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Recommended Citation

John H. Langbein, "Judging Foreign Judges Badly: Nose Counting Isn't Enough," 18 *Judges' Journal* 4 (1979).

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MAYBE STATISTICS HAVE SOMETHING TO TELL US, AFTER ALL

By Earl Johnson, Jr.

When Ann Drew and I accepted the invitation to publish an article based on the comparative statistical work our program was then doing, we knew we ran the risk of a Langbein-like critique. In some respects, his piece represents fair comment on the article—but not the research. (I have some quarrel with his reasoning about the article, too, which I will take up shortly.)

We knew it would be impossible to insert all the explanations and qualifications present in the full 300 page report within the page limits of the article. In the full report, for instance, there is a section describing just the German legal system which is nearly as long as our entire article that was published in the Summer 1978 issue of *The Judges' Journal*. There is virtually nothing in Professor Langbein's critique which is not highlighted in that section of our full report.

At the time we decided to prepare the article we knew that the data, however explained and qualified, were open to various interpretations and conclusions, as is true of most statistical information. We anticipated that others would offer their interpretations. In that sense, we welcome Professor Langbein's article, although we do not find it nearly as devastating as he evidently does.

I first want to emphasize that much of our article and many of its most significant findings remain undisturbed by Professor Langbein's critique.

In our article we emphasized those statistics from our study which seemed to run counter to what we suspected were common assumptions about the United States justice system. If one were to ask the average American which country has the most judges per capita, I suspect the overwhelming majority would answer "Why the United States." And if asked who spent the most per capita on judges, "The United States, of course." And where is legal aid most generously funded? "Clearly the good old U.S. of A." That these notions are held by important policy makers, if not the common citizen, is suggested by a statement in an article authored last year by Anthony Kline, probably the most influential figure with respect to court-related legislation in the nation's largest state. Kline writes that "With a complement of 1312 judges, commissioners and referees, California has a far larger judicial system than exists in any nation in the world; indeed, there are few nations that have as many judges, absolutely and per capita, as Los Angeles County."¹

I should add that I regard Mr. Kline as a friend and find many of the suggested reforms described later in his article to be commendable. But as the information in our study indicated, he was reflecting a widely held but erroneous assumption about the statistical facts and where the United States stands in comparison to other countries.

Nothing in the Langbein piece refutes the finding that West Germany—as well as several other European countries—has significantly more judges per capita than typical American jurisdictions.² Nor does his critique undermine the finding that Germany spends twice as much on its court system whether measured per capita or as a percentage of national income.³ In fact, Langbein leaves largely untouched the principal thrust of our article—that the statistical facts were, on the whole, inconsistent with a widely accepted view that our justice system is huge and overly expensive compared with other countries. And thus we questioned, and continue to question, whether public policy and funding decisions should be predicated on false notions that ours is a uniquely expensive system of justice.

Langbein's quarrel appears to be with any affirmative use of this data to support in any way a larger public investment in America's *justice* system. In truth his real quarrel appears to be with the title of the article, "This Nation Has Money For Everything—Except Its Courts," a title which we did not choose and does not accurately capture the modest tone of our suggestions from the data.⁴

But beyond this, Langbein's critique misconceives what it is we suggested might be underfinanced, comparatively speaking. Typically, in his very first paragraph Langbein excerpts a section from our article in which we point out that America's relative underinvestment of public resources in its total *justice system* might sabotage the performance of the *judicial system* precisely because our approach is so adversarial and, hence, dependent upon private parties to finance the necessary investigation, etc. Langbein construed that to mean we were arguing that the judicial system was being sabotaged by an inadequate investment in the *judicial system* itself. That may be true also but the excerpt Langbein chose to use applied to legal aid and other elements of the justice system rather than the courts.⁵

But putting these issues of tone and interpretation aside, let us examine the Langbein thesis itself. Briefly stated it seems to amount to this: the admittedly
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greater public investment in the courts in West Germany cannot be used in any way to justify more generous appropriations for the American justice system because the Germans use an inquisitorial approach which places greater responsibility on the judiciary for developing the evidence and the issues. Therefore, it is to be expected that the German taxpayer will pay a lot more for each case and for the total system.

There are at least two answers to the Langbein proposition. The first is that the differences between the inquisitorial and adversarial processes do not logically justify a difference in the level of public financing for the justice system. Instead, at most they justify a different distribution of the public investment. One might reasonably anticipate that because of its adversary approach, which places so much responsibility on the lawyers representing the parties, the United States would invest heavily in legal aid and other programs to subsidize those litigants unable to afford the cost of all these responsibilities. In effect, while most of the justice system dollar in Germany goes to the judiciary, in America we would expect it to be divided nearly equally between the courts and subsidized legal representation.

But what do we find? It is Germany that has had a legal guarantee of free counsel for low income civil litigants dating back to 1871.⁶ We still have no such guarantee in the United States.⁷ And while England, which like the United States uses an adversarial system, has begun to move toward the anticipated relationship between judicial and civil legal aid expenditures, the United States has not. In 1973, England's civil legal aid budget was over 25 percent as large as its judicial budget while America's was only 5 percent as large.⁸ Significantly, the United States did not even compare favorably with Sweden which uses a semi-inquisitorial approach.⁹

A second answer is that the real issue in these contrasting figures is the comparative level of commitment. The fact that Germany uses a system which requires more judicial time to dispose of each case does not detract from the further fact that German legislatures have displayed a willingness to commit twice as much of the nation's resources to the courts in order to afford that more expensive approach. They are according more priority to the achievement of justice in their distribution of public funds.

American lawmakers might pause a moment in their demands for further economizing by the courts, with their frequent reluctance to add even a few new judges or to adequately finance legal assistance for the poor, in order to contemplate that some other countries are willing to commit substantially more of their national resources to the dispute resolution function. In part, these countries may do so because they have adopted a more expensive approach which they feel

contributes to a higher quality of justice, but their willingness to make that larger commitment may in itself be instructive to American policy makers. If we do not like the quality of justice delivered by our courts—the delays are too long, too many litigants suffer because they cannot afford legal representation, and the like—perhaps we should consider raising our public financial commitment to something closer to that found in some European countries.

This point may be easier to see if we imagine for the moment that we were comparing one nation's public investment in fire protection with another. Assume that Country A invested twice as much tax money per capita to put out fires as country B. But when this discrepancy was pointed out to a Professor of Comparative Fire Engines he said, "Sure, Country A spends twice as much tax money on fire protection. That doesn't mean anything because in that country the public pays for the firemen to put out the fire while Country B only supplies the fire engine and the driver. It expects the people whose houses are on fire to hire the people to do most of the rest of the work (whether they can afford to or not). So you see Country A's legislators aren't any more committed to putting out fires than Country B's."

I guess I see a problem with the logic of the hypothetical Professor of Comparative Fire Engines. Perhaps some readers will also and similarly with Langbein's logic as well.

I also probably should clear away some of the underbrush from Langbein's critique. He makes a valid point when he suggests that American lawyers have a different role—to a certain degree—than their German counterparts.¹⁰ They have somewhat less responsibility in the litigation process and, as a whole, more of them spend more of their time offering legal advice, and in other non-litigious activities. Nonetheless, even making some major adjustment for these differences does not explain away entirely the two practicing lawyers per judge in Germany versus 20 practicing lawyers per judge in California (as of 1973). In California, at the present time, the California Trial Lawyers Association, which is composed primarily of only one kind of trial lawyer—those who represent plaintiffs in personal injury cases—alone has several times the number of members as there are judges in the state.

But more significant than the dramatic difference in ratios between the United States and most European countries is the rapid increase in the size of the legal profession related to the judiciary since 1965. This upswing was reflected in a graph in our article and is highlighted more explicitly in our report.¹¹ There has been no comparable upsurge in the number of lawyers in Germany, France or Italy (in relation to the number of judges). England and Sweden have actually experienced a downturn in this ratio during the early 1970s.¹² And with the even more dramatic increases in the size of the American legal profession

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ACTIVE 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. CHI. 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 pre-trial 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

At times it appears that Langbein is feeling defensive about German judges and the German legal process.¹⁹ But be assured that we were not intending to criticize the West German system, nor do the statistics comprise an indictment of the German legal system in any way. We did not mean to intimate that German judges do not work very hard or that the inquisitorial process is necessarily inefficient or undesirable. If anything, we were suggesting that the statistics constituted a criticism of America's public commitment to justice.

At the same time I don't want to be construed as suggesting that we are arguing that solely because some other industrial democracies commit substantially higher percentages of their national income to their courts and justice system that the United States must do so also. We are not in some sort of competition with the other Western democracies to see who can spend the most on their courts, legal aid, etc. If we are fully satisfied with the performance of our legal system at current levels of investment, there is no reason to contemplate any change, including any change that might cost more money. But virtually nothing in either the popular or professional literature suggests that our justice system is performing perfectly or even very well.

Nor did we mean to suggest that all the problems with our current system can be solved most effectively merely by "throwing money" at the legal system. Contrary to Langbein's implication,²⁰ we were not commissioned by LEAA to build a case for increased appropriations. We were given a grant to research and present comparative statistical data about various elements of the legal system. We were as astonished as any American citizen might be with most of the results of our inquiry. Also contrary to Langbein's implication, be assured that our report would have reflected what we found even if it had confirmed every American's assumption, that is, that we have more judges per capita than anybody, that we spend more proportionately than anyone, that we are more generous with our impoverished litigants than anyone, etc., etc., etc. (Whether *The Judges' Journal* would have been as eager to publish an article presenting some of the highlights of such a report is a separate question.)

As a matter of fact, contrary to Langbein's assertion,²¹ our overall research has not been devoted primarily to building a case for increased funding for the courts. Nor was that the purpose of our federal government funding. Rather, the bulk of our research in recent years has been devoted to looking for ways to process disputes less expensively and better outside the courts.²²

I would be one of the last, once again contrary to Langbein's apparent assumption, to contend that we can cure the major problems in the American justice system merely by appropriating more funds for the courts as they are presently constituted and as they presently process disputes. In another context, I have advocated to the judges themselves that we make fun-

damental changes in how we resolve at least some major categories of disputes in this society.²³

There is a series of complex policy issues to be addressed. How many of the serious deficiencies in the current American justice system can best be cured by more judges and increased appropriations for the courts? How much by more prepaid legal insurance and more adequate funding of the Legal Services Corporation? How much by the creation of new forums? How much by diversion of entire categories of disputes like uncontested divorces and personal injury compensation completely away from the courts? How much by fundamental restructuring of how the courts themselves resolve other significant categories of disputes in this society?

In any event, that this society has the resources with which to finance the necessary measures without exceeding the commitment displayed by other comparable economies appears fairly clear from the European data. At least that seems to be a reasonable interpretation.

¹⁹John Anthony Kline, *Law Reform and the Courts: More Power to the People or to the Profession?* 53 CAL. STATE BAR J. 14, 16 (Jan./ Feb., 1978). Mr. Kline is the Legal Affairs Secretary to Governor Jerry Brown. As such he is the Governor's chief advisor on judicial appointments, legislation affecting the judicial system and related matters.

²⁰Earl Johnson, Jr. and Ann Drew, *This Nation Has Money for Everything—Except Its Courts*, 17 JUDGES J. 8, 10, 11 (Summer, 1978, No. 3).

²¹*Id.* at 11. Moreover, the judiciary's proportion of Gernam national income rose steeply during the early 1970s while it was falling off in the California and the United States as a whole.

²²The final paragraph of our article is illustrative.

Although these particular statistical comparisons do not conclusively resolve any policy issues, they may disturb certain widely-accepted assumptions and raise some intriguing new questions. Explanations for some of the dramatic contrasts between the United States and other industrial democracies are probably debatable. But, at the very least, the statistics and observations we have presented invite our society to consider seriously whether its public investment in the justice system—particularly courts and civil legal aid—measures up to that of analogous nations. (*Id.* at 56.)

²³To place what Langbein quoted into context, consider what appeared before it in the article.

Data . . . suggest that, compared with other jurisdictions, the public sector of the American dispute resolution system is much smaller relative to the private sector. . . .

Dispute resolution systems which are unusually dependent upon the private sector appear particularly subject to problems caused by economic disparities between litigants. Investigation of the facts, research of the law and many essential dispute resolution tasks must be bought and paid for by private citizens.

When one or both parties lack the necessary funds, these tasks are not performed or are done inadequately. If neither side is financially able to discharge its responsibilities, the court is seriously handicapped by lack of evidence and thorough research of the applicable law. If only one litigant lacks sufficient means, the judge will hear only one version of the dispute and there is an obvious danger of bias in the result. Thus, it may be that the American judicial system, which can deliver a very precise and equitable form of justice under ideal circumstances, is currently being sabotaged by an inadequate public investment. (*Id.* at 56-57.)