6. Freedman discusses criminal cases, but our society also uses an adversary system for handling civil cases. To what extent can Freedman's arguments be used to defend zealous advocacy and aggressive legal tactics in civil cases?

An Alternative to the Adversary System

John H. Langbein

It is often assumed by practicing lawyers as well as the wider public that the adversary system is if not perfect, at least better than its alternatives. But why should that be assumed, especially in light of the fact that so many other nations use a different system? Indeed it has seemed to many that the adversary system makes demands on lawyers that cannot possibly be met, since it asks that they both represent their clients' interests and that they serve justice as "officers of the Court." In this essay John H. Langbein describes the differences between the Anglo-American and German systems of civil procedure. Civil procedure (as opposed to criminal procedure) is the process by which the legal system resolves disputes over "private" matters such as contracts, negligence that causes damage, property, marriage, corporations, and taxation—in other words, much of the law. As Langbein points out, the major differences between the adversary system and what is sometimes called an "inquisitorial" one are first that the Court plays the dominant role in gathering the evidence, rather than the lawyers, and second that the trial is not treated as a separate, brief period in which the lawyers and clients present their cases to the judge or jury but rather as an extended process during which evidence is gathered and assessed.

There are two fundamental differences between German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require. . . .

From the standpoint of comparative civil procedure, the most important consequence of having judges direct fact-gathering in this episodic fashion is that . . . in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case. Free of constraints that arise from party presentation of evidence, the court investigates the dispute in the fashion most likely to narrow the inquiry. A major job of counsel is to guide the search by directing the court's attention to particularly cogent lines of inquiry. . . .

The episodic character of German civil procedure—Benjamin Kaplan called it the "conference method" of adjudication—has other virtues: It lessens tension and theatrics, and it encourages settlement. Countless novels, movies, plays, and broadcast serials attest to the dramatic potential of the Anglo-American trial. . . . German civil proceedings have the tone not of the theatre, but of a routine business meeting—serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage. . . .

In this business-like system of civil procedure the tradition is strong that the court promotes compromise. The judge who gathers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved. As the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the

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Adversary control of fact-gathering in [U.S.] procedure entails a high level of conflict between partisan advantage and orderly disclosure of the relevant information. Marvin Frankel put this point crisply when he said that "it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth.*"

If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial. . . . "[T]he partisan nature of trials tends to make partisans of the witnesses."

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

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

Equality of representation. The German system gives us a good perspective on another great defect of adversary theory, the problem that the Germans call "Waffenungleichheit"—literally, inequality of weapons, or in this instance, inequality of counsel. In a fair fight the pugilists must be well matched. . . . The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation. Adversary theory thus presupposes a condition that adversary practice achieves only indifferently. It is a rare litigator in the United States who has not witnessed the spectacle of a bumbling adversary whose poor discovery work or inability to present evidence at trial caused his client to lose a case that should have been won. Disparity in the quality of legal representation can make a difference in Germany, too, but the active role of the judge places major limits on the extent of the injury that bad lawyering can work on a litigant. In German procedure both parties get the same fact-gatherer—the judge. . . .

Prejudgment. Perhaps the most influential justification for adversary domination of fact-gathering is that nonadversarial procedure risks prejudgment—that is, prematurity in judgment. . . .

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

Depth. Concern about prematurity shades into a different issue: how to achieve appropriate levels of depth in fact-gathering. Extra investment in search can almost always turn up further proofs that would be at

least tenuously related to the case. Adversary domination of fact-gathering privatizes the decision about what level of resources to invest in the case....

[German fact-gathering] does indeed contrast markedly with the inclination of American litigators "to leave no stone unturned, provided, of course, they can charge by the stone." The primary reason that German courts do less fact-gathering than American lawyers is that the Germans eliminate the waste....

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

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

REVIEW AND DISCUSSION QUESTIONS

1. Describe the fundamental differences between the German inquisitorial system and the Anglo-Saxon adversary system.
2. Why has the inquisitorial system been described as a "conference method" of deciding disputes?
3. Describe the advantages that Langbein believes the inquisitorial system has, as compared with the adversarial system.
4. What dangers does Langbein see in the inquisitorial system? How can they best be addressed?
5. Is the case for the adversary system stronger for criminal law than civil law? Explain.
6. How might Monroe Friedman respond to Langbein?

Building Power and Breaking Images: Critical Legal Theory and the Practice of Law

Peter Gabel and Paul Harris

In this essay Gabel and Harris explore a model of legal practice radically at odds with the traditional one. Rather than protecting rights, they argue, the current legal system is more accurately understood if seen simply as part of a structure designed to maintain power and prevent serious social change. Using two famous cases as illustrations, the authors describe an alternative approach to legal practice that would politicize legal cases and empower those who are normally made powerless under the current legal system.

INTRODUCTION

In this essay we present [an] optimistic approach to radical law practice that is based on a view of the legal system different from . . . both the orthodox Marxist view that the law is simply a "tool of the ruling class" and the liberal-legalist view that powerless groups in society can gradually improve their position by getting more rights. Instead we argue that the legal system is an important public arena through which the State attempts—through manipulation of symbols, images, and ideas—to legitimize a social order that most people find alienating and inhumane. Our objective is to show the way that the legal system works at
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