unacceptable is a question that can only be decided by experimentation with new procedures.

The chief danger of the various newly proposed methods of handling scientific issues at trial—all of which involve to some degree an independent investigation of scientific issues—is that the independent investigations will be given undue weight and may unacceptably displace social judgment with scientific judgment. If a trial jury is presented with a decision of, let us say, a court-appointed panel of scientific experts, they may allow the scientific judgment of that panel to take the place of the fundamentally social judgment they must make, and thereby relinquish their essential decision making function.

There are safeguards that can help prevent such a result. For instance, reports of special masters or court-appointed experts or reports from a science court could be carefully stripped of all value or social judgments, so that only purely scientific data remains. The problem, of course, is that the line between presentation of data and evaluation of it is a hazy one. Moreover, mere presentation of data without some sort of evaluation would be of little help to a jury composed at least in part of nonscientists. Thus the danger of replacing scientific judgment with social judgment in the courtroom is a real one, and new methods of treating technical issues at trial must be carefully

drawn to reduce that danger as far as is practicable.

My point, though, is not to weigh the relative merits of various procedures for producing scientific evidence for trial, but simply to point out both the need to consider new proposals and some of the potential dangers they create. I suspect that there are workable methods for handling scientific issues at trial that would be more efficient than the traditional use of opposing experts. I think that such new methods should be welcomed, but only with a cautious eye toward the preservation of the critical role of the nonexpert judge or jury in the process of judicial decision making. The best way to learn about the efficacy of new methods of treating scientific issues is by careful experimentation.

While our society is increasingly governed by and dependent upon science and technology, most governmental decisions remain social decisions. In the courtroom, no matter how technical the dispute, the judge or jury is nearly always called upon to make a decision of an essentially social nature. Hence these decisions must not be made the exclusive province of the scientific community. Science, of course, must provide the informational basis for intelligent decision making and, in a sense, we must all be scientists in order to deal intelligently with questions of policy. We must therefore be receptive to new and different methods of resolving disputes that involve scientific issues, so long as we do not sacrifice the inestimably important role of the jury and, in some cases, judges, as the spokespersons of social judgment.

The effort to arrive at a just truth and to arrive at a scientific fact—the product of an internally consistent but externally perceived construct—are often quite different. Holmes put it well:

I use to say, when I was young, that truth was the majority vote of that motion that could lick all others. [Holmes: *Natural Law*, 32 HARV. L. REV. 40.]

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for the reform of American procedure in the sophisticated and efficient traditions of Continental law.²⁹ My point is that Johnson and Drew have not studied the Continental systems in a reasonable way.

Johnson and Drew have fallen victim to the cardinal error of comparative legal studies, the one that will doom any comparative inquiry. They have neglected to look at the contexts from which they have drawn their comparative data, and thus inevitably they have misunderstood and misapplied the data. Armed with federal grant money, they have produced recommendations that will doubtless be familiar in the corridors where federal grant money is distributed: the way to solve the problems of the legal system is to spend more tax money and hire more personnel. However justified

such recommendations might or might not ultimately be, they are wholly unsupported by the comparative study from which the authors purport to derive them.

1. Johnson & Drew, *This Nation Has Money for Everything—Except Its Courts*, 17 JUDGES' J. (No. 3, Summer 1978) at 8. [Hereafter cited as Johnson & Drew.]

2. *Id.* at 9.

3. *Id.* at 10.

4. *Id.* at 56.

5. *Id.* at 10.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure I*, HARV. L. REV. 1193, 1201 (1958).

11. GERICHTSVERFASSUNGSGESETZ art. 23.

12. *Id.* at 1206-07. Subsequent developments have increased the authority of the single judge within the collegial court; for English-language discussion see A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 156-59 (2d ed. 1977).

13. For an English-language account see J. LANGBEIN, *COMPAR-*

ATIVE CRIMINAL PROCEDURE: GERMANY 82-85 (1977).

14. See generally Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443, 1443-61 (1958).

15. The German judiciary cannot be divided into first-instance and appellate personnel for statistical purposes as easily as ours can, because the Landgericht—the court of first instance in more substantial civil and criminal matters—is also the court that conducts review de novo proceedings for the less serious cases that originate in the local court (Amtsgericht). Nevertheless, published statistics do hint at the dimensions of German appellate judicial staffing. For example, at the state supreme court (Oberlandesgericht) level, which is exclusively appellate, there were as of January 1978 some 340 civil chambers and 71 criminal chambers (for a country with one quarter the U.S. population). Statistisches Bundesamt, *Statistisches Jahrbuch 1978 fuer die Bundesrepublik Deutschland* 321 (table 15.1) (1978). These totals also do not include the appellate chambers in the federal supreme court (Bundesgerichtshof).

16. JOHNSON & DREW 56 n. 4.

17. *Id.*

18. *Id.* at 10.

19. *Id.*

20. *Id.* at 11.

21. Compare Halbach, *Probate and Estate Planning: Reduced Need and Cost Through Change in the Law*, in DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 165 (E. Halbach, ed.) (ABA Section of Real Property, Probate and Trust Law) (1977). German savings banks distribute pamphlets advising their customers on how to draft and execute their own wills, e.g., "Checkliste: Der geregelte Nachlass" (Frankfurt Sparkasse 1822) (1978).

22. van Hecke, *A Civilian Looks at the Common-Law Lawyer*, in INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE 5, 8 (W. Reese ed.) (Parker School Studies in Foreign and Comparative Law) (1962).

23. JOHNSON & DREW 11.

24. *Id.* 56 n. 5.

25. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 I. CH. L. REV. 439, 451-52 (1974).

26. See Langbein, *supra* note 13, at 110-111.

27. See Langbein, *supra* note 26, at 448-467.

28. See KAPLAN, *et al.*, *supra* note 10, at 1232-37; KAPLAN, *et al.*, *supra* note 14, at 1461-66.

29. E.g., Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 21-22 (1978).

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since 1973, it seems reasonable to anticipate that by 1979 the ratio of practicing lawyers to judges in the United States must be considerably above the 20-to-1 mark, perhaps exceeding 25-to-1 in many jurisdictions. Unless one assumes that none of these new lawyers are engaged in litigation or that there is *no* relation between the number of lawyers and the number of disputes that will become lawsuits, it would seem that the burgeoning size of the American legal profession (relative to the size of the judiciary) does contribute some to backlog, delay, etc., in the courts.

At another point Langbein asserts that "Europeans tend to handle in specialized or non-judicial tribunals matters that we process as lawsuits in our ordinary courts."¹³ This is undoubtedly true. However, it is also true that in the United States many disputes are handled in specialized courts or non-judicial tribunals that would go through regular courts in West Germany or other European countries. Workers' compensation tribunals, welfare fair hearing boards, and thousands of administrative agency hearing officers decide literally millions of disputes in the United States. Many of these categories would end up in the Labor Courts or Social Courts. He also indicates that the American figures are "deeply distorted by the pretrial diversion and plea bargaining process that is so strongly suppressed in West Germany."¹⁴ But might not the American system's reliance on plea bargaining to dispose of so many criminal cases be a symptom, in part at least, of a court system asked to dispose of too many criminal cases? To pose the question another way, would West German courts continue to "strongly suppress"¹⁵ plea bargaining if their caseload were suddenly doubled or tripled or expanded sixfold without any increase in judicial manpower or budget?

If Langbein was attempting to establish that, on the average, cases disposed of by West German courts are six times more complex than the ones that go through American courts, it would take more proof than he has offered. In one breath he reminds us that Germany has decriminalized a "host of petty and regulatory offenses"¹⁶ (that is "simple" cases) that are still handled by the courts in the United States (presumably at rather little cost in time and money). Yet in the next breath he suggests that America has a much higher rate of "serious" crime than Germany which presumably would place a greater demand on America's judicial resources.¹⁷

On the other hand, that there are significant differences in the composition and weighted significance of the caseloads between the United States and West Germany (or for that matter between Los Angeles and San Francisco) is beyond dispute. But which way those differences cut in comparing American and German caseloads per judge is not apparent on the surface. It may even be possible that American judges are asked not only to dispose of a larger caseload but of a larger caseload of more difficult cases than their West German counterparts.

Langbein exposes the obvious issue without presenting any convincing evidence that German judges, on the average, confront vastly more serious and complex disputes. It would require an enormous amount of very sophisticated research to provide a documented answer to this question. But in the meantime these comparative caseload ratios tend to suggest that Germany's higher expenditures on the courts cannot be explained away by a bigger caseload. Beyond that, it is interesting to note that the higher ratios of caseloads per judge in the United States are accompanied by higher ratios of private lawyers per judge, higher police expenditures per judge, larger numbers of prosecutors per judge, etc.¹⁸