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It's the Law! Applying the Law is the Missing Measure of Civil Law / Common Law Convergence

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I. INTRODUCTION: IT'S THE LAW! (AT LEAST, ITS APPLICATION)

Law — or rather the application of law — is the category of common law and civil law systems of civil procedure that is missing in the conference program.[1] The previous session addressed "Getting Straight to the *Facts*"[2] and "Getting *Results*".[3] Facts and results are fine, but what of *law* and its application? Should applying the law not have pride of place in systems of civil justice? Should it not be *the* measure of convergence? It is *application* of the *law* to the *facts* that determines what the *results* are. Until the consequences of applying law to facts are comparable, claimed convergence among legal systems is cosmetic.

In announcing the conference program, Professor Chase asks "whether, in view of the ongoing procedural reforms, the age-old categories of

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[1] International Association of Procedural Law (IAPL), *Common Law – Civil Law: The Future of Categories / Categories of the Future* (2009 IAPL Annual Conference, Toronto, Canada: June 3-5, 2009). See IAPL 2009, online: <http://www.iapl2009.org>.

[2] Session III, "Changing Roles of Participants", Part A: "Witnesses and Counsel: Getting Straight to the Facts", *id.* (June 4, 2009) (emphasis added). For the papers prepared by the speakers during this session, see David Bamford, "The Continuing Revolution: Experts and Evidence in Common Law Litigation" (2010) 49 S.C.L.R. (2d) 161; Emmanuel Jeuland, "Changing Roles of Witnesses and Counsel in Civil Law Countries and, in Particular, in France (Le changement de rôle des témoins et des conseils dans quelques pays de droit civil et, en particulier, en France)" (in French) (2010) 49 S.C.L.R. (2d) 193; and Ian Binnie, "The Changing Role of the Expert Witness" (2010) 49 S.C.L.R. (2d) 179.

[3] Session III, "Changing Roles of Participants", Part B: "Judges and Parties: Getting Results", *id.* (June 4, 2009) (emphasis added). For the papers prepared by the speakers during this session, see Judith Resnik, "Managerial Judges, Jeremy Bentham and the Privatization of Adjudication" (2010) 49 S.C.L.R. (2d) 205; Eduardo Oteiza, "Civil Procedure Reforms in Latin America: The Role of the Judge and the Parties in Seeking a Fair Solution" (2010) 49 S.C.L.R. (2d) 235; and Soraya Amrani-Mekki, "The Future of the Categories, the Categories of the *Futur*" (2010) 49 S.C.L.R. (2d) 247.

common law and civil law, continue to be relevant … ".[4] I submit that categories of common law and civil law will continue to be relevant until common law systems apply law to facts routinely and not exceptionally, while doing so efficiently and not expensively. So long as common law systems make the separation of law and fact more important than bringing them together, we shall not see convergence.

I have stated my claim more broadly than I intend. While our program speaks generally of common law and civil law, I restrict my claim to the two legal systems that I know first-hand: American common law and German civil law. My claim may also apply to other common law systems, such as those of English-speaking Canada and England, or to other civil law systems, such as those of Quebec and France, but I do not assert that it does.

This paper consists of three further parts: Part II addresses the centrality of the application of the law to civil procedure. It points out an infrequently recognized obstacle to correct and efficient application of law: the interdependency of determining the rules and finding the facts. Part III introduces the method that German civil procedure uses successfully in order to apply law to facts: the *Relationstechnik* (or "*relationship technique*"). It works. It is a method to strive for. Part IV concludes the paper by noting that American civil procedure lacks a method for dealing satisfactorily with the interdependency of determining rules and finding facts, and speculates whether such a method is possible.

II. APPLYING LAW TO FACTS AND THE CONVERGENCE OF SYSTEMS OF CIVIL PROCEDURE

Applying law to facts is fundamental to rational systems of civil procedure. Civil lawsuits resolve disputes between parties by determining the legal rights and the legal duties of the parties.[5] If there were no civil

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[4] Letter from Oscar Chase to members of the American Society of Comparative Law, online: <http://www.comparativelaw.org/iapl09.pdf>.

[5] See, *e.g.*, Paul D. Carrington, "Virtual Civil Litigation: A Visit to John Bunyan's Celestial City" (1998) 98 Colum. L. Rev. 1516, at 1522-23 ("It is sometimes assumed that the business of courts is merely dispute resolution, by whatever means may be effective to bring repose. … I assume that this pre-Enlightenment purpose will not become the norm, and that we will continue to expect courts to decide cases by applying law to fact"); Oscar G. Chase, "Reflections on Civil Procedure Reform in the United States: What has been Learned? What has been Accomplished?" in Nicolò Trocker & Vicenzo Varano, eds., *The Reforms of Civil Procedure in Comparative Perspective* (Torino: G. Giappichelli, 2005) 163, at 165; Peter L. Murray & Rolf Stürner, *German Civil Justice* (Durham: Carolina Academic Press, 2004), at 575 [hereinafter "Murray & Stürner"] (the "primary

lawsuits, private parties might use self-help to realize their rights and to resolve their disputes. The stronger, rather than the righteous, would prevail. To preserve peace and right, modern legal systems prohibit self-help, except in limited cases. Instead, they seek the correct application of the law to the facts of each case.

Primitive legal systems emphasized dispute resolution. Legal process — not substantive law — determined legal rights. As Professor Resnik has observed, this was a matter of *rites* instead of *rights*.[6] Primitive systems accepted methods of dispute resolution, such as trial by ordeal or trial by battle, which were unrelated to parties' rights. At least since the 18th century Enlightenment, however, modern systems of civil procedure have rested on the idea that the outcomes of legal disputes should be determined according to substantive law and not by the combative skills of the parties (or their representatives).

1. The Importance of Applying Law for Legal Systems

Lawsuits take place within legal systems. The importance of legal procedures transcends individual cases.[7] Most of the time, people apply the law to their own lives, outside of lawsuits. They can do this when the law fulfils a guidance function. People will follow the law because it expresses their sense of justice and because they believe that the law will be enforced for all. This kind of self-application is essential to well-functioning states. For every instance of the application of the law in a lawsuit, there are millions of instances of individuals applying the law to themselves in the absence of lawsuits.[8]

When there is a generally accepted method of applying the law, and the rules are determinant and the facts are known, different people looking at the same rules should reach the same conclusions. In such cases, people can conduct their lives within the rules, confident that they will

purpose" of civil justice is "vindication of private rights"); Leo Rosenberg, Karl-Heinz Schwab & Peter Gottwald, *Zivilprozeßrecht*, 16th ed. (Munich: Beck, 2004); Manfred Wolf, *Gerichtliches Verfahrensrecht* (Reinbek bei Hamburg: Rowohlt, 1978), at 10 ("die Prüfung und Feststellung der materiellen Rechtslage").

[6] See Resnik, *supra*, note 3.

[7] As Thomas W. Shelton, the "godfather" of the Federal Rules of Civil Procedure, colourfully put it: "judicial procedure is to the substantive law what the arteries are to the human body; that the latter is worthless without the former". Thomas W. Shelton, *The Spirit of the Courts* (Baltimore, MD.: J. Murphy Co., 1918), at 17.

[8] See James R. Maxeiner, "Legal Indeterminacy Made in America: American Legal Methods and the Rule of Law" (2006) 41 Val. U. L. Rev. 517, at 523-24 [hereinafter "Maxeiner"].

not be disturbed by assertions from the government or from third parties that their conduct is outside the law. They can rely on rules. If, however, application of the law is erratic and unpredictable — if application is divorced from the rules of law — people cannot safely rely on the law, even if the rules themselves appear determinant.

Where it is the application of the law to the facts — and not a matter of procedure — that determines right, law will guide the process. Facts material to the law's application are appropriate for the process; facts immaterial to law's application have little place in the process. Legal process imposes on parties the power of the state to probe their lives. Unbounded legal process can place unacceptable burdens on the participants in the process.

2. The Process of Applying Law to Facts

Applying law to facts requires determining and interpreting applicable rules, finding material facts, and then applying these rules to the facts that have been found. It brings law and facts together.

Each of these steps presents difficulties. Even in systems where the law is codified and well organized, determining the applicable rule is not simple. Even where the only law that one is concerned with is a code itself, specifying the applicable rule requires constructing a legal norm from the many provisions of the code; it requires sophistication and skill to identify which sections of the code are applicable to the current case, as well as talent in putting together the norm to be applied to the facts. That norm may then require interpretation.

In a similar way, finding the facts is not necessarily a simple exercise either. Even in uncomplicated cases, evidence may be difficult to obtain or to evaluate. Documents may have disappeared; witnesses may be forgetful. Even where cases are uncomplicated and evidence-taking is unproblematic, finding the facts in the context of a lawsuit can be challenging. The parties with knowledge are more interested in victory than in the correct finding of the facts.

Once the law has been determined and the facts found, the determined law is applied to the found facts. That is ordinarily a syllogistic process: the legal rule is the major premise and the facts found are the minor premise. The facts are subsumed logically under the legal rule to reach the correct legal consequence. Each element of the major premise

of the norm must be fulfilled by a particular fact of the minor premise. If one fails, application of the norm fails.

Syllogistic law application enables self-application; it permits legal systems to respond to the need identified by H.L.A. Hart "for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues".[9] Although not without detractors, syllogistic law application dominates daily practice in both the United States and Germany. No competing theory better describes what it means to apply rules to facts in ordinary cases.[10]

3. Back-and-forth in Applying Law: The Interdependency of Rules and Facts

Applying a rule to the facts is considerably more challenging than is generally realized in the United States. Bringing rules and facts together depends on determining rules that are applicable to the facts and finding facts that are material to the applicable rules. No longer is it believed that the applicable rule can simply be read from statutes or precedents. Instead, it is necessary to search statutes and cases for rules, compare rules to facts, revisit statutes and cases in light of the facts found, and examine the facts again, in light of the rules. This process of going back and forth was identified in the first part of the 20th century, but, to this day, it is only occasionally noted.[11]

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[9] H.L.A. Hart, *The Concept of Law*, 2d ed. (New York: Oxford University Press, 1994), at 130.

[10] Arthur Kaufmann, *Das Verfahren der Rechtsgewinnung. Eine rationale Analyse*: *Deduktion, Induktion, Abduktion, Analogie, Erkenntnis, Dezision, Macht* (Munich: Beck, 1999), at 2-6, 29-30, 54-62 (reviewing criticisms and discussing alternatives to deduction); Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (New York: Oxford University Press, 2005), at 32-33, 43-47 (the legal syllogism is "central to legal reasoning"). For a discussion with further citations, see Maxeiner, *supra*, note 8.

[11] See Jesse Franklin Brumbaugh, *Legal Reasoning and Briefing: Logic Applied to the Preparation, Trial and Appeal of Cases, with Illustrative Briefs and Forms* (Indianapolis: The Bobbs-Merrill Company, 1917), at 364-67; Thomas A. Mauet, *Pretrial*, 7th ed. (New York: Aspen Publishers, 2008), at 21 ("This process, going back and forth between investigating the facts and researching the law, is ongoing and is how you will develop your 'theory of the case'"); Oskar Hartwieg & H.A. Hesse, *Die Entscheidung im Zivilprozeß: Ein Studienbuch über Methode, Rechtsgefühl und Routine in Gutachten und Urteil* (Königstein/Ts.: Athenäum, 1981), at 78-79 (*Die Lehre vom Pendelblick*); Dieter Stauder & David Llewellyn, "Oskar Hartwieg's Thoughts on the English Legal System" in D. Vaver & L. Bently, eds., *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish* (New York: Cambridge University Press, 2004) 47, at 51; Herbert Schöpf, *Die Wechselbeziehung zwischen Sachverhalt und Normenordnung bei der Rechtsanwendung* (Diss. Erlangen under Reinhold Zippelius, 1971), Friedrich-Alexander Universität, Erlangen-Nürnberg.

Determining the applicable rules and finding the material facts are therefore *interdependent* inquiries: until one knows which rules are applicable, one cannot know which facts are material. But until one knows the facts, one cannot know which rules are applicable. Settle the applicable rules too soon, and facts may be overlooked which would change the results if other rules were thus applied. Fail to settle the applicable rules soon enough, and the process may detour to find facts that are not material under the rules that are actually applied.[12]

The complexity of the task is exacerbated by the nature of the rules applied. Rarely does the determinative rule consist of just one syllogism. Usually, it consists of many syllogisms working together. Thus, going back and forth requires one to hold subsidiary rules in the ready, in case facts are found that call for their invocation.

III. THE GERMAN RELATIONSHIP TECHNIQUE OF APPLYING LAW TO FACTS

The German Federal Minister of Justice boldly asserts that "'Made in Germany' is not just a quality seal reserved for German cars or machinery, it's equally applicable to German law."[13] And what is it a quality seal for? She says that it guarantees "fair laws and an efficient judiciary", "just solutions", that "[e]veryone has access to law and justice, independent of their financial means", and courts that "decide without delay".[14] Even discounting for the tendency of lawyers to promote their own systems and solutions, this is a remarkable claim of success. She is not alone in her praise for the German system of civil procedure. It has won praise from international groups and it serves, not infrequently, as a model for other systems.[15]

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[12] Arthur T. von Mehren conceived of this problem in terms of concentration and surprise at trial. See Arthur T. von Mehren, "The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks", in Norbert Horn, ed. *Europäisches Rechtsdenkens in Geschichte und Gegenwart*: *Festschrift für Helmut Coing zum 70. Geburtstag*, vol. 2 (Munich: Beck, 1982), at 361 *et seq*. [hereinafter "von Mehren"], relevant parts substantially reproduced in Arthur T. von Mehren & Peter L. Murray, *Law in the United States*, 2d ed. (Cambridge: Cambridge University Press, 2007) [hereinafter "von Mehren & Murray"].

[13] Brigitte Zypries, "Law – Made in Germany: global effektiv kostengünstig", online: <www.lawmadeingermany.de>, at 3 [hereinafter "Zypries"].

[14] *Id.*

[15] The Global Competitiveness Report 2008-2009 of the World Economic Forum ranks the German legal system among the top five systems in the category of "Efficiency of Legal Framework". It ranks the U.S. system 28th. *Id.*, at 5. See generally Walther J. Habscheid, ed., *Das deutsche*

What are the quality controls of German justice? One is its method of applying law to facts, the *Relationstechnik*, or "relationship technique". That technique is, in substance, what it was when it was first adopted as the approach to be used throughout the newly united Germany in the *Code of Civil Procedure* of 1877.[16] A professional judiciary applies professionally drafted rules to facts using the "relationship technique" in order to produce professionally justified judgments. Thus, German procedure brings law and facts together through the "relationship technique".

The foregoing syllogism is the basis of the "relationship technique": the legal rule is the major premise, the facts are the minor premise and the judicial decision is the logical conclusion. The "relationship technique" is taught by the courts to all German jurists, whether they become judges or lawyers.[17] It has been proven through more than a century of judicial practice.

1. The Major Premise: The Statute as Norm

The statute is *the* fundamental concept of all German law. German statutes take the form of syllogistic norms. The major premise is that a legal consequence prescribed by statute applies when a generally described state of facts is present. The minor premise is that a particular state of facts fulfils the statutorily prescribed state of facts.

Moreover, while it is the plaintiff's responsibility to plead the facts, it is up to the judge to know the law and to identify the applicable legal rule. In Germany, as in other civil law countries, the maxims *jura novit curia* (the court knows the law) and *da mihi factum, dabo tibi ius* (give me the facts, I will give you the law) apply. So long as there is any legal rule that would support relief on the facts alleged, the judge is to direct the service of the complaint. The plaintiff's incorrect choice of rule is of no moment.

The individual elements that are required by statute in order to establish a claim are the "spectacles" through which the judge views

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Zivilprozeßrecht und seine Ausstrahlung auf andere Rechtsordnungen (Bielefeld: Gieseking-Verlag, 1991).

[16] Compare Hermann Daubenspeck, *Referat, Votum und Urtheil*, 1st ed. (Berlin: F. Vahlen, 1884), with its current version, Winfried Schuschke, Sattelmacher/Sirp, *Bericht, Gutachten und Urteil*, 34th ed. (Munich: Valhlen, 2008).

[17] In an idealized form, students learn it early, in law school, as part of legal methods. A basic text on German legal methods has recently been translated into English. See Reinhold Zippelius, *Introduction to German Legal Methods*, 10th ed., trans. by K.W. Junker & P.M. Roy (Durham: Carolina Academic Press, 2008).

the case. What the judge can see through the spectacles matters; everything else is immaterial.[18]

Well-drafted statutes coordinate with each other well. Well-drafted statutes are clear about who may invoke them and what the consequences of their invocation are. Well-drafted statutes, to the extent possible, require that judges find objective facts rather than make subjective valuations. Well-drafted statutes do not expect judges to make political or other social policy decisions. While well-drafted statutes often require judges to evaluate individual equities and to find subjective facts (such as a party's state of mind), they minimize, to what extent they can, the use of such determinations. When they cannot avoid such determinations, they guide the judge's deliberations by setting boundaries and by giving examples.

A well-drafted statute is no accident. Most modern legal systems have a central office that is responsible for the technical quality of statutes. In Germany, preparation and perpetuation of good legislation is *the* raison d'être of the Federal Ministry of Justice. The Ministry engages some of the best-qualified jurists of the land in that work: former appellate judges.

2. The Minor Premise: Facts and the Process to Find Facts

The relationship technique guides legal process without straitjacketing it. The relationship technique avoids two extremes of civil procedure: a single-issue focus and a lack of focus altogether. It narrows the issues without cutting off the right to be heard. The "golden rule" of German civil justice is that there are no surprise decisions.[19] Here, we discuss four of the ways in which the relationship technique guides process: (1) pleading; (2) deferred decision-making; (3) case-structuring; and (4) focused evidence-taking.

(a) Pleading

The plaintiff begins a lawsuit by filing a complaint with the court. Before the court serves the complaint on the defendant, it assigns the

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[18] Joachim Hruschka, *Die Konstitution des Rechtsfalles: Studien zum Verhältnis von Tatsachenfeststellung und Rechtsanwendung* (Berlin: Duncker & Humblot, 1965), at 22-24.

[19] Helmut Rüßmann, "Grundregeln der Relationstechnik", online: <http://ruessmann.jura.uni-sb.de/zpo2004/Vorlesung/relationstechnik.htm>.

case to a judge. This judge then makes a preliminary review of the complaint for procedural prerequisites and other patent deficiencies. Already, even at this stage, the relationship technique anticipates the judgment that is to come. The plaintiff must plead a case that has a plausible chance of success. While the plaintiff need not plead the legal basis on which the complaint rests, the plaintiff must plead facts upon which relief could be granted. Moreover, the plaintiff must plead the proof that the plaintiff intends to rely upon in order to prove the factual assertions (*i.e.*, the plaintiff must "substantiate" the factual allegations of the complaint). A properly substantiated complaint includes all of the material documents in the plaintiff's possession, designates all of the material documents in the possession of other parties, and identifies the testimony on which the plaintiff plans to rely. It should state the facts so exactly that, based on the information provided, the court could potentially determine that the claimed legal relief should be granted.

If the judge should have concerns about whether or not the procedural prerequisites have been met, or whether or not the complainant has sufficiently substantiated the factual allegations, then he or she is to direct the plaintiff to clarify the point before dismissing the case.[20]

Once the judge directs service and the defendant is served, the defendant is required to answer the complaint. The defendant's answer is subject to requirements similar to those that govern the complaint: its content must be true, complete, specific and substantiated.

(b) Deferred Decision-making

The German system masters the interdependency problem through the relationship technique. The relationship technique makes determinations of applicable rules and findings of material facts concurrently, rather than consecutively. It finds facts "just in time"; it limits consideration of facts to the material facts in the dispute. It routinely and efficiently applies law to facts in formal judgments.

German judges defer the final decisions of individual aspects of cases until they are prepared to decide the case as a whole. German judges decide no issues before their time.[21] The critical moment in a

[20] See Michael Bohlander, "The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties" (1998) 13 Tul. Eur. & Civ. L.F. 25, at 33; Murray & Stürner, *supra*, note 5, at 210.

[21] Paul Masson, advertising slogan: "Paul Masson [or "We"] will sell no wine before its time."

German lawsuit is the last oral hearing when the court conclusively and finally applies the law to the facts that it has found. German parties do not have to commit, irrevocably early in the lawsuit, to a single legal claim or group of claims.

While judges are authorized to reject evidence for being offered too late — and often do precisely that — their enthusiasm for such measures, which can serve to expedite the process, is tempered by their ever-present duty of elucidation under section 139 of the *Code of Civil Procedure*. This provision assures the right of parties to be heard, which is guaranteed by article 103 of the *German Constitution*. Section 139 is a far-reaching prescription, requiring judges to thoroughly discuss all aspects of a case with the parties involved. It rules out the possibility of one party surprising the other with an unexpected witness, fact or claim (a tactic known, colloquially, as "trial by ambush" in American law). Further, section 139(2) requires that the judge call to a party's attention — and then give that party an opportunity to comment on — any non-trivial issue that the party has apparently overlooked or considered insignificant, or any point of fact or law upon which the judge's understanding and the party's understanding differ.

(c) Case-Structuring

Coincident with the preliminary review, the judge determines how the case is to proceed further — that is, whether the case will use additional written proceedings or a so-called early first hearing. The judge's choice is purely pragmatic: the judge selects the method that he or she believes is the one that is likely to be more efficient, *i.e.*, which method is more likely to simplify and hasten the framing of the material and dispute issues. A party dissatisfied with this choice may request that the judge use the other method, in which case the party should state why the other method would be more efficient. The judges with whom I have spoken have told me that most judges prefer early oral hearings in contested cases.

Prior to the first hearing or the exchange of further written pleadings (whichever the case may be), the judge is required to prepare for the future proceedings. These preparations may include: (1) directing the parties to supplement their pleadings; (2) directing government authorities to provide information and documents; (3) ordering the personal appearance of the parties; (4) summoning witnesses named by a party to

the hearing; and (5) ordering the production of documents or other materials, and making premises and other items available for observation. Sometimes, these preparations make it possible to resolve the entire case at the first hearing.

At this stage, the judge structures the lawsuit without making any final decisions on the case. The judge works with the parties to identify those issues that are both material to the plaintiff's claims and in dispute. Such early structuring of the case, through issue framing, plays an important role in keeping German civil justice proceedings within bounds. It identifies the legal rules that are under consideration for application, the elements of those rules, and the evidence that will be necessary in order to establish the elements of the rules. For each party, the judge points out any weaknesses in the party's claim and then inquires how the party plans to revise it.

Structuring the case and framing its issues serves not only to guide the judge in subsequent considerations, but also helps the parties to reach a settlement more expeditiously and reasonably. The parties can see which rules will determine the decision and which facts are needed. Some judges have informed me that they consider this structuring stage of the process to be one of their most important judicial duties.

To an American accustomed to formal exchanges between the judge and counsel, the early first hearing to clarify issues is remarkable. By American standards, these hearings are interactive, cooperative and informal.[22] They resemble American pre-trial conferences more than American trials. They differ from American pre-trial conferences, however, in several important ways. What is most remarkable from an American perspective is the roles of the parties. Typically, the judge summons the parties themselves to the early first hearing and speaks directly with them.

This kind of hearing is neither an American-style discovery nor an American-style trial.[23] Its focus is on identifying the material issues of fact that are actually in dispute between the parties; it is not about uncovering unknown facts or proving known ones, and it is not concerned with

[22] Murray and Stürner describe these hearings at length. See Murray & Stürner, *supra*, note 5, at 256-59.

[23] See, *e.g.*, Thomas D. Rowe, Jr., "American Law Institute Study on Paths to a 'Better Way': Litigation, Alternatives, and Accommodation: Background Paper" (1989) 1989:4 Duke L.J. 824, at 854, n. 109 (incorrectly characterizing the hearing).

the possible presentation of a narration later.[24] The judge probes the potential claims and the facts that are needed to support them. In essence, the judge turns to the party and the party's attorney, and asks: "now, on this issue, are you seriously going to dispute the fact?"

What prevents the party or the party's attorney from responding with: "so let the other side prove it"? Section 138 of the German *Code of Civil Procedure* imposes a duty of cooperation on the parties with respect to clarifying the issues in the case. Section 138(1) requires the parties to completely and truthfully give their declarations concerning factual circumstances; section 138(2) requires that they state their positions with respect to the facts asserted by the opponent. These discussions are *not* evidentiary. They do *not* constitute taking the testimonies of the parties. They amount to a clarification of the factual assertions of the parties that are necessary for the eventual application of the law to the facts. Section 138(3) provides that an asserted fact will be treated as admitted if the other party is silent and fails to contest it. Section 138(4) provides that only in limited circumstances will a declaration of a lack of knowledge serve to put a matter into dispute. Moreover, section 138(2) is interpreted to require that a mere denial of a fact is not sufficient to put that fact into dispute. In most cases, a party must explicitly contest the fact that has been asserted. If the contended fact is known or could be known to the contending party, then that party must substantiate its contrary contention with the facts that are known to it. If one party, in the course of the hearing or the pleadings, admits to a fact that has been asserted by the other party, then there is no need to prove that fact. In relatively short order, the judge can inform the parties of the applicable legal rules and then obtain their agreement on which matters of fact are material to those rules and are in dispute.

(d) Focused Evidence-taking

Thanks to case-structuring, many cases conclude without the oral testimony of witnesses ever being necessary. Where witness testimony is taken, framing the issues helps to focus and expedite the testimony.

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[24] *Cf.* Frederick D. Wells, "A Justice Factory" in *Justice Through Simplified Legal Procedure* (1917) 73 Annals Am. Acad. Pol. & Soc. Sci. 196, at 202:

> The court could practically say: "Now on this issue are you seriously going to dispute the fact? As a reasonable man, are you denying it?" If he answers "Perhaps it is so, but, let the other side prove it," it ought to be possible for the court to throw his technical objections out of the window.

When it comes to taking the testimony of witnesses, German civil justice is just-in-time justice. The judge takes evidence only at the request of a party and only after the judge so orders.[25] The judge is to order the taking of evidence only when it is necessary to convince him or her of either the truth or the untruth of a particular fact that is disputed by the parties and that is material to the decision of the case. Thus, the judge should not take evidence to prove undisputed facts, facts generally known to the judge, facts presumed by statute to be true until the contrary is proven, favourable facts established by the other party's submissions, disputed material facts that have been established by undisputed facts, disputed facts for which the judge is already convinced of the truth without needing to take evidence and facts that are not necessary for the judgment (*e.g.*, when two alternatives for granting relief are allowed and one is already acknowledged).

The judge's control over the taking of evidence does not, however, prevent the parties from insisting on the taking of evidence that they believe is relevant to deciding material issues in the dispute. German judges have told me that a sure way to bring about a reversal on the appeal of a lower court judgment is through a judge's rejection of an application to take evidence without strong justification. Such a refusal violates the judge's section 139 duty of elucidation.

3. The Logical Conclusion and Its Validation: The Judgment

While statutes guide the application of law, judgments validate the correct application thereof. They allow for the kind of "output" control that was discussed earlier at the conference. Judgments have four parts: (1) a caption that identifies the parties and the lawsuit ("*Rubrum*"); (2) a statement of the decision and of the relief ordered ("*Tenor*"); (3) a *Tatbestand*;[26] and (4) the grounds for the decision ("*Entscheidungsgründe*"),

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[25] John Langbein has written eloquently of this German advantage in civil procedure. See John Langbein, "The German Advantage in Civil Procedure" (1985) 52 U. Chicago L. Rev. 824. His main theme is that "by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice" (at 824). His article led to a flurry of discussion that has continued over the course of 20 years. A recent review can be found in Bradley Bryan, "Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question" (2004) 11 Tulsa J. Comp. & Int'l L. 521, at 523.

[26] *Tatbestand* is a legal term that has no single English translation. Depending on the context in which it appears, a different English translation is appropriate. In this essay, *Tatbestand* refers to a specific part of a German judgment that is so designated. There is no formal counterpart to the *Tatbestand* in an American judgment. To avoid inducing a false understanding, it is left here in the

hereafter referred to as the "justification". All four parts are subject to strict rules concerning style. The first two parts need no explanation; the last two do.

The *Tatbestand* is a short statement that summarizes the parties' legal claims and respective assertions of fact. It is *not* a finding of facts and, thus, it is not an analogue to the findings of fact in an American bench decision. The *Tatbestand* should include: the subject matter of the lawsuit; a sketch of the facts, but only in as much detail as is necessary to clearly establish the subject of the lawsuit; the evidence that has been offered by the parties; the applications of the parties; the relevant history of the lawsuit; and specific references to the file. It should *not* include: facts that are not necessary to the decision of the case; party statements that have been made previously in the proceedings, but are no longer relevant; the legal arguments of the parties; statements of the law; or normative evaluations of the facts.

The justification applies the law to the facts. It determines the facts of the *Tatbestand* and subsumes them under the abstract elements of the applicable rules. The process of applying the law to the facts is not a mechanical act of mindless processing, but a mindful act of creative evaluation.

The justification follows a format that, in clarity and brevity, facilitates understanding. It begins by stating the result of the lawsuit and by identifying the determinative legal rule. It confirms or denies that the plaintiff's claim is permissible under procedural law and well founded in substantive law. For example, a typical justification might begin: "the plaintiff's action is, in all respects, permissible and well founded. Pursuant to § 488, Paragraph 1, Sentence 2 of the Civil Code, the plaintiff has a right arising from the loan agreement of December 12, 2007 to repayment of the loan of 75,000."

The justification then systematically addresses the applicable rule, its elements, and, if the judgment denies the plaintiff's claims, all of the rules that might support any of the claims. For each element of the rule, as far as it is necessary to do so, the justification clarifies the legal definition of the element as it relates to the particular case. Here, the justification may interpret the applicable statute, but only to the extent that it is directly relevant to a determination of whether the facts in the

original German. Readers should note that this meaning is different from the *Tatbestand* of German criminal law, which might be translated as "elements of the offence".

present case fulfil the elements of the statutory norm. Abstract discussions of law have no place.

The justification then tells the factual story of the case. It focuses on only those facts that are material to deciding the case. Immaterial facts have no place in the justification, except where they are necessary in order to understand the court's decision. The justification starts from the undisputed facts. Where facts are disputed, the justification evaluates the evidence that leads the court to decide as it does. The justification does not discuss the burden of proof, other than with respect to the material facts that are in dispute.

Once the justification has clarified the material and disputed facts, it subsumes those facts under the identified and clarified rule.

The judgment certifies that the procedure has fulfilled constitutional guarantees, which include the guarantees that every exercise of state power has been justified by and grounded in statute, and that the parties have each been heard and have received equal treatment under the law. The judgment is an act of an impartial and impersonal public authority that furnishes the official and objective interpretation and application of the law.[27] It helps parties to understand why the court decided as it did. Ideally, it convinces the losing parties that the outcome is legally correct; at a minimum, it demonstrates that the process was rational.

IV. CONCLUSION: COMMON LAW PROBLEMS AND CONVERGENCE

If "'Made in Germany' is a seal of quality for German cars and German law",[28] "made in America" might be a quality seal for American car companies and American civil procedure. American civil procedure works about as well as American car companies: sometimes it produces good results, but the overall venture needs help.

In March 2009, a committee of the American College of Trial Lawyers, a professional association of self-proclaimed elite trial lawyers, reported that the American civil justice system is "in serious need of repair".[29] The objective of "the just, speedy, and inexpensive determination

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[27] See Reinhard Zimmermann, "Characteristic Aspects of German Legal Culture" in Mathias Reimann & Joachim Zekoll, eds., *Introduction to German Law* 1, 2nd ed. (The Hague: Kluwer Law International, 2005), at 26-27.

[28] Zypries, *supra*, note 13, at 3.

[29] American College of Trial Lawyers, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* (Denver: Institute for the Advancement of the American Legal

of every action and proceeding … is … not being met".[30] American procedure takes too long, costs too much, discourages too many meritorious lawsuits, and encourages too many frivolous ones.[31]

The cause of the problem, according to the elite trial lawyers, is that lawsuits do not routinely reach "early identification of the contested issues to be litigated".[32] Lack of issue identification leads to a "lack of focus" in subsequent proceedings and to "nightmares" for the parties.[33]

The solution to the problem, according to the elite trial lawyers, is that "[j]udges should have a more active role at the beginning of the case in … the direction and timing of the case all the way to trial."[34] The system of notice pleading should be replaced by fact-based pleadings that would "define the issues of fact and law to be adjudicated".[35]

In other words, America's elite trial lawyers recommend abandoning the "notice pleading" that was adopted in the *Federal Rules of Civil Procedure* of 1938. Evidently, they would replace it with something along the lines of the fact pleading that notice pleading had replaced. A recent decision of the United States Supreme Court, *Bell Atlantic Corp. v. Twombly*,[36] seems to go in a similar direction.

1. Common Law Problems in American Civil Procedure

American systems of civil procedure aspire to facilitate application of the law. Their implementation of syllogistic application of legal norms, however, has been beset with persistent and recurrent problems. No satisfactory solution has been reached. Although alternatives to syllogistic application of legal norms have been tried, they have not found general acceptance.

System, University of Denver, 2009 [March 11, 2009; revised March 20, 2009]), online: <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf>, at 2.

30 *Id.*, at 3.

31 *Id.*, at 2:

> Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*, at 5.

36 550 U.S. 544 (2007) [hereinafter "*Twombly*"].

American difficulties in implementing syllogistic law application are attributable, in part, to failures to overcome the problem posed by the interdependent relationship between the tasks of determining the applicable law and finding the relevant facts. As we have seen, German civil procedure addresses this problem by deferring the final choice of the law — and its application — until the very end of the process of finding the facts. This works because the process of finding the facts is directed by judges. In the United States, problems peculiar to common law methods (and, in particular, the historic form of the common law trial and the unsystematic nature of common law rules) create impediments to such an approach that are not present in Germany.

The historic common law trial was a concentrated presentation by the parties to the court, rather than episodic conferrals of the parties with the court. Preparation for an efficient trial required prior identification of the issues to be tried. It was a two-step process. First, the parties ascertained the subject that must be decided upon; then, and only then, did parties present their cases to the court, in one continuous presentation that was without substantial interruption. The less clearly the issues for trial were identified beforehand, the more demanding, difficult and even dangerous (in the sense of risking the case) the preparation for trial would become. The parties had to prepare, not for the trial of one issue, but for the trial of all conceivable issues.[37]

The court of the historic common law trial consisted of two decision-makers: the judge and the jury. Each of these decision-makers had a separate responsibility. In order to permit the proper exercise of those responsibilities, the historic trial was thought to require a strict separation of the decision-makers' respective roles.[38] The classic division of the received English model applied in America: judges determined issues of law, while juries found questions of fact.[39]

This classic formulation — where judges determine the law, and juries find the facts — has, however, left unanswered the question of which decision-maker is to apply the rules that have been determined to the

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[37] On the nature of the common law trial as a concentrated proceeding, see von Mehren, *supra*, note 12.

[38] The possibility that those responsibilities might be exercised jointly, rather than severally — along the lines of the mixed benches of professional judges and lay assessors common in civil law systems — has received almost no serious consideration in the United States.

[39] Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary Upon Littleton* [lib 2, cap 12 § 234 at 155(b)], Charles Butler, ed., 13th ed. (London: Printed for J. & W.T. Clarke, 1823).

facts that have been found.[40] Historically, that question has been answered variously, with considerable consequences for the application of law. The problem has proved intractable.

The historic common law trial found substantive law in the forms of action. These rigid forms addressed only a few specific fact situations, the origins of which lay, even for the 19th century, in the distant past. The forms of action were not modern legal norms, and they had not been written to abstractly cover classes of cases that might not all be specifically described. These rigid forms were not created as a system, but as individual, particular solutions. As a consequence, the forms of action were not as a body seamless, but full of gaps. To fill in these gaps, common law courts resorted to legal fictions and tortured analogies. To provide justice where gaps remained, the chancellor created jurisdiction in equity. From this unsystematic lot of forms, however, parties — not judges — had to choose the law that would govern their cases. An incorrect choice meant dismissal; little in the system helped to guide the choice.

American systems of civil procedure have taken common law problems as given, and have been structured accordingly. Whether they are based on common law pleading, fact pleading, or notice pleading, certain structural components of American systems of civil procedure all share the same approaches:

(1) They provide for the application of law as a two-stage process. In the first stage, the subject of the decision is ascertained. In the second stage, the matter is decided.

(2) They provide for decisions on the issues that have been presented by parties, rather than for the application of norms. Parties have principal responsibility for the selection of the law and the identification of the disputed issues of law or fact. Together, the parties frame the issues to present to the court for its part: the decision-making. Courts only decide on the issues that the parties present. As a consequence,

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[40] Charles Frederic Chamberlayne, *A Treatise on the Modern Law of Evidence* (Albany, NY: Matthew Bender & Co., 1911), §§ 68, 116, 119-120:

> Who should apply rule of law? … [Determination of right or liability requires that] (1) a rule of law must be formulated and announced; (2) the ultimate facts must be ascertained; (3) the rule of law must be applied to these ultimate constituent facts. … Only as to who is entitled to take the third step — that of applying the rule of law to the constituent facts — is there confusion among the authorities and lack of symmetrical and scientific development in the law of evidence.

it is the parties more than the courts that are responsible for syllogistic application of norms to cases.[41]

(3) They are concerned with separating issues of law from questions of fact in order to permit judges to determine the former and juries to find the latter.

(4) They apply unsystematic and uncertain law, which they allow lawyers to expand. Lawyers educate courts in applicable law. They are licensed to argue for "extending, modifying, or reversing existing law or for establishing new law".[42] The civil law maxim *jura novit curia* (the court knows the law) does not apply.

(5) As consequence of the foregoing, American systems, compared to the German system, place less importance on the results of applying the law to the facts, and more importance on the choice of the law applied, the allocation of decision-making and the presentation of the facts.

2. Can Common Law Problems Be Overcome? Can There Be Convergence with Civil Law?

We are unlikely to see convergence in the application of the law between German and American systems of civil procedure any time soon, unless substantial changes are made in *American* procedures. It is unlikely that the German system — which has proven successful — will change any time soon. It is more likely that the American system — which has undergone many unsuccessful reforms — might make yet further reforms. Americans have put up with three generations of failure of notice pleading and discovery; there are signs that they might not tolerate another.[43]

A restoration of fact pleading, such as that proposed by the American College of Trial Lawyers and hinted at by the United States Supreme

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[41] This division of responsibility seems inconsistent with Principle 22 of the *ALI/UNIDROIT Principles of Transnational Civil Procedure* [As Adopted and Promulgated by the American Law Institute at Washington, D.C., U.S.A., May 2004, and by UNIDROIT at Rome, Italy, April 2004] (Cambridge, Mass.: Cambridge University Press, 2006), at 42. The comment to that principle states, at 43, that "[i]t is universally recognized that the court has responsibility for determination of issues of law and of fact necessary for the judgment."

[42] U.S. *Federal Rules of Civil Procedure*, Rule. 11(b)(2).

[43] *Cf. Buck v. Bell*, 274 U.S. 200 (1927), at 208 (*Per* Holmes J.: "Three generations of imbeciles are enough").

Court in the *Twombly* case,[44] would not fix what ails the American system. It would reprise two centuries of failure to solve the problem of the interdependency between the determination of applicable law and the finding of relevant facts.[45] Learning from foreign experiences is, for the American legal system, no longer merely desirable — it is imperative.

Two measures that could help to fix the American system and move it in the direction of convergence with German civil justice are:

(1) concurrent, instead of sequential, determinations of the rules, the findings of fact, and the application of the rules to the facts;

(2) judicial application of norms that have been selected by the judge, rather than determinations by the court of the issues that have been presented by the parties.

An objection that may be raised is that both of these measures are impossible. The jury trial and, above all, the concentration of proceedings that the jury trial seems to demand, preclude them.

Such an objection denies the imaginative forces behind American civil justice and the capability of American systems to try new approaches. American proceedings today are very different from what they were in 1937, the year before the *Federal Rules of Civil Procedure* came into force, or in 1847, the year before the *Field Code of Civil Procedure* took effect.

There are possibilities that place judges in charge of applying the law to specific facts that they have relied upon the juries to find (*e.g.*, special verdicts and jury interrogatories). For the immediate future, we can see possibilities for summoning a jury together, remotely and intermittently, using the Internet.

Americans would do well to conceptualize civil procedure inclusively — that is, as a whole — including the pre-trial and trial stages. German procedure has no trial; it has proceedings that, from the first, are oriented toward an application of the law to the facts. German procedure is concerned with determining legal rights and deciding disputes.

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[44] *Supra*, note 36.

[45] See von Mehren & Murray, *supra*, note 12, at 171:

> [A]ll pleading approaches to the problem of surprise have certain serious disadvantages. … An approach to issue-framing and notice-giving that depends essentially on the pleading process is inherently both complex and rigid. … [T]he pleading approach to the surprise problem seems too technical and arbitrary to be acceptable except on a *faute-de-mieux* basis.

It is what American procedure should be, in Clark's words: the "handmaid of justice".[46]

[46] Charles Edward Clark, *Procedure — The Handmaid of Justice: Essays of Charles E. Clark*, C.A. Wright & H.M. Reasoner, eds. (St. Paul: West Pub. Co., 1965).