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Civilizing American Civil Justice: International Insights

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Note on Cover:

In the United States, Germany and Korea the scales of justice are frequently used as an image for law and justice. The equities of each case are weighed. In Germany the section sign from law codes (§) is also used. Sometimes they appear together. Juxtaposing the two here makes the point that civil justice in the United States would be furthered were Americans to pay more attention to drafting statutes and deciding cases according to written law.

Civilizing American Civil Justice:

International Insights

Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Warren E. Burger
Chief Justice of the United States (1984)¹

[T]he United States in its judicial procedure is many decades behind every other civilized Government in the world, and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access to justice, is the greater part of justice itself.

Woodrow W. Wilson (1915)
President of the United States²

¹ *The State of Justice, Annual Report of the Chief Justice of the United States to the Midyear Meeting of the American Bar Association, Las Vegas, Address, February 12, 1984*, 70 A.B.A. J. 62, 66 (1984).

² *Jackson Day Address at Indianapolis, January 8, 1915*, reprinted in PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES, INTRODUCTION BY ALBERT SHAW 80 (1917).

Summary: Civilizing American Civil Justice

In 1776, when Americans declared independence from Britain, they also declared their rights. Their declarations of rights count “open courts” as among the best means for constitutional development. Open courts should secure to every man, without regard to wealth, a just remedy for every wrong suffered, according to the law of the land, by fair and speedy procedure.

Since 1776 Americans have invested heavily in creating open courts. They have been disappointed by returns that fall “far short of perfection” (Maurice Rosenberg). They have found reform to be an “unending effort to perfect the imperfect” (Jay Tidmarsh).

That Americans have built on the imperfect, i.e., that they have looked only to the system that they have, explains their disappointing results. Contemporary critics can diagnose disorders, but cannot contribute cures known to work. Reformers must imagine how proposed new methods might work; they have no guide to ways proven to work.

Elsewhere in the world there are civil justice systems that work better. American reformers need not imagine the unproven; they can study the proven. Yet contemporary reformers have not done so. They have foregone international insights. Why? Those better-functioning foreign systems are in non-English speaking countries. Their civil law methods seem distant from American common law practices.

This book is intended to make our three systems of civil justice, the German and the Korean, more familiar and less foreign to each other. It demonstrates that civil processes in Germany and in Korea are closer to American understanding than Americans assume. German and Korean civil justice values are familiar; their means of implementing those values are known and often practiced in America. Far from fearing foreign

processes, American reformers should find them fonts of tested ideas.

Ten Points for Civil Procedure Reform that Promote Justice that is Civilized³

- 1) Legal rules seek justice through statutes.
- 2) Civil justice is accessible independent of wealth.
- 3) Those in right are not burdened with high litigation expenses.
- 4) Judges are professionals.
- 5) Trusted institutions coordinate civil justice.
- 6) Jurisdiction is determined without litigation.
- 7) Parties tell courts about their disputes.
- 8) Judges work with parties to prepare cases for decisions according to law.
- 9) Judges oversee taking evidence.
- 10) Courts base their judgments on law and explain them.

³ Cf. MAURICE ROSENBERG, *DEVISING PROCEDURES THAT ARE CIVIL TO PROMOTE JUSTICE THAT IS CIVILIZED* (Thomas M. Cooley Lectures, 1971), *reprinted in* 69 Mich. L. Rev. 797 (1971); *See also* MARVIN E. FRANKEL, *PARTISAN JUSTICE: TOO MUCH FIGHT? TOO LITTLE TRUTH? EQUAL JUSTICE?*, 101 (“Chapter 8. For Procedures More Civil”); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States: Opportunity for Learning from Civilized European Procedure Instead of Continued Isolation?* in *FESTSCHRIFT FÜR KARL BEUSCH*, 853 (1993), *reprinted in* 42 AM.J.COMP.L. 167 (1994).

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Preface

Why don't you take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human experience?

Pierre Lepaulle (1929)
Pioneering French international lawyer,
on judicial procedure in America,
as quoted by Edson R. Sunderland⁴

Litigation is merely a means to an end, like transportation, and the same tests should apply to both. No American objects to the use of the Diesel engine because it is of German origin, nor to the radio because it is Italian, and the victims of rabies make no protest against the employment of Pasteur's treatment because it was developed in France. In every field of human activity outside of the law men are constantly searching for new and better methods, overcoming the barriers of language and forgetting the prejudices of nationality and race.

Professor Edson R. Sunderland (1929)⁵

It may be the oldest use of comparative law: you want to fix something at home that does not work. You look next door to see how your neighbor does it.⁶

In our book the subject of neighborly inquiry is civil justice. That American civil justice does not work well is recognized worldwide. Those subject to it were among the first to complain, but today many American lawyers, law professors and judges will tell you the same thing.

Professor Jay Tidmarsh of Notre Dame Law School and co-author of a leading introductory work on civil procedure⁷ has stated the magnitude and persistence of the problem: "our civil justice system is broken. ... The

⁴ Edson R. Sunderland, *Current Legal Literature*, 15 A.B.A. J. 35 (1929). Professor Sunderland was co-drafter of the Federal Rules of Civil Procedure and principal drafter of its pretrial provisions.

⁵ *Id.*

⁶ See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361 (1977).

⁷ SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE: ESSENTIALS* (2007).

history of Anglo-American procedure has been an unending effort to perfect the imperfect. ... Our system is not sustainable in the long run.”⁸ He is not alone in his assessment.⁹

We are not first to urge comparative inquiry as route to American law reform. For generations foreigners, and Americans, have been telling Americans of virtues of the Roman-law based legal systems of the European continent (known as “civil law” in contrast to Anglo-American “common law” systems). Jeremy Bentham was among the first.¹⁰ The molders of American law were keenly aware of civil law virtues and sought to adopt many of them.¹¹

Nor are we first to bring civil law insights specifically to American civil justice. The four Americans most important in development of American civil procedure, Joseph Story, David Dudley Field, Jr., Edson R. Sunderland, and Charles C. Clark, appreciated foreign civil justice systems.¹² Yet American law reformers today pay civil law systems little mind.¹³ We hope to help change that.

Today both need and opportunity for foreign insights to inform American civil justice are greater than ever. Need arises from the dysfunctional performance of American civil justice and from the long history of ignoring Continental systems. Opportunity springs from the dearth of domestic ideas which parochialism has produced and from the wealth of ideas that globalization is revealing. Today, Americans have available in good number treatises in English on specific foreign systems together with

⁸ Jay Tidmarsh, *Resolving Cases on the Merits*, 87 DENVER L. REV. 407 (2010).

⁹ See the list of over 150 titles in the Bibliographic Notes.

¹⁰ See JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION: INCLUDING CORRESPONDENCE WITH THE RUSSIAN EMPEROR, AND DIVERS CONSTITUTE AUTHORITIES IN THE AMERICAN UNITED STATES, reprinted in JEREMY BENTHAM, COLLECTED WORKS, ‘LEGISLATOR OF THE WORLD’: WRITINGS ON CODIFICATION, LAW, AND EDUCATION 1 (Philip Schofield & Jonathan Harris, eds., 1998).

¹¹ See THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920 (Matthias Reimann, ed., 1993).

¹² See text at notes ** infra.

¹³ John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545 (1995); John H. Langbein, *The Influence of German Émigrés on American Law: The Curious Case of Civil and Criminal Procedure*, in DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTS ENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND 321 (Marcus Lutter, Ernst Stiefel, & Michael H. Hoeflich, eds. 1993); Richard L. Marcus, *Review Essay: Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005) (“American proceduralists have not been comparativists.”); Linda Mullinex, *American Exceptionalism and Convergence Theory*, in COMMON LAW CIVIL LAW AND THE FUTURE OF CATEGORIES 41, 45 (Janet Walker & Oscar G. Chase, eds. 2010) (“the one common characteristic among American law reform projects is the lack of reference to foreign law”). See also Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147 (1994), originally published in FESTSCHRIFT FÜR KARL BEUSCH ZUM 68. GEBURTSTAG 853 (1993); Ernst C. Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, in THE INTERNATIONAL PRACTICE OF LAW 213 (Nedim Vogt, et al., eds., 1997).

supporting literature such as not been seen before. The success of the European Union portends still more opportunities for Americans to learn how civil law systems work.

Yet these books and articles alone will not be sufficient to induce Americans to learn about civil law civil justice systems. Many are descriptive of foreign systems and are couched in those systems' own terms. They do not relate foreign solutions to American problems. They are written by non-Americans with non-American audiences in mind.

For Americans the civil law is different and exotic;¹⁴ civil justice in civil law countries is mysterious and unfamiliar. Common law jurists have for centuries been suspicious of continental procedures. They assume that the civil law has a "different moral and legal framework;"¹⁵ its adoption in the United States is an "absolutely foreign" notion.¹⁶ This suspicion has blocked meaningful learning about foreign alternatives. It must be cleared way and knowledge substituted if Americans are to benefit from foreign experiences. For when it is cleared away, one can see that a particular civil law institution is "hardly exotic" and that its elements may be "equally applicable to our own."¹⁷

Professor Kevin M. Clermont, an author of a leading introduction to American civil procedure,¹⁸ demurs to borrowing, not because of suspicion, but because "foreign practice is not sufficiently familiar to most lawyers for the comparison to serve the practical purpose of a guiding hand."¹⁹ The knowledge deficit is, indeed, great. Few Americans scholars have seriously studied even one civil law system. American law schools pay civil law systems little mind. Sometimes, what they do teach is simplistic at best and misleading at worst; a generation ago one critic spoke of "a smattering of ignorance."²⁰ Thanks to neglect, today most Americans, if they have any knowledge of civil justice abroad, have a comic book picture of "the inquisitorial system."

¹⁴ See, e.g., *Carden v. Arkoma Assocs.*, 494 U.S. 185, 190 (1990) (opinion of Scalia, J. for Court, quoting prior decision describing Puerto Rican *sociedad en comandita* form of business organization as "an exotic creation of the civil law"). Some would avoid comparison by the moniker of "American exceptionalism." See Appendix.

¹⁵ Antonin Scalia in Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University, Washington College of Law, January 13, 2005.

¹⁶ Antonin Scalia, Address, January 4, 2010, Jackson Mississippi, sponsored by Mississippi College School of Law, quoted saynsumthn.wordpress.com/.../supreme-court-justice-antonin-scalia-on-abortion-and-international-law/.

¹⁷ *Carden v. Arkoma Assocs.*, 494 U.S. at 208 (O'Connor, Brennan, Marshall and Blakmun, JJ., dissenting).

¹⁸ KEVIN M. CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE CONCISE HORNBOOK* (2nd ed. 2008).

¹⁹ KEVIN M. CLERMONT, *THREE MYTHS ABOUT TWOMBLY-IQBAL 8* (May 22, 2010, Cornell Legal Studies Research Paper) available at SSRN: <http://ssrn.com/abstract=1613327>.

²⁰ Benjamin Aaron, *Labor Courts: Western European Models and Their Significance for the United States*, 16 U.C.L.A. L. REV. 847, 851 (1969).

It is our purpose in writing this book to help make civil justice in Germany and Korea more familiar and less frightening to Americans. So we have written a book that is not a treatise for specialists, but *is* an introductory textbook for civil justice in the United States, Germany and Korea.²¹ We intend for it to be accessible to people with an educated layman's knowledge of a modern legal system. We do not limit our audience to Americans. We want this book to help introduce Germans and Koreans to American civil justice. We want it to work for readers from all lands interested in civil procedure. Non-Americans need, too, to find familiarity and not only fear in the American system.²²

To present three entire systems of civil justice, even at an introductory level, is a daunting task which we do not undertake. We have a more modest approach that we believe is sufficient to achieve our goal of making each of our systems a little less foreign to readers from other systems.

*Familiarizing Foreign Civil Justice:
The Biography of a Lawsuit in Three Countries*

We present our three systems by looking at a particular dispute as it would develop differently in each. We present, in effect, a biography of a lawsuit. This is a genre with a long tradition in the United States and before that in England.²³ What makes our biography unusual is that it is a biography of the same lawsuit in three different systems.²⁴ By using a particular case we can focus on those aspects of our systems of civil justice that are most relevant to understanding without being diverted by consideration of matters

²¹ In this book we use "American" to describe the United States of America and do not include Canada, Mexico, or other parts of the Americas. We use "Korean" to describe the Republic of Korea, *i.e.*, South Korea and do not include the People's Republic of Korea, *i.e.*, North Korea.

²² Foreigners are no less frightened of the prospect of an American lawsuit: it gives them nightmares! See James R. Maxeiner, *Book Review*, 23 INT'L LAWYER 321 (1989); ROLF STÜRNER, WHY ARE EUROPEANS AFRAID TO LITIGATE IN THE UNITED STATES (2001).

²³ Compare ABRAHAM CARUTHERS, HISTORY OF A LAWSUIT IN THE CIRCUIT COURT OF TENNESSEE: ADDRESSED TO A LAW STUDENT (1st ed. 1852; 6th ed. by Sam B. Gilreath 1937) with MARC A. FRANKLIN, THE BIOGRAPHY OF A LEGAL DISPUTE: AN INTRODUCTION TO AMERICAN CIVIL PROCEDURE (1968); STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 59 (2006) ("Chapter 4. An American Civil Litigation From Beginning To End"). See also RICHARD BOOTE, AN HISTORICAL TREATISE OF AN ACTION OR SUIT AT LAW: AND OF THE PROCEEDINGS USED IN THE KING'S BENCH AND COMMON PLEAS FROM THE ORIGINAL PROCESSES TO THE JUDGMENTS IN BOTH COURTS (1781); JOHN WILLIAM SMITH, AN ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW, AMERICAN EDITION FROM THE THIRD LONDON EDITION BY DAVID BABINGTON RING (1848).

²⁴ This is not the first such biography. Catalyst for this book and the first such biography is ANDREW J. MCCLURG, ADEM KOYUNCU & LUIS EDUARDO SPROVIERI, PRACTICAL GLOBAL TORT LITIGATION: UNITED STATES, GERMANY AND ARGENTINA (2007).

not germane to that case. The particular case gives a “contextual anchor” so that readers can move from one system to another without being cast adrift.²⁵

We present all three systems of civil justice in their daily workings. We avoid the technical, the unusual and the abuses. By focusing on the usual, we hope to make all three systems more familiar. In the usual we see common cause in working to realize common values.²⁶ To address the technical or the usual or the abuses would accent differences among our systems; it would make difficult appreciation of what all three systems have in common. The unusual do not appear across all systems, at least, not in the same way.

To keep our book focused on the goal of American law reform, we have limited it to three systems of civil justice. We chose the German system because throughout world the German system is rightly viewed as a success story. Perhaps more than any other, it has been the principal counterpoint to American civil justice. Among civil law systems, only the French system is a competitor. While we might have chosen the French system as a second system, that would introduce a different world of legal concepts while remaining a Euro-centric comparison. We have instead chosen the Korean system. Korea is a non-Western society that has been greatly influenced in its law by both the German and the American systems. The Korean system of civil justice straddles the German/American divide. It provides an example of a system choosing between our two principal competing approaches.

As American readers know, we have also had to make a choice from among the civil justice systems of the fifty United States. We chose the federal system. Focusing on the federal system is a common convention in American works on civil procedure. Practically, one can present only one American system. The federal system is the closest that there is to a model for all systems. While there is no better choice as model for lawsuits, it has an important deficiency: the federal system focuses on cases that are large cases in most systems of civil justice, *i.e.*, where the amount in controversy is in excess of \$75,000.²⁷

We have also chosen not to address “alternative dispute resolution” or “ADR” as it is known. ADR is a way that parties, by agreement before a dispute arises, often in a standard form agreement, or after a dispute arises, by special agreement, arrange to have a private body resolve their dispute. It is particularly popular in the United States, in part, because the alternative, ordinary civil justice, is less palatable in the United States than elsewhere.

²⁵ See Andrew J. McClurg, *Preface* xii, in MCCLURG ET AL., *supra* note 24; *cf.* Markesinis, *infra* note 29, at 30.

²⁶ While we assert common values and common cause, we are not injecting our book into what comparative scholars speak of as a search for a “common core” of legal systems.

²⁷ See Oscar G. Chase, *Reflections on Civil Procedure Reform in the United States: What has been learned? What has been accomplished?* in *THE REFORM OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE* 163, 164 (Nicolò Trocker & Vincenzo Varano, eds. 2005).

We choose not to address it, because our point in this book is to provoke making American civil justice more palatable.²⁸

The Provocative in Our Book

Lay readers may think that our book is provocative because we see American civil justice as flawed.²⁹ To observe that American civil justice is flawed, however, is not provocative. It is conventional wisdom; others have said that for a long time.³⁰ What makes our book provocative is that we urge Americans to look abroad for insights for improving their system of civil justice.³¹ Here are five objections that we expect to locating insights in foreign law in general and in German law in particular:³²

1. American civil justice is the best in the world (“not invented here”).³³
2. German civil justice is not as good as we assert (“not so good there”).³⁴

²⁸ Cf. Langbein, *The Influence of German Émigrés*, *supra* note 13, at 323-324 (“Rather than confront the problem directly and undertake to solve it, we escape the problem by encouraging propertied persons to buy their way out, which leaves the poor and the unsophisticated to bear the main burden of victimization.”).

²⁹ See Basil Markesinis, *Ways and Means of Teaching Foreign Law*, 23 TULANE EUR. & CIVIL L. FORUM 175, 204-206 (2008).

³⁰ We list in the Bibliographic Notes more than 150 such critiques. The most famous such critique is: Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REP. 395 (1906).

³¹ Common law systems are found in those countries where English is a national language and where Englishmen are either native or colonized the land. Civil law systems are found in most other modern countries.

³² We need not be good soothsayers to foresee it: similar objections greeted John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) and recent references by United States Supreme Court justices to foreign law.

³³ E.g., Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 36 HARV. J.L. & PUB. POL'Y 175, 175-176 (2003) (drawing a parallel to Churchill's famous aphorism about democracy). See generally Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from ‘Civilized’ European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147 (1994), originally published in Festschrift für Karl Beusch zum 68. Geburtstag 853 (1993); Ernst C. Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning from Comparative Law?*, in THE INTERNATIONAL PRACTICE OF LAW 213 (Nedim Vogt, et al., eds., 1997). See also, Schlesinger, *supra* note 6, at 363 (noting the same xenophobia for criminal procedure).

³⁴ Professor Allen of Northwestern University Law School is Professor Langbein's principal protagonist on this point. See Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for Fewer Generalities and Greater Detail in Comparative Law Scholarship*, 82 NW. U. L. REV. 705 (1988). For Professor Langbein's response, see John H. Langbein, *Trashing “The German Advantage,”* 82 NW. U. L. REV. 763 (1988). While Professor Allen questions the factual claims made for German civil justice, Professor Cappalli of Temple University School of Law argues the positive case that American common law methods are better. See RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD (1997); Richard B. Cappalli, *Richard B. Cappalli, At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMPLE INT'L. & COMP. L. J. 87 (1998). See also Robert Adriansen, *At the Edges of the Law: Civil Law v. Common Law: A Response to Professor Richard B. Cappalli*, 12 TEMP. INT'L & COMP. L.J. 107 (1998).

3. American institutions of dispute resolution embody American cultural values that are incompatible with cultural values embodied in German dispute resolution institutions (“American exceptionalism”).³⁵

4. American civil justice serves public law functions that German and Korean civil justice do not and which limits the value of international insights.³⁶

5. Practically, for the foregoing reasons, and because of the self-interest of those who preside over the system, it is foolish to think that Americans would ever adopt foreign models of civil justice (“real reform is hopeless”).³⁷

We do not in this book answer these objections directly. Instead, we present information that we hope will enable readers to reach their own conclusions.³⁸ We want first to help overcome the knowledge deficit. Throughout the book we point to factors that bear on these questions. We seek to provide helps to readers in pursuing these issues on their own.

With respect to one of these objections—the asserted exceptional public law functions of American civil justice—our pedagogic approach of looking at how our respective systems handle a single hypothetical case necessarily

³⁵ Professor Oscar G. Chase of New York University School of Law is the eloquent proponent of this view. His argument is that it is the general culture itself and not the legal culture that determines these differences. See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002); Oscar G. Chase, *Culture and Disputing*, 7 TULANE J. INT’L & COMP. L. 81 (1999); OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005); Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1 (1997); Oscar G. Chase, *Reflections on Civil Procedure Reform in the United States: What has been learned? What has been accomplished?* in THE REFORM OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE 163 (Nicolò Trocker & Vincenzo Varano, eds. 2005). For Professor Langbein’s response to one of these, see John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT’L & COMP. L. 41 (1997). In a similar direction, see Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987). Professor Chase is not, however, the first proponent of the view. See already Samuel Tyler, *Introduction*, in HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (Samuel Tyler ed., 3d Am. ed., 2d London ed. 1871). We cannot resist commenting on Professor Chase’s selection of four features that demonstrate the influence of American culture on civil procedure: the civil jury, pretrial discovery, the role of the judge, and the role of the expert witness. “American Exceptionalism,” *supra* at 287-301. Only the third would support not making changes in contemporary civil justice. As we show below the civil jury has practically disappeared. On the other hand, pretrial discovery as we know it today originates only in 1938 and in the present form later, so that we cannot see it as an immutable part of American culture. We cannot easily imagine that culture has much to say about expert testimony.

³⁶ See Appendix

³⁷ Professor Langbein reports that Max Rheinstein, the dean of the generation of émigré German scholars from the 1930s, thought the vested interests of those who run the defective legal machinery make reform of procedure “hopeless.” See Langbein, *The Influence of German Émigrés on American Law*, *supra* note 13, at 322-323, 326-327. See also John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990).

³⁸ See Basil Markesinis, *Book Review Essay: Ways and Means of Teaching Foreign Law*, 23 TULANE EUR. & CIVIL L. FORUM 175, 206 (2008).

means that we do not consider that argument in our principal discussion. So as not to leave it unaddressed, we summarize it in the Appendix and explain why we believe that it does not undercut the utility of comparative examination.

* * *

Finally, a word on responsibilities: while we share the conclusions stated, our experiences and knowledge on which those conclusions are stated, vary. Professor Maxeiner bears primary responsibility for the work as a whole and, in particular, for comparative conclusions.

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ACKNOWLEDGMENTS

To be added.

CHAPTER 1

INTRODUCTION:
 THE PURPOSE OF CIVIL JUSTICE
 THE THEME OF THIS BOOK
 THE STRUCTURE OF THIS BOOK
 THE FACTS OF THE HYPOTHETICAL CASE

Justice—Civil Justice.



JUSTICE is the measuring out to each individual what is his due, according to the inflexible rule of right. Justice is frequently personified, and represented as holding a pair of balanced scales, thus indicating its disposition to estimate things by the true and even standard of right.

Political or civil justice, is the measuring out what a man may claim according to the laws of the land. If the laws are founded in absolute justice, then political or legal justice coincides with absolute justice.

THE YOUNG AMERICAN (popular schoolbook, 1844)³⁹

Civil justice describes the system of the administration of justice in civil matters. The law of civil procedure is the law that governs lawsuits, *i.e.*, civil actions, among private parties.

³⁹ S.G. GOODRICH, THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE AND NECESSITY. FOR THE USE OF SCHOOLS 23 (4th ed., 1844).

Whether in the United States, Germany or Korea, the course of a civil action is simply stated and similar in outline. One person feels aggrieved by another person. Usually before bringing a lawsuit, the aggrieved person asks the other to make the matter right. Only if the latter fails to make the matter right does the aggrieved person take the matter to court.

The aggrieved person, i.e., the plaintiff, commences a civil action with a formal complaint. The complaint declares a claim against one or more defendants. It asserts the plaintiff's right or defendant's duty or both and asks the court to recognize and enforce the rights or duties claimed. Upon officially receiving the complaint, the defendant has three principal alternatives: comply with the claim, ignore the claim and accept a judgment by default, or contest the claim.

Together, complaint and any written answer or subsequent reply to such an answer, constitute pleadings. Pleadings define the subject matter of the lawsuit; they begin a process of applying law to fact. Subsequent proceedings find facts that are then judged according to law. At the end of that process, if parties do not themselves otherwise resolve the dispute, the court issues a judgment that concludes the matter. A party dissatisfied with that judgment ordinarily may appeal to a higher court. After all appeals are exhausted, there is a final decision according to law.

The Purpose of Civil Justice

The purpose of civil justice is determination of rights and duties among private parties according to law. Determining rights and duties of parties resolves their disputes.

If there were no civil justice, private parties might use self-help to realize rights and to resolve disputes. The stronger, rather than the righteous, would prevail. To preserve peace and right, modern legal systems prohibit self-help except in a few cases.

Primitive legal systems worked differently. They emphasized dispute resolution over right determination. Process—not substantive law—resolved disputes. Resolving the dispute determined the right rather than determining the right resolved the dispute. Primitive systems used methods of decision, such as trial by ordeal or trial by battle, which were unrelated to parties' rights. At least since the eighteenth century Enlightenment, however, modern systems of civil procedure have rested on the idea that rights of parties as set forth in

law and not the skills of the parties or of their representatives should determine outcomes of disputes.⁴⁰

Realizing rights and resolving disputes are essential purposes of modern systems of civil justice. They lie at the heart of American law. Sir William Blackstone, whose famous *Commentaries* once were the Bible of American lawyers, began his third book on Private Wrongs: “The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited.”⁴¹ Nearly two-and-one half centuries later, a report of a committee of the American College of Trial Lawyers echoes Blackstone: “Our civil justice system is critical to our way of life. In good times or bad, we must all believe that the courts are available to us to enforce rights and resolve disputes – and to do so in a fair and cost-effective way.”⁴²

Civil procedure is more important than the lawsuits it governs. Civil procedure implements substantive law. Thomas W. Shelton, a founding father of modern American civil procedure, likened procedure to the arteries through which our blood flows: “so surely as the human heart connected with clogged arteries must eventually cease to beat, so certainly will a government retarded by clogged judicial procedure surely decay.”⁴³

Civil justice makes civil society possible. People comply with law because they know what it requires and because they believe that it applies to everyone. Most people most of the time observe most laws. They apply laws to themselves. Effective civil justice is essential if law is to provide guidance that makes self-application possible. For every instance of application of law in a lawsuit, there are millions of instances of individuals applying law to themselves without lawsuits.⁴⁴

The Theme of This Book:

Civil Justice that is Just, Speedy, Inexpensive and Accessible to All

We take the theme of our book from the “open courts” clause of the Maryland Declaration of Rights of November 3, 1776. The Declaration of Rights is intended to be “the best means of establishing a good constitution

⁴⁰ Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1522-1523 (1998). Professor Carrington was Reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States, 1985-1992.

⁴¹ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1768; 1st Am. ed., Philadelphia, 1772).

⁴² 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 23 (2009). If one doubts this judgment, one need only examine conditions in countries where this is *not* the case.

⁴³ THOMAS W. SHELTON, THE SPIRIT OF THE COURTS 17 (1918).

⁴⁴ See James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO U.L. REV. 517, 523-524 (2006).

in this state, for the surer foundation, and more permanent security thereof.” The open courts clause promises a civil justice system that works well routinely:

17. That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.⁴⁵

In this book we present our three systems of civil justice in comparative perspective; we examine the methods that each system uses to pursue those goals. In the clause we find four promises:

(1) **Substantive accuracy:** does the system work to decide disputes correctly, that is, accurately according to substantive law and consistent with justice? (Does the system provide “*justice and right ... according to the law of the land?*”)

(2) **Procedural fairness:** does the system work to decide disputes fairly, that is, does it secure the right to be heard, that is, a “day in court,” as the right to be heard is known in the United States? (Does the system decide “*by the course of the law of the land?*”)

(3) **Access to justice:** does the system assure access to courts to all? (Does the system make justice available to all persons “*freely without sale [and] fully without any denial?*”)

(4) **Efficiency:** does the system decide disputes efficiently and timely? (Does the system decide “*speedily without delay?*”)

We adopt these promises from the Maryland Declaration of Rights as our theme because they are timeless and universal in modern legal systems. They are not limited to the eighteenth century; they speak to our time.⁴⁶ They are not peculiar to the American legal system; they are fundamental to the German and Korean legal systems.⁴⁷ The promises of accuracy, fairness, access and efficiency are elementary legal learning.⁴⁸ We return to these

⁴⁵ *Maryland Declaration of Rights of Nov. 3, 1776*, in THE DECISIVE BLOW IS STRUCK, A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTION CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977).

⁴⁶ *E.g.*, Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENVER U.L. REV. 437, 442 (2010).

⁴⁷ *See, e.g.*, Charter of Fundamental Rights of the European Union, Art. 47. 2000/C O.J. 364/01.

⁴⁸ *See* JAY M. FEINMAN, LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM 90-91 (2000).

promises throughout the book, for these promises are ideals of every modern system of civil justice.

The open courts clause goes back to the earliest days of Anglo-American law. Its origin is Chapter 40 of the Magna Carta of English law. Chapter 40 found resonance in colonial America. Maryland was not alone in adopting it; most states followed suit. Article XI of the 1780 Declaration of the Rights of the Commonwealth of Massachusetts is similar. Another close relative was proposed by Virginia for inclusion in the federal Bill of Rights.⁴⁹ Today the open courts clause is in force in Maryland as part of the state constitution. Most states of the United States of America have similar or related provisions in their constitutions.⁵⁰

The ideals of the open courts clause are fundamental to the Federal Rules of Civil Procedure of 1938 on which modern American civil procedure is based. The Federal Rules “seek the costless application of substantive law onto specific disputes in the form of judicial decisions.”⁵¹ Rule 1 provides that the Rules are to “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” When the drafters formally unveiled the Rules to the legal profession at the Fifty-Ninth Annual Meeting of the American Bar Association in 1936, the Secretary of the drafting committee blessed them by reading from Magna Carta Chapter 40: “To none will we sell, to no one will we deny, or delay, right or justice.”⁵² He explained the need for the then new rules: “What is the matter with present methods of the trial of cases? Every one, I think, will agree that our methods of procedure have three major faults. First, delay; second, expense; third, uncertainty.”⁵³ The then new rules were to remedy these maladies. They were to fulfill the promises of open courts: accuracy, fairness, access and efficiency.

Making Civil Justice Just, Speedy, Inexpensive and Accessible to All

In this book we ask how our respective systems work to make civil justice just, speedy, inexpensive and accessible. We engage in a comparative examination because we believe that that is one way to identify those methods that work better than other methods. We are not conducting a contest over which is better.⁵⁴ Each system has its unique properties. Each

⁴⁹ See A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 284-297 (overview), 458 (Massachusetts), 464 (Virginia), 483-487 (cataloging state constitutional provisions (1968).

⁵⁰ See Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1311 (2003).

⁵¹ SAMUEL ISSACHAROFF, *CIVIL PROCEDURE* 1 (2nd ed. 2009).

⁵² Edgar B. Tolman, *Statement, The New Federal Rules of Civil Procedure*, 61 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 423, 432, 433 (1936).

⁵³ *Id.* at 437.

⁵⁴ See, e.g., *DOING BUSINESS IN 2004: UNDERSTANDING REGULATION* (The International Bank for Reconstruction and Development/The World Bank 2004); Benedicte Favuarque-Cosson &

system has its successes and its failures. None is perfect. Our search is for better ways for each system.⁵⁵ Necessarily each solution will be different; but each system can profit from experiences of the others.

While our intention is not to judge one system better than the other, we cannot avoid a seemingly competitive observation: the consensus judgment of Americans of their own system of civil justice is that it fails to achieve the goals that it sets out for itself. It does not deliver justice justly, quickly and inexpensively to all.⁵⁶ The consensus judgment of Germans of their own system of civil justice, in contrast, is that it does do these things well, if not perfectly. The consensus judgment of Korean jurists is that their system—still in historical terms a relatively new one—is on its way to achieving these goals and that their job is to win the confidence of a skeptical public by making sure that it does achieve them.

A natural consequence of these different judgments is that we give attention to those aspects of the American system that undermine and to those aspects of the German and Korean systems that promote realization of a civil justice system that is just, quick, inexpensive and accessible. We turn now to consider the states of civil justice in our countries.

The State of American Civil Justice

That American civil justice did not work well until the 1938 Federal Rules—that it was expensive, time-consuming and even incoherent—has become an “organizing perspective” for law school classes.⁵⁷

That the Federal Rules, despite great hopes, have led to ever more expensive and time-consuming lawsuits has become a commonplace of our

Anne-Julie Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, 57 AM. J. COMP. L. 811 (2009).

; RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 76 (1996) (asking that question of England and America).

⁵⁵ See, e.g., *American Law Institute Study on Paths to a “Better Way,” Litigation, Alternatives, and Accommodation, Steering Committee Report*, 1989 DUKE L.J. 811; LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *infra* note 99.

⁵⁶ Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENVER U.L. REV., 407 (2010) (“I start from the premise that our civil justice system is broken. ... [O]ur system is not sustainable in the long run.”) The perception of failure to satisfy open courts values is not limited to the United States. According to Justice Ronald Sackville civil justice systems in common law countries generally are thought “unable to meet basic objectives of fairness, affordability and efficiency.” Ronald Sackville, *Reforming the Civil Justice System: The Case for a Considered Approach*, in *BEYOND THE ADVERSARIAL SYSTEM* (Helen Stacy & Michael Levarch, eds., 1999). With these hopes in mind, England and Wales changed their civil justice system. See LORD WOOLF, MASTER OF THE ROLLS, *ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES* (1996).

⁵⁷ John Leubsdorf, *The Myth of Civil Procedure Reform*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 53 (Adrian A.S. Zuckerman, ed., 1999). Cf. Paul D. Carrington, *A New Confederacy?*, *supra* note 57, at 932 (“nineteenth century civil procedure was a sport of chance in which the substantive merits of claims and defenses played a minor role.” [citations omitted]).

generation.⁵⁸ The Federal Rules of Civil Procedure of 1938 have not lived up to the hopes of their drafters. While few jurists doubt the continued validity of the drafters' ideals,⁵⁹ many question their system's fidelity to them.⁶⁰

In 2009 a committee of the American College of Trial Lawyers reported that the civil justice system "is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much."⁶¹ A survey of the members of the Litigation Section of the American Bar Association found general agreement that it is not cost-effective to litigate cases for less than \$100,000.⁶² That amount is nearly double the median American household income.⁶³ Thirty-seven percent of litigating lawyers responding said the Federal Rules are not conducive to attaining the Rules' goals of just, speedy and inexpensive determination of all suits.

Criticisms of American civil justice are legion. The history of American civil procedure is said to be "an unending effort to perfect the imperfect."⁶⁴ While in the last generation criticisms have swelled,⁶⁵ there has scarcely been a time in American history when there was not substantial criticism. Already Benjamin Franklin's *Poor Richard's Almanack of 1733* included a satirical poem on the "Benefit of Going to Law."⁶⁶

In finding the American system as in need of fixing, we are not being unduly critical or fair in our comparison. So that no reasonable reader shall doubt whether we are even-handed, we list in a bibliographic note more than 150 mostly separately published critiques; many make more dire judgments than ours. We begin our list with titles that predate Jesse Higgins' 1805 pamphlet, *Sampson against the Philistines, or the Reformation of Lawsuits; and Justice made Cheap, Speedy, and Brought Home to Every Man's Door*, and conclude with titles that postdate Al Sampson's 2004 book, *Lawyers Under Fire: What a Mess Lawyers Have Made of the Law!* We note Chief

⁵⁸ Leubsdorf, *supra* note 58 at 53.

⁵⁹ *But see* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENVER U.L. REV. 287, 288 (2010), at 288 (asserting that Rule 's statement of them is "misleading and counterproductive" and has three assumptions that "make little sense for modern litigation").

⁶⁰ *E.g.*, Steven S. Gensler, *Justice! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 273 (2008) ("the future of federal rule making depends not on finding new ideals but on fidelity to the ones we have.").

⁶¹ AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note 42, at 2.

⁶² *Id.* at 6.

⁶³ In 2008 the median household income was \$52,029. U.S. Census Bureau, State and County Quick Facts, <http://quickfacts.census.gov/qfd/states/00000.html>.

⁶⁴ Tidmarsh, *Resolving Cases "On the Merits," supra* note 56, at 407.

⁶⁵ One of the first and best of the new wave is MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1976). It was reviewed by the then director of the Max Planck Institute for Foreign and International Private Law in Hamburg. Hein Kötz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478 (1981). Kötz concluded his review with the exhortation: "If there is a desire to reform American civil procedure, either by making changes within the adversary system or by developing alternative methods of dispute resolution, the Continental experience may be well worth studying." *Id.* at 486.

⁶⁶ Quoted below in the Bibliographic Notes.

Justices of the United States (e.g., Taft, Warren and Burger) and presidents (e.g., Taft, Wilson and Bush) who have joined in the clamor for civil justice reform.

The State of German Civil Justice

According to the German Minister of Justice, German civil justice approximates the ideals of the open court's clauses. It "is predictable, affordable and enforceable. [German] legislation balances the various interests in a fair and equitable manner, ensuring just solutions. Everyone has access to law and justice, independent of their financial means. ... German courts decide without delay"⁶⁷ While to a skeptic this can only be political puffery, the minister's claim is credible. Legal aid is available to most people who need it. The system is not limited to large claims, but handles them all. While in the United States only cases in excess of \$100,000 are considered viable, in Germany, few cases are that large.⁶⁸ Courts deal with most cases with dispatch: in 2009 the courts of general jurisdiction in first instance concluded 56.9% within 6 months and 80.1 % within a year.⁶⁹

We explain in the Appendix that the present day German civil justice system is the system established in the first twenty-five years following German unification in 1871 in the Code of Civil Procedure of 1877, the Court Organization Law of 1877 and the Civil Code of 1896. That system worked well then and does today. It has long been admired in the world,⁷⁰ including in the Common Law world.⁷¹ At home it has long been held in high regard; it has been subject to no criticism remotely comparable to that of its American counterpart. As we shall discuss it is the task of the Federal

⁶⁷ LAW—MADE IN GERMANY; GLOBAL—EFFEKTIV—KOSTENGÜNSTIG 3 (2008), available at www.lawmadeingermany.de.

⁶⁸ About 20% exceed about €0,000 (about \$62,500).

⁶⁹ STATISTISCHES BUNDESAMT, RECHTSPFLEGE, ZIVILGERICHTE, JUSTIZSTATISTIK DER ZIVILGERICHTE (FACHSERIE 10 REIHE 2.1) Table 5, 50-51 (2009), available at www.destatis.de.

⁷⁰ See DAS DEUTSCHE ZIVILPROZESSRECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN (Walther J. Habscheid, ed. 1991). In Bavaria, the numbers were still better, 60.7% within six months and 83.2% within a year.

⁷¹ See Frederick William Maitland, *The Making of the German Civil Code* in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 484 (Fisher, ed., 1911); Roscoe Pound, *The Causes of the Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 397 (1906) ("the wonderful mechanism of modern German judicial administration"); FREDERICK FRANK BLACHLY & MIRIAM EULALIE OATMAN, THE GOVERNMENT AND ADMINISTRATION OF GERMANY (Brookings Institution 1928); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). Langbein's article created a stir in the American legal community. For reviews of that stir, see Michael Bohlander, *The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties*, 13 TUL. EUR. & CIV. L.F. 25, 33 (1998); Bradley Bryan, *Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question*, 11 TULSA J. COMP. & INT'L L. 521, 523 (2004).

Ministry of Justice to watch over that system to assure that it continues to work well.⁷²

The principal problem that the system has had to cope with in recent years has been resources: demand for civil justice continues to rise, but financial means available to meet the demand have not kept pace. To keep costs within bounds, many first instance cases that were formerly would have been handled by three judges are now handled by one. Appeals that formerly would have conducted as proceedings *de novo* now concentrate on correction of incorrect decisions.

The State of Korean Civil Justice

Korea today has a modern legal system that in structure and methods differs little from western legal systems. The goals of civil justice in modern Korea are the same as they are in the United States and in Germany. Conditions are, however, different. As we explain in the Appendix, due to thirty-five years of foreign occupation (1910-1945), when judicial administration was part and parcel of repressive government and the legal system was seen as a means of obliterating national identity, and thanks to another forty-two years of authoritarian rule (1945-1987), the Korean system is a newcomer to the rule of law. In the last quarter century, however, Korea has had success in building a firm and sound system suitable to support its modern economic and social systems. So great has been that success that Korea is often seen as a model for other developing countries.⁷³

Korean jurists recognize that they are still overcoming a deep alienation to law that developed in those dark years.⁷⁴ The long-tradition of faith in institutions found in the United States and the similar tradition of faith in law found in Germany are both under construction in Korea. Korean jurists cannot count on the benefit of doubt that long traditions bring; more than their counterparts in the United States and in Germany, they must prove the virtues of their institutions and rules.

⁷² For example, although the system handles most cases expeditiously, to meet claims that it is too slow in some instances, the Ministry has proposed a law that would give litigants subject to undue delay a modest monetary claim for damages. *See*, Gesetzentwurf der Bundesregierung: Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren (12. August 2010).

⁷³ *See* Youngjoon Kwon, *Korea: Bridging the gap between Korean substance and Western form*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 151, 152 (Ann Black & Gary F. Boll, eds., 2011); Won-Ho Lee, *Kurzer Abriss über Koreanisches Recht in Vergangenheit und Gegenwart*, in *FESTSCHRIFT FÜR BERNHARD GROBFELD ZUM 65. GEBURTSTAG* at 687 (Ulrich Huber & Werner Ebke, eds., 1999).

⁷⁴ *Id.* *See* Chang-Rok Kim *Where is the Korean Legal System Going?*, in *LAW IN A CHANGING WORLD - ASIAN ALTERNATIVES: PROCEEDINGS OF THE FOURTH KOBE LECTURES BEING THE FIRST ASIA SYMPOSIUM IN JURISPRUDENCE, TOKYO AND KYOTO, 10 AND 12TH OCTOBER 1996*, 11, at 14-16 (Yasutomo Morigiwa, ed., 1998).

Among the greatest challenges to modern Korean civil justice is improving public confidence in the legal professions. Surveys find public confidence in the judiciary at a low level (only 50% in one). In Chapter 3 we discuss some of the possible sources for this lack of confidence. One is a civil service system for judges that finds ex-judges representing clients before former colleagues. Another is a lawyer licensing system that until recently allowed only a very few people to become lawyers and which meant that most parties in civil cases represent themselves.

In building the rule of law Korean jurists have taken profound interest in foreign legal systems and, in particular, in the Japanese system (which they inherited from the occupation), in the German system (on which the Japanese system is based) and in the American system (thanks to the overwhelming economic and political presence of the United States and of English in Korea). Many Korean jurists have journeyed abroad looking for optimal solutions for their civil justice system. As we shall see below, in civil justice, while Korean jurists have flirted with American innovations, they have largely gravitated toward modern German methods.

Structure of this Book

This book is a comparative introduction to civil procedure in the United States, Germany and Korea.⁷⁵ We present civil procedure in three countries using the medium of examination of a particular factual situation as it might develop differently in each. We present, in effect, a biography of a lawsuit. This is a genre with a long tradition in the United States and before that in England.⁷⁶ What makes our biography unusual is that it is a biography of the same lawsuit in three different jurisdictions.⁷⁷

The idea is that placing rules of foreign law in context of their application facilitates their learning and appreciation. By using a particular case we can present rules against the context of those aspects of the systems that are most relevant for understanding, without being diverted by consideration of matters not germane to that case.⁷⁸ The particular case gives

⁷⁵ In this book we use “American” to describe the United States of America and do not include Canada, Mexico, or other parts of the Americas. We use “Korean” to describe the Republic of Korea, *i.e.*, South Korea and do not include the People’s Republic of Korea, *i.e.*, North Korea.

⁷⁶ *Compare* ABRAHAM CARUTHERS, HISTORY OF A LAWSUIT IN THE CIRCUIT COURT OF TENNESSEE: ADDRESSED TO A LAW STUDENT (1st ed. 1852; 6th ed. by Sam B. Gilreath 1937) with MARC A. FRANKLIN, THE BIOGRAPHY OF A LEGAL DISPUTE: AN INTRODUCTION TO AMERICAN CIVIL PROCEDURE (1968). *See also* JOHN WILLIAM SMITH, AN ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW, American Edition from the Third London Edition by David Babington Ring (1848).

⁷⁷ Professor Andrew J. McClurg, whose own book was catalyst to this one, deserves credit for the idea. *See* ANDREW J. MCCLURG, ADEM KOYUNCU & LUIS EDUARDO SPROVIERI, PRACTICAL GLOBAL TORT LITIGATION: UNITED STATES, GERMANY AND ARGENTINA (2007).

⁷⁸ For example, we discuss jurisdiction in general and as it applies to the case, but do not consider other than with a passing mention jurisdiction over things (*i.e.*, *in rem* jurisdiction).

readers a “contextual anchor” for what they are learning.⁷⁹ Thus we do not give comprehensive introductions to our three systems. We chosen a simple case to show how ordinary cases develop. Our case is *Mary Roh v. John Doh, Jr.*⁸⁰

*The Facts of the Hypothetical Case*⁸¹

Mary Roh and John Doh, Sr. have been personal friends and business associates for decades. Their two children, Rosa Roh and John Doh, Jr., fell in love in college and were engaged to get married.

Mary Roh has a Honda dealership in the nation’s capital; John Doh, Sr. holds the regional Honda distributorship, Honda Capital Area Distributorship, Inc., that supplies the dealership. The Distributorship is located in Second City. John Doh, Sr., intends for his son John Doh, Jr. to take over the family business. To foster that goal, in January he set up his son as manager of a new Honda dealership, DohSon Honda, LLC, in Second City.

In April 2011 Mary Roh and John Doh, Jr. attended the annual spring party of the national Honda dealers’ association. The meeting was sponsored by Capital Honda Distributorship Inc. and held in the nation’s capital. John Doh, Sr. was not there. John Doh, Jr. and Roh disagree about what was said between them at the party, but they agree that the next day Roh transferred [~~\$75,000—€60,000—₩75 million~~] to the account of DohSon Honda LLC.

In June the Roh-Doh engagement fell apart acrimoniously.

Later Roh said that John Doh, Jr. had come to her with an urgent request for cash. DohSon Honda LLC, suddenly had a shortfall. It didn’t need much—just [~~\$75,000—€60,000—₩75 million~~]—but Doh, Jr. did not want to go to his father for it, since that would shake his father’s faith that he could handle the dealership. He wanted a short-term loan—four months at the longest.

John Doh, Jr.’s version of events was different. He said that Roh’s version was nonsense: if he had needed money, he had personal credit lines of [~~\$75,000—€60,000—₩75 million~~]. He said that the money was a gift. Roh denied that the money was gift: if the money had been a gift, it would have been motivated by Doh, Jr.’s announced marriage to her daughter Roh.

⁷⁹ See Andrew J. McClurg, *Preface*, in MCLURG *et al.*, *supra* note 77, at xii; Basil Markesinis, *Ways and Means of Teaching Foreign Law*, 23 TULANE EUR. & CIVIL L. FORUM 1, 30 (2008).

⁸⁰ John & Jane Doe and Richard & Mary Roe are names used for fictitious or anonymous parties in the United States. *E.g.*, *Mary Roe v. John Doe*, 29 N.Y.2d 188 (1971); *Joan Roe v. Jane Doe*, 420 U.S. 307 (1975). To give the names a more international flavor and names more familiar in Germany and Korea, we have made them Roh and Doh.

⁸¹ The case facts find inspiration in: Armin Weber & Harriet Weber, “Geldsegen,” material distributed at the *Richterfortbildung* seminar of the Bavarian State Ministry of Justice, December 2006; 2 E.J. COHN, *MANUAL OF GERMAN LAW* 191-97 (1971); and *Ver Bryck v. Ver Bryck*, 379 Md. 669, 843 A.2d 758 (2004), *affirming in part, reversing in part*, 150 Md. App. 623, 822 A.2d 1226 (2003).

A broken engagement wasn't the only problem the two families had. Both parties' automotive businesses experienced unexpected industry-wide crises. At a summit of Honda dealerships held in early September to address the problem, Mary Roh asked Doh, Jr., when was he going to pay the loan back. It had been due, she said, August 15. She demanded that he pay it back immediately. Doh, Jr. looked surprised and asked why she was asking. Hadn't she always intended it as a gift? If you want your money back, he asked sarcastically, why don't you ask your daughter for it? Roh was speechless.

When Doh, Jr. paid nothing, Roh asked Doh, Sr., to intercede with his son. She told him that the money was a loan, but even if it had been a gift, now that the engagement was off, Doh, Jr. should give it back. When Doh, Sr. could not persuade his son to repay the money, Roh decided to bring a lawsuit to get back the money that she now desperately needed.

The Dohs and the Rohs live in three incarnations: in Maryland/Virginia, United States; Bavaria/Berlin Germany; and Busan/Seoul, Korea. The American Dohs live in Baltimore, Maryland, while the Rohs live in Alexandria, Virginia, in suburban Washington, DC. The German Dohs live in Munich, Bavaria, while the Rohs live in Berlin. The Korean Dohs live in Busan, while the Rohs live in Seoul.

	United States	Germany	Korea
Plaintiff Mary Roh	Virginia	Berlin	Seoul
Defendant John Doh, Jr.	Maryland	Bavaria	Busan
DohSon LLC	Maryland	Bavaria	Busan
John Doh, Sr.	Maryland	Bavaria	Busan
Location of meetings	D.C.	Berlin	Seoul

Our book consists of this introductory chapter, six topical chapters, a concluding chapter, an appendix of historical notes and an appendix of bibliographic notes. The subsequent chapters are:

Chapter 2. Thinking Like a Lawyer

Chapter 3. Lawyers & Legal Systems: Access to Justice

Chapter 4. The Court: Jurisdiction and Applicable Law

Chapter 5. Pleading: Structuring the Matter in Controversy

Chapter 6. Process: The Right to Be Heard

Chapter 7. Judgments, Appeals & Outcomes: Decisions According to Law

Chapter 8. Conclusions and Lessons

Appendix—Historical Notes

Bibliographic Notes

CHAPTER 2

LEGAL METHOD
THINKING LIKE A LAWYER**Contemporary Korean Lawyer**

Before we discuss our lawsuit in three systems, we address basic legal methods. What we say may seem obvious, but our experience suggests that that which is obvious in one legal system, may not be in another.⁸² We consider what it means to *think like a lawyer* and we look at *sources of law*, i.e., principally statutes and court decisions.

Deciding according to law requires determining applicable rules, finding facts, and applying rules to facts. This is considerably more difficult than is generally supposed. The legal rule cannot always be read from a single statute or precedent. It often is necessary to search statutes and precedents, analyze them, compare them to facts, revisit statutes and precedents in light of the facts, and again examine facts in light of the law. The end result is to bring facts and law together.

Substantive law, as distinguished from procedural law, determines rights and duties abstractly. Civil procedure translates those abstract statements of rights and duties into determinations of rights and duties in individual cases. Its method is legal reasoning. Some form of legal reasoning is universal among modern legal systems. Legal reasoning is familiar to anyone who has studied in law school for only a single term. In America, it is known as

⁸² See, e.g. James R. Maxeiner, *Law without Justice? Do the Right Thing and Reform Legal Reasoning*, forthcoming (comparing two discussions of thinking like a lawyer).

“thinking like a lawyer.”⁸³ In Germany and Korea it is called “legal thinking.”⁸⁴

One introductory text provides a concise definition of legal reasoning in the United States. Legal reasoning requires that one:

1. identify the applicable sources of law, usually statutes and judicial decisions;
2. analyze these sources of law to determine the applicable rules of law and the policies underlying those rules;
3. synthesize the applicable rules of law into a current structure in which the more specific rules are grouped under the more general ones;
4. research the available facts; and
5. apply the structure of the rules to the facts to ascertain the rights or duties created by the facts, using the policies underlying the rules to resolve difficult cases.⁸⁵

This formulation is not the only one found in the United States. Other formulations emphasize legal argument more and law application less. But it is within the American mainstream. It is a theory of legal reasoning that relies principally on syllogisms for application of law.⁸⁶ The classic syllogism consists of a major premise, a minor premise and a conclusion. A famous example is: “All men are mortal; Socrates is a man; therefore, Socrates is mortal.”

There is nothing mystical about syllogistic reasoning. Justice Antonin Scalia of the United States Supreme Court and his co-author rhetorician Byron A. Garner wryly observe that even though we may have never studied logic, all of us use syllogistic reasoning.⁸⁷ A legal rule typically states that whenever a generally described prerequisite (P) exists, a certain consequence (C) applies. The rule thus takes the form of a syllogism: whenever the rule’s prerequisite (P) is realized in a factual situation (F), then the consequence (C) applies. This is the major premise. The minor premise is that this factual

⁸³ See, e.g., KENNETH J. VANDELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING (1996).

⁸⁴ See, e.g., KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN (9th ed. 1997); Ok-Tae Chung, *Eine Einführung in die koreanische Rechtskultur und in die Grundzüge des koreanischen Rechtsdenkens*, http://www.dkjg.de/download/online1_1.pdf (1989) (Deutsch-Koreanische Juristische Gesellschaft e.V.).

⁸⁵ VANDELDE, *supra* note 83, at 2.

⁸⁶ *Id.* at 19-20, 67-70.

⁸⁷ ANTONIN SCALIA & BYRON A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 41 (2008). *Accord*, DAVID CRUMP, HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY 4 (2001) (“We use syllogistic every day in our thinking ...”).

situation (F) fulfills the prerequisite (P), that is, F is a case of P.⁸⁸ The conclusion then logically follows that for the factual situation F, consequence C applies. Schematically:

$$\begin{array}{l} P \rightarrow C \quad (\text{For } P\text{—that is, for every case } P\text{—}C \text{ applies}) \\ \underline{F = P} \quad (\text{F is a case of } P) \\ F \rightarrow C \quad (\text{For } F, C \text{ applies}). \end{array}$$

Typically a rule's prerequisite consists of more than one element. Each element may itself require application of other rules to determine if the prerequisite is satisfied. Only if all elements are present in a particular case, does the rule apply.⁸⁹

The process of rule application thus requires finding substantive law governing the case (*law-finding*), finding facts that fulfill a governing substantive rule (*fact-finding*) and applying the rule to the case to produce the consequence mandated by it (*law-applying*). Thus rule application brings facts and law together to produce a legal consequence (often a right or duty). It presupposes that someone has already made the laws to be applied (*lawmaking*).

The quoted definition of legal reasoning in the United States is sufficiently general that we may use it as a reference point for considering legal reasoning in Germany and Korea as well. There, too, legal reasoning relies principally, although not exclusively, on syllogisms for application of law. In German civil procedure the method for applying law to facts is called the "*Relationstechnik*," that is, in English, literally "relationship technique."⁹⁰ Korean civil procedure has comparable methods.

Thinking like a lawyer, *i.e.*, syllogistic law application, is not universally approved. It bewilders some laymen. A recent report on legal education by the Carnegie Foundation can stand for the general skepticism.⁹¹ Its objection is that legal reasoning "consists in the abstraction of the legally relevant aspects of situations and persons from their everyday contexts." The Report laments that "the rich complexity of actual situations that involves full dimensional people, let alone the job of thinking through the social

⁸⁸ See, e.g., *Lamphear v. Buckingham*, 33 Conn. 237, 248 (1866) ("Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the judgment the conclusion.")

⁸⁹ See VANDELDE *supra* note 83, at 19; James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TULANE J. INT'L & COMP. L. 542, 556 (2007).

⁹⁰ See James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 113 PENN STATE L. REV. 469 (2009).

⁹¹ See CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

consequences or ethical aspects of the conclusion, remains outside the method.”⁹²

Even American professionals are skeptical of thinking like a lawyer. Professor Frederick Schauer, in a book intended to support rules, observes that: “every one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision *other than* the best all-things considered decision for the matter at hand.”⁹³ In Germany it is otherwise. The Latin maxim, justice is the cornerstone of the state: *Justitia est fundamentum regnorum*, prevails. Professor Reinhold Zippelius, in a classic that is counterpart to Schauer’s book, describes justice as an essential element of laws and legal methods applying law.⁹⁴

There should be no need to apologize for thinking like a lawyer. Thinking like a lawyer helps reach just solutions to legal problems.⁹⁵ It is what makes positive law a constraint on law’s abuse. Those charged with applying the law, including those subject to the law and applying it in their daily lives to themselves or to others, cannot easily escape it or bend it to their own needs when they are required to apply law syllogistically.

A. Sources of Law Generally

In legal reasoning the law provides the major premise, while the facts furnish the minor one. When the law is self-evident, as ideally it would be all of the time, legal reasoning can and does revolve around establishing that minor premise, the facts of the case. Lawyers around the world recognize that most cases turn on facts.

The principal sources of law in modern legal systems are *statutes* and *precedents*. Statute law consists of rules promulgated by legislatures or by their delegates (such as regulations adopted by administrative bodies). Sometimes statutes are integrated together in the form of *codes*. Precedents are the legal grounds for decision stated by courts or court-like bodies in their decisions of individual cases. Precedents as a group constitute *case law*.

Statute Law

Statutes are designed to govern a multitude of cases. They are of general application. They are written as rules. They are designed for legal syllogisms. They are written in abstract terms to cover some classes of cases and to leave uncovered other classes. They originate in a legislative process. They are enacted by persons who are politically responsible. They are

⁹² *Id.* at 187.

⁹³ FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 7 (2009). See Maxeiner, *Law without Justice?* *supra* note 82.

⁹⁴ See REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS 13 (2008); see also Maxeiner, *Law without Justice?*, *supra* note 82.

⁹⁵ *Id.*

promulgated to provide for the common good. They are to govern the people. And, they are to apply generally and equally to all.

Well-drafted statutes have many benefits. They legitimate political decisions. They create comprehensive and effective legal solutions to social problems. They provide predictability and impose uniformity. They facilitate their application by drawing bright lines. They prescribe the elements for rules that they create. They state when they may be invoked, by whom, and with what consequences. They are published in conveniently accessible and understandable form. When they coordinate well with each other, they bring coherence and consistency to the legal system as whole. In short, statutes inform people of what is expected of them. They should provide legal certainty.

Precedents (Case Law)

Precedents are decisions of courts that are followed by courts in deciding later cases. While every precedent is a court decision, not every court decision is cited as a precedent. Most are not.

Precedents originate not in legislative but in judicial process. Judicial process determines individual rights in specific cases. Only exceptionally do precedents arise out of that process. In ordinary cases, beginning with the court of first instance and continuing to the first appellate level, judicial decisions are concerned principally with correct application of existing law. Commonly an appellate court determines that a lower court was right or wrong in its determination of a question of substantive law or was right or wrong in its use of existing procedures. Creation of new law or of new procedures is exceptional and incidental to decisions of particular cases.⁹⁶

Appreciation of this distinction—generality versus particularity—helps understand the respective benefits and detriments of statutes and precedents. Basically, judicial process is backward looking; legislative process is forward looking. When, in judicial process, new law is being made, the effect on future cases assumes importance.⁹⁷ Yet even then the law created is particularist rather than systematic. The new law may address some element of a syllogism, but rarely does it create new rights requiring totally new syllogisms. The law created is said to be “interstitial,” that is, it fills in gaps.

A virtue of finding law in precedents is that a precedent can provide a specific answer to a particular question, while leaving free for later consideration those issues not then before the court. Precedents can maximize freedom of future decision while eschewing regulation. They can permit law to change with time; they can facilitate dealing with changing social and economic circumstances. They are able to do this thanks to the

⁹⁶ See Paul D. Carrington, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. APP. PRAC. & PROCESS 231, 233-237 (2007).

⁹⁷ See SCALIA & GARNER, *supra* note 87, at 155.

process of “distinguishing” precedents. That is, each precedent is an example of a legal rule announced being applied to specific facts; when those facts change, the reason and the applicability of the rule applied in the precedential case may no longer apply. This flexibility, however, also makes difficult and time-consuming consulting precedents. The statement of law found in a precedent alone is not enough; an ideal precedent should also be based on facts similar to those in the case to which its application is under consideration. It should reach a similar application.

Even well-crafted precedents cannot provide the benefits that less well-drafted statutes provide. Only exceptionally can precedents legitimate political decisions. Judges are not expected to make political decisions; they should not “legislate from the bench.” Even if judges had the expertise and time available to drafters of legislation, precedents could not create comprehensive legal solutions to social and economic problems. Precedents are created by ad hoc resolution of specific issues in particular disputes before the court. They are not well suited to drawing bright lines or to prescribing precise elements for norms. Rooted as they are in decisions of individual controversies, precedents are by their nature uncoordinated. This is all the more so when they emanate from many courts of many judges instead of from one court with few judges. Today’s world does not permit of the small number of courts and of judges that characterized the glory days of the English common law.

Statutes versus Precedents

There was a time when it was commonplace to see in different sources of law a principal difference between two great families of systems of law in the world, *i.e.*, between English-law based common law and Roman-law based civil law systems. According to this view, common law countries were governed by precedents, while civil law countries were governed by codes. Common law judges were bound to decide according to precedents, while civil judges were required to decide according to codes.

This cliché was never entirely true. Today it has little application to the three legal systems that we are discussing. In the United States, Germany and Korea alike, statutes and precedents are recognized sources of law. In all three statute law is primary and case law is secondary. Differences in theory drawn from different sources of law are less important in practice than is commonly supposed. The differences that matter lie less in what are the sources of law than in how the sources of law are created and utilized in legal reasoning. These differences we turn to momentarily.

A legal system that relied exclusively on either statutes or precedents would be incomplete. Societies and economies are constantly changing. They are changing faster than legislatures can legislate and faster than courts can decide. While statutes have the virtue of generalizing rules, precedents have the benefit of particularizing them. Even if societies and economies

were not changing, human imperfections would require precedents to fill in statutes. Legislatures cannot foresee and determine all possible cases beforehand. They cannot abstractly govern all foreseen cases so that none is overlooked. They cannot use language so precisely that they correctly classify all cases that they do abstractly decide. Statutes draw outer boundaries; precedents guide decisions in particular cases. Statutes and precedents are not mutually exclusive, but complementary.⁹⁸

All three of our systems follow precedents in practice despite differences in theory. In the American system, theory says that precedents are binding. In the German and Korean systems, theory says that precedents are not binding. In practice, however, the three systems give most precedents similar binding effect: precedents are followed, unless there is a good reason to depart from them. An appellate court is not bound by its own precedents, but ordinarily follows them. A lower court is expected to and does ordinarily follow precedents of those courts to which it is subordinated, but is not required to follow precedents of coordinate courts or of other courts to which it is not subordinate. Those latter precedents are merely “persuasive” authority.⁹⁹ We now examine these two principal sources of law in each of our three countries.

B. United States

In the fact that no man knows what the law is, lie two thirds of the evil of despotism.

New York Times (1858)¹⁰⁰

Statutes in the United States

Although Americans revere common law, they live in “the Age of Statutes.”¹⁰¹ Few practicing lawyers spend much of their time finding cases and distinguishing precedents. They leave such “legal research”—if they

⁹⁸ See JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY 26-31, 157 n. 109 (1986).

⁹⁹ See VANDELDE, *supra* note at 33; REINHOLD ZIPPÉLIUS, JURISTISCHE METHODENLEHRE 82 (8th ed., 2003), 10th ed., 2006, in *English translation*, INTRODUCTION TO GERMAN LEGAL METHODS (Kirk Junker & P. Matthew Roy, transl. 2008) § 13 II; GYOOHO LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM: REFLECTIONS ON KOREA’S CIVIL PROCEDURE THROUGH INQUIRY INTO AMERICAN JURISPRUDENCE 152 (J.S.D. dissertation, Washington University in St. Louis, 1998), available at SSRN: <http://ssrn.com/abstract=1656205>.

¹⁰⁰ Editorial, *Our Judiciary—Conflict of the Judges and Uncertainty of the Law*, N.Y. TIMES, Nov, 10, 1858, at 4.

¹⁰¹ GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982). See also Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 229 (1998); WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 2 (2000).

need it—to neophyte lawyers. Practicing lawyers have better things to do with their billable hours. Their day-to-day job consists of finding facts and applying existing rules—be they rules of statute law or of case law—to those facts. Clients pay a premium for senior lawyers because senior lawyers already know the law and are experts in finding facts and applying law to those facts.

American statutes are uneven in quality. Some federal statutes and some state statutes, particularly uniform state statutes, are carefully crafted. They achieve clarity and consistency of content and coordinate well with other statutes. But many American statutes, perhaps most, do not achieve even a minimal level of efficacy. “Carefully prepared legislation,” writes Professor Peter L. Strauss, “is a rarity.”¹⁰² American legislation, he says, instead of being systematic rules for the population at large, sometimes is just another way of resolving private disputes or of achieving private goals.¹⁰³

In well-functioning legal systems the pieces fit well together. Individual rules do not contradict each other. One definition serves for most purposes. Conflicting rights and duties are reduced or ideally avoided altogether. That American legislation often fails this test was stunningly proven by the 2000 election. A constitutional crisis was created because two statutes of the state of Florida commanded inconsistent ways of counting votes.

Precedents in the United States

Precedents are little systematized when they are not based on statutes. They are thousands of points of light; every year many thousands of new ones are added to the inventory. Thanks to the ingenuity of American publishers, beginning even before the index-digest systems of the nineteenth century and continuing well into today’s computer-assisted searching, it has been easy to find not just one, but many precedents on just about any point. The numerosity of precedents results in the importance of any one precedent being determined less by the strength of the precedent’s reasoning and more by the place of the rendering court in the judicial hierarchy relative to the court considering it. A lower court is bound by a decision of appellate courts that review its decisions, especially when those decisions are recent. It is less bound by older decisions or by decisions of courts that do not review its cases.¹⁰⁴

The uncertainty that results from so many precedents of so many courts is exacerbated by the form of federalism practiced in the United States. In most areas of American law, state law controls. This means that courts of fifty different states generate precedents. If a particular question is not

¹⁰² Strauss, *supra* note 101, at 231.

¹⁰³ *Id.* at 243.

¹⁰⁴ See SCALIA & GARNER, *supra* note 87, at 53. (discussing how to “master the relative weight of precedent.”).

resolved in the law of the state where a lawsuit is pending, lawyers are expected to examine the law in other states to help determine how the state where the law is unsettled would resolve the issue.

Preeminence of Statutes

Statutes have had preeminence in American law for over a century. In the nineteenth century the United States debated codification, that is, systematizing all law into codes. The two principal protagonists were David Dudley Field, Jr., author of New York's Code of Civil Procedure or 1848, and James C. Carter.¹⁰⁵ Carter defeated Field's codes, but he could not defeat statutes. Over Carter's objection and at Field's insistence the American Bar Association resolved in 1886: "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."¹⁰⁶ When Carter's book, *Law: Its Origin, Growth and Function* appeared in 1907, Roscoe Pound dismissed it as out of touch with a day in which "legislation is the source, the form and the formulating agency" of our rules.¹⁰⁷ Today Americans live in "an Age of Statutes."¹⁰⁸ They debate how much room statutes leave for judicial lawmaking.¹⁰⁹ They still pine for the common law.¹¹⁰ Many legal educators remain wedded to common law methods and give statutes short shrift.¹¹¹ Despite a century of domination of statutes, American lawyers still do not know how to "deal with statutes."¹¹²

B. Germany

The statute is the friend of the weak.

Friedrich Schiller (1803)¹¹³

¹⁰⁵ Field's writings, other than the codes themselves, are collected in *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* (3 vols., 1884, 1890). Carter's classic contemporary challenges to codification are *THE PROPOSED CODIFICATION OF OUR COMMON LAW* (1884); *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* (1889); and *THE IDEAL AND THE ACTUAL IN THE LAW* (1890), reprinted in 13 A.B.A. REP. 305 (1890) and in 24 AM. L. REV. 752 (1890).

¹⁰⁶ REPORT OF THE NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 74 (1886).

¹⁰⁷ Roscoe Pound, *Review*, 24 POL. SCI. Q. 317, 320 (1909).

¹⁰⁸ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

¹⁰⁹ See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 15 (2008).

¹¹⁰ See RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* (1997).

¹¹¹ See, e.g., FREDERICK C. SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* (2009). See also James R. Maxeiner, *Law Without Justice, Do the Right Thing and Reform Legal Reasoning*, forthcoming (2010-2011).

¹¹² See JAMES WILLARD HURST, *DEALING WITH STATUTES* (1982). See also James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO U.L. REV. 517, 527-534 (2006).

¹¹³ DIE BRAUT VON MESSINA 51 (1803).

Statutes in Germany

In Germany, the statute—*das Gesetz*—is *the* fundamental concept of all law. It is *the* central category of legal thinking. It is *the* primary source of law. It is *the* basis for legal certainty. The statute is a legal norm. It is a rule of law. Taken together, rules form an abstract and objective legal order that governs behavior. Rules are interrelated; they form a system. While it may be that the ideal cannot be realized, the goal is a system organized as if a single plan governed. Different laws should mesh with each other—none should command contrary action. Inconsistency among norms should be avoided.¹¹⁴ Among statutes, the national code has first place, subject, of course to the German constitution (*Grundgesetz*, Basic Law) and European Union law.

A preconception common among American lawyers is a belief that civil law judges apply law mechanically without giving thought to whether results are just or accord with purposes of the statutes that they apply. This prejudice is fallacious; the German constitution commands the contrary. Its Article 20 binds judges to law and justice (*Gesetz und Recht*).¹¹⁵ In German understanding, in a democracy, statutes are followed, or at least tolerated, only if they are consistent with ideas of justice. Formal adoption by parliament is not enough. Every statute, therefore, must have a minimum connection to justice. At the very least, it must not contradict basic ideas of justice. Because statutes are binding on the executive and the judiciary, it is essential that they mirror justice in substance and in application as much as is reasonably possible. Judges, in applying statutes, are responsible for assuring that results are in accordance with statutory purposes and justice.¹¹⁶

In Germany drafting of legislation is subject to quality control. A commonplace in the United States—that a third party drafts a law and finds a lone legislator to introduce it in the legislature—cannot happen in Germany. German parliamentary procedure requires that at least five percent of legislators join in proposing legislation.¹¹⁷

Precedents in Germany

¹¹⁴ See James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TULANE J. INT'L & COMP. L. 541, 556-558 (2007).

¹¹⁵ GRUNDGESETZ [GG] [Constitution] art. 20(1). The translation “law and justice” is that of Christian Tomuschat and David Kurrie as revised by Christian Tomuschat and David P. Kommers in cooperation with the Language Service of the German Bundestag and published by the German Federal Ministry of Justice in 2010, available at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#GGengl_000P20. Gesetz might be translated “statute” and Recht “law.”

¹¹⁶ See Maxeiner, *Law without Justice?*, *supra* note 82.

¹¹⁷ See James R. Maxeiner, *Legal Certainty: A European Alternative to American Legal Indeterminacy?*, 15 TULANE J. INT'L & COMP. L. 542, 562-567 (2007).

Long ago the German legal system abandoned the ideal of a gap-free statutory legal order. There is no question *whether* there are precedents, there is only a question of their *extent*. Within an existing framework of statutes, judges may and do fill gaps. “The judicial decision then fills this gap according to the standards of practical reason and the ‘community’s well-founded general ideas of justice.’”¹¹⁸

C. Korea

In Korea there has been enormous progress toward a consolidation of the Rule of Law. ... The existing regime of law had to be transformed to meet the rising needs of the people for a renovated, rational system of governance. The changes took place basically in three directions: (1) legislative innovations propelled by the government; (2) development of case law through vitalized law-finding activities of the courts; and (3) growing demand and pressure from the people for Rule of Law in Public Administration.

Professor Dr. jur. (Göttingen) Joon-Hyung Hong¹¹⁹

Statutes in Korea

Korea, like Germany, has a civil law tradition; statutes are the primary source of law. The judge’s role is to interpret those statutes and to apply them to concrete cases.¹²⁰

Korean treatment of statutes is between the untidy American treatment and the more systematic German approach. In traditional Korean law, statutes concerned principally punishment. During the Japanese occupation statutes were edicts of Japanese occupiers. Only in the 1960s did Korean laws become subject to academic analysis. As a result, to this day in Korea there is less attention to abstract theories and less predictability in judicial interpretation of statutes than in Germany.

Korean civil procedure is less subject to criticism for mechanical judging than is German procedure. The Korean constitution’s counterpart to

¹¹⁸ *Decision of the Federal Constitutional Court of 14 February 1973 (“Soraya”), BVerfGE 34, 269, 287, as translated in Robert Alexy & Ralf Dreier, Statutory Interpretation in the Federal Republic of Germany, in INTERPRETING STATUTES: A COMPARATIVE STUDY 73, 80 (D. Neil McCormick & Robert S. Summers eds., 1991).*

¹¹⁹ *The Rule of Law and Its Acceptance in Asia: A View from Korea, in THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM (Mansfield Center for Public Affairs, 2000), available at http://www.mansfieldfdn.org/programs/rol/rol_perspectives.htm,*

¹²⁰ § 1 Korean Civil Code. *See Kwon, Korea: Bridging the gap, supra note 73, at 156-162, 165; LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, supra note 99, at 152-153.*

Article 20 of the German constitution (binding judges to statute and justice), Article 103, binds judges to statute and conscience: “Judges shall rule independently according to their conscience and in conformity with the Constitution and Act.”¹²¹ Korean judicial practice is mindful of what is termed “appropriateness in the concrete.” Put simply, judges are required “to think of who must win apart from the superficial logic.”¹²² Korean jurists are more likely to apologize for uncertainty of law’s application than for it being overly mechanical.

Precedents in Korea

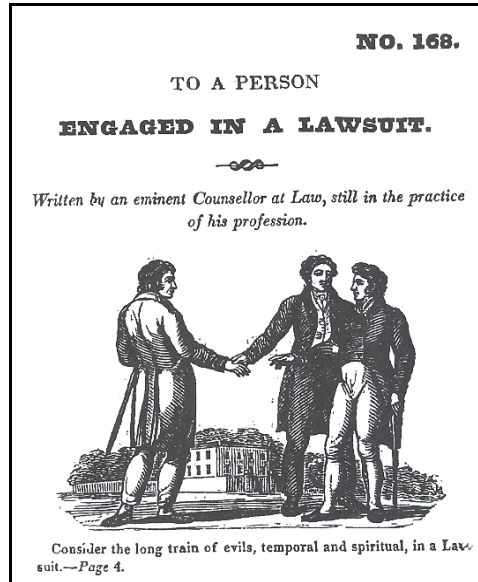
As in Germany, while Korean courts are not bound to follow interpretations of other courts, generally they do. Lower courts are loath to deviate from precedents of appellate courts to which they are subordinated, for fear that they may be reversed. Even where they need not fear reversal, in common law and civil law countries alike lower courts often follow decisions of other courts. Economic efficiency explains why. The principal role of judges is finding and interpreting law and applying that law to facts in particular cases. Following precedents serves legal systems generally through reducing caseloads that judges must hear by making legal decisions foreseeable. Following precedents serves judges individually by reducing their own costs of decision and of judicial administration.¹²³

¹²¹ CONSTITUTION OF THE REPUBLIC OF KOREA, translation of the Constitutional Court of Korea, <http://english.court.go.kr/>.

¹²² Chaewong Lim, *A Study on the Target of Avoidance in Korean Bankruptcy Law: When There is No Debtor’s Action*, 7 J. KOREAN L. 333, 344-345 n. 24 (2008).

¹²³ See Kwon, *Korea: Bridging the gap*, *supra* note 73, at 162; LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 152.

CHAPTER 3

LAWYERS AND LEGAL SYSTEMS:
ACCESS TO JUSTICEEarly American Christian Tract (1827)¹²⁴

Deciding to bring a lawsuit is a difficult decision. One should make every effort to avoid going to court. Even someone who “wins” a lawsuit, as measured by legal outcome, may lose more in time, energy and in damaged personal relations than the victory is worth. In all three of our legal systems lawyers advise: sue only if a lawsuit cannot be avoided.

Mary Roh has reached that point. She has decided to sue. Most likely, that means she needs to find a lawyer. While a lay person might present a small case to a court without being represented by a lawyer, in a civil case of consequence, such as we have here, a lawyer is a practical necessity; in Germany, it is a legal requirement. In this chapter we consider when one needs a lawyer and how one goes about finding and engaging one. We then consider the legal systems within which they operate.

¹²⁴ Simon Greenleaf (attributed), *To a Person Engaged in a Lawsuit*, 6 PUBL. AM. TRACT SOC. No. 168 (1827). Greenleaf was the leading authority on evidence law in nineteenth century America and professor at Harvard Law School.

Even before Roh decides to sue, she may find a lawyer helpful to negotiate a settlement. Ordinarily parties try to settle disputes without suing. Introducing the right lawyer may make John Doh, Jr. realize that Roh is serious about the dispute and is thinking about suing. On the other hand, introducing the wrong lawyer could undermine settlement. Roh will decide whether and when to use a lawyer based on convenience, cost and other personal considerations.

Once Roh decides to use a lawyer, whether in the United States, Germany or Korea, she is likely to follow a similar approach to finding one. Most likely, she will speak first with friends and business contacts that have used lawyers. If she is sophisticated, she will look for someone who has experience with lawyers in lawsuits. She might consult listings of lawyers maintained by local or national bar associations, *i.e.*, associations of lawyers themselves. She might do her own hunting through visits to the Internet sites of possible lawyers. She is not likely to rely on media advertising. While in the United States there is much lawyer advertising, most of that is for plaintiffs' lawyers seeking high-award personal injury, contingent-fee litigation. Below we discuss contingent fee (*i.e.*, success-based) arrangements.

In finding a lawyer Roh has an advantage that other potential litigants do not have: she already has had dealings with lawyers, or at least the company that she controls has. In the United States, where litigation practice is usually separate from corporate counseling, the company's lawyer is not likely to take on lawsuit representation personally, but if the lawyer is part of corporate law firm, the firm almost certainly will. The firm's corporate clients are an essential source of business for lawyers who handle lawsuits. If the lawyer is independent of a firm, the lawyer will feel a responsibility to find suitable counsel. In Germany and Korea, Roh Honda's regular lawyer might personally take on Roh's case. Usually there is no conflict of interest in the company's lawyer taking on responsibilities for a company executive, particularly in a small "closely-held" company where management and share owners are the same. In our hypothetical, Mary Roh has as her lawyer, Harry Hahn, whose firm regularly represents Roh Honda.

Specialization in law, as in other fields of human endeavor, can be desirable. The specialist is familiar with the tasks involved. Experience can contribute to handling those tasks more efficiently and more effectively. Specialization among lawyers has proceeded farther in the United States than it has in either Germany or Korea. In the United States conducting lawsuits ("litigation") is a specialty. General corporate lawyers might handle smaller matters (say less than \$100,000) in their initial stages, but are not likely to take sole responsibility for larger matters or for taking even smaller matters to court. In Germany and Korea, where judges have greater responsibility for conduct of proceedings and opportunities for lawyer-missteps are fewer, there is less specialization in litigation, although even still, there are trends toward greater specialization in practice. This trend is particularly evident in

criminal procedure, where most criminal work is done by criminal law specialists in all three of our countries.

What will lawyer Hahn do for Roh? Before commencing litigation, Hahn will evaluate the case to help Roh decide whether bringing the lawsuit is worth it. That involves not only evaluating its legal merits, but also predicting the likelihood of success and estimating the costs and risks. Assuming that Roh decides that it is worth bringing a lawsuit, Hahn will help her decide in which court to bring the case and against which parties. Hahn will make a tentative application of law to the facts as they are known to Roh. That requires that Hahn determine which law is likely to govern the case, and which defendant(s) are likely to be liable to Roh. Hahn will explain the process and the litigation risks. In the court proceedings the lawyer will represent Roh to the court and to the other parties to the proceedings. The lawyer will help present Roh's case to the court.

In this chapter we describe the diversity of personnel that handle the machinery of justice. These differences profoundly affect fulfillment of the promises of the open courts clause: decisions according to law, with access for all, reached efficiently and without delay.

What is the principal difference among our legal professions? In short form: the American legal system is organized by the bar, that is, by private lawyers. The bar largely determines the structures of court procedures. It runs the legal system as a service for clients who have particular needs. The German and the Korean legal systems, on the other hand, are run, by German state and federal ministries of justice, and by the Korean Supreme Court. These government bodies treat provision of justice as a public service that should be available to all members of the public. One might say that the American bar runs a taxi service, while the German and Korean governments run public transit systems.

A. United States

The machinery by which justice is wrought out has always been, and must forever remain, the creation of the profession. ... No one thinks of challenging the right of the bar to determine the methods of which the remedies affecting the profoundest concerns of life shall be administered.

Charles M. Wilds,
Address Before the Vermont State Bar Association
(1894)¹²⁵

¹²⁵ AN ADDRESS ON COMMON LAW PLEADINGS, BEFORE THE VERMONT BAR ASSOCIATION, OCTOBER 9, 1894 (1894).

1. Access to Justice in the United States

Pro Se Representation

In the United States and in Korea, Roh is not required to use a lawyer to bring her lawsuit. By law she is required to do so in Germany. In the United States and in Korea Roh could represent herself and proceed, as it is termed, *pro se*. Federal law, first adopted in section 35 of the Judiciary Act of 1789, permits her in federal court to “plead and conduct [her] own case[] personally.”¹²⁶ While the right to proceed *pro se* is said to be “a basic right of a free people,”¹²⁷ and is constitutionally protected in criminal cases, its rationale today is more pragmatic: to provide theoretical access to justice.

In the United States, with limited exceptions, there is no right to court-provided lawyers in civil cases.¹²⁸ The right to proceed alone, without a lawyer, *i.e. pro se*, is thus essential to participating in legal proceedings. Were there no right to *pro se* representation, the United States would either have to provide indigent parties with legal representation as Germany does (civil legal aid), or deny people the right to be heard. As it is, without a right to civil legal aid, the indigent are left to public or private charity; only a few get lawyers. Most have only the choice to proceed *pro se* or not at all.

If the right to be heard is to be meaningful, and if legal aid is not provided, then the legal system should be so fashioned as to be usable to parties without lawyers. To compensate for a lack of civil legal aid and to promote access to courts, there have been efforts in the United States to facilitate *pro se* representation. Some federal courts provide clinics and websites to assist *pro se* litigants. Well intentioned that those projects are, they are destined to fail unless the system is reconfigured to anticipate *pro se* litigation. Lawyer-free litigation is not likely to work in any but the most mundane of American lawsuits. Complex cases call for competent legal counsel if only because procedures are complicated.

Relying on *pro se* representation to increase access to justice challenges fulfillment of other promises of the open courts clause. While parties ordinarily have the best knowledge of the facts, they have little knowledge of law and no experience in the system’s process for applying law to facts. If self-representation is to be successful in American courts, it practically requires that courts assist *pro se* litigants in ways that they have not previously assisted parties; it pushes courts to provide new services to such parties.¹²⁹

¹²⁶ 28 U.S.C. § 1654.

¹²⁷ O’Reilly v. New York Times Co., 692 F.2d 863, 867 (Friendly, C.J.).

¹²⁸ Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981).

¹²⁹ See generally THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT (National Center for State Courts, 2005), available at www.ncsc.org.

Permitting parties to represent themselves burdens, rather than assists judges in applying law to facts.¹³⁰ It denies judges the assistance of trained counsel while it practically compels them to be active in litigation to assure that justice is done. Otherwise the side represented by a lawyer will prevail over the party without one. The American Poet Laureate Robert Frost is supposed to have said “A jury consists of twelve persons chosen to decide who has the better lawyer.”¹³¹

While American litigants are not legally required to use lawyers, the passive role of the judge practically compels them to do so. Few plaintiffs in the position of Mary Roh represent themselves: it is too difficult, it distracts too much from daily life, and it puts too much at risk, not just in asserting claims, but in resisting counterclaims. In the American federal courts about 10% of civil non-prisoner cases are brought *pro se*.¹³²

Civil Legal Aid

Civil legal aid in litigation is the provision of a lawyer or other legal professional to a party who is unable to provide for his or her own lawyer. Around the world civil legal aid takes many forms. The legal aid lawyer or legal professional may be from a legal aid office that exclusively conducts legal aid cases, a law student from a legal aid clinic, a lawyer from private practice chosen by the party but paid by the court, or a lawyer from private practice chosen by the party or appointed by the court to work for no fee (*pro bono*). In the United States, all forms of civil legal aid combined support only a small percentage of those in need.

The United States is said to stand almost alone among modern states in its near total failure to provide civil legal aid.¹³³ Other countries recognize that legal aid is fundamental to realizing equal justice under law. Equal justice under law is compromised when financial considerations compel parties to forgo legal rights.

Americans have long recognized that legal aid is important for access to justice. In 1876 German immigrants founded America’s first organization dedicated to using private resources to provide legal aid.¹³⁴ In the early

¹³⁰ See Drew A. Swank, *In Defense Of Rules and Roles: the Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1547-1548 (2005).

¹³¹ JURIES: WEBSTER’S QUOTATIONS, FACTS AND PHRASES 1 (ICON Group Int’l 2008).

¹³² Table S-23. Civil Pro Se And Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2009, in JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR JAMES C. DUFF, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/tables/S23Sep09.pdf>.

¹³³ Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World 2006 Edward V. Sparer Symposium: Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 769 (2006).

¹³⁴ Der Deutsche Rechtsschutz Verein. Inc. See HARRISON TWEED, THE LEGAL AID SOCIETY: NEW YORK CITY, 1876-1951 (1954).

twentieth century legal aid began to achieve political recognition. In 1908 William Howard Taft, the only person ever to serve both as President of the United States and as Chief Justice of the United States, pointed to the ill effects that the costs of litigation were having for the poor.¹³⁵ In 1919 Reginald Heber Smith published what remains the legal aid classic: *Justice and the Poor*. In 1920 the American Bar Association established a Standing Committee on Legal Aid and Indigent Defendants” and named Charles Evans Hughes, later Supreme Court Justice, as its first chair.

In the 1960s proponents of a legal right to legal aid achieved success when the United States Supreme Court found a constitutional right to legal aid in criminal prosecutions in the iconic case of *Gideon v. Wainwright*.¹³⁶ Today Americans speak of a comparable right in civil matters as “civil Gideon.”¹³⁷ Civil Gideon still eludes the United States despite repeated efforts to achieve it. Litigation based on the open courts clause has failed to achieve recognition of a constitutional right to counsel.¹³⁸ Legislation recognizing a limited right may be making headway. In 2006 the American Bar Association resolved that legislatures should adopt statutes mandating legal aid in a small class of cases “where basic human needs are at stake” In 2010 it adopted a *Model Access Act* and *Basic Principles of a Right to Counsel in Civil Legal Proceedings* providing for a legal right to counsel so limited.¹³⁹ For the Association’s proposals to be effective, legislatures must adopt them.

Among principal obstacles to substantial legal aid in the United States have been (1) fear and (2) cost.

Fear. Legislators are not anxious to give money to anyone, but they fear giving legal aid to the poor particularly. They worry that the poor will make instrumental uses of the American legal system. Their fear manifests itself in restrictions that they impose on such legal aid as they do provide. One

¹³⁵ William Howard Taft, *The Administration of Justice—Its Speeding and Cheapening*, 21 REPORTS OF THE ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 233, 236 (1908).

¹³⁶ 372 U.S. 335 (1963); see ANTHONY LEWIS, *GIDEON’S TRUMPET* (1966).

¹³⁷ See, e.g., STEPHEN DANIELS & JOANNE MARTIN, *LEGAL SERVICES FOR THE POOR: ACCESS, SELF-INTEREST AND PRO BONO*, IN *ACCESS TO JUSTICE* 145, 165 (Rebecca L. Sandefur, ed., 2009).

¹³⁸ See Steven D. Schwinn, *Faces of Open Courts and the Civil Right to Counsel*, *Symposium Issue: A Right to Counsel in Civil Cases: Civil Gideon in Maryland & Beyond*, 37 U. BALT. L. REV. 21 (2007).

¹³⁹ American Bar Association 2010 Resolution 104 (Revised), available at http://www.abanet.org/legalservices/sclaid/downloads/104_Revised_FINAL_Aug_2010.pdf; American Bar Association 2010 Resolution 105 (Revised), available at http://www.abanet.org/legalservices/sclaid/downloads/105_Revised_FINAL_Aug_2010.pdf. The latter catalogues state action.

supporter of legal aid observes that countries that provide extensive legal aid do not rely on courts for law reform.¹⁴⁰

Cost. Cost may be a still more important obstacle to a legal right to legal aid.¹⁴¹ The costs of American litigation are high: beyond what even the well-off can afford. American law, both litigation and counseling, is time-consuming. Clients pay for the inefficiencies of the system. To fund legal aid completely could cause, as it is reported to have done in England, an overhaul of the system of civil justice.

Mary Roh is too well-off to qualify for the limited legal aid available in America. She, like most people in the middle class, must pay the ordinary charges. We turn now to those fees.

2. The Cost of Lawyer Representation in the United States

If the American Mary Roh uses a lawyer in her lawsuit, she will pay a price that her counterparts in Germany and Korea will not pay. That price does not stop with higher fees. Unless she is able to obtain contingent fee representation, she will have to pay the fees all herself, even if she wins the case. The practice that each party must bear his or her own attorneys' fees is usually called the "American rule." Since it is based on no rule, but is only a practice, we refer to it as the "no indemnity practice."¹⁴² In Germany and in Korea (and in most modern systems), plaintiffs who bring claims that courts affirm are right, are entitled to some indemnity for their attorneys' fees from the losers who resisted their rightful claims. Here we refer to this rule as the "loser pays rule."

American No Indemnity Practice

The American practice of no indemnity means that the American Mary Roh, even if she "wins" her lawsuit, after paying lawyers' fees, will take home less—perhaps much less—than \$75,000. How much less no one can say with certainty. In the best case, she might end up with \$70,000 if Doh does not resist the claim. If she manages to use a lawyer who agrees to a contingent fee, but Doh contests, she might end up with as much as \$40,000.

¹⁴⁰ Lidman, *supra* note 133, at 778. See generally William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1997).

¹⁴¹ See Daniels & Martin, *supra* note 137. For further readings on legal aid, see *ABA Symposium on Access to Justice*, 38 FORDHAM URBAN L.J. 1-507 (2010); *Symposium Issue, A Right to Counsel in Civil Cases: Civil Gideon in Maryland and Beyond*, 37 U. BALT. L. REV. 1-78 (2007); 2006 *Edward V. Sparer Symposium: Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501-800 (2006). On pro bono representation, see Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

¹⁴² See James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. SUPP. 195, 197 (2010).

In the worst of cases, if Doh vigorously defends the action and uses all the tools the system places at his disposal, Mary Roh might end up owing her lawyer more money than the \$75,000 she wins. As we shall see in Chapter 6, the American system puts lawyers in charge of litigation and allows them to determine just how much time (and fees) they put into the case. Without control of costs, and in the absence of a loser pays system, defense counsel, through a vigorous defense, can render a \$75,000 claim valueless. In Chapter 8 we compare likely outcomes in the United States, Germany and Korea.

To a foreign jurist the American result is “incredible, strange, terrible and intolerable.” One eminent émigré, Albert A. Ehrenzweig, lamented that the United States “which has taken it on itself to play the decisive role in building the Rule of Law throughout the world, has forgotten the little man in his struggle for civil justice.”¹⁴³

Ehrenzweig, an Austrian judge who became a law professor in the United States, spoke out “in sorrow and in anger” because the loser pays rule has the logic of right on its side. A plaintiff begins a lawsuit because a defendant, the plaintiff alleges, has failed to pay an obligation that is owed as right. If the court finds the plaintiff right, then justice requires that the defendant pay those expenses which defendant in effect imposed on plaintiff by refusing the justified demand. Otherwise, plaintiff gets back less than the right claimed.

The founders of American civil procedure recognized this logic of right.¹⁴⁴ Loser pays provided the rule in parts of the United States through the nineteenth century.¹⁴⁵ It continues unquestioned to provide the rule when court costs, and not attorneys’ fees, are assessed. Loser pays, if the loser is defendant, is the rule under many statutes. But today as a general rule applicable to plaintiffs and defendants alike it survives only in Alaska.

How can it be that the United States is almost alone among modern nations in not having a loser-pays rule for lawyers’ fees as well?¹⁴⁶

One explanation for the absence of the loser pays rule is that United States has no ministry of justice (as in Germany) or no supreme court (as in

¹⁴³ *Reimbursement of Counsel Fees in the Great Society: In sorrow and in anger—and in hope*, 54 CAL. L. REV. 792, 793 (1966).

¹⁴⁴ Theodore Sedgwick, America’s first authority on damages and one of more influential jurists, endorsed a loser pays rule. THEODORE SEDGWICK, HOW SHALL THE LAWYERS BE PAID? OF SOME REMARKS UPON TWO ACTS RECENTLY PASSED ON THE SUBJECT OF THE COSTS OF LEGAL PROCEEDINGS IN A LETTER TO JOHN ANTHON (1840); THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, OR, AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN THE AMOUNT OF COMPENSATION RECOVERED IN SUITS AT LAW (1st ed. 1847, 9th ed. by Joseph Henry Beale, 1920). So too did his law office associate, David Dudley Field, Jr., America’s first great reformer of civil procedure. See James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. 195, 218-219 (2010).

¹⁴⁵ See John Leubsdorf, *Toward a History of the American Rule on Fee Recovery*, 47 LAW & CONTEMP. PROBLEMS 9 (1984).

¹⁴⁶ See Matthias Reimann, *General Report of Cost and Fee Allocation in Civil Procedure*, forthcoming.

Korean) that looks out for the interests of parties to lawsuits. The bar, quite naturally, tends first to its own interests. Only long after no indemnity became routine practice, did American lawyers offer the rationalization that no indemnity facilitates access to justice.¹⁴⁷ Legal rights, these lawyers say, are uncertain; no one should be penalized for asking a court what those rights are.¹⁴⁸

Such access to courts that the American practice of no indemnity facilitates is inefficient and unfair to those with righteous claims. It denies full compensation to all parties in order to benefit only a few parties with “plausible” claims. By most accounts the American practice encourages parties to bring marginal or even frivolous lawsuits, since parties suffer little risk in suing.¹⁴⁹

Replacing the American practice with a loser-pays rule would face practical and political obstacles. Loser pay rules work when fees shifted are modest and are proportionate to amounts in dispute. In Germany, as we shall see, total legal fees for both sides of a lawsuit are usually well below the fees for one side in the United States. To maintain modest levels German civil justice imposes statutory limits on total fees that may be recovered. In the United States, the practicing bar is politically powerful: it opposes the occasional proposal to bring back loser-pays.¹⁵⁰

Calculating Lawyers’ Fees

In the United States payment arrangements are private contracts between lawyers and their clients. While there are some legal limitations on legal fees, there are no statutory fee schedules such as one finds in Germany and Korea.

In American litigation two approaches to payment predominate: contingent fee and hourly billing. Sometimes the two are combined. In contingent fee arrangements plaintiffs pay little or nothing—sometimes not even court fees and out-of-pocket expenses—but then grant to lawyers a percentage of the amounts recovered. Typically those percentages are between 33% and 50%. In some states statutes or professional regulations limit these percentages. In hourly billing arrangements plaintiffs and defendants pay their lawyers charges that typically range from \$150 to \$500

¹⁴⁷ *Id.*

¹⁴⁸ For a spirited defense of the American practice, see John F. Vargo, *The American Rule of Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U.L. REV. 1567, 1594 (1993).

¹⁴⁹ *E.g.*, Marie Gryphon, Greater Justice, Lower Cost: How a “Loser Pays” Rule Would Improve the American Legal System, Civil Justice Report, No. 11 (Manhattan Institute, December 2008). See generally Maxeiner, *Cost and Fee Allocation*, *supra* note 142.

¹⁵⁰ See Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States: Opportunity for Learning from Civilized European Procedure Instead of Continued Isolation?*, in *FESTSCHRIFT FÜR KARL BEUSCH* 853 (1993), reprinted in 42 AM.J.COMP.L. 147, 162 (1994).

or more per hour depending on market factors. Flat-rate billing—used in some areas of legal services in the United States and the norm in litigation in Germany and Korea—is unusual in civil cases.

Contingent fees. By their nature self-funding contingent fee arrangements are available only to plaintiffs, since defendants ordinarily recover no damages from which they could compensate their lawyers. Defendants can, of course, make their payment of fees incurred in defense contingent on success.

Practically contingent fee arrangements are not available to all plaintiffs. Most plaintiffs are not attractive contingent fee clients: their cases are too uncertain, potential costs are too high, or the relief sought will not generate money (*e.g.*, an order for child custody). Most lawyers are loath to take on contingent fee clients except in high-value cases for individuals (*e.g.*, severe personal injury cases) or in extremely simple commercial cases (*e.g.*, uncontested unpaid invoices). Their reluctance to represent means that parties unable to pay high-hourly charges and accept the risk of loss, practically are prevented from bringing lawsuits at all.

Roh has an ordinary case that is neither high value nor as simple as an unpaid invoice. Particularly in a high-cost urban area, she may have difficulty finding a lawyer willing to work on a contingent fee basis. The potential lawyer will assess her as a possible witness and evaluate the complexity of the case (to estimate how much time it might require). Her company's corporate law firm is unlikely to represent her on a contingent fee basis. If she is lucky, Hahn might accept a mixed form of representation, *i.e.*, a lower-hourly rate in exchange for a percentage fee contingent on any recovery.

Retainer fees and hourly rates. If Roh is unable to obtain contingent fee representation, her lawyer is likely to require her to make what is called a "retainer" payment of typically around \$5,000 to \$10,000. Depending upon their representation agreement, the lawyer might deduct his or her charges as incurred from the retainer, or might hold it in reserve just in case Roh fails to pay the lawyer's bills when they come due.

Legal expenses insurance. While there have been attempts to provide legal insurance in the United States, these have found little application in providing insurance to plaintiffs. What may be the largest provider of legal expenses insurance in the United States is ARAG Legal Solutions, a subsidiary of the German firm Allgemeine Rechtsschutz-Versicherungs Aktien Gesellschaft.¹⁵¹

3. Representing Roh in the United States: Is a Lawsuit Worth it for Roh?

Inevitably Roh will get around to talking with her lawyer Hahn about the expense of representation. He will remind her of all of the collateral costs

¹⁵¹ See www.araggroup.com.

of the lawsuit in terms of her lost time, possible lost time of employees, frustrations and so on. Then he will be sure to establish his fee arrangement with her. They might have a conversation such as the following one found in a teaching text for law practice and slightly modified to meet our case:

Hahn: We'll file a complaint and thereafter prosecute this suit vigorously through trial, correct?

Roh: Exactly.

Hahn: I'll want to meet with you at least once more before we file any papers with the court to talk more specifically about how I think we ought to proceed. But earlier you asked about my fees, and I think I know enough now to give you a general estimate based on what I know at this point. I'll handle this on an hourly basis; my fee is \$300.00 an hour. Some of the work can be handled by my paralegal assistant, whose hourly rate is \$100.00 an hour. I estimate that I'll need to spend about 70 to 100 hours to get ready for a possible trial, though it could go higher if the other side is obstinate and I have to get court orders requiring them to give me material that they should turn over voluntarily. My estimate includes taking or attending 3-4 depositions. Other fees will be court costs, costs of the deposition transcripts, and a few other miscellaneous costs for a pretrial total of \$4,000. If the court decides in our favor, as I suspect it will, we will be able to recoup those [court] costs from the other side. In light of all this, I suggest an initial retainer of \$10,000.00. I'll bill you monthly if and when the retainer is used up. Does that sound OK?

Roh: I guess so. Of course, I wish it weren't so expensive but I guess that's the way things go these days. This a probably a dumb question, but I assume that if the case settles in just a few hours, I'd get the unused part of the retainer back?

Hahn: Of course. You only pay for the time I actually spend. At the same time, remember that if he does take the case to trial, the number of hours that I have to spend may go way up. If that starts to happen, I'll let you know. One other thing that I'm ethically required to inform you of is that should you fall too far behind in your payments, I may have to withdraw as your counsel. I'm sure that won't happen, but it's something you should be aware of. Do you have any other questions?¹⁵²

The client in the text cited had no further questions, but our Mary Roh does. We add them here:

Roh: Yes. I have two questions. First of all, what will your total fee be? At \$300 an hour and seventy hours, we are talking \$21,000, and that doesn't count—you said—paralegal time or trial or trial preparation time?

Hahn: Oh, I am sorry. I should have mentioned that you will also have to pay the court's filing fee. It's \$350, no matter how big or small your claim is. But at least you will get that back if you win.

Roh: That's no big deal. But can't you give me at least an approximation of what your fee will be, say, something between \$15,000 and \$18,000?

¹⁵² DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 237-238 (2nd ed. 2004).

Hahn: I am sorry, but I cannot tell you what my total fee will be. I will do all that I can do to keep my fee down. I won't take any depositions more than are absolutely necessary: I think we can get by with just taking John Doh, Jr.'s deposition, although, depending upon how the facts turn out, we may have to take the deposition of his father, John Doh., St., or someone at DohSon Honda LL.C. Unfortunately in contested litigation, it is impossible to predict beforehand how much work will be needed. It all depends on how the case develops and how John Doh, Jr. and his lawyer pursue the case. We don't know what claims they will make. It would not be fair to either of us were I to charge you a flat rate. I might take less time; I might take more than I predict.

Roh: That's troubling you cannot give me at least an approximate figure on the total, but, you said that if we win, we get the costs back. That includes your fee, right?

Hahn: No.

Roh: No? What do you mean, then, that your fee depends upon how the case develops? Can't you see to it that we don't waste time? Isn't this case basically just a question whether the judge believes me or John, Jr.? Can't you fast forward the process?

Hahn: You may be right and you may ultimately prevail, but the process does not allow us to "fast forward" to the end game. You will be forced to bear the cost and burden of litigation until you have an opportunity—at the trial—to present the evidence that will show Doh is liable. And if you win, although Doh will owe you \$75,000, you will have no ability to recover from anyone what you have spent in lawyers' fees.¹⁵³

As a plaintiff, though, you are better off, we lawyers believe, with this American practice. If we did what they do in other countries, if you lost, you would have to pay not only my fee, but also the fee of the lawyer.

Roh: Better off? I am not so sure. It sounds like, that at the end of the day, from the \$75,000 that John Jr. owes me, I will be lucky to end up with only \$50,000; if I am unlucky, it might get only \$25,000 or nothing at all.

Hahn: I am afraid so. That is why, if he makes a settlement offer after the complaint for as little as \$10,000, we should give it consideration. For the moment, go ahead and fill out the information sheet that I gave you to prepare for our next meeting. That is Wednesday at 2:00. You don't have to give me the retainer until then. Take the time to think about whether you want to go ahead.

Roh: I will.

We now consider the people who make up the American legal system.

4. Legal Professions in the United States

Americans lawyers and judges by and large value the legal system, and their roles in it, instrumentally, that is, as a means for resolving concrete disputes and achieving specific goals. It is the role of the judge in the

¹⁵³ This paragraph with only minor changes is FROM JONATHAN B. WILSON, OUT OF BALANCE: PRESCRIPTIONS FOR REFORMING THE AMERICAN LITIGATION SYSTEM 25 (2005).

American system to preside over a clash of competing interests and to clarify what is the law that governs the dispute's resolution. The role of the advocate is to find a way to the client's desired resolution through shaping of the law, the facts, and the judgment of the dispute. American lawyers like to think of themselves as "social engineers" and as "problem solvers"; judges revel in the role of making political decisions.

The trial lawyer embodies this public persona of the jurist in the United States. The lawyer-advocate is both hero and scourge: hero as champion of the underdog doing justice, scourge as the "hired gun" of the rich or as the "shyster" promoting frivolous lawsuits.¹⁵⁴

Lawyers

The practicing bar dominates the professions of law in the United States. It measures jurists largely by the practical results that they as lawyers achieve for their clients and for themselves. Leading lawyers are typically high-powered litigation lawyers in smaller litigation boutiques (fifty or fewer lawyers) or business lawyers in huge law firms (many hundreds of lawyers). These lawyers, while the best remunerated, are only a small fraction of the more than one million lawyers in the United States. The United States has among the highest per capita number of lawyers of all legal systems.

Although the bar oversees the professions of law, it takes little direct care for the development of lawyers and judges. Unlike the bars in other countries, it provides no formal apprentice training to aspiring lawyers. While its role in legal education is limited, it is a controlling one. The accrediting body for law schools is the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association. State attorneys general and education departments have little say over legal education. State Supreme Courts have more.

While bar associations supervise practice, they are ill-suited to bring about substantive changes. They lack the political clout or the continuity of leadership of a German state or federal ministry of justice or of the Korean Supreme Court. Of course they are outside the government; many leadership positions are for only one year. For example, the Constitution of the American Bar Association permits a President in his or life to serve only a one year term. It is not surprising that American bar associations produce progressive position papers but often have difficulty realizing them.

American lawyers are advocates for their clients. Robert W. Gordon, a long-time student of the legal profession, has stated comparative perspective the extent of that devotion in a manner that many American lawyers might find objectionable:

¹⁵⁴ For an illustration of a shyster bringing a frivolous lawsuit, see 40 PUCK No. 1169 (July 17, 1899), reprinted in Maxeiner, *Cost and Fee Allocation*, *supra* note 142 at 220.

Compared to other nations' legal professions, the American legal profession has always stressed lawyers' duties to their clients over duties to the courts, legal system, third parties or the public interest. As late as the 1980s, lawyers' rhetoric continued to celebrate the contrasting ideal of the lawyer as a high minded independent counselor as well as an adversary or hired gun who steers his client in the paths of legality and warns of adverse consequences if the client strays. Yet as a practical matter the bar's ethics rules and informal norms aligned lawyers' interests almost entirely with those of clients and—most of all—other lawyers. Successive revisions of the bar's ethics codes, such as the ABA's Model Code of 1969 and Model Rules of 1983, made fidelity to clients mandatory; lawyers should keep quiet even if the client were about to commit crime or fraud, unless they believed the criminal act was 'likely to result in imminent death or substantial bodily harm.'¹⁵⁵ Duties to the courts remained vague and mostly unenforced; duties to the public were hortatory and optional.¹⁵⁶

Judges

In the United States, as in other common law countries, judges do not begin their careers as judges. Typically they come from the practicing bar in mid-career. They begin judicial service without any formal training as judges. They are not subject to probationary appointments. Some are appointed for life: others are appointed for a term of years and are subject to re-election or confirmation in office. After appointment few must undergo judicial training or are subject to continuing judicial training requirements. Some voluntarily participate in training programs lasting a few days. None undergo professional training comparable to that required of their counterparts in Germany or Korea.¹⁵⁷ Those German and Korean programs resemble the residency programs all American physicians undergo.

In American legal lore, judges are heroes. The heroes among judges are not judges who conduct trials, but judges who make law in appellate courts. In recent years, as federal constitutional law has achieved ascendancy, these heroes are invariably federal appellate judges and most of them are justices of the United States Supreme Court.

The focus on lawmaking and on federal judges has effects for ordinary cases. It has long been an adage of American law: "don't make a federal case of it." Some federal judges disdain the routine of applying law to facts and

¹⁵⁵ ABA Model Rules of Professional Conduct, Rule 1.6 (1983).

¹⁵⁶ Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 *CAMBRIDGE HISTORY OF AMERICAN LAW* 82 (Michael Grossberg & Christopher Tomlins, eds., 2008).

¹⁵⁷ Not just the political appointment process stands in the way of professionalization of the judiciary: so, too, does the involvement of lay jurors in law application. See note *** *infra*.

yearn for the novelty of path-breaking, society-shaping decisions. Many federal judges do not welcome additions to their ranks, even though more judges would assist in lightening their workloads, for they fear that more judges will dilute their status.

Federal judges enjoy material support shared by few judges elsewhere in the world. Not only are their salaries among the highest for judges in the world, the accouterments of their offices, in terms of support staff and office facilities, for judges of the lowest courts, exceed those of justices of some of the world's supreme courts.

The practicing bar has embedded its measures of lawyer quality into selection standards for judges. In federal appointments historically a committee of the American Bar Association has rated judicial nominees. The committee prefers nominees who are successful litigation lawyers (trial lawyers are too rare to insist on) and successful business lawyers. The bar's success is remarkably revealed in the Annual Report of the Chief Justice of the United States for 2006.

In the 2006 report the Chief Justice of the United States worried that the nature of the federal judiciary is changing, because federal judges "are no longer drawn primarily from among the best lawyers in the practicing bar." While a half century ago, he noted, two-thirds of new federal judges came from private practice, today only 40% do. Ominously, he reported, some 50% of new federal judges come from prior work as judges (as magistrates or as state judges, presumably), while another 10% come from some other form of federal service.

The Chief Justice attributed the shift from relying on the practicing bar to relying on people experienced in the public sector to a "dramatic erosion of judicial compensation" that "will inevitably result in a decline in the quality of persons willing to accept lifetime appointment as a federal judge." The situation, he observed, has reached a "level of crisis." Federal judges, he noted, have not been treated fairly. The sacrifice that they must make is too great.¹⁵⁸ The thousand judges of the District Courts have salaries of about \$170,000 a year, the same as Congressmen receive, while the three hundred judges of the Courts of Appeal receive salaries of about \$180,000 a year. The eight Associate Justices of the United States Supreme Court have salaries of about \$210,000, while the Chief Justice himself gets paid a bit more.¹⁵⁹ Those incomes, particularly for district and appellate judges, would be considered high in Germany and Korea and are suggestive of the high status of federal judges in the United States. Salaries and status in state courts varies more and are not uniformly so high.

¹⁵⁸ 2006 Year-End Report [of the Chief Justice of the United States] on the Federal Judiciary. January 1, 2007, available at <http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf>

¹⁵⁹ <http://www.uscourts.gov/salarychart.pdf>.

Judicial selection is everywhere by political process. In some systems judges are appointed by the governor (*e.g.*, Maryland) or by the legislature (*e.g.*, Virginia); in other states they are elected (*e.g.*, New York). In the federal system judges are appointed by the President and confirmed by the Senate. The confirmation role of the Senate gives the senator from the state of appointment a *de facto* veto on the appointment. The term and manner of retention likewise varies from state-to-state. In the federal system the appointment is for life, so there is no retention issue.

Throughout American history reformers have sought to remove judicial selection from politics. In particular, many have seen judicial elections, such as is common in the state courts, as anathema. Reformers' successes have been limited. The American Judicature Society, founded in 1913, has spearheaded the effort. Its internet site tracks the methods of selection in each state.¹⁶⁰

Once selected federal judges are free of almost all control; state judges, on the other hand, usually are subject to popular votes or reappointment. Contrary to the organization of the German and Korean judiciaries, American judges are not subject to the administration of a ministry of justice or of a supreme court.

Law Professors

American law professors are closely tied to American judges. In recent years an increasing percentage of American law professors have begun their professional careers as law clerks for federal judges. Today a federal clerkship is almost a necessary condition to appointment as law professor at a leading law school. The preferred clerkship is with the highest federal court and most renowned judge possible. A clerkship with a justice of the United States Supreme Court is the most desired of all clerkships. Service as a clerk gives the clerk a fascinating window into the law and policy making role of America's highest appellate courts. That service is distant, however,

¹⁶⁰ See <http://www.judicialselection.us/>. On judicial selection see generally: JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY (2003) (approved by the American Bar Association House of Delegates in August 2003); STANDARDS ON STATE JUDICIAL SELECTION, REPORT OF THE ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, COMMISSION ON STATE JUDICIAL SELECTION STANDARDS (2001) (approved by the American Bar Association House of Delegates July 2000), available at <http://www.abanet.org/judind/downloads/reformat.pdf>; JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION [AND] BACKGROUND PAPER BY DAVID M. O'BRIEN (1988). Specifically on judicial elections, see generally: Melinda Gann Hall, *The Controversy Over Electing Judges and Advocacy in Political Science*, 30 JUSTICE SYSTEM J. 284 (2009); RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS (Matthew J. Streb, ed., 2007). For a rare scholars' defense of judicial elections, see CHRIS W. BONNEAU & MELINDA GANN HALL: IN DEFENSE OF JUDICIAL ELECTIONS (2009).

from the vast majority of ordinary cases, many of which, owing to the deficiencies of the system, never make it into any American court at all.

American law professors differ from their German and Korean counterparts in two important respects. When at the beginning of their careers aspiring American law professors are clerking for judges, their German and Korean counterparts are working on dissertations. Those dissertations deepen their knowledge of law and contribute to legal science. Many of those German and Korean law professors-to-be study law abroad. Few American law professors have done either. Non-Americans are typically surprised to learn that American law professors do not meet the usual scholarly requirements, i.e., dissertation in field, of university appointments.

Legal Education

In the United States all legal professionals are trained to be advocates. The system of legal education was established to train lawyers for practice.¹⁶¹

Someone who wishes to become a lawyer must successfully graduate from an undergraduate college with a degree in any subject. That presupposes twelve years of primary and secondary education and four years of undergraduate college education. Students apply to one or more of nearly two hundred accredited law schools. Most are colleges of law within universities, either public or private. A significant number, however, are private law schools independent of any university.

The system of university legal education began as a private substitute for an existing informal private system of apprenticeship training conducted by practicing lawyers. That system was generally one of easy admission. The apprenticeship system continued to exist alongside the university system throughout the nineteenth century.

In the twentieth century the apprenticeship system disappeared as an independent route to bar admission. Law school training became a necessary condition for bar admission. Remarkably, although for a time apprenticeship survived as a necessary complement to law school training, it has disappeared in that form too. The United States is virtually alone among modern legal systems in not requiring post law-school practical training.

Law school study consists of three years of academic work. Since tuitions are high, students rarely take more than time or more courses than the required minimum. Because there is no post-graduation practical training, most American law schools offer “clinical legal education” courses where students act as lawyers under the direction of a faculty member. Few law schools require students to take these courses and the majority of students do not. Upon graduation from law school, a student receives the Juris Doctor degree. This is not a true doctorate, in that no dissertation is

¹⁶¹ See MAXEINER, EDUCATING LAWYERS NOW AND THEN, *supra* note 91.

required. Upon graduation from law school, a student may take a bar examination in one of the fifty states. Admission to practice is by state.

In most states the bar examination consists of a one-day multiple-choice test and of a one-day essay test. Most students (65% to 90%, depending upon the state) pass a bar examination on the first try. Without further training they are legally qualified to practice law.

Relatively few graduates begin work as independent lawyers. More commonly they begin their careers as junior lawyers in law firms (associates) or otherwise as junior lawyers in larger organizations. Most get their practical training in on the job work.¹⁶²

Attorneys General

The Attorney General of the United States is the head of the United States Department of Justice. The attorney general of each state is the chief legal officer of the state. The offices of the attorneys general are not American counterparts of ministries of justice in Germany and Korea. The attorneys general in the United States are principally lawyers for the heads of state. They do not administer courts. They have limited or no authority to direct public prosecutors, who are largely independent of attorneys general. Attorneys general do not have major responsibilities for drafting or application of the laws of the land other than those directly related to their responsibilities for executing the law (*e.g.*, criminal prosecution).

The United States Department of Justice is not well-suited in its present form to assume the role of a ministry of justice. Much like the professional organization of the bar, its leadership lacks continuity. Moreover, its top leaders are political appointees. Typically they remain in office for only two to three years.¹⁶³ Repeatedly presidents have sought to control politically not only the top dozen officials but lawyers in the Department generally.

B. Germany

We are the ministry responsible for upholding justice,
rights and democracy.

Federal Minister of Justice
Ministry Website Homepage¹⁶⁴

¹⁶² See James R. Maxeiner, *Integrating Practical Training and Professional Legal Education*, THE INTERNATIONALIZATION OF LAW AND LEGAL EDUCATION (J. Klabbers & M. Sellers, ed.), 2 IUS GENTIUM: COMPARATIVE PERSPECTIVE ON LAW AND JUSTICE 37 (2008).

¹⁶³ See JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY 109-115 (1986).

¹⁶⁴ http://www.bmj.bund.de/enid/321939d8df2a18f97991fdcf94afdeaa,0/aktuelles_13h.html.

1. Access to Justice in Germany

Mandatory Legal Representation

In Germany Roh is required to use a lawyer to bring a lawsuit in the *Landgericht*. § 78 ZPO. The *Landgericht* is the ordinary court of general jurisdiction for civil claims that exceed €5000. If Roh's claim were for less than that, she could sue in the *Amtsgericht*, a civil court of limited jurisdiction, without a lawyer, either *pro se*, or represented by another person who is not necessarily a lawyer. § 79 ZPO. In other courts, such as the labor courts, *pro se* representation is routine.

In Germany mandatory representation is thought to contribute to a productive process. Lawyers filter cases and prepare them for court determination.¹⁶⁵ Lawyers facilitate the judicial job of applying law to facts. They protect clients against judicial overreaching. Having legally qualified lawyers on each side assures a level of comparable skill in conduct of the lawsuit ("equality of arms" *Waffengleichheit*). Whether these benefits justify mandatory representation, or whether lawyer self-interest should be seen as the motivator of the requirement, is debated. Mandatory representation impels the state to take responsibility for the quality of the legal representation and, pursuant to the equal protection guarantee of the German constitution, to assure that representation is available. The requirement of mandatory representation does not discourage many lawsuits, since fees for lawsuits are modest and awarded to winners and because, as we now discuss, civil legal aid and legal services insurance are widely available.

Civil Legal Aid

Parties who sue in the *Landgericht* are required to be represented by a lawyer admitted to practice, but that requirement does not preclude many parties from suing as it might in the United States. In Germany, if a party is unable to afford representation or other costs of litigation because of personal or commercial circumstances, the party has a statutory right to financial support.¹⁶⁶ The right extends to legal persons, such as DohSon Honda, LLC.¹⁶⁷

Civil legal aid is designed to assure that no one is forced to forego his or her rights for financial grounds; it serves to realize the constitutional guarantee of equal protection under law. Already the German Code of Civil Procedure of 1877 recognized a right to legal aid. Its drafters saw that the

¹⁶⁵ See Judgment of 6 May 2008, German Supreme Court (BGH), File X ZR 28/07.

¹⁶⁶ § 114 ZPO.

¹⁶⁷ § 116 ZPO.

rule of law, to be worthy of the name, is meaningful only if the poor as well as the rich have access to legal protection.¹⁶⁸

In Germany a party asserts the right to legal aid by making application to the court stating the requisite circumstances. The court is to grant the application, at a level and upon terms (*e.g.*, possibly repayment) commensurate with the circumstances shown, provided that it determines that the claim has a sufficient prospect (*hinreichende Aussicht*) of success and that it appears not to be brought spitefully (*mutwillig*). Courts regularly receive and routinely grant legal aid applications, which are commonly prepared by lawyers that the applicants have already consulted. Parties are not limited in their choice of lawyers, but may use any lawyer willing to accept representation for statutory fees. While not all lawyers accept statutory fees, most do and rarely are parties unable to secure competent representation. If a party entitled to legal aid is unable to find a lawyer, on application the court is to order representation.¹⁶⁹

2. The Cost of Lawyer Representation in Germany

“Loser pays”

In the German civil justice system the loser in a lawsuit pays the winner’s lawyers’ fees and court costs. The justification for this rule is that the lawsuit determines which party has right on his or her side. The other party should have paid the claim of right without a lawsuit; it is unfair to burden the righteous party with the costs of the lawsuit.

The loser pays rule discourages frivolous lawsuits. It also discourages excessive damage claims in well-founded lawsuits, since determination of which party wins depends on whether the amount claimed is recovered.

Although the “loser pays” rule is colloquially known in the United States as the “English rule,” some variation of it prevails in most modern legal systems. England has modified its rule to incorporate aspects of the German rules.¹⁷⁰

The loser pays rule discourages some meritorious lawsuits of uncertain prospects for success. We surmise that the number is not great. Legal services insurance, discussed below, reduces the risk for many cases. In other cases, claim-splitting does. A party with a large claim of uncertain

¹⁶⁸ See 1 BERNHARD WIECZOREK & ROLF A. SCHÜTZE, ZIVILPROZESSORDNUNG UND NEBENGESETZE: GROSSKOMMENTAR, vorb § 114, 2049 (3rd ed., 1994) (citing to legislative history of the CPO).

¹⁶⁹ § 121(5) ZPO.

¹⁷⁰ See John Peysner, *Learned in Germany: Applied in England in THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY, LEGISLATIVE AND LEGAL EDUCATIONAL ASSISTANCE TO OTHER COUNTRIES IN PROCEDURAL LAW* 339 (Masahisa Deguchi & Marcel Storme, eds. 2008).

success may test the waters by bringing one small claim first. Finally, at least compared to American fees, German fees that are shifted to losers are modest. Often in German litigation, fees for both sides combined are less than fees for one side would be in the United States.

Calculating Lawyers' Fees

Fee regulation. The requirement that losers pay winner's lawyers' fees practically requires regulating the amount of the fees that may be recovered. It would be unfair to burden losers with whatever fees winners might choose to incur. Such a system would permit powerful parties to spend their opponents to death.

While charges in excess of statutory fees may not be recovered, powerful parties, such as large corporations may and do agree with their lawyers to pay higher fees. Most parties, however, pay and most lawyers work at statutory rates. The system of regulated fees helps keep the costs of lawsuits proportionate to the amounts in dispute.

The Lawyers' Compensation Statute (*Rechtsanwaltsvergütungsgesetz*) sets the rates. It uses a fee system in which lawyers earn fee-units for accomplishing specific tasks. The statute bases the size of each fee-unit on the amount in controversy. In the ordinary case the statute provides that lawyers receive one-fee unit for each of three tasks: preparing a case, filing a complaint, and attending court. The statute provides for additional fee-units for cases that settle or are appealed.

The statutory fee schedule does not adjust fees to account for time actually required. Consequently, the statute encourages lawyers to accomplish tasks efficiently and discourages wasting time. Of course, it similarly discourages them from thoroughly handling these tasks if the time spent promises little gain. The statutory system can encourage lawyers to let courts take the lead in difficult issues.¹⁷¹

The statutory system results in fees that, in comparison to their American counterparts, are modest. For example, in *Roh v. Doh*, since the amount in controversy is €60,000, Hahn's fee would be three fee-units, or a total of €536. In the United States, if Hahn won the case, a 1/3 contingent fee would be \$25,000, but nothing if he lost. If he took the case on an hourly basis, if the time required were 70 hours, then @ \$300 per hour, his fee would be \$21,000.

Legal expenses insurance. While Mary Roh is not likely to qualify for legal aid, she may have legal services insurance, which is readily available in Germany at moderate cost. Unlike liability insurance, which commonly covers only legal services for defense of claims, legal services insurance covers lawyers' fees for prosecution of claims. It contributes to access to courts for persons of modest means, for it both supports bringing lawsuits as

¹⁷¹ See PETER MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 115 (2004).

well as relieves plaintiffs of the burden of having to pay the other sides costs and lawyers' fees in the event of loss.

Contingent fees and similar arrangements. Until 2006 contingent fees (*i.e.*, fees conditional on success in the lawsuit) were illegal. It was, and remains possible, to obtain third party financing of large litigation. Following a decision of December 12, 2006 of the German Constitutional Court, and a federal law of April 25, 2008 implementing that decision, contingent fee arrangements are now permitted, provided that the prospective party is otherwise financially unable to bring the lawsuit. The law would not likely permit Roh to reach a contingent fee arrangement.

3. Representing Roh in Germany: Is a Lawsuit Worth it for Roh?

Inevitably in Germany too Roh will get around to talking with her lawyer Hahn about the expense of representation. He will remind her of all of the collateral costs of the lawsuit in terms of her lost time, lost time of employees, frustrations and so on. Then he will be sure to establish his fee arrangement with her. They might have a conversation such as the following one:

Hahn: We'll file a complaint and thereafter prosecute this suit vigorously through to judgment, correct?

Roh: Exactly.

Hahn: I'll want to meet with you at least once more before we file any papers with the court to talk more specifically about how I think we ought to proceed. But earlier you asked about my fees, and I think I know enough now to tell you what the fees will be. While we could agree that you pay me a different fee, I usually do my job for the fee set by law. That is the maximum fee that you get back from the other side if you win the case. The fees for lawyers are determined by the amount in controversy: here €60,000, *i.e.*, the amount of the loan claimed without interest or additional fees. You can actually go to a website to calculate your fees. It is www.rechtanwaltsgebuehren.de. For work opening the case and preparing to bring it, my intake fee is €729. I need you to pay that today if you want me to go ahead and prepare a complaint. I will count it toward your total process fee of €2807. On filing with the court, you will have to pay the court fee of €1668, and I will want you to pay the balance of my fee, *i.e.*, €2078.

If you win, assuming that Mr. Doh has the money, he will have to pay you both my process fee and the court fee. If either of you decides not to accept the decision of the court, then there will be fees for the appeal. Whoever loses the appeal will have to pay all of the lawyers' fees and all of the court costs for both proceedings from the start. Is everything clear?

Roh: I guess so. Of course, I wish it weren't so expensive but I guess that's the way things go these days. This is probably a dumb question, but I assume that if the case settles in just a few hours after we file it, I'd get most of the €4475 back?

Hahn: Not if we have begun the lawsuit. If we settle before we begin the lawsuit, then you will get back most of it. But once the lawsuit is underway, even if we settle nearly immediately, while you will get back €1112 of the court fee, you will then, by law, have to pay me a settlement fee of €1123. The idea is that will encourage me to help bring

about a settlement. Of course, in the case of a settlement, we will have to apportion the lawyers' fees. Usually the parties pay their own lawyer's fees. Shall we meet again on Wednesday at 2:00 to discuss the complaint? You can approve it then and I will file it.

Roh: Sure. I am good to go.

We turn now to consider the people who make up the German legal profession.

4. The German Legal Professions

American lawyers in their focus on the instrumental role of achieving specific results can easily overlook that a legal system measured by the ends that the system produces for society as a whole. Civil justice is a public good, just as are national defense, public highways and public education. Nowhere is that recognition stronger than in Germany than in the institution of the ministry of justice.

The Ministries of Justice

There are in Germany one federal and sixteen state ministries of justice. Their responsibility is to minister to and provide for the peoples' needs for civil and criminal justice. Some of the most revered of American jurists, including long-time Harvard Law School Dean Roscoe Pound and the iconic Supreme Court Justice Benjamin N. Cardozo, have pointed enviously to foreign ministries of justice.¹⁷²

In Germany federal and state ministries of justice coordinate among themselves along lines typical for German federalism: the Federal Ministry provides for a uniform national structure, while the state ministries carry it out. The employment figures given on the ministries' websites demonstrate the division of responsibilities: the Federal Ministry has fewer than 1,000 employees, while the Bavarian Ministry, which is just one of sixteen state ministries, has more than 19,000 employees.

The Federal Ministry of Justice is principally responsible for maintaining a codified and rational body of laws and for overseeing the administration of the federal courts.

The state ministries of justice are responsible for state legislation and, above all, for the full range of the administration of justice. Their tasks include:

- administration of the civil and criminal courts;

¹⁷² Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921) (citing two contemporary works by Roscoe Pound); ROSCOE POUND, 3 JURISPRUDENCE 736-37 (1959); see RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 14-15 (6th ed. 1998).

- administration of the offices of public prosecution;
- administration of the system of legal aid in criminal, civil and counseling cases;
- administration of the prisons;
- administration of post-incarceration supervision;
- crime victim programs;
- witness assistance;
- employment of judges, prosecutors and prison employees to staff the forgoing;
- admission of applicants to legal practice, including prescribing the required course of their preparatory studies;
- practical training of apprentice lawyers in the courts; and
- supervision of practical training by the bar of apprentice lawyers.

Judges

Where once German judges may have had a uniform self-image as appliers of the law, today there is no single self-image, but a plurality of images. These images range from strict law-appliers to equity judges; from political judges through people protectors to public service providers. On the one hand, one former President of the German Supreme Court called upon judges to place first the need for predictability and accountability (*Berechenbarkeit*) for the sake of business; another to place in the forefront protection of the weak.¹⁷³

Germany has among the highest, possibly the highest, number of judges per capita of any modern country. There are over 20,000 German judges; The United States with more than three times the population, does not have 30,000 judges.

Judicial selection for the state courts in Germany is not political. Almost all new judges are chosen within a few years of completion of their legal education when they are twenty-five to thirty-five years old. The principal basis for selection is high performance on the two state examinations in law. For many years most applicants have scored in about the top 10% of those taking the examinations.

Typically new judges begin their careers in one of the two courts of first instance, the *Landgericht*, the court of general jurisdiction, or the *Amtsgericht*, the principal court of limited jurisdiction. About one half of German judges are judges of an *Amtsgericht*. New judges in a *Landgericht* are assigned to multi-judge chambers. Before 2002 these chambers usually

¹⁷³ See Peter Kauffmann, *Richterbilder heute—Eine rechtssoziologische Betrachtung*, DEUTSCHE RICHTERZEITUNG (DRIZ) 2008, 194; PETER KAUFFMANN, ZUR KONSTRUKTION DES RICHTERBERUFS DURCH RICHTERLEITBILDER: EINE EMPIRISCHE UNTERSUCHUNG (2003).

decided in panels of three; today mostly they decide as single judges. Nevertheless, *Landgericht* judges typically work together. Junior judges may share offices, while experienced judges usually have offices in suites or otherwise close together. Since *Amtsgericht* judges have long decided alone, they historically have acted more on their own and, for this reason, some judges prefer to work there.

Judicial compensation is little different between *Landgericht* and *Amtsgericht*, so many judges have no difficulty staying with the formally lower courts for their careers. Supervisory judges in an *Amtsgericht* can earn more than judges in a *Landgericht*. This pattern continues even to the courts of appeal (*Oberlandesgerichte*). Judicial salaries are based principally on years of service, age, family status and supervisory responsibilities. Typical annual salaries run from about €40,000 to €70,000.

Appointment to the federal courts, on the other hand, does have a political element. Appointment to the Constitutional Court is deliberately political and is so provided in the Constitution (Basic Law). In the case of the other federal courts, appointments are not overtly political, but since they originate in the state ministries of justice, they have a non-partisan, yet not entirely merit-based component.¹⁷⁴

In Germany, almost all federal judges are appellate judges. They are paid annual salaries of about €90,000 to €130,000, most at the lower rate. Fourteen of the sixteen justices of the Constitutional Court are paid at roughly the higher of these rates; the President and Vice President are paid somewhat more. Almost all federal judges, except Constitutional Court judges, were state court judges before they become federal judges. Few have any post-bar admission private practice experience. Justices of the Constitutional Court often are former law professors.

Lawyers

More than its American counterpart, the German bar is in the shadow of the judicial profession. In Germany, the system of legal education was established to train civil servants for the State. All persons who wish to become legal professionals, whether as lawyers or as judges or otherwise, are trained as judges. The bar has sought to escape from the judicial

¹⁷⁴ On selection to the federal courts other than the Constitutional Court (which has its own constitutionally-mandated political procedures), see David P. Kammers, *American Courts and Democracy; A Comparative Perspective*, in THE JUDICIAL BRANCH 200, 207-208 (Kermit L. Hall & Kevin T. McGuire, eds. 2005). On selection to all courts, see MARTINA KÜNNECKE, TRADITION AND CHANGE IN ADMINISTRATIVE LAW: AN ANGLO-GERMAN COMPARISON 56-60 (Constitutional Court), 63-69 (state and other federal courts) (2007).

domination of education as education for judges, but so far, without success.¹⁷⁵

The image of the judge has colored the historical ideal of the legal professional. Judges have the leading roles among all legal professionals: it is judges who apply law to facts of cases to decide them.¹⁷⁶ Lawyers and other legal professionals play supporting roles in helping judges apply law. The classic model of German lawyers is as “independent organ of the system of the justice system” (*unabhängiges Organ der Rechtspflege*¹⁷⁷). Within that system, lawyers are independent advocates (*freie Advokatur*).

In the past generation the German bar has experienced great growth and terrific turbulence. In the middle of the twentieth century, the bar was still relatively small and relatively homogenous. Through most of the century it was sheltered from competition by professional rules that limited law firms to practice in one city and lawyers to practice before one court. Lawyers practiced alone or in firms with fewer than ten members. Lawyers did not vastly outnumber judges.

The idyllic picture—for lawyers, anyway—changed in the last decade of the twentieth century. The number of attorneys sky-rocketed while protective limitations on practice were undone (by courts applying European Union and constitutional law.) While in 1959, there were 16,000 lawyers authorized to practice law in Germany, in 2009 there were nearly 150,000, or almost ten times as many with little population growth. As late as 1973 there were only two lawyers for every judge (25,000 lawyers to 13,000 judges).¹⁷⁸ By 2005 there were seven (150,000 lawyers to 20,000 judges). German lawyers now may practice German law throughout Germany and throughout the European Union. Law firms of ten or fifty lawyers are common. Still larger firms lead in international practice; most of the ten largest law firms in Germany are branches of law firms headquartered in England or in the United States. In today’s global world of free competition, German lawyers are looking for a new professional model.¹⁷⁹

Legal Education

In Germany all legal professionals are trained to be judges. People who wish to become lawyers must successfully graduate from an academic high school with the *Abitur* degree. This requires 12 years of study and usually

¹⁷⁵ See, e.g., Hartmut Kilger, *Wie der angehende Anwalt ausgebildet sein muss*, 2007 ANWALTSBLATT 1; *Entwurf eines Gesetzes zur Einführung einer Spartenausbildung in der juristenausbildung*, 2007 ANWALTSBLATT 45.

¹⁷⁶ See ALFRED RINKIN, EINFÜHRUNG IN DAS JURISTISCHE STUDIUM 134-149 (1977).

¹⁷⁷ BRAO [Bundesrechtsanwaltsordnung, Federal Law on Lawyers] § 1.

¹⁷⁸ *Id.* at 142.

¹⁷⁹ See Hans-Jürgen Hellwig, *Anwaltsethos—Lehren aus der Finanzkrise*, 2009 ANWALTSBLATT 465; Hans-Jürgen Hellwig, *Das Konzept des anwaltlichen Berufsbilds*, 2008 ANWALTSBLATT 844.

occurs at age 18. With a single exception, law faculties are all faculties in public universities. There is minimal or no tuition at public universities, so students may and do spend more than the required seven or eight semesters of study. When students feel ready, they take the first state examination. About two-thirds of all students are successful in passing this examination. These examinations are more challenging and longer (they take longer than a week) than their American counterparts. Students who fail the first time, usually may retake the exam only once.

Students that pass the first state examination are admitted to a two-year period of practical training sponsored by the courts of the different states. In that training program they called in German, *Referendare*, or in English, legal interns. *Referendare* are paid a small stipend that helps cover basic living costs. Upon successful completion of this period, *Referendare* take a second state exam. If successful they are qualified to become lawyers or judges.

In the practice training period after the first state examination prospective lawyers learn practical skills needed by for legal practice as judges, lawyers or government officials. They do internships with courts, lawyers and government agencies. They begin their practical training at the courts and, although only a few become judges, all are required to learn judicial skills. Of greatest importance is the *Relationstechnik* of relating facts to law and of crafting judgments. Judges as classroom teachers didactically teach classes that lay out the fundamentals of this technique, while other judges are assigned to tutor the aspiring legal professionals, the *Referendare* or interns, as apprentice judges. The interns learn how to take the substance of the law they learned at the university, how to conduct legal proceedings to determine facts, and how to justify in legal judgments their correct determinations of how law applies to particular cases. In short, they learn to do what a judge has to do. And it is the mastery of the techniques of applying law to facts (*Relationstechnik*) that defines the judge.¹⁸⁰ Qualification as *judges* (*Befähigung zum Richteramt*) is the necessary prerequisite to admission to practice as lawyers.

C. Korea

We must continue to devote our time to ensure that justice becomes a part of the national reality, and not simply an ideal. To this end, our courts will undergo significant changes. These efforts will allow the court to listen to even the smallest voices from the public and to resolve their deepest concerns.

¹⁸⁰ ALFRED RINKEN, EINFÜHRUNG IN DAS JURISTISCHE STUDIUM 135 (1977). See James R. Maxeiner, *Imagining Judges that Apply Law*, 114 PENN STATE L. REV 469 (2009).

Yong-hoon Lee,
Chief Justice of the Supreme Court of Korea (2007)¹⁸¹

1. Access to Justice in Korea

Pro se Representation (본인소송)

Korea has a higher incidence of pro se participation than do either the United States or Germany. Even in substantial cases it is common that one or both parties is without a lawyer. Even leaving small claims to one side (jurisdictional amount below ₩100,000,000), in fewer than 20% of all cases are both sides represented by lawyers. Here are the figures for 2008 for the number of cases where a party or parties were represented by lawyers before a district court (or branch court) of original jurisdiction in civil meritorious cases (민사본안사건) in Korea:

Number of Dispositions	Collegiate Division			Single Judge Division			
	Plaintiff only	Defendant only	Both Parties	Number of Dispositions	Plaintiff only	Defendant only	Both Parties
48,880	12,213 25.0%	3,042 6.2%	22,991 47.0%	283,011	111,414 39.4%	10,181 3.6%	29,021 10.3%

¹⁸²

Because judges in Korea take more responsibility for proceedings than do their counterparts in America, it is easier for the Korean system to accept unrepresented parties than it is for the American. When parties are not represented by lawyers, judges proactively direct procedures and explain relevant legal principles to help unrepresented parties participate. Frequently judges direct lay parties to material points in dispute and away from personal attacks on opponents. Without a study comparing *per se* to lawyer representation in Korea, we are not able to evaluate reliably whether these measures are sufficient to overcome the inequality of arms that inevitably results when one side is represented by a lawyer and the other it not.

*Civil Legal Aid*¹⁸³

¹⁸¹ Quoted in THE SUPREME COURT OF KOREA at 5 (Supreme Court of Korea, 2007) available as 2008 INTRODUCTORY BOOK OF THE SUPREME COURT OF KOREA at <http://eng.scourt.go.kr/eng/supreme/introduction.jsp>.

¹⁸² Office of Court Administration, Annual Judicial Report for Year 2008, <http://www.scourt.go.kr/justicesta/JusticestaListAction.work?gubun=10>.

¹⁸³ See generally Gyooho Lee, *Cost and Fee Allocation in Civil Procedure in Korea*, forthcoming, temporarily available at http://www.wcl.american.edu/events/2010congress/reports/National_Reports/II_C_1_Cost_and_Fee_Allocations/Korea.pdf?rd=1

The Korean Civil Procedure Act allows, but does not require, courts to provide civil legal aid. The legal aid provided is usually in the form of deferment of payment rather than provision of free services.¹⁸⁴ While the German system delivers civil legal aid through the ordinary bar, the small number of lawyers in Korea makes that approach difficult. In Korea, such legal aid as there is, is largely provided by the Korea Legal Aid Corporation. Established pursuant to the Legal Aid Act enacted in 1987, it is a public interest organization under the supervision of the Ministry of Justice. Korean scholars criticize government support for legal aid by private organizations as trivial. Where the amount in controversy is less than ₩50 million (about \$50,000), with permission of the court, parties may choose to be represented by someone who is not qualified to practice law.

2. Cost of Legal Representation in Korea

*“Loser pays”*¹⁸⁵

Korea follows the international norm and shifts litigation expenses, including legal fees, to losing parties. The system is less effective in Korea than in Germany, however, because the relatively small bar is less willing to work for statutory fees. Parties often have to pay their lawyers at rates in excess of the statutory fees.¹⁸⁶

The Korean Civil Procedure Act authorizes the Supreme Court of Korea to set legal fees for indemnification in litigation.¹⁸⁷ The Supreme Court’ Rules Regarding Lawyers’ Fees, when first issued in 1981, were unsatisfactory in that they did not account adequately for economic growth and the increase in amounts in controversy. After study of the American no indemnity practice and the international “loser-pays” standard, the Supreme Court reissued the Rules.

The Rules limit only reimbursable fees and not the fees that lawyers charge their clients. Party autonomy prevails so that parties may agree to pay their lawyers more. Typically parties and lawyers agree on a two part fee that consists of a non-refundable initiation fee and an additional fee contingent on success in the action. In 1983 the Korean Bar Association recommended fees, but withdrew these recommendations in 2000 when they were questioned as competition law violations.

Calculating Legal Fees in Korea

¹⁸⁴ KPCA §§ 128, 129.

¹⁸⁵ This section follows Lee, *Cost and Fee Allocation in Civil Procedure in Korea*, *supra* note 183.

¹⁸⁶ See Kap-You (Kevin) Kim, *Dispute Resolution in Korea*, <http://www.femuni-hagen.de/JAPANRECHT/Streitbeilegung.pdf>;

¹⁸⁷ KPCA § 109(1).

The reissued Rules Regarding Lawyers' Fees provide for a reimbursable fee of a designated percentage of the amount in dispute. That amount begins at 8% for an amount in dispute of ₩10 million (roughly \$10,000) and drops for additional amounts in 1% increments until it is only 1% for amounts in excess of ₩100 million but below ₩200 million, and ½ % for amounts in excess of ₩500 million.¹⁸⁸

The statutory system results in fees that, in comparison to their American counterparts, are modest, but are in line with their German counterparts. For example, in *Roh v. Doh*, since the amount in controversy is ₩75 million, the fee would be ₩1,050,000 (roughly \$4000). As we saw in Germany, based on an amount in controversy of €60,000, Hahn's fee would be €3536.

Initiation Fees (Retainers). Initiation fees normally range from ₩2 million to ₩5 million (roughly \$2000 to \$5000). Typically they are refundable only in the event of breach of duty by the lawyer.

Contingent fees. Contingent fees are common in Korea. Their use was subject to limits recommended by the Korean Bar Association's rules that were abolished in 2000. Today they are not controlled. Proposed legislation to limit their use in criminal cases was defeated in 2007 by a coalition of former judges and prosecutors who saw the legislation as interfering with their ability to take full advantage of their former status.

Contingent fees in civil cases are usually determined on a case-by-case basis and typically range between 5% and 10% of the amount recovered. They usually take into account the importance and difficulty of the case, the amount in controversy, where the case occurred and where the parties reside. Often contingent fees are waived if the case is resolved quickly in the course of provisional proceedings.

Fee competition. Korean lawyers compete for clients based on fees. LawMarketAsia is an internet site that offers an auction service where lawyers bid on cases. It asserts that it saves clients 20% to 50% on fees. The site also provides support for parties who represent themselves.

Legal expenses insurance. The Korean public has long sought legal event insurance. In 2009 D.A.S., a subsidiary of Munich Re Group in Germany, began to offer such insurance. It covers legal costs, such as lawyers' fees, stamp fee, fees on service of process, up to ₩50 million.

3. Representing Roh in Korea: Is a Lawsuit Worth it for Roh?

Hahn: We'll file a complaint and thereafter prosecute this suit vigorously through to judgment, correct?

Roh: Exactly.

¹⁸⁸ Supreme Court Rules No. 2116, amended on November 28, 2007, effective on January 1, 2008.

Hahn: I'll want to meet with you at least once more before we file any papers with the court to talk more specifically about how I think we ought to proceed. But earlier you asked about my fees, and I think I know enough now to tell you what the fees will be. The initiation fee generally ranges from ₩3 million to ₩5 million [\$3000 to \$5000] irrespective of how much the amount in controversy will be. Besides the initiation fee, I will be paid for contingency fees amounting to 5% to 10% of the amount of settlement or judgment if you settle or win the case. We can negotiate how much you will pay initiation fee for me, taking into account several factors such as the difficulty of the case or the length of disposition of the case. In this case, I would like to propose ₩4 million for the initiation fee. How do you think it is reasonable? Also, I want to be paid for 7% of the amount of settlement or judgment if you settle or win the case. If that is ₩75 million exactly, then my fee contingent fee would be ₩5.25 million additional. If you accept my offer for the attorney fee arrangement, why don't you sign this retainer agreement?

Roh: I agree. I will sign it.

Hahn: Here you are. O.K. It's done. Before we file the court, I want you to pay both of my initiation fees and the court fee including stamp fee. On filing, you will have to pay the stamp fee of ₩342,500 because the amount in controversy is ₩75 million and, in accordance with Art. 2 sec. 1 (2) of the Stamp Fees Act, the stamp fee is computed by the formula, "(amount in controversy multiplied by 45/10,000) + ₩5,000" when amount in controversy is ₩10 million or more and less than ₩100 million.

Roh: I would like to inquire whether I get the costs back if we win. That includes your fee, right?

Hahn: Not quite. Let me explain. If you win, John Doh, Jr. will be required to pay the court costs and most of my contingent fees. The general rule is that the losing party has to pay the court costs and the legal fees for the winning party. That is stated in Article 98 of the Korean Civil Procedure Law. Article 109 (1) of the Act tells us how much of my contingent fee Doh has to pay. It's somewhat less. In this case, it would be ₩1.05 million because the amount in controversy is ₩75 million. Of course, that assumes that Roh has the money to pay your claim.

Also, I have to tell you, that if he wins, then you will have to pay his court costs and ₩1.05 million KW of his lawyer's fees. While it seems unlikely in this case, if the court were to find that he owes you something less than ₩75 million, then, depending upon how that court finds, you would end up getting less or perhaps even owing Doh money.

Roh: Now, I got it. When can I meet you to discuss the complaint? Recently, I am very busy.

Hahn: You do not need to come by my office because I fully understand how this case will go. As soon as you remit the initiation fees to my law firm's bank account, I will file the complaint. Afterwards, I will let you know as soon as the date for early hearing is set.

Roh: Thank you. I will remit the initiation fees to you right away. I am sure that you will do your best to win the case. Still, I would feel better if we meet one more time before you file the complaint. I can review it and ask you questions about what to expect in the proceedings. How about Wednesday next week at 2:00 PM

Hahn: OK with me. See you then.

4. Korean Legal Professions

Lawyers (변호사)

The Korean legal professions shares features of the Japanese legal professions out of which they grew. Historically the legal professions in both countries had very few lawyers; the number of lawyers was limited to artificially low levels. Even today, the Ministry of Justice, after consulting with the Supreme Court of Korea and the Korean Bar Association, sets the total number of successful applicants. Until 1978 that number of successes was below one hundred; until 1995 it was below three hundred. The percentage of successful takers was three percent or lower. While the number admitted has increased, it remains subject to government control. This contrasts to the open bar admissions of Germany and the United States, where everyone who demonstrates minimal legal competency on the bar examination is eligible to practice law.

Joining the legal profession has been a symbol of fulfilling the “Korean dream.”¹⁸⁹ The limited number of bar admissions has led some Koreans to regard lawyers as an exclusive social caste. In the course of recent reforms, the organized bar has sought to gain influence over the number of students admitted to study law and thereby to retain influence over the number of persons eventually admitted to practice law.¹⁹⁰

The Korean bar historically has been closely-knit and grouped into three types of legal practice: relatively large international business firms, medium size domestic firms, and courthouse area lawyers mostly practicing on their own or in small groups in individual litigation. The international firms typically have fifty to two hundred-fifty lawyers and focus on international transactions such as mergers; the domestic business firms usually have around ten lawyers.¹⁹¹ Roh’s lawyer Hahn in Korea likely would come from that group of firms.

Whether the closely-knit bar will survive the rapid increase in number of lawyers is an open question. Not only will numbers increase, but future lawyers are also likely to have more diverse experiences. The common experience of training at the Judicial Research and Training Institute, in a few years time, may become a thing of the past.

¹⁸⁹ Kyong-Whan Ahn, *Law Reform in Korea and the Agenda of Graduate law School*, 24 WIS. INT’L L.J. 223, 227 (2006)

¹⁹⁰ Chang Rok Kim, *The National Bar Examination in Korea*, 24 WIS. INT’L L.J. 243, 252 (2006).

¹⁹¹ Hyung Tae Kim, *Legal Market Liberalization in South Korea: Preparations for Change*, 15 PAC. RIM L. & POLICY J. 199, 204 (2006).

The Supreme Court of Korea (대법원)

From its sixteen story, 66,500 square meter building in southern Seoul the Supreme Court of Korea literally towers over the Korean legal system. Its American and German counterparts sit in smaller buildings and have nowhere near the influence over their respective legal systems. And yet the Court consists of only one Chief Justice (대법원장)—appointed to a single, non-renewable six year term by the President of Korea with the consent of the National Assembly—and thirteen justices—similarly appointed, but to renewable six year terms. One of the Justices is the Minister of National Court Administration and is not allowed to participate in judgments rendered by the Court.

The Supreme Court has the following responsibilities:

- It is the court of last resort for all courts, civil, criminal, administrative, patent, except for the Constitutional Court;
- The Chief Justice designates three of the nine justices appointed by the President of Korea to the Constitutional Court;
- The Chief Justice has general control over judicial administrative affairs, and appoints and directs the officials charged with judicial administration, including the Minister and the Vice Minister of National Court Administration;
 - Other courts, i.e., the High Courts, the District Courts, the Patent Court, the Family Court and the Administrative Court are administrative subdivisions of the Supreme Court of Korea;
- The Chief Justice with the consent of the other Justices (대법관) sitting in the Council of Supreme Court Justices appoints all judges;
 - The Chief Justice can evaluate service of judges and affect their personnel record.
- The Chief Justice appoints and supervises the President of the Judicial Research and Training Institute;
 - All Korean judges and lawyers are trained by the Judicial Research and Training Institute;
- The Chief Justice appoints and supervises the President of the Training Institute for Court Officials;
- The Chief Justice appoints the Chairman and Commissioners of the Sentencing Commission;
- The Supreme Court establishes the Supreme Court Rules and Regulations and other rules and regulations concerning judicial proceedings, discipline and management;
- The Chief Justice has the right to present his or her opinion to the National Assembly on matters related to the administration of justice;

- The Supreme Court has exclusive jurisdiction over disputed presidential and parliamentary elections;
- The Supreme Court reviews the constitutionality or legality of orders, rules, regulations and actions taken by administrative entities;
- The Supreme Court's Judicial Disciplinary Committee is responsible for disciplining judges.¹⁹²

The Ministry of Justice (법무부)

The Korean Ministry of Justice functions more like the United States Department of Justice than like the German ministries of justice. Its principal tasks are acting as legal counsel for the government and directing and supervising criminal law enforcement, corrections and immigration. In recent years it has taken on some legal system responsibilities: in 2002 it took over administration of the National Bar Examination; since 2005 through what is now the Commercial Affairs Division it reviews commercial legislation. The Office of Legal Counsel is responsible for updating and improving the Korean Civil Procedure Act. It also provides legal advice to the President, Prime Minister and Ministers, and authoritative interpretations of laws to government bodies.

The Ministry of Government Legislation (법제처)

The Korean Ministry of Government Legislation corresponds to the German Federal Ministry of Justice. Its primary duties are the comprehensive control and coordination of the government's legislative affairs, statutory examination, statutory interpretation, and statutory improvement.

Judges (법관)

The Chief Justice and the Justices of the Supreme Court of Korea are appointed by the President with the confirmation of the National Assembly. The Chief Justice with the consent of the Council of Supreme Court Justices appoints all other judges. They also determine the number of judges appointed to each court. There is no age requirement for judges.¹⁹³

¹⁹² See THE SUPREME COURT OF KOREA (published by the Court, August 2007) and available at <http://eng.scourt.go.kr/eng/main/Main.work> as 2008 INTRODUCTORY BOOK OF THE SUPREME COURT OF KOREA.

¹⁹³ See Woo-young Rhee, *Judicial Appointment in the Republic of Korea from Democracy Perspectives*, 9 J. KOREAN L. 53, 60-62 (2009).

Korean judges have all passed the difficult National Bar Examination and studied for two years at the Judicial Research and Training Institute. While outwardly similar in organization and careers to German judges, Korean judges are subject to greater career pressures. Initially they are given ten-year appointments. But in practice an up-or-out system prevails. The Chief Justice can evaluate the service of judges and the result is reflected in their promotion. In this regard, the judges in Korea are likely to be encouraged to settle the cases in question. While German judicial organization is essentially flat and there is little pressure to advance, in the Korean system there are ten or more promotional steps which every judge is expected to climb. Those that fail to do so in a reasonable period are expected to resign. Indeed, if ever someone junior is promoted over a more senior judge, the more senior judge is expected to resign.

The early severance system has contributed to low levels of public confidence in the Korean judiciary. On the one hand, judges and prosecutors who separate from service prior to retirement may register as lawyers and represent clients before the courts and agencies with which they formally served. The public believes that these former judges and prosecutors turned lawyers have a higher rate of success than do other lawyers. They pay them better. Newspaper studies of statistical data lend credence to those beliefs.¹⁹⁴ The practice is known in Korean as *Jeon-gwan ye-u* (전관예우).

On the other hand, judges, so long as they remain in service, are vulnerable to adverse performance evaluations. This puts their independence at risk. That control can come directly from the top: from the Chief Justice of the Supreme Court.

The introduction of the law school system (discussed in the next subsection) makes uncertain what will be the background of future judges. The Judicial Research and Training Institute in the future will only train judges. There is to be increased emphasis on recruiting as future judges lawyers from the practicing bar in mid-career.

Legal Education

In 2009 Korea followed the example of Japan of five years earlier and introduced a law school system to replace partly the former law faculties.¹⁹⁵

¹⁹⁴ See Jae Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 ASIAN-PACIFIC L. & POLICY J. 45, 50-53 (2001); Kwon, *Korea: Bridging the gap*, *supra* note 73, at 172-173, 179.

¹⁹⁵ See generally Ahn, *Law Reform*, *supra* note 189; Young-Cheol K. Jeong, *Korean Legal Education for the Age of Professionalism: Suggestions for More Concerted Curricula*, 5 EAST ASIA L. REV. 155 (2010); Chang Rok Kim, *The National Bar Examination in Korea*, 24 WIS. INT'L L.J. 243 (2006); Jasper Kim, *Socrates v. Confucius: An Analysis of South Korea's Implementation of the American Law School Model*, 10 ASIAN PACIFIC L. & POLICY J. 322 (2009); Kwon, *Bridging the gap*, *supra* note 73, at 173-175. For Japan see James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools*, 13 PACIFIC RIM L. & POLICY J. 303 (2004).

In the former system, university law faculties provided undergraduates with non-professional education in law. Nearly all students who were interested in becoming lawyers, studied as well at cram schools to prepare for the National Bar Examination. Applicants could, if they wished, forego university studies altogether, for the bar exam itself had no prerequisites. The deleterious effect such a system had on the legal education of successful takers and on the lives of unsuccessful applicants was widely decried.

In the old system, all students who passed the National Bar Examination were admitted to a two year period of theoretical and practical studies at the Judicial Research and Training Institute to be prepared to become judges, prosecutors or lawyers. That institute is a branch of the Supreme Court of Korea. Under the new system the study period is reduced to one year and only those students selected to be judges will study at the Institute.

Under the new system, students who have an undergraduate education are admitted to law schools to study law professionally. The government controls the number of law schools and the number of law students. As of 2009 the Ministry of Education, Science and Technology certified only twenty-five law schools with a total approved enrollment of only two thousand. The new system permits only graduates of law schools to take the National Bar Examination. The government continues to set quotas on the number of applicants allowed to pass the examination. That quota is expected to be substantially higher than the historic quota; at least more than half of all applicants and perhaps as high as four-fifths.

D. Comparative Statistics

These statistics are for approximate comparisons only. Any proper detailing would require discussion of classifying legal professionals as lawyers, judges or other personnel.

Statistics	United States	Germany	Korea ¹⁹⁶
Approximate population	308 million	82 million	50 million
Lawyers	1,162,124 ¹⁹⁷	146,910 ¹⁹⁸	7,007
Lawyers per 100,000	386	179	14
Judges—total	28,723	20,138 ¹⁹⁹	2,008

¹⁹⁶ Chang Rok Kim, *The National Bar Examination in Korea*, 24 WIS. INT'L L.J. 243, 259 (2006). The statistics are for 2005.

¹⁹⁷ American Bar Association, National Lawyer Population by State, as of December 31, 2007. http://www.abanet.org/marketresearch/2008_NATL_LAWYER_by_State.pdf.

¹⁹⁸ Bundesrethanwaltskammer, Großer Mitgliederstatistik, as of January 1, 2008, at <http://www.brak.de/seiten/pdf/Statistiken/2008/MGgross2008.pdf>

¹⁹⁹ Bundesamt für Justiz, Referat III 3, 3110/6 - B7 17/2007, available at, http://www.bmj.bund.de/files/3f68e11a4fd244d6b92a2c3833dc885e/1196/Gesamtstistik_Anzahl_Richter_Staatsanw%C3%A4lte_Vertreter_des_%C3%B6ffentlichen_Interesses_04.11.2006.pdf. Statistics as of December 31, 2006.

Judges per 100,000	9 ½	24 ½	4
Lawyers per judge	40 ½	7 ¼	3 ½
<i>Judges—federal courts</i>	862 ²⁰⁰	455	<i>na</i>
<i>Judges—state courts</i>	27,861 ²⁰¹	19,683	<i>na</i>

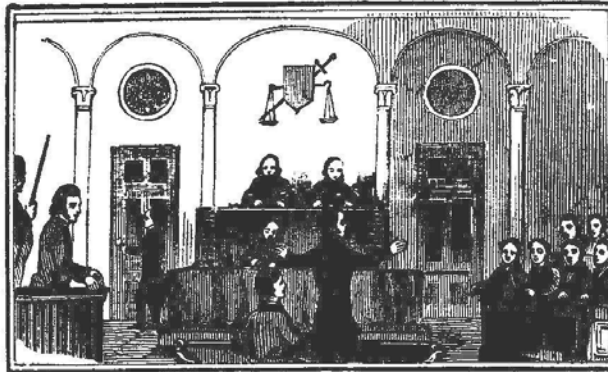
²⁰⁰ Authorized Article III judges, appellate 28 U.S.C. § 44(a), district court 28 U.S. C. §133(a), and U.S. Supreme Court. Does not include magistrate judges or bankruptcy judges.

²⁰¹ Bureau of Justice Statistics, Special Report: State Court Organization, 1987-2004, at 3 (2006), available at www.ojp.usdoj.gov.

CHAPTER 4

THE COURT
JURISDICTION AND APPLICABLE LAW

The Judicial Power—the Judiciary.

*A court of justice.*

THE *judicial* or *judging power*, is exercised by courts. A court of justice usually consists of one or more judges, with a sheriff and a jury. This being a most important branch of government, we should be careful to understand its nature, duties, and functions.

THE YOUNG AMERICAN
(popular schoolbook, 1844)²⁰²

Mary Roh now has a lawyer. She still has no lawsuit.

What does Roh want from a lawsuit? She, like most litigants not bearing grudges, wants her money back. She cares all about result and not at all about process. The faster and cheaper she gets result she wants, the happier she will be.

At her first meeting with her lawyer Harry Hahn, Roh asks: “when do we go to court?” Hahn answers: “Not so fast. The first thing that we have to consider is in which court we can bring a lawsuit. We need a court that has what lawyers call ‘jurisdiction.’ The court must have jurisdiction both over the subject matter of the lawsuit and over the parties. Lawyers call the first type ‘subject matter jurisdiction’ and the second type ‘personal jurisdiction.’

²⁰² S.G. GOODRICH, THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE AND NECESSITY. FOR THE USE OF SCHOOLS 23 (4th ed., 1844).

If more than one court has both subject matter and personal, we will have to choose among them. In the United States, the American Hahn is likely to add, “I will look for the court that I think will get you the best result based on the law of the court and its personnel.” American lawyers call the practice of looking for the most favorable court “forum-shopping.”

Roh does not care how Hahn answers these questions, so long as the court chosen gives her what she wants. To Roh jurisdiction is legal nitpicking. All she just wants to hear from Hahn is that there is a court that can give her the result she wants and is likely do so soon.

While Roh understandably sees jurisdiction as mere detail—it has little to do with her claim of right—in all three of our systems it is an essential detail. A judgment rendered without jurisdiction is not enforceable; it is no judgment at all.

In this chapter we begin with a section that addresses jurisdiction generally. We continue with three national sections, each of which considers for the relevant system: the system’s courts, the system’s rules of subject matter jurisdiction, the system’s rules of personal jurisdiction and applicable law. The United States section includes an historical note on personal jurisdiction. Finally we conclude the chapter with a section on forum-shopping.

Jurisdiction

The two types of jurisdiction we have just identified, personal jurisdiction and subject matter jurisdiction, are different. Subject matter jurisdiction is concerned with the relationship between the court and the subject matter of the controversy. Personal jurisdiction, on the other hand, is concerned with the relationship between court and parties. We consider the two seriatim. Questions of jurisdiction should be easily and quickly answered. Answering them should not delay lawsuits materially. Answers in ordinary cases should be mere details that are answered quickly. The German and Korean systems achieve this goal; the American system does not. While concepts and goals of all three systems are similar, the German and Korean systems are efficient, while the American is not. Their efficiency promotes justice and fairness, while the American piles on costs.

Subject Matter Jurisdiction

Subject matter jurisdiction is concerned with which courts *within a national court system* is or are competent to decide particular cases. For examples, a criminal court is not competent to decide civil controversies; a small claims court is not competent to decide large claims. If subject matter jurisdiction is a complicated issue, it is because within a given national system, it has been poorly governed.

As we shall see, compared to the German system, the American and Korean legal systems make less use of courts of special competencies. We might expect that the more courts of special competency there are, the more complicated are issues of subject matter jurisdiction. Yet subject matter jurisdiction questions figure prominently in American civil justice, where there are few specialized courts, and rarely arise in Germany, where there are many.

The reasons for this are three: (1) the German system offers litigants less choice. While different courts may have subject jurisdiction, plaintiffs rarely get to choose among them. (2) Where there is choice, as we discuss in the section on forum shopping, the choice makes little difference for the outcome. (3) Whatever questions may arise, are resolved quickly and conclusively at the outset of lawsuits.

Personal Jurisdiction

Personal jurisdiction is concerned with whether a court has authority over all parties to a lawsuit. As we discuss below in the Historical Note, originally personal jurisdiction was concerned with whether a court had physical power over all participants. Today authority suffices.

German and Korean systems of civil justice resolve questions of personal jurisdiction using a handful of bright line rules most of which both systems share. The principal rule is that plaintiffs should sue defendants where defendants are at home. This is consistent with the underlying principle of civil procedure that plaintiffs have the burden of persuading courts to intervene in defendants' lives. This principle that plaintiffs must sue where defendants are at home is modified in certain classes of cases where that is deemed to be unfair to plaintiffs. In these cases, plaintiffs may choose to sue where defendants are at home, *i.e.*, the defendants' court of general jurisdiction, or in some other jurisdiction which a statute deems fair. These latter courts have "special jurisdiction." Three of the most common cases are: (1) when plaintiff accuses defendant of a civil wrong, plaintiff may sue in the jurisdiction where the wrong occurred; (2) when plaintiff is a consumer, plaintiff may sue in the jurisdiction the transaction took place; and, (3) when plaintiff dealt with defendant through a local branch of defendant, plaintiff may sue in the jurisdiction of the branch. In certain other classes of cases, based on the nature of the subject of the dispute, the law requires that plaintiffs sue in a particular court's jurisdiction. For example the law may require that disputes over title to real estate be brought in the jurisdiction where the real estate is located.

The American approach is different. It is not based on clear rules but on a more "textured" or "nuanced" test of fairness in individual cases. That is to say, the American approach eschews bright line tests and prefers to examine each case on its own to determine whether it should be heard in that court.

A. United States

[J]urisdictional questions do not arise naturally and inevitably. Rather, they arise because one of the lawyers—typically the plaintiff’s lawyer—has brought the case to a certain court to obtain an advantage.

Geoffrey C. Hazard, Colin C. Tait, William A. Fletcher &
Stephen McG. Bundy (2007)
from their casebook’s teacher’s manual²⁰³

1. American Courts

There is no one American system of courts. There are fifty-one American court systems: one federal system and one state system for each state. Each of these systems is separate one from the other: each has its own rules of jurisdiction; each has its own rules of civil procedure; and each has its own substantive laws, *i.e.*, the laws that determine the parties’ rights.

The fifty-one different systems of courts, while different in detail, are mostly similar in outline. Most have multi-tiered systems of courts of general jurisdiction. Typically they consist of:

- (1) “courts of limited jurisdiction,” *i.e.*, entry level courts for specific—usually smaller—cases;
- (2) “courts of general jurisdiction,” *i.e.*, entry level courts for legal disputes generally;
- (3) “intermediate appellate courts,” *i.e.*, courts that review decisions of entry level courts; and
- (4) “courts of last resort,” *i.e.*, courts having final appellate jurisdiction to maintain integrity of law.

Roh’s lawyer Hahn will consider only (1) courts of limited jurisdiction and (2) courts of general jurisdiction, since only these courts are “courts of first instance,” *i.e.*, courts where lawsuits can be begun. Courts of limited jurisdiction (1) have specifically-assigned areas of competence and are commonly limited to cases where amounts in dispute are below fixed levels; courts of general jurisdiction (2) have responsibility for everything else. Appellate courts review decisions of other courts and do not act as entry level courts. One difference among American states is that some of the smaller states by population do not have an intermediate appellate court.

State Courts

²⁰³ TEACHER’S MANUAL, CASES AND MATERIALS PLEADING AND PROCEDURE STATE AND FEDERAL 12 (9th ed. 2007) (quoted with permission).

American state systems vary in detail, but all have a similar structure of courts. In the Maryland system, for example, there are twenty-four District Courts of limited jurisdiction and twenty-four Circuit Courts of general jurisdiction. The District Courts handle small civil claims (below \$5000 in controversy) as well as certain other mostly minor matters; the Circuit Courts handle larger matters, as well as all matters not handled by the District Courts or by other special courts. In other states, there are similar courts with similar functions, although they may have different names and different jurisdictional amounts. In Maryland courts of first instance are subject to appellate jurisdiction of the Court of Special Appeals, an intermediate appellate court, and to that of the Court of Appeals, Maryland's court of last resort. In most states the courts of last resort are termed "supreme courts."

Federal Courts

Existing alongside the state courts in every state is a parallel system of federal courts. Federal courts in the United States are courts of limited jurisdiction; they are competent to decide only certain types of cases specifically assigned them. The cases are an eclectic mix of about three dozen matters most of which have some connection to the federal system.²⁰⁴ Exceptionally federal courts have subject matter jurisdiction over cases unrelated to the federal system that are based on state law but which involve parties from different states, provided that the matter in controversy exceeds \$75,000.²⁰⁵

In Maryland the federal court of first instance is the United States District Court for the District of Maryland, which is located in Baltimore and in Greenbelt, Maryland; it is subject to the appellate jurisdiction of the United States Court of Appeals for the Fourth Circuit, which is in Richmond in the adjacent state of Virginia, and to the final appellate jurisdiction of the United States Supreme Court in the District of Columbia, coincidentally and conveniently located between Maryland and Virginia.

Plaintiffs are not required to bring diversity cases in federal court and most do not. When plaintiffs could sue in federal court but do not, defendants may have the case transferred to federal court ("removal").²⁰⁶ Ordinarily, once a party properly brings a case into federal court, that court is required to decide the case and cannot transfer it to a state court. The court can, however, transfer the case to another federal court.²⁰⁷ Exceptionally it

²⁰⁴ See 28 U.S.C. §§ 1330-1389 (listing bases of federal jurisdiction).

²⁰⁵ 28 U.S.C. § 1332 ("diversity jurisdiction").

²⁰⁶ 28 U.S.C. § 1441.

²⁰⁷ 28 U.S.C. § 1404.

may, under the discretionary doctrine of *forum non conveniens*, dismiss the case to permit parties to bring it in a different court.²⁰⁸

Federal Courts & Federalism

Many Americans assume that existence of parallel state and federal court systems is a necessary feature of federalism, but as German readers know, it is not. Germany is a federal state, but there state courts carry out federal law. German federal courts are, with one minor exception, not courts of first instance, but appellate courts that oversee decisions of state courts in applying federal law.

The United States Constitution mandates “one Supreme Court;” it allows, but does not require “such inferior courts as Congress may from time to time ordain and establish.” Section 1, Art. III. When in 1789 Congress chose to create inferior federal courts, consistent with the Constitution, it could just as well have chosen not to; it could have relied on state courts to apply federal law. That possibility was discussed in the course of ratification of the Constitution. Federalists created lower federal courts because they feared that state courts might not carry out federal law.

2. Subject Matter Jurisdiction

In the United States, since most courts are not specialized, questions of subject-matter jurisdiction are uncommon. They arise most frequently in connection with whether federal courts have subject matter jurisdiction over disputes between parties from different states, *i.e.*, under diversity jurisdiction

Diversity Jurisdiction

The First Congress, in creating separate federal courts, bestowed on those courts diversity jurisdiction. The rationale was that state courts might not be “wholly without state prejudice, or state feelings” in deciding matters concerning parties from other states. Even in those early years, however, that fear was seen to be overstated.²⁰⁹ It was, as Professor Carrington notes, a product of eighteenth century compromise that “no sensible person” with a choice would design.²¹⁰

²⁰⁸ See Elizabeth Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IA. L. REV. 1147 (2006).

²⁰⁹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1684, at 561-562, 368 (1833).

²¹⁰ Paul D. Carrington, *Moths to the Light: The Dubious Attractions of American Law*, 46 KANSAS L. REV. 673, 674 (1998), also in FESTSCHRIFT FÜR BERNHARD GROBFELD ZUM 65. GEBURTSTAG 129, (Ulrich Hübner & Werner Ebke, eds. 1999).

Today, diversity jurisdiction has few friends, but the friends that it does have are powerful. The original and only rationale for existence—the idea that state courts are or might appear to be biased against parties from out-of-state—is not seriously maintained. In-state parties are as likely to use diversity jurisdiction as are the out-of-state parties that diversity jurisdiction supposedly protects. Despite repeated calls to eliminate it, diversity jurisdiction survives, it is predicted to survive well into the future because the organized bar supports it.²¹¹

In its present form diversity jurisdiction requires that plaintiffs show two elements to establish jurisdiction: (1) complete diversity of citizenship between all plaintiffs and all defendants; and (2) that the amount in controversy exceeds \$75,000.

Diversity of Citizenship. Plaintiffs must establish complete diversity of citizenship, that is, that no plaintiff shares the same citizenship with any defendant. Often determining citizenship for diversity purposes of a particular party can be problematic. The United States has no civil registration requirement for individuals and no commercial register for corporations, so there is no convenient way to establish state citizenship.

Jurisdictional Amount. To spare federal courts the burden of handling small cases, today, as always, diversity cases must meet high minimums. Today a diversity case must claim more than \$75,000 in damages. The minimum requirement is an incentive for plaintiffs to inflate and even to create damage claims. An easy way to meet the threshold is to include a claim that is not easily measured, *e.g.*, for emotional damage, for pain and suffering or for punitive damages. As we saw in Chapter 3, there is little risk to asserting higher claims, since losing parties do not indemnify winning parties for legal fees. Federal courts take a tolerant view of claims made to establish diversity jurisdiction. They reject claims based on insufficient amounts only if they conclude “to a legal certainty” that recovery of the jurisdictional amount is not possible.

3. Personal Jurisdiction

American law provides a variety of bases for personal jurisdiction. Some, such as domicile, *i.e.*, the place where a defendant has his or her home, are familiar to non-Americans. Others, such as serving papers on a person while in the state (“personal service,” colloquially called “tag jurisdiction,” after the children’s game, or “catching jurisdiction”), seem exorbitant to non-Americans. Later in our discussion of *Roh v. Doh* we discuss some of these other bases of jurisdiction.

One form of jurisdiction that is ubiquitous in American proceedings and yet in other countries is considered exorbitant is “minimum contacts”

²¹¹ STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 89-90 (2006).

jurisdiction. In the case of *International Shoe Co. v. Washington* (1945)²¹² the United States Supreme Court held that American courts *may* decide cases concerning defendants over whom they do not have physical power, provided that “certain minimum contacts” exist with the state of the original court “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

What makes the minimum contacts test complicated and time-consuming for Americans and exorbitant for non-Americans is that it is applied on a case-by-case basis. The decision in *International Shoe* could have been the basis for simplification of American law of personal jurisdiction. It could have been the basis of national rules authorizing particular special bases of jurisdiction as known in Germany and Korea, *e.g.*, jurisdictions where a civil wrong occurred, where a consumer bought a product or where a defendant maintained an office. It did not turn out that way.

Congress did not legislate national rules; it allowed the individual states to write their own rules. Legislate the states have done, but not in coordination with one another. Instead of one uniform national rule, the states have created fifty non-uniform state rules. While some of these rules created special bases of jurisdiction, almost all have general clauses that operate on a case-by-case basis to extend the state’s jurisdiction to the uncertain constitutional limit.

State jurisdiction statutes take three principal forms: (1) statutes that assert jurisdiction only in cases of certain enumerated situations; (2) statutes that assert jurisdiction in cases of certain enumerated acts *and* in other cases to the limits of due process; and (3) statutes that assert jurisdiction to the “limits of due process” without enumeration of any specific cases. These statutes vary materially one from another.²¹³

This multiplicity of vague and competing state statutes means that there is no authoritative statutory solution. There is only the amorphous Supreme Court minimum contacts standard that is applied *ad hoc* in individual cases. It takes a charitable German observer to credit the argument that “[t]his enables the judge to focus on achieving justice in individual cases even if it hampers predictability for the parties.”²¹⁴ A more perspicacious German observer is not misled: “[J]urisdiction needs certainty and predictability. The minimum contacts test as presently applied does not meet this goal. Courts in their exaggerated concern for justice in individual cases drown themselves and the legal profession in an ever swelling flood of case-by-case adjudication.”²¹⁵ A critical American professor puts it plainly: the reality is

²¹² 326 U.S. 310, 316.

²¹³ See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended To The Limits Of Due Process*, 84 B.U.L. REV. 491 (2004) (inventory of the different types).

²¹⁴ Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT’L L. 1003, 1008 (2006).

²¹⁵ HAIMO SCHACK, JURISDICTIONAL MINIMUM CONTACTS SCRUTINIZED 1 (1983).

an American test that “really makes first-year law students crazy.”²¹⁶ We may add that it impoverishes litigants. It can make personal jurisdiction a complicated issue even in minor cases, and the most significant issue in high-stakes cases. It benefits lawyers, who can keep cases to themselves rather than refer those cases to colleagues in distant cities.

How did the American system get to this point?

4. Historical Note: Jurisdiction from Power to Authority

In the past personal jurisdiction was an issue of *power* over all parties to a lawsuit; today, in civil matters, it is an issue of *authority*.²¹⁷

In ordinary lawsuits, personal jurisdiction is not an issue. Neighbor sues neighbor. Together they go to their local court. The neighbors are from the same place. The court has power (and authority) over both of them. Both must do as the court directs.

Personal jurisdiction becomes an issue when a party comes from outside the court’s jurisdiction. When parties come from different jurisdictions, it may be that no one court has power over both of them. That used to be a big problem; today usually it is not.

Personal Jurisdiction in the Past—A Matter of Power

In the eighteenth century a court had to have physical *power* over all parties to a lawsuit because, without that power, it could not enforce its judgments. Parties not subject to its power could ignore the court with impunity. Hence English common law courts did not entertain lawsuits until plaintiff could demonstrate power over defendant. Well into the nineteenth century American courts sought to obtain physical power over distant defendants either directly, through physically arresting them while within the court’s jurisdiction, or indirectly, through taking control of their property.

Another way to deal with distant defendants is to require plaintiffs to go to courts where defendants are at home. Those distant courts *ipso facto* have power, and therefore personal jurisdiction, over defendants living within their jurisdiction; they gain power over plaintiffs when plaintiffs subject themselves to the courts’ personal jurisdiction by suing there. But it is not always fair to require plaintiffs to litigate in courts at defendants’ homes. Today, one might choose not to require impecunious consumers to sue mammoth corporations doing business worldwide in the courts of the corporations’ home offices.

²¹⁶ JAY M. FEINMAN, LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT AMERICAN LAW 96 (2005).

²¹⁷ See generally Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981).

Personal Jurisdiction in the Present—A Matter of Authority

A court that decides a lawsuit need not have power over a party if some court somewhere has such power and that court will enforce the former court's judgment. In such cases the latter court "recognizes" and "enforces" the judgment of the former. There are three principal ways that this happens: (1) pursuant to *federal law*, courts in one state of a federal entity are required to recognize and enforce judgments of courts of other states; (2) pursuant to *international treaty* one country commits to another country that its courts will recognize and enforce judgments of courts of the other provided that those judgments satisfy specific criteria; and, (3) unilaterally courts in one state recognize and enforce decisions of courts of other states out of respect for those courts and their processes (*international "comity"*).

All three of these approaches assume that the courts that recognize and enforce judgments of other states' courts are prepared to assume that the original judgments are legally correct and that those judgments were reached by fair process.

(1) **Federal law.** In both respects, of these three approaches, least problematic are judgments of other courts within federal entities. Then the quality of the original judgments, both substantively and procedurally, is better known and presumed of equal quality; federal law can establish specific criteria that qualify judgments for recognition and enforcement.

(2) **International treaty.** More problematic are judgments recognized and enforced pursuant to international treaty. Then the quality of original judgments and of their process are less well-known, even at the time of treaty adoption, and cannot be easily changed after treaty adoption. Treaties can set specific criteria that qualify judgments for recognition and enforcement.

(3) **International comity.** Most problematic is unilateral recognition and enforcement pursuant to comity. Then the original court must assume that a later court will grant comity; the later court has to make *ad hoc* judgments about the substantive and procedural qualities of the first court and may have no statutory guidelines to direct it when to do that.

Statutory Simplicity—German and Korean Solutions in Interstate Cases

In the nineteenth century commerce increased greatly. More and more people interacted with people from distant places. More contacts meant more disputes among people from different jurisdictions. More interstate disputes meant more disputes where no local court had jurisdiction over all parties. Requiring all plaintiffs all of the time to pursue defendants in their home states became unacceptable.

In federal states, such as Germany and the United States, the issue of jurisdiction was felt more acutely than in unitary states. A major purpose of federation in both Germany and the United States was to increase commerce

among constituent states. In both Germany and in the United States, personal jurisdiction was subject of decisive action in the 1870s.

Action came a little earlier in Germany; it was simple, and resolved the issue to this day. German unification in one federal state occurred in 1871. In 1874 the federal constitution was amended to give the federal legislature authority to adopt a national Code of Civil Procedure. Such a code was adopted and became effective January 10, 1877. As we discuss in the section on Germany, the German solution sets clear criteria for when courts have personal jurisdiction, provides that such judgments are enforceable in all states of the federation, and provides for expeditious and inexpensive resolution of any jurisdiction questions that do arise. German courts spend little time or energy on issues of jurisdiction.

The German statutory solution of 1877 is a time-tested success. Without fundamental changes it prevails in Germany today, where it justly, fairly and quickly determines personal jurisdiction issues. The Korean solution is essentially similar. So, too, is the rule for personal jurisdiction in the twenty-seven member states of the European Union.²¹⁸

Case Law Complexity—American Indeterminacy

Supreme Court precedent and Congressional inaction are principally productive of perplexity. In *Pennoyer v. Neff*,²¹⁹ decided just one year after the successful statutory solution of the German Code of Civil Procedure went into force, the Court held that courts in one state of the United States are powerless to decide cases governing litigants outside their states unless they have acquired power over the out-of-state parties or their property.²²⁰ The Court rejected arguments that the “Full Faith and Credit” clause of Article IV, Section 1 of the U.S. Constitution always required recognition and enforcement by one state court of judgments of another state’s courts.

The Full Faith and Credit Clause of the Constitution was in 1789 a prescient provision for integrating a nation that was only then coming into being. Justice Robert H. Jackson said that it is the “foundation of any hope for a truly national system of justice.”²²¹ It requires “Full faith and credit

²¹⁸ See Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“The Brussels Regulation”).

²¹⁹ 95 U.S. 711 (1878).

²²⁰ 95 U.S. at 720.

²²¹ Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COL. L. REV. 1, 34 (1945), reprinted in 1 THE BENJAMIN N. CARDOZO MEMORIAL LECTURES, DELIVERED BEFORE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1941-1970, 125,169 (1970). Jackson despaired: “nowhere else in the modern world is judicial authority so dispersed among disjointed and insular units, nowhere else is the choice of trial so much regulated as a by-product of territorial limits on jurisdiction, an nowhere else does litigation present such a multitude and complexity of controversies over conflict of laws.” *Id.* at 23, reprint at 155. See also Michael H. Gottesman, *Draining the Dismal Swamp: The Case for*

shall be given in each State to the public acts, records, and judicial proceedings of every other State.” It authorizes Congress to make general laws “to prescribe ... the effects thereof.” It allows Congress to allocate jurisdiction in interstate cases through general venue rules much as Germany and Korea do. It provides, according to Justice Jackson, “legislative power better to integrate our legal systems.”²²²

While the Constitutional Convention of 1787 seems to have expected that Congress would flesh out details of this clause,²²³ and while judges in the early Republic awaited such instruction,²²⁴ other than prescribing rules for proving judicial proceedings from other states, Congress has never adopted a general law prescribing prerequisites and effects for Full-Faith-and-Credit treatment of jurisdiction. Why not? Justice Jackson answered: “we are so accustomed to the delays, expense, and frustrations of our system that it seldom occurs to us to inquire whether these are wise or constitutionally necessary.” Relevant to this book, he continued, “[p]erhaps the best perspective for judging whether our society is being well served ... is by the comparative study of the methods and degree of integration employed by other peoples”²²⁵ Since Justice Jackson spoke in 1944, the European Union has come into being and has integrated twenty-seven separate legal systems that are more disparate in language and in culture than are America’s fifty state systems.²²⁶

The Supreme Court’s decision in *Pennoyer v. Neff* did not slow creation of a national market. Requiring courts to obtain physical power over all parties soon proved inconvenient in a world where interactions among people in different jurisdictions occurred with ever greater frequency and complexity. Through legal fictions lawyers sought to avoid the effect of

Federal Choice of Law Statutes, 80 GEO. L.J. 1 (1991). See also Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919) (noting the success of another federal common law country, Australia, with an act based on a similar clause and proposing such an act for the United States). The issue of same sex marriages has created new interest in the Full Faith and Credit Clause. See, e.g., WILLIAM L. REYNOLDS & WILLIAM RICHMAN, *THE FULL FAITH AND CREDIT CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2005); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201 (2009). That interest has not, however, spilled over to efforts to integrate American courts.

²²² *Id.* at 21, reprint at 151.

²²³ See James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224 (1954).

²²⁴ See JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1367, at 181-182 n.1 (1833).

²²⁵ Jackson, *supra* note 221, at 18, reprint at 147-148.

²²⁶ See Council Regulation (EC) No 44/2001 of 22 December on jurisdiction and enforcement of judgments in civil and commercial matters, Official Journal No. L 012, 16/01/2001 at 1-23; BRUSSELS I REGULATION (Ulrich Magnus & Peter Mankowski, eds. 2007); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OFFICIAL JOURNAL L 177, 04.7.2008, at 6-16; *ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE* (Franco Ferrari & Stefan Leible, eds., 2009).

Pennoyer v. Neff. By 1945 the Supreme Court stepped back from it. As we have seen, in *International Shoe Co. v. Washington*,²²⁷ the Supreme Court held that American courts *may* decide cases concerning defendants over whom they do not have physical power, provided that “certain minimum contacts” exist. The United States has not yet, however, sought to move from state jurisdiction to interstate venue.²²⁸

5. Applicable Law in American Courts

Applicable law refers to the jurisdiction whose laws govern a case (*e.g.*, Korean law), as well as to the particular laws of that jurisdiction that govern (*e.g.*, Civil Code). While a court must always decide which country’s laws to apply, usually it does so without thinking; it applies its own laws. Where a case has connections to more than one country, a court may consider and decide to apply the law of country different than its own. It might do that to protect the parties’ expectations where that other country has a closer connection to the case. The process of deciding which country’s law governs is called “choice of law;” the body of law that governs that choice of law is called the “law of conflicts of law” (or in some countries “private international law.”)

Since our case touches only one country, it concerns the laws of only one country. In Korea and in Germany, choice of law is not an issue, because in both countries, no choice of law is needed. Korea is a unitary, *i.e.*, not federal state, and hence it has only one set of laws. While Germany is a federal and not a unitary state, and has separate state laws, most private law matters are governed by nationally applicable federal law, most commonly, the Civil Code.

In the United States, on the other hand, applicable law is an issue in domestic cases that touch more than one state. Each state has its own substantive law and that law, rather than a national code, usually applies. Those different state laws mean courts frequently decide which state’s law applies. To help courts decide which state’s law applies, each state has its own (and different) law of conflicts of law.

So far we have just been speaking of a choice of substantive law. If a plaintiff sues under diversity jurisdiction in federal court, however, choice of law gets more (!) complicated. In federal court in diversity cases, while federal law of civil procedure applies, state substantive law governs. It is not, however, always clear when a rule should be regarded as a procedural law and when as a substantive one. The federal courts led by the Supreme Court have developed a complicated jurisprudence stating when a rule is considered substantive and then must be the state rule.

²²⁷ 326 U.S. 310 (1945).

²²⁸ Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103 (1971).

6. Forum Shopping

Forum shopping refers to parties choosing the court in which to bring a lawsuit from among more than one possible court. Forum shopping is routine in international litigation, but except in the United States, it is uncommon in domestic litigation. Forum shopping has a pejorative connotation, since its aim is to gain an advantage in process. Outside the United States, although not unknown (choice is explicitly recognized as the plaintiff's prerogative in § 35 ZPO), it is offensive to some.

Forum shopping is seen negatively because it accents the contest aspect of civil procedure. Through choice of forum, one seeks a location that is convenient for the plaintiff, inconvenient for the defendant, procedural rules that favor the plaintiff, or a court that is likely to be more favorably disposed toward the plaintiff. The sporting analogy is apt: the plaintiff aspires to a "home-court" advantage.

Laymen think that law is simply "there;" when one has a dispute, one turns to the neighborhood court. Law is, or at least should be, a matter of one's right and not of one's power. Civil procedure is, or should be, the process by which that right is determined. If these lay propositions are true, then forum selection should not be outcome determinative. Right is right. At most, choice of forum should concern convenience, but not determine outcome. German and Korean lawyers share this view. American lawyers do not. American trial lawyers in particular see choice of forum as one of the most significant factors in a case's outcome; some say it is *the* most significant factor.²²⁹

That American lawyers are more oriented toward forum shopping than are their German and Korean counterparts is attributable more to practical than to philosophical differences. There are in the United States more reasons to engage in forum shopping, just as there are in Germany and Korea fewer opportunities to do so. The primary reason to forum shop is to get a better result; convenience is only a distant secondary reason. It is said one cares more whether one is hanged than where. Both reasons make forum-shopping more attractive in the United States than in either Germany or Korea.

Outcome Determinative

There are three principal areas in which a choice of forum can advantage one party or disadvantage the other and thereby lead to an outcome the chooser prefers: (1) substantive law; (2) procedural law; and (3) personnel

²²⁹ CHARLES H. ROSE & JAMES M. UNDERWOOD, *FUNDAMENTAL PRETRIAL ADVOCACY: A STRATEGIC GUIDE TO EFFECTIVE LITIGATION* 110 (2008) (quoting Professor Louis Muldrow at hearings before the Texas legislature).

and institutional conditions (e.g., faster, better). Of these three, only the last is a real consideration in most civil cases in Germany and Korea, but all three are important in American cases.

More favorable substantive law. We have seen that in nearly all cases in Korea and in most cases in Germany, the substantive law applied is the same regardless of forum. In the United States substantive law varies from state-to-state. Moreover, since substantive law is often uncertain, it can vary from judge to judge.

More favorable procedural law. We have also seen that all civil cases in Germany and Korea are subject to only one code of civil procedure. In the United States, on the other hand, procedure varies significantly from state-to-state and from state to federal. While similarities in general are great, litigation is concerned with differences in particular, which in particular cases may be outcome determinative.

More favorable personnel—Judges and Courts. Not all courts have personnel of the same quality. Not all courts are at the same level of efficacy. To get a better court or a court that decides faster, a plaintiff may choose one court over another. These variations are found everywhere, but are perceived to be of greater importance in the United States than in either Germany or Korea.

Juries. Juries in one jurisdiction may be more generous than in another. Because federal courts draw their juries from larger geographic areas than do state courts, one side might prefer a more narrowly or a more broadly drawn jury. Since American communities are often *de facto* ethnically or economically segregated, a narrower or a broader source of jurors may be thought beneficial. While quality control of juries is more difficult than quality control of judges, here too institution of uniform standards for jurors and for their work could reduce the importance of forum selection.

Whose convenience

Party and witness convenience. Party convenience once was a motivating factor for forum shopping. Thanks to development of modern means of transportation and communication, beginning with the railroad and the telegraph and continuing to commercial air service and internet texting and conferencing—convenience has lost much importance. Insofar as differences remain, however, they are greater in the United States, where distances are much larger than either Germany or Korea.

Lawyer convenience. This too has lost importance in a day of easy travel and free permission to act in other courts. Today lawyer convenience is most important in the comfort lawyers get from dealing repeatedly with the same courts, the same rules and the same judges.

Opportunities to forum shop

In Germany and Korea there are relatively few courts to choose from. There are no parallel systems of courts. The principal choice is between defendant's general *Gerichtsstand* or 보통재판적, usually defendant's place of residence, and a special *Gerichtsstand* 특별재판적, such as the place of contract fulfillment or the place of a wrong.

***Diversity Jurisdiction and Forum Shopping:
What the American Bar Likes About Diversity Jurisdiction***

Procedural options. The plaintiff's bar, *i.e.*, lawyers who represent individual plaintiffs in contingent fee personal injury and similar cases, like the options in procedural law that a choice of courts offers. One practitioner's checklist identifies ten different procedural differences a litigator should consider. These range from the time generally spent in depositions to the location of the courthouses.

Among options that the defense bar likes is ability to undercut the plaintiff's attempts to get a favorable jury. State courts, because they serve small parts of states, draw jurors from smaller geographic areas. These may be areas that are homogenous economically and ethnically. By shifting a case to federal court, which has a larger geographic area, a defendant changes the make up of the potential jury.

Familiarity. Litigators with big firms have cases that may be all over the country. They have a handful of large cases rather than a mountain of small ones. do not have many cases. For them, federal courts offer familiarity with rules and with judges. Rules are the same the nation over and judges are few in number in the local court.

Better courts. The most frequently-voiced ground for preferring federal courts to state courts is a perception that federal courts are better. This perception is near universal, although it should be made on a state-by-state basis. Federal judges generally have more prestige than do state court judges. Their tenure is more secure. They are thought less subject to political pressure. They generally have lower volume caseloads. And they have more support staff than do state court judges.²³⁰

7. Jurisdiction in Roh v. Doh

Subject Matter Jurisdiction

In our case Roh filed suit in federal court. Why? We confess: because that is the only way that we can describe a procedural system applicable throughout the United States. Roh might have been better served to have filed in state court.

²³⁰ See Victor R. Flango, *Litigant Choices Between State and Federal Courts*, 46 S. CAR. L. REV. 961, 974 (1995).

In this case, there is no issue regarding diversity of citizenship. Roh is a Virginia citizen; all of the potential defendants, *i.e.*, John Doh, Jr., John Doh, Sr., and DohSon Honda, LLC., are Maryland citizens. That means that there will be complete diversity of citizenship.

There is, however, a possible issue regarding the amount in controversy that the lawyer for John Doh, Jr. might raise and even more likely, that a lawyer for DohSon Honda, LLC, if made a defendant would raise. To qualify for diversity jurisdiction in federal court, Roh's claim must *exceed* \$75,000. It is, however, on its face *exactly* \$75,000, *i.e.*, one cent too low. If Roh's claim is for a loan, then that claim is probably permissible, since the loan arguably assumed an interest payment or, in any case, John Doh, Jr.'s failure to repay it timely created incidental or consequential damages that would take the case over the jurisdictional minimum. But if Roh's claim is only for unjust enrichment, which probably is the case in an action against DohSon Honda LLC, then it is does not exceed the magic amount. DohSon Honda LLC then might move to dismiss the case against it for failure to satisfy the jurisdictional amount.²³¹

Personal Jurisdiction

Since no national law determines personal jurisdiction, whether personal jurisdiction exists is a matter of the law of each separate state. As we have seen, there is national constitutional law that sets limits to the state exercise of personal jurisdiction but does not determine by class when it does.

Four different systems of American courts potentially have personal jurisdiction over Doh and DohSon Honda LLC: the federal, that of the State of Maryland, that of the Commonwealth of Virginia and that of the federal District of Columbia. Since the federal system adopts the jurisdictional rules of the district court of the state in which the federal court sits, Hahn has to consult "only" three sets of personal jurisdiction rules: those of Maryland, Virginia and the District of Columbia and no additional federal rules.

While the jurisdictional rules of Maryland, Virginia and the District of Columbia are substantially similar in general terms, they differ materially in what can be critical details. All three have variations of the same three basic approaches to personal jurisdiction: domicile, "tag" (or "catching") and "long-arm" (or "minimum contacts").

Domicile. Maryland, Virginia and the District of Columbia assert personal jurisdiction over defendants "domiciled" in their respective territories. While domicile has a technical legal definition, for purposes of the book, it is sufficient to regard it as meaning the place of a natural

²³¹ See Jeffrey L. Rensberger, *The Amount In Controversy: Understanding The Rules Of Aggregation*, 26 ARIZ. ST. L.J. 925 (1994).

person's habitual residence and the place where a legal entity is organized as a legal entity.

Based on domicile, Maryland has jurisdiction over all of the three possible Doh defendants: John Doh, Jr., and John Doh, Sr. both live there; DohSon Honda LLC is incorporated there. Virginia has jurisdiction based on domicile over Roh. The District of Columbia has no jurisdiction based on domicile over any party.

“Tag” or “Catching” Jurisdiction. Maryland, Virginia and the District of Columbia all permit their courts to assert jurisdiction over persons found within their territory, if they are personally given (“served”) the summons and complaint in a lawsuit. It is a relic of the power orientation of personal jurisdiction.

Catching does not meet the minimum contacts requirement of the *International Shoe* case, yet the Supreme Court in more recent case upheld it as basis for personal jurisdiction, even when the party served was only temporarily in the state on grounds unrelated to the lawsuit. The Court upheld catching for no better reason than that the United States has always done it that way: “... it is one of the continuing traditions of our legal system ...”²³² {This is a reminder that the American legal system is built more on history than on system.}

Since the Doh parties are all domiciled in Maryland, there is no need to tag them there. Tagging them in Virginia or the District of Columbia is possible. Were that desired, Roh's lawyer Hahn could employ a private investigator to follow them around and tag any of them the moment they step into the desired jurisdiction. As bizarre as it may seem, American plaintiffs have tagged defendants as they fly in planes over the desired jurisdictions.

Minimum Contacts Jurisdiction. Hahn will consider whether there may be personal jurisdiction in either the District of Columbia or Virginia under minimum contacts jurisdiction. In Roh's case, arguably the event that gave rise to the cause of action was the meeting in the District of Columbia that led to the transfer of the money. That act could satisfy the jurisdictional prerequisite of District of Columbia Code § 13-423(a)(1) for a claim to relief arising out of “transacting any business in the District of Columbia.” This provision raises questions, however. With respect to a suit against Doh for breach of contract, the claim probably arises out of transacting business in the District. But what if the claim is for unjust enrichment? If Roh is seeking return of a gift, is that sufficient to constitute “transacting” business? On the other hand, if obtaining of the gift were characterized as fraud, then it might come under (3) as a claim for relief arising from the person's “causing tortious injury in the District of Columbia by an act or omission in the District of Columbia.” But is that true? While the causal act took place in the District of Columbia, where did the tortious injury occur?

²³² *Burnham v. Superior Court*, 495 U.S. 604, 645 (1990).

But wait. There are other issues with the District of Columbia's minimum contact law. Hahn might like to include DohSon Honda, LL.C., as defendant. In that case, if Roh sues in the District, she will need to show that Doh acted as agent of DohSon Honda, LLC.

The courts of Virginia are another possible place to bring suit. There, however, the only contact to the state is Roh's domicile. However, that conceivably could provide the basis for jurisdiction. Virginia Code § 901.-328.1(A)(1) allows for jurisdiction over a non-resident who transacts business in the state. Obligating oneself to repay a loan to someone residing in the state might constitute "transacting business." Alternately, if a fraud claim is viable, then possibly Roh could assert jurisdiction based on subsection (4): "Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." This provision might also support jurisdiction over DohSon Honda LLC, since it sells many automobiles to Virginia residents, but is of less certain applicability to Doh himself.

B. Germany

Disputes about jurisdiction should delay the consideration and decision of lawsuits as little as possible.

Professor Dr. jur. Kurt Kuchinke (1969)²³³

1. German Courts

Germany has five separate systems of courts: the courts of general jurisdiction and the administrative, labor, social, and tax courts. As we shall see, conflicts among the five court systems are not common; choices for litigants to make among them are few, are easily made, and are ratified or rejected expeditiously without great expense or severe adverse consequences.

Although Germany is a federal state, its federal courts do not parallel state courts. Federal courts are (with exception of a Patent Court), appellate courts that oversee separate systems of state courts. So there is a Federal Supreme Court (*Bundesgerichtshof*) responsible for civil and criminal justice) a Federal Administrative Court (*Bundesverwaltungsgericht*), a Federal Labor Court (*Bundesarbeitsgericht*), a Federal Social Court (*Bundessozialgericht*) and a Federal Tax Court (*Bundesfinanzhof*). Unlike the United States Supreme Court, the German Supreme Court is not responsible for issues of

²³³ ZIVILPROZESSRECHT § 36, 161 (9th ed., 1969).

constitutional law. Instead, there is a Federal Constitutional Court (*Bundesverfassungsgericht*).

Each of the sixteen German states has its own court system. Although each state is responsible for administration of its own courts, state courts are all built on the same model provided by federal statute (the *Gerichtsverfassungsgesetz*). The court of first instance in civil matters of general jurisdiction is the *Landgericht* (state district court; plural *Landgerichte*). Inferior to the *Landgerichte* is a court of first instance of limited jurisdiction, the *Amtsgericht* (county court; plural, *Amtsgerichte*). The *Amtsgerichte* are competent for family law matters and for civil matters where the amount in controversy is less than €5,000. From an *Amtsgericht*, except in family law matters and in certain international cases, an appeal is taken to the competent *Landgericht*. For a matter begun in a *Landgericht*, appeal is taken to the competent *Oberlandesgericht* (state appellate court; plural *Oberlandesgerichte*). Because some states have more than one such appellate court, there are in all twenty-four *Oberlandesgerichte*. For most cases, the *Landgerichte* (for appeals from the *Amtsgerichte*) and the *Oberlandesgerichte* (for appeals from the *Landgerichte*) are the courts of last resort. Further appeal is to the Federal Supreme Court, mostly, as in the United States, in the discretion of that court upon determination that a case raises new questions of law or if there is a divergence of authority in the lower appellate courts.

Characteristic of German courts generally is specialization of judges by subject matter. The Federal Supreme Court itself has more than one hundred judges. It usually sits in panels of five. Each panel is assigned specific areas of law for internal competence.

2. Subject Matter Jurisdiction

German law distinguishes two types of subject matter jurisdiction: between German court systems (*Rechtswegzuständigkeit*) and within court systems (*sachliche Zuständigkeit*). Here we refer to the former as inter-court system subject matter jurisdiction and to the latter as intra-court system subject matter jurisdiction. Inter-court system issues in the German judicial system are not between court systems of different countries or states, but between different court systems within the same state. Each state has ordinary, administrative, finance, social and labor courts, from which final appeals lie to corresponding federal courts in matters applying federal law.

Although the German system provides five systems of courts (seven if one adds the Federal Patent Court and the Federal and State Constitutional Courts), these neither compete with one another nor do they share jurisdiction. Which system is competent depends on the “nature of the disputed claim, *i.e.*, legal relationship” as defined by statute. Section 13 of the Court Organization Act (*Gerichtsverfassungsgesetz*, GVG) assigns to the ordinary courts all criminal cases and most private law disputes, with the

principal exceptions of employment-related disputes and social law, i.e., pension and medical insurance, disputes, which it assigns to labor courts and to social Courts. It assigns public law disputes either to those two courts in their fields, or to administrative or tax courts. In addition, the Federal Patent Court, the Federal Constitutional Court and the state constitutional courts have special competencies. Despite the cornucopia of courts, inter-system subject matter jurisdiction issues in ordinary civil disputes are not common. When they occur they are usually between civil courts and either administrative or labor courts.

In any case, choice of the wrong court system has minimal adverse consequences. The judge on the judge's own motion, after giving parties opportunity to take a position, but without necessarily holding a hearing, is to decide whether plaintiff has brought suit in the correct court. If the judge finds that the court is without jurisdiction, the judge is to transfer the case to the correct system. The decision to transfer is binding on the transferee court. In either case, the transferor court's decision binds all other courts once it is final. Before it is final, parties may take an interlocutory appeal (*Beschwerde*).²³⁴ The only adverse consequence for plaintiffs who chooses the wrong court is imposition of modest costs of transfer. The case continues in the transferee court as if it had been begun there. For statute of limitations purposes, commencement of the suit is dated from the original filing.

Intra-court system subject matter jurisdiction is likewise no big deal. In the civil courts, the *Landgericht* has general subject matter jurisdiction. The other possible courts of first instance are only the *Amtsgerichte*, which have jurisdiction over landlord tenant and family law matters without regard to the amount in controversy.

3. Personal Jurisdiction

Personal jurisdiction is straight-forward in Germany. Although Germany is a federal state, the national Code of Civil Procedure (ZPO) provides rules for personal jurisdiction that govern in all *Länder*. So when Hahn in Berlin considers which court has jurisdiction, he looks at the same rules for Bavaria as for Berlin. Rules do not vary from state to state; they are the same in Bavaria and in Berlin. Those rules today are fundamentally the same as they were when the Code of Civil Procedure first went into force in 1877. The German system provides plaintiffs with few choices; it makes consequences of most wrong choices inexpensive and not outcome determinative.

General jurisdiction. The key concept for personal jurisdiction is *Gerichtsstand*, which is a place where suit may be brought (plural *Gerichtsstände*). The Code of Civil Procedure distinguishes among three types of *Gerichtsstand*: general (*allgemeiner*), specific (*besonderer*) and

²³⁴ § 17a GVG (*Gerichtsverfassungsgesetz* = Court Organization Law).

exclusive (*ausschließlicher*). It defines the general *Gerichtsstand* as the court which has jurisdiction over all claims against a person, except for those claims for which another provision of the code or a another law designates an exclusive *Gerichtsstand*. § 12 ZPO. For natural persons the code designates as the general *Gerichtsstand* the place of permanent residence (*Wohnsitz*) (§ 13 ZPO), i.e., domicile in American law for natural persons, assuming they have one, and for legal persons, their seat, which is ordinarily their place of their administration. § 17 ZPO. The code has other provisions that designate a general *Gerichtsstand* for Germans abroad (§ 15 ZPO), for persons without permanent homes (§ 16 ZPO) and for various government authorities (§§ 18-19a ZPO).

German law imposes a general registration of residence requirement on natural and legal persons. A party to a lawsuit or potential lawsuit may obtain from the relevant registration authority confirmation of registration and the address of a potential party or witness. Thus the Code of Civil Procedure assures that there is at least one court that has personal jurisdiction over a defendant domiciled in Germany.

Specific jurisdiction; exclusive jurisdiction. In addition to providing a general jurisdiction for every person in Germany, the code establishes a series of specific *Gerichtsstände* that are available in addition to the general *Gerichtsstand*. Where one (or more) of these is available, and there is no exclusive *Gerichtsstand*, plaintiffs have free choice among them. § 35 ZPO. Among specific *Gerichtsstände* the code establishes are: temporary residence (*dauernder Aufenthalt*) (§ 20 ZPO), place of a commercial branch (§ 21 ZPO), place of contract performance (§ 29 ZPO) and place of commission of a legal wrong (tort) (§ 32 ZPO). For each of these the code defines specific prerequisites and provides that there is personal jurisdiction specific to claims arising from those prerequisites. Likewise it defines a few exclusive *Gerichtsstände*, mostly involving realty and other immovables. *E.g.*, § 24 ZPO. It specifically authorizes, under detailed circumstances, merchants to agree upon a forum that would not otherwise have personal jurisdiction. § 38 ZPO. Germany has its own exorbitant jurisdiction rule, but it can have no application to cases such as this book discusses, or indeed to any cases limited to parties within Germany or within the European Union.

4. Applicable Law in Germany

Although German states have substantial authority to make laws of their own, the federal government has authority to issue national laws for most aspects of civil law. All the potential claims discussed here are claims under the German Civil Code, which is a national law.

C. Korea

[Summarizing Korean rules of jurisdiction:] Basically, the district court at the place of address of the defendant is a competent jurisdiction court. A civil lawsuit over real estate is under the jurisdiction of the district court in the place where the real estate is located and a civil lawsuit over a tort is under the jurisdiction of the district court where the tort is committed.

The Supreme Court of Korea (2008)²³⁵

1. Korean Courts

Korea is a unitary, rather than a federal state. There are no federal courts. Like the German system, which it in many respects resembles, the Korean court system has some, although not as many, separate court systems for specific areas of law. It has specialized branch courts for family (가정법원), patents and industrial property (특허법원) and administrative law (행정법원).²³⁶

The ordinary courts have three levels: the District Courts (지방법원), the High Courts (고등법원), and the Supreme Court (대법원). District Courts (as well as the Family Court) may establish Branch Courts and Municipal Courts and delegate some matters, including registration matters to them.

The ordinary court of first instance of general jurisdiction is the District Court or one of its subsidiary Branch Courts. Presently there are eighteen District Courts with forty Branch Courts; the Family Court has three Branch Courts. Each court is competent for a specific geographic area. District Courts (or the Branch Courts) decide in panels of three when the amount in controversy exceeds ₩100 million (on the order of \$100,000). When the amount in controversy is ₩100 million or less, the District Court or the Branch Court decides by one judge. In that case, an appeal is to a panel of three judges in the same court, if the amount in controversy does not exceed ₩80 million. Municipal courts are responsible for cases where the amount in controversy is ₩20 million or less. Appeals from a District Court judgment by a three judge panel is to the competent High Court. There are five high courts: one in each of the countries' major cities: Seoul (서울), Busan (부산), Daegu (대구), Gwangju (광주) and Daejeon (대전). Judgments of the High

²³⁵ LEE JINMAN (Judge and Executive examiner of civil policy in Judicial Administration Office at Supreme Court), CIVIL PROCEDURE SYSTEM IN KOREA 2-3 (9 September 2008), available at <http://eng.scourt.go.kr/eboard/NewsViewAction.work?gubun=43&seqnum=18¤tPage=1&searchWord=&pr=>.

²³⁶ Cf. Youngjoon Kwon, *Litigating in Korea: A General Overview of the Korean Civil Procedure*, 7 J. KOREAN L. 109, 115-118 (2007), reprinted in LITIGATION IN KOREA 1, 6-8 (Kuk Cho, ed., 2010).

Courts, as well as judgments as Appellate Courts of the District Courts, may be appealed to the Supreme Court. For constitutional questions, there is a separate Constitutional Court (헌법재판소).²³⁷

2. Subject Matter Jurisdiction

Since Korea does not have separate court systems, such as the United States (with federal and state courts) and Germany (with subject matter systems), strictly speaking, there are no subject matter jurisdiction issues. There is only the lesser issue of which court within a system with subject matter jurisdiction is the *competent* court to hear the claim. These issues are analogous in the system of the State of Maryland, discussed above, whether the District Court or the Circuit Court, is competent to hear the case, or in Germany whether the *Amtsgericht* or the *Landgericht*. Unless there is a possibility that an administrative or family court is competent, plaintiffs do not even need to think about the issue. In Korea, upon filing, the court will assign the case to the correct judge according to the rules of subject matter competence (사물관할; *samul kwanhal*) of the Court Organization Act (법원조직법; *bopwonjojik bop*). The Court Organization Act mechanically assigns lawsuits by the amount claimed or other aspects of the case (*e.g.*, promissory note, real property) to either a three-judge panel or to a single judge. Presently it provides that cases involving more than ₩100 are for three judge panels, while those for ₩100 million or less are for single judges. For our case that means that the court will assign it to a single judge panel.²³⁸

2. Personal Jurisdiction

Korean principles of personal jurisdiction are similar to the German ones on which Korean provisions are indirectly based. The court of the defendant's domicile is the court of general jurisdiction (보통재판적) in cases where the defendant is a natural person. KCPA §§ 2 and 3. Unlike both Germany and the United States, domicile in Korean law does not require. The law provides rules where a party has no domicile in Korea. It further provides that the court of general jurisdiction for a legal person is the court where the entity has its principal place of business. KCPA § 5(1). The law provides for special jurisdiction. In certain cases, other courts have special jurisdiction(특별재판적) in a number of cases, including, place of temporary residence, KCPA § 8, place of a commercial branch, KCPA § 12,

²³⁷ See CONSTITUTIONAL COURT OF KOREA, TWENTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA (2008).

²³⁸ See LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 131.

place of contract performance, KCPA § 8, and place of commission of a tort, KCPA § 18.²³⁹

4. Applicable Law in Korea

Since Korea is a unitary state there is rarely a question of applicable law in domestic litigation.

²³⁹ See generally Kong-Woong Choe, *Jurisdiction in Korean Conflict of Laws—A Comparison with American Rules of Jurisdiction*, KOREAN J. COMP. L. 89, 103-113 (1977); Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 124-126, reprint at 14-16.

CHAPTER 5

PLEADING
THE MATTER IN CONTROVERSY

*Your Honor a day for me set/
On which I my right may get.*

16th Century German Codex²⁴⁰

Mary Roh has decided to sue. She has a lawyer; she has a court. Now she is ready to bring her case to court. Starting a lawsuit requires that she tell the court what it is that she wants. Otherwise, the court will not know which matters it is to decide and which remedies, if any, it is to order. What the court is to decide—the matter in controversy—is fundamental to all three of our systems of civil procedure.

In all three of our systems plaintiffs begin lawsuits by telling courts what they want from whom. They answer the classic question that law professors pose to first year American law students: *who* is suing *whom* for *what*? They do this in documents called complaints. Defendants are formally “served with process,” that is, they are informed of the lawsuit and are

²⁴⁰ JOHANN FREIHERR ZU SCHWARZENBERG, CONSTITUTIO CRIMINALIS BAMBERGENSIS, BAMBERGER HALSGERICHTSORDNUNG leaf 14 (1543 ed.).

formally given the complaint. Defendants are “summoned” to appear within a certain period of time (usually, less than a month) and, if they do not, they are deemed in default. They respond either in documents called answers, or in motions to the court. Plaintiffs may reply to these answers and motions. Collectively this written give-and-take between the parties at the beginning of the lawsuit constitutes the pleadings.

Pleadings identify the controversy before the court; they determine who is party to the lawsuit (“party joinder”) and which events are before the court (“claim joinder”). They tell the court what the parties want by way of relief (“demand”).

In all three of our systems pleadings are principally the work of the parties. In the American system, they are reviewed by the court only on request after they have been served. In the German and the Korean systems, on the other hand, complaints are reviewed by the court before they are served on defendants.

In our case Roh will state in her complaint that she gave money to John Doh, Jr. She will demand that Doh give her back the money with interest. She may demand that someone else, perhaps Doh’s former firm, DohSon Honda LLC, or Doh’s father, John Doh, Sr., pay the money. Doh will answer that he is not required to pay the money. The court now knows who is suing whom for what.

In this chapter we discuss pleadings generally and then turn to pleadings as used in our respective systems.

A. Pleading Generally

It is easy for lawyers to get wrapped up in the technicalities of their craft and to forget the mundane aspects of what they are doing in lawsuits. Looked at from a purely practical perspective, pleadings have all the romance of a car owner going to the shop and telling the mechanic what is wrong with the car or a patient going to the physician and telling the physician how it hurts. Both mechanic and physician will respond similarly: they will talk with the car owner or the patient and diagnose the problem before taking the car apart or prescribing treatment. Pleadings, and how they are handled, should be the counterpart of the first trip to the mechanic’s shop or to the physician’s office.

For generations American lawyers began their study of civil procedure with the lesson that before a court decides, it must know what it is to decide. In American civil procedure one talks about framing an issue for decision. In German and Korean civil procedure one speaks of the subject of the lawsuit, the matter in controversy, the *Streitgegenstand* or 소송물 (*sosongmul*). As we shall see, behind that small difference in describing what is being done lie important differences in our systems and in their handling of pleadings. Nevertheless, in all of our systems, before a court can go to work to

determine who is right by determining law and finding facts, it needs to know what plaintiff thinks is wrong.

1. Purposes of Pleadings

Three purposes of pleading are: (1) establishing jurisdiction of the court to consider the controversy; (2) directing process to material issues that the parties dispute; and (3) bounding the controversy.²⁴¹

Establishing jurisdiction to consider the controversy. In Chapter 4 we examined jurisdiction. Pleading subject matter jurisdiction confirms that the court has responsibility for determining disputes of this type. Pleading personal jurisdiction confirms that this defendant is subject to the authority of this court, usually because the court's jurisdiction is his or her home, or because the court's jurisdiction is where the matter arose. In Chapter 4 we saw that German and Korean courts decide these issues quickly based on the pleadings. American courts, if presented with the issue, can require more time. We refer readers back to Chapter 4 for consideration of this purpose of pleading.

Directing process to material issues in dispute. While establishing jurisdiction is a necessary part of every lawsuit, that finding is incidental to the purpose of the lawsuit: determination of parties' rights. Ideally every step that parties and court take in the course of a lawsuit should contribute to the accurate, fair and prompt determination of the parties' rights. Since a lawsuit is about different views of what is right, pleadings can advance that eventual determination by setting out not only what one party thinks is wrong, but by informing the court of the factual basis for that claim and by setting out those matters about which the parties agree and those matters about which they disagree.

Bounding the controversy. Deciding what to decide is essential to any legal decision; deciding what not to decide, i.e., bounding the controversy, is important for an efficient decision. Going off point not only delays final decision of right, it makes that decision more costly. Setting bounds to the controversy conserves party resources. Matters which are not raised in the pleadings, parties need not consider. Setting bounds to the controversy protects parties from surprise. Parties need prepare their cases only on matters before the court.

Bounding the controversy has an importance that transcends process efficiency: protection of autonomy of parties and the privacy of the public. In all three of our systems of civil justice, while courts are *required* to decide all private disputes properly brought to them, they are *prohibited* from investigating on their own initiative matters not brought to them by the

²⁴¹ Cf. Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VANDERBILT L. REV. 399 (1961); FLEMING JAMES, JR., CIVIL PROCEDURE § 2.2 (1965).

parties. Those matters not before the court, the court cannot properly examine or decide.

2. Limits on Pleading—the Interdependency of Law and Facts

Directing process to material points in dispute and bounding process from going off on unproductive paths are benefits that pleading can deliver. While essential to efficient process, directing and binding process are necessarily tentative if process is to achieve correct decisions according to law. It is a truism of lawsuits that no one can predict with certainty what the process will turn up in the way of facts and legal issues. An issue that may not have been apparent at the outset, may become central to decision.

Civil procedure aims at correct application of all law to true facts. The process starts out, however, with imperfect knowledge of which rules are applicable and of which alleged facts are true. Applying law to facts thus requires determining the rules that are applicable to the facts and finding the facts that are material to the applicable rules.

Determining applicable rules and finding material facts are *interdependent* inquiries: until one knows which rules are applicable, one cannot know which facts are material. 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 results were other rules applied. Fail to settle the applicable rules soon enough and the process may detour to find facts that are not material under the rules actually applied. This process of going back and forth was identified in the first part of the twentieth century, but to this day is only occasionally noted.²⁴²

²⁴² In contemporary American civil procedure the question, when it is discussed at all, is seen from the lawyer's perspective as one of case theory development. *See, e.g.*, THOMAS A. MANUET, PRETRIAL 21 (7th ed. 2008) ("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'"). But American practitioners saw it as a practical problem before case theory took over. *See* JESSE FRANKLIN BRUMBAUGH, LEGAL REASONING AND BRIEFING: LOGIC APPLIED TO THE PREPARATION, TRIAL AND APPEAL OF CASES, WITH ILLUSTRATIVE BRIEFS AND FORMS 364-367 (1917). American academics Hart & Sacks noted it in their iconic work on legal process. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 351 (1958 Tentative Edition published 1994) ("the law determines which facts are relevant while at the same time the facts determine what law is relevant.") They concluded, as German practice does, that "[w]hat comes last, however, is always the job of law application." But they had no more to say about it. Comparativists seem to have seen the issue most clearly. Arthur T. von Mehren conceived of the 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*, 2 EUROPÄISCHES RECHTSDENKENS IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING ZUM 70. GEBURTSTAG 361 *et seq.* (Norbert Horn, ed. 1982), relevant parts substantially reprinted in ARTHUR T. VON MEHREN, & PETER L. MURRAY, LAW IN THE UNITED STATES (2nd ed, 2007). The German comparativist, Oskar Hartweg, saw the issue in his studies of English pleading. *See* Dieter Stauder with David Llewellyn, *Oskar Hartweg's Thoughts on the English Legal System*, in INTELLECTUAL PROPERTY IN THE NEW MILLENNIUM: ESSAYS IN HONOUR OF

B. United States

In the course of administering justice between litigating parties, there are two successive objects,—to ascertain the subject for decision, and to decide.

Henry John Stephen (1824)
*In nineteenth century's leading book on pleading*²⁴³

One might think that such a mundane matter as informing the court what the case is all about would be non-controversial. Yet again and again over the two century long history of American civil procedure, pleading and its consequences have been at the heart of controversy. Points of procedure end up dominating the work of the appellate courts. Today, pleading is again center stage in American debate over civil procedure.

In this section we discuss contemporary American pleading in general, then examine historical pleading, issues of joinder and turn finally to how pleading would be handled in *Roh v. Doh*.

1. Contemporary American Pleading

Modern American pleading is termed “notice pleading.” That is because it serves principally to give the other party notice of the proceedings. As we shall shortly discuss, earlier approaches to pleading forced the parties to develop specific issues for trial. The result, in view of the back-and-forth nature of law applying just discussed, was to deny meritorious claims. The notice pleading system seeks to avoid those problems by making less of the former issue narrowing role of pleadings.

Some legal scholars nevertheless assert that American pleadings “define the issues presented in a legal dispute.”²⁴⁴ In modern notice pleading,

WILLIAM R. CORNISH 47, 51 (D. Vaver and L. Bently, eds. 2004). Hartweg brought the problem and its relevance to the German system to the attention of a wider circle of German readers in a challenging introductory book. OSKAR HARTWIEG & H.A. HESSE, DIE ENTSCHEIDUNG IM ZIVILPROZESS: EIN STUDIENBUCH ÜBER METHODE, RECHTSGEFÜHL UND ROUTINE IN GUTACHTEN UND URTEIL at 78-79 (1981). See OSKAR HARTWIEG, SACHVERHALTSARBEIT ALS STEUERUNGSMITTEL IM ZIVILPROZESS (Stephan Meder, ed., 2010). Already the idea is discussed in a doctoral dissertation done under Prof. Dr. Reinhold Zippelius in 1971. HERBERT SCHÖPF, DIE WECHSELBEZIEHUNG ZWISCHEN SACHVERHALT UND NORMENORDNUNG BEI DER RECHTSANWENDUNG (Diss. Erlangen 1971). See generally James R. Maxeiner, *It's the Law—The Missing Measure of Civil Law/Common Law Convergence* 49 Sup. Ct. L. Rev. 469 (2010) reprinted in COMMON LAW AND CIVIL LAW AND THE FUTURE OF CATEGORIES (Janet Walker and Oscar G. Chase, eds., 2010).

²⁴³ HENRY STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 1 (1824).

²⁴⁴ GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 108 (1993)

however, they do not do much to direct the court to what the dispute is about. They barely begin to direct the case toward material points in dispute; they hardly bound the scope of process. Serving the complaint corresponds to dropping the starter's flag at the beginning of a race. A complaint may be sufficient even though it has no "legally relevant allegations at all."²⁴⁵ In theory, structuring the case in order to decide it is in "the bailiwick of discovery and motion practice."²⁴⁶ In practice, that is seen as myth.²⁴⁷ We discuss discovery and motion practice in Chapter 6.

Formal Requirements of Complaints

The building block of notice pleading is the "claim." The claim is the legal basis for relief required by Rule 8(a)(2); it is the legal cause of action. Under Rule 26(b)(1) the claim in theory determines the scope of pretrial discovery discussed in Chapter 6; in theory it facilitates the eventual subsumption of facts of the case under law.

The formal requirements of American complaints are few. Rule 8(a) of the Federal Rules of Civil Procedure sets them out. Besides a statement of the ground for federal jurisdiction (1) and a demand for relief (3), all that it requires is "(2) a short and plain statement of the claim showing that the pleader is entitled to relief."²⁴⁸ For money lent it is sufficient to state: "The defendant owes the plaintiff \$ _____ for money lent by the plaintiff to the defendant on *date*."²⁴⁹ Only if the complaint asserts fraud or mistake must it, under Rule 9(b), "state with particularity the circumstances constituting fraud or mistake."

Lazy lawyers can make short work of a complaint: it is said less than thirty minutes on their way to the golf course. The best lawyers take more time. They draft complaints that take into account secondary objectives such as impressing opposing counsel with their attention to the case and using the complaint to begin to tell a story.²⁵⁰

Rule 8(a) does not require that plaintiffs identify in the complaint "specific facts;" plaintiffs need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests."²⁵¹ The Rule does not require that parties choose a single claim, let alone a single issue, to present to the court.²⁵² The Rule does not require that a party plead all the elements

²⁴⁵ Geoffrey C. Hazard, *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665 (1998).

²⁴⁶ THOMAS A. MAUET, PRETRIAL 117 (7th ed., 2008).

²⁴⁷ Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENVER U. L. REV. 245, 247 (2010).

²⁴⁸ FED. R. CIV. PRO. 8(a).

²⁴⁹ FED. R. CIV. P. Form 10(d).

²⁵⁰ CHARLES H. ROSE & JAMES M. UNDERWOOD, FUNDAMENTAL PRETRIAL ADVOCACY: A STRATEGIC GUIDE TO EFFECTIVE LITIGATION 144, 158-159 (2008).

²⁵¹ *Erickson v. Pardus*, 551 U.S. 89 (2007).

²⁵² See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1000 (2003).

of any cause of action.²⁵³ The Rule does not normally require that parties even state facts that support the claims they make.²⁵⁴ The Rule imposes no requirement similar to the German requirement that matters asserted must be substantiated by naming the proof to be used to prove them. In the American system all that is unnecessary.

Contemporary Controversy

Pleading is again a hot topic in spirited debate in the United States about civil justice. In 2007 in *Bell Atlantic Corp. v. Twombly*,²⁵⁵ the United States Supreme Court, with an eye to the high cost of the discovery phase that follows pleading in the United States (discussed in Chapter 6), tightened up pleading standards with the goal of sparing innocent defendants those costs. The Court interpreted the “short and plain” standard of Federal Rule 8(a)(2) to require that plaintiffs allege “enough facts to state a claim to relief that is plausible on its face.” The *Twombly* decision reversed (or as the Court more gently said, “retired”) “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).” The *Twombly* decision focuses on the function of pleadings as gate-keeper or bounding device; it does not give much attention to pleading as device to direct process.

Some scholars find the *Twombly* decision startling. It means, they believe, that notice pleading is dead—to be replaced by plausibility pleading. In the view of other critics of *Twombly*, however, access to justice means that plaintiffs should have access to a particular form of process that permits discovery or even creation of legal rights that they are not able to state when they plead. Plaintiffs, according to this view, should be allowed to assert claims that to some may appear “tenuous,” to initiate their claims without “full and complete information,” and to have ability “to investigate their claims under the aegis of the courts,” and only after that, to have tested the factual sufficiency of their claims.²⁵⁶ Others scholars are less surprised; they see only a modest departure from past practice. From historic and comparative perspectives, the change—if there is one—is slight. Plaintiffs

²⁵³ See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002).

²⁵⁴ Cf. Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1987 (2004).

²⁵⁵ 550 U.S. 544 (2007).

²⁵⁶ A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353 at 355 (2010).

still are not required to plead evidence or even to allege facts that would fulfill all of the elements of an applicable legal rule.²⁵⁷

2. American Pleading in Historical Perspective

After over two hundred years of failed attempts, it is obvious that American pleading has failed. It has failed, we believe, because American civil procedure leaves to the parties' lawyers principal control of the process of applying law to facts, starting already with pleading.

In permitting the parties' lawyers to control application of law to fact, American civil procedure has vacillated between extremes in how it uses pleading. At both extremes it reserves only a modest supporting role to courts and directs the parties' lawyers to *share* the leading role. It expects the parties' lawyers to cooperate among themselves, not only to advance applying law to fact, but to carry out nearly the entire job beginning with determining of law, continuing through finding of fact, and ending with subsuming found facts under determined law. At the one extreme, pleading was to accomplish all that; at the other extreme, pleading was to accomplish none of it and all was to be left to post-pleading, pre-trial procedure or to trial itself.

Common law special pleading was the extreme where pleading was to do it all. Common law pleading required that plaintiffs choose one specific legal claim (the form of action) on which to base their claims and to force facts into that form. To do that often required that plaintiffs plead false or fictitious facts. Defendants had to respond to plaintiffs' pleadings with the object of reaching one material issue, of law or of fact, the determination of which disposed of the case. That precise issue the parties put on the record without any action on the part of the court. When lawyers got law and facts right, special pleading made for efficient process. Pleadings directed the court to the issue and pleadings bounded the process. When lawyers got it wrong, however, and chose the wrong rule, or facts turned out to be other than expected, the righteous were punished for their wrong procedural choice. Hence common law pleading was overthrown and code pleading substituted.²⁵⁸

Code pleading occupied a middle ground between common law special pleading and modern notice pleading. In code pleading plaintiffs' lawyers no longer selected a single form of action under which they had to subsume their cases. They were to plead facts and not law. Those facts, however, had to constitute a "cause of action," or multiple causes of action. In code

²⁵⁷ See generally James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, A Day in Court and a Decision According to Law*, 114 PENN STATE L. REV. No. 4 (2010).

²⁵⁸ See *Knowles v. Gee*, 8 Barb. 300, 4 How. Pr. 316 (N.Y. S. Ct., 1850, opinion of Samuel L. Selden, later Chief Judge of the N.Y. Court of Appeals), *quoted in* EDSON R. SUNDERLAND, *CASES AND MATERIALS ON CODE PLEADING INCLUDING THE NEW FEDERAL RULES 6-7* (1940).

pleading defendants' lawyers were no longer restricted to disputing one point of law or one point of fact, but could dispute multiple points of each.

Code pleading was more like common law pleading or more like modern notice pleading depending upon the extent to which courts using it restricted the parties' lawyers to the assertions that they made in their pleadings. Courts concerned with guiding and bounding process might review pleadings strictly. They were concerned with how plaintiffs' lawyers were to present at trial all of the different possible causes of action and issues. They worried how practically defendants' lawyers could prepare for all that plaintiffs' lawyers might throw at them. Reformers underestimated the complexity of the problems that they created in pleading and in eventual application of law to fact at trial. The back-and-forth nature of law application defeated the reforms. Strict courts could and did make "fact pleading" every bit as onerous as the common law pleading that preceded it.

Federal Rules of Civil Procedure. Edson R. Sunderland, drafter of the Federal Rules of Civil Procedure's pretrial provisions, considered the federal rules to be "in effect code pleading emancipated from the various technical requirements which a century of experience has shown to be unnecessary."²⁵⁹ Sunderland's vision for how pleading should work was not so very different from older forms and rather distant from the notice pleading we know today and described above. Shortly after adoption of the federal rules he wrote: "The purpose of pleading is to analyze controversies between parties, and to segregate and formulate the points in dispute, in such a manner that the parties may have sufficient information to enable them to properly prepare for trial and that the court may know exactly what questions are to be decided."²⁶⁰ Pleading was still then, according to one contemporary, "absolutely essential to the orderly administration of justice." Without some means to develop an issue for trial: "the proceedings would be a mere groping in the dark. An unknown point of difference could not be intelligently tried by the court; nor could the parties intelligently prepare for trial."²⁶¹ A dozen years after their adoption, however, another scholar feared that pleadings under the federal rules no longer had a rationale. They failed to fulfill their "ultimate objective": "to advise the court, lawyers and parties prior to trial what questions are to be decided."²⁶²

As we shall see in the Chapter 6, Sunderland provided or strengthened other means for developing material issues in dispute, namely pretrial conferences and summary judgment motions. Their nonuse, together with

²⁵⁹ EDSON R. SUNDERLAND, *CASES AND MATERIALS ON CODE PLEADING INCLUDING THE NEW FEDERAL RULES 15* (1940).

²⁶⁰ *Id.* at 172.

²⁶¹ SAM B. GILREATH, *SIXTH EDITION OF ABRAHAM CARUTHERS, THE HISTORY OF A LAWSUIT* § 94, at 1-3 (1937).

²⁶² James Alger Fee, *The Lost Horizon in Pleading under the Federal Rules of Civil Procedure*, 48 COLUM. L. REV. 491, 494 (1948).

the demise of pleading, has led to the other key development in American procedure discussed in that chapter, the vanishing of trials.

3. Joinder of Claims and of Parties

While formal requirements for American complaints are few, the practical consequences are sufficient to impel plaintiffs' lawyers to evaluate their cases before filing them. In particular they need to decide which claims to raise (*joinder of claims*) and against which parties they will raise them (*joinder of parties*).

In our case, should Roh sue only for an unpaid loan, or for other claims, such as for unjust enrichment or fraud? Should she sue only John Doh, Jr., or perhaps other parties, such as John Doh, Sr. or DohSon Honda, LL.C.?

Decisions concerning both forms of joinder are largely for the parties and not for the court. They are reached as matters of litigation strategy. Usually they are made by the lawyers themselves and are influenced by their interests.²⁶³

Joinder of Claims

The contemporary American system of pleading and discovery encourages rather than discourages adding claims. Here we speak both of claims arising out of the same transaction or occurrence and those arising out of completely different events. There is no restriction on parties joining completely different claims against each other, although the court may order their severance.²⁶⁴ Free joinder is a change from common law pleading, which with its need to produce a single issue between the parties, was hostile to any form of joinder, be it of claims or of parties.

There is no price to pay for adding claims; plaintiffs can drop them at any time. Since a claim is a legal characterization of facts, caution suggests raising every conceivable legal claim in case the court prefers one characterization or another. Since a claim defines the scope of pretrial discovery, flexibility in discovery encourages raising every conceivable claim. Since different claims support different remedies, maximizing one's options pushes one toward calling for all claims.

In our case Roh's lawyer, Harry Hahn, will write a complaint that asserts at least two different claims: repayment of a loan and unjust enrichment. For the first claim (styled variously "cause of action" or "count" in court papers), Roh will allege that she and defendant Doh, Jr. agreed to a loan of \$75,000 which loan Doh, Jr., has failed to repay. For a second claim, she will assert, that were the court to find the payment a gift and not a loan,

²⁶³ HAZARD & TARUFFO, *supra note* 244, at 152 (1993).

²⁶⁴ FED. R. CIV. P. 18(a).

it was a gift conditioned on the marriage of Doh, Jr. and Roh's daughter Rosa, which condition failed and, therefore gives rise to a right to its return.

Hahn will also consider other possible causes of action. In particular, he might for tactical reasons wish to add a claim of fraud. That might be that Doh, Jr. sought the money as a loan, but never intended to repay it, and now claims it as a gift. By adding a fraud claim, Roh could then also add a claim for punitive damages. Punitive damages are damages awarded not to compensate, but to punish. Although they thus serve a public function, they are paid to the plaintiff. They can be very high: commonly a multiple of the underlying compensatory damages claimed. Merely the presence of a claim for punitive damages can alarm defendants and can achieve for plaintiffs tactical benefits.

The only limit to the number of claims that Hahn asserts are his imagination and his brazenness. The system permits him creativity in claim creation. He may properly make any claim that he can imagine, even if not supported by the law, provided that it is warranted "by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law."²⁶⁵

For the sake of simplicity, we assume that Hahn limits himself to two claims: (1) a contract claim for repayment of a loan; and (2) an unjust enrichment claim for repayment of a conditional gift.

Joinder of Parties

Just as today's system of pleading encourages plaintiffs to add claims, so too does it encourage plaintiffs to add parties. Unlike in the days of common law pleading—which had complicated and convoluted rules when plaintiffs could or sometimes had to join parties—the present-day system does not discourage plaintiffs from adding parties; sometimes it requires that they do ("compulsory joinder"). It is generally easier to join parties at the outset of litigation than later. The system allows joinder of parties not yet known through the device of fictitious names, *e.g.*, John Doe, Mary Doe or Richard Roe. The generous rules of personal jurisdiction allow joining many parties, while the elasticity of those rules encourages plaintiffs to join non-obvious parties.

Naming multiple parties confers many benefits on plaintiffs. Perhaps the most important of these is to draw into the lawsuit so-called "deep pockets," that is, parties who are financially able to pay large judgments—or better yet—large settlements early on. If defendants are "jointly and severally liable," as often is the case, plaintiff can collect the full amount of a judgment from any of them. Thus it is typical to name as party just about anyone in the vicinity of the plaintiff's cause of action. Naming a third party as defendant offers the further benefit of the generous rules of party

²⁶⁵ FED. R. CIV. P. Rule 11(b)(2).

discovery to obtain information that may be in that party's hands. It offers the possibility that in the course of litigation defendants may quarrel among themselves to the benefit of plaintiff. Finally, the third party may have clout over the real defendant and be willing to use that clout to "help" that party reach a settlement.

Plaintiffs who chose to sue in federal court under federal diversity jurisdiction have special considerations. By adding or omitting parties they can make or destroy diversity, *i.e.*, the basis for subject matter jurisdiction of the court. Federal courts assume diversity jurisdiction only when there is so-called complete diversity, *i.e.*, all the plaintiffs are from different states than are all defendants. The same technique can be used to create or destroy venue.²⁶⁶

In the case of *Roh v. Doh*, Roh is the only plaintiff on the scene, but John Doh, Jr. is not the only possible defendant. Hahn will give thought to adding DohSon Honda LLC or John Doh, Sr. as defendants. He might add DohSon Honda LLC as defendant, since Roh paid the money directly to it. Hahn might add John Doh, Sr. as defendant, even though the basis for such a claim is not presently clear. Perhaps Doh, Sr., explicitly or impliedly guaranteed loans to Doh, Jr. Or perhaps, discovery will show that Doh, Sr., so participated in the management of DohSon, LLC that a court would be justified in "piercing the corporate veil" and assessing liability against him for the actions of that legal entity. Hahn need have no present factual basis for these claims. It is sufficient if he believes that such factual assertions as are necessary to support such claims "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."²⁶⁷

To simplify our discussion, we assume that Hahn adds no additional defendants.

4. Handling Complaints

Once Hahn has prepared the complaint and obtained Roh's approval of it, he will file it with the court. Roh will have to pay a filing fee. It is small. In federal court, the fee is the same whether one demands \$100 or \$100 million (presently in Maryland the fee is \$350). It is no deterrent to lawsuits. In Germany and Korea, on the other hand, the filing fee depends on the amount in controversy; in Roh's case it would be €1,668 (about \$2000); in Korea ₩42,500 (about \$350). The more plaintiffs ask for, the more they must pay into the court. As we shall see later in this chapter, this leads some plaintiffs in Germany to split claims. Claim-splitting is unusual in America.

Upon filing the court assigns a judge to handle the case. In the federal courts, each district court individually decides how to assign judges to cases. In the United States District Court for the District of Maryland, as in most

²⁶⁶ See, *e.g.*, *Payton-Henderson v. Evans*, 949 A.2d 654 (Md. 2008).

²⁶⁷ Rule 11(b)(3) FED. R. CIV. P.

federal district courts, assignment is random. The judge assigned is potentially any one of the judges in the court, without regard to subject matter of the case and without consideration of the expertises of the judge. Federal judges are assigned both civil and criminal matters at the same time. The assigned judge might be busy with a high profile criminal case.

Filing and immediate assignment of a judge were not always federal practice and, to this day, are not the practice in all states. As late as 1992, in New York plaintiffs commenced civil actions by serving process on defendants rather than by filing with courts.²⁶⁸ They needed never file with the court, if they settled the lawsuit; if they did not settle, they could wait as late as until they wanted the court to summon a jury. The parties needed to contact the court only when they needed a judicial ruling; then they would file what is still called a “request for judicial intervention.”

Since 1992 plaintiffs in New York commence cases by filing. But still today the court does not assign a judge when filed. Still today New York courts await filing by parties of requests for judicial intervention. The idea of this system is that most cases can be worked out among parties without judges being involved. Courts should assign judges only when parties need judicial rulings, such as, the decision of motions, the setting of discovery deadlines (discussed in Chapter 6), or the setting of trial dates (discussed in Chapter 7).

This belated assignment of a judge to the case is a vestige of a practice known as the calendar system that is still used in some states. While in an individual assignment system, one judge handles the entire case from beginning to end, in a calendar system, judges supervise specific stages of cases, *e.g.*, motion practice, trials, etc. The calendar system was thought more efficient, particularly for routine cases, for then a matter could go forward without waiting for a particular judge to have time to hear it.

Reviewing Complaints before Serving

Unlike in Germany and Korea, American courts do not review complaints before they are served. Even after complaints are served, courts review them only on request. As we discuss below, courts leave it to defendants to object to sufficiency of plaintiffs’ complaints. Barring defendants’ motions, they do not concern themselves with whether plaintiffs have sufficiently stated legal claims or adequately alleged jurisdiction and other necessary procedural prerequisites.

Serving Complaints

Unlike in Germany and Korea, American courts usually do not serve complaints on defendants. That task falls on plaintiffs. Today, service is

²⁶⁸ The drafters of the Federal Rules considered, but eventually rejected, this approach.

simpler than in the past. Once service is accomplished, Hahn will, however, have to file proof of service with the court.

As Hahn and Roh discussed in Chapter 3, Roh comes back to review the complaint and to discuss with Hahn what to expect from the process that she is bringing into life. In Chapter 6 we related part of that conversation. In this chapter we provide the a complaint such as her lawyer might bring.

COMPLAINT		
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND		
Jane Roh,		
	Plaintiff	
	v.	No. _____
John Doh, Jr.		Civil Action
	Defendant	
COMPLAINT		
1. The plaintiff is a citizen of Virginia. The defendant John Doe, Jr. is a citizen of Maryland. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332 [<i>i.e.</i> , \$75,000]. [Fed. R. Civ. Pro. Form 7(a).]		
COUNT I		
2. The defendant John Doh, Jr. owes the plaintiff \$ 75,000 principal plus additional loan interest, for money lent by the plaintiff to the defendant on April 15, 2011. [Fed. R. Civ. Pro. Form 10(d).]		
COUNT II		
3. Defendant John Doh, Jr. received from plaintiff \$75,000 on the condition that John Doh, Jr. and plaintiff's daughter, Rosa Roh, were engaged to marry.		
4. John Doh, Jr. and Rosa Roh have broken off their engagement and no longer plan to marry.		
5. For John Doh, Jr. to retain the \$75,000 would be unjust enrichment.		
Therefore, the plaintiff demands judgment against defendant John Doh, Jr. for \$75,000, such loan interest as the Court may determine is applicable, plus interest and costs. [Fed. R. Civ. Pro. Form 10.]		
Date: November 15, 2011		

Harry Hahn
Hahn & Traurig
1601 K Street NW
Washington DC 20006
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202-555-5555

Responding to Complaints

Once John Doh, Jr. and DohSon Honda LLC are served with the complaint, the lawsuit begins in earnest. Defendants have four alternatives: acquiesce, default, move to dismiss, and answer on the merits. We address each in turn:

Acquiesce. For a defendant to acquiesce is the simplest of all solutions. The defendant contacts the plaintiff, offers to accept plaintiff's demand and requests that the plaintiff withdraw the lawsuit. Of course, in cases where plaintiffs have been diligent in letting potential defendants know of their intention to file suit, acquiescence is not likely, for if on demand the defendant refused to pay, why would he or she now pay? Still, defendant may have had a change of heart. Or, in the case of a corporate defendant, the lawsuit may have brought the case to attention of senior management.

Default. If defendant does nothing, the court, after the period of time for answering the complaint expires, plaintiff may apply for entry of a judgment by default. If the plaintiff's claim is for a "sum certain," that is a determined amount, and if defendant is neither a minor (child under 18 years old) or mentally incompetent, the clerk of the court, without the involvement of a judge, and without review of legal sufficiency of the complaint, must enter judgment for plaintiff in that amount.²⁶⁹ If the claim is not for a sum certain, then plaintiff must apply to the court. The court may, but is not required, to hold a hearing or take evidence. It could conduct an accounting to determine the amount of damages, take evidence to establish the truth of any allegation, or investigate any matter.²⁷⁰ Evidence is mostly taken by affidavits without hearing.

Move to dismiss. While courts do not without request review plaintiffs' complaints for legal sufficiency or for procedural requirements, defendants' lawyers should. With respect to certain defenses, defendants may choose between raising them as defenses in their answers, or presenting them by motion to the court before answering. The latter is known as motion

²⁶⁹ FED. R. CIV. P. 55(b)(1).

²⁷⁰ FED. R. CIV. P. 55(b)(2).

practice.²⁷¹ In the federal system these defenses are seven: “(1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19.”²⁷²

Of these choices it seems defendants most often raise (1) to (3). If successful, these motions may lead to plaintiffs dropping their case or, at least, forcing them to bring them to go to different courts. Less often, it seems, but still not unusual, defendants raise other defenses. In challenges to process, *i.e.*, (4) and (5), if there is no statute of limitations issue (that would bar the claim if served later than it was initially), if successful the motion at best gains for defendants a few weeks’ time. In case of (6), failure to state claim, and of (7), failure to join a party, tactical and strategic considerations come into play. For example, if plaintiffs have only novel claims not previously recognized in law, defendants may challenge those claims at this stage to avoid discovery expenses. If, on the other hand, plaintiffs have claims well recognized in law, but have not stated them well, defendants often choose not to challenge the claims at this stage for fear that the court would instruct plaintiffs on how better to formulate their claims and then permit them to do just that.

When defendants raise any of these defenses by motion, then that is their only response until the motion is decided. If the motion does not end the lawsuit, defendants will have further time to answer the complaint. When defendants decide not to make motions to raise these issues, they may include them as affirmative defenses in their answers and then contest them later in pretrial and trial. Just as plaintiffs are encouraged to assert in their complaints a wide variety of claims, so too are defendants encouraged to raise in their answers all conceivable affirmative defenses (*e.g.*, that an agreement should have been in writing, that the statute of limitations has run).

Answer. Defendants who take none of these three steps must answer complaints timely (in the federal courts, usually within 20 days). With respect to each allegation of the complaint defendants must admit, deny or state that they have “no knowledge or belief” sufficient to answer the allegation. The assertion of lack of knowledge must be made in good faith, but is subject to no further limitation. A response is not in good faith if defendant could easily determine the matter. There is no obligation to give reasons why the defendant might deny the truth of the allegations.

To limit the scope of admissions, defendants typically admit only one part of an allegation, but deny knowledge about the balance. For example, in

²⁷¹ Motion practice at this stage also includes motions for judgment on the pleadings, for more definite statement, and to strike redundant and immaterial matter in complaints. FED. R. CIV. P. 12(c), (e) & (f). We do not discuss these here.

²⁷² FED. R. CIV. P. 12(b).

an automobile accident case the allegation might be: “7. At 11:05 PM on May 10, 2011 Witness W had just left the Main Street liquor store with a pint of vodka and an open umbrella.” The response might be: “Admits that Witness W had just left the Main Street liquor store, but does not have sufficient knowledge or information to form a belief as to the truth of the other allegations in paragraph 7, and therefore denies them.”

The answer must also set out all of the applicable 12(b) defenses not raised by motion as well as any affirmative defenses. An affirmative defense is defined in Rule 8(c) and amounts to any defense that admits the truth of the plaintiff’s assertion but gives a ground for defeating the defendant’s claims. An example might be a defense of fraud or duress to an otherwise valid contract claim. In the case of doubt whether a defense is an affirmative one, the prudent lawyer will include it in the answer.

If defendant wants a jury trial, defendant in the answer must request one or forever waive that right.

The answer is also where defendant should bring claims against plaintiff (counterclaims) and may bring claims against third parties (third party claims). Counterclaims and third party practice are beyond the scope of this book.

Counterclaims. Counterclaims are of two types: compulsory and permissive. Compulsory counterclaims are governed by Rule 13(a); they are claims that arise out of the same transaction or occurrence as that event alleged in the complaint. Permissive counterclaims are governed by Rule 13(b); they are all other counterclaims. For tactical reasons alone, defendants will attempt to find some basis for a counterclaim if at all possible. Claims against third parties are governed by Rule 14 and are permissive. When a defendant makes counterclaims or third party claims, there are additional pleadings.

Doh’s Answer

John Doh, Jr. consulted his own lawyer, Betty Bahn. Upon advice from Bahn, in his answer he will deny both the claims that the money was a loan and that it was a gift in contemplation of marriage. Moreover, he will raise as affirmative defenses that if the payment was a loan, (1) it was a loan to DohSon Honda, Inc. and not to him; and (2) if it he was guarantor of that, it is not enforceable because it is not in writing. While he might make a third party claim for contribution or indemnity against DohSon Honda, Inc., for the sake of simplicity, in this case he will not.

Directing further Proceedings

Even after Roh has served Doh, unless Doh responds with a motion, the initiative remains with the parties. Rule 26 requires that the parties’ lawyers confer as soon as practicable, and in no event later than 89 days after the day

Doh is served or 69 days after he files an appearance or an answer with the court. The lawyers are to discuss the nature and basis of their clients' claims and the possibilities for settlement, to disclose certain material and to make plans for discovery (discussed in Chapter 6). The court has authority to order lawyers to confer in person or to direct that parties themselves personally participate, but since lawyers usually confer without informing the court, the court does not ordinarily make such orders. Within fourteen days of conferring, the parties are to submit a written report outlining a proposed discovery plan.²⁷³

After the lawyers for the parties have conferred and submitted their report, the court may order that the lawyers meet with the judge for a pretrial conference. The frequency of such early pre-trial conference varies from court-to-court and from judge-to-judge. In any case, within 120 days after Doh or any other defendant is served, or within 90 days after Doh or any other defendant appears or answers, the assigned judge is required to issue a scheduling order. That order must limit the time to join other parties, to amend pleadings, to complete discovery and to file motions. Typically it allows six to twelve months for discovery. It may set tentative dates for future conferences and for trial.²⁷⁴

C. Germany

da mihi factum, dabo tibi ius
("give me the facts; I will give you right").

Roman law maxim

German pleading practice puts the goal of civil procedure—the judicial determination of the rights of the parties—front and center. It focuses the attention of the parties on the task at hand. It insists that parties state clearly why relief is, or is not, in order. German pleading practice facilitates the work of judges: the determination of competing claims of right. It helps judges clear out technical issues immediately. It permits them to direct proceedings to material points in dispute between the parties.

1. Substantive Requirements of Complaints

The complaint need make no mention of legal grounds for relief. The court knows the law (*jura novit curia*). The court needs no instruction on law. The parties may, in subsequent proceedings, suggest alternate legal grounds for recovery, but they are not required to. Their suggestions of which law might

²⁷³ FED. R. CIV. P. 26(f).

²⁷⁴ FED. R. CIV. P. 16(b).

apply do not bind them in the evidence that they may present. The court is required to test the facts presented against all possible legal grounds for relief.

While German pleading practice does not require that the complaint name legal claims, it does require that the facts alleged do fulfill some legal claim. The foundation of the complaint is the factual basis for the claim (*Klagegrund*). That is the concrete set of facts, *i.e.*, the life events, from which plaintiff claims right to request a legal remedy.²⁷⁵ Thus the complaint must allege facts sufficient to fulfill all the elements of at least one legal claim. It is insufficient if it asserts merely a legal claim without alleging the factual elements. German pleading is thus similar to the fact pleading that applied under the Field and other American reform codes in the nineteenth century.²⁷⁶ As we shall see, however, it is different in the practice of how it implements that pleading requirement.

In one respect, the pleading of evidence, German pleading practice imposes requirements that no American system has ever required. Not only must plaintiffs allege facts that they intend to prove, they must also identify evidence that they intend to rely on to prove those facts.

A German complaint determines “the matter in controversy” (*Streitgegenstand*). The matter in controversy is “the central concept” of German civil procedure.²⁷⁷ The court has no authority go beyond the matter in controversy, except as parties may appropriately raise additional claims. The matter in controversy determines not only the definiteness of the complaint, but also subject matter jurisdiction, personal jurisdiction, joinder of claims and of parties, amendments of the complaint, and effect of the lawsuit for pending and future lawsuits.

The matter in controversy is independent of the legal basis for relief.²⁷⁸ It determines the scope of legal protection the court can award.²⁷⁹ German pleading practice gives the complaint the ambitious function of beginning the structuring of the lawsuits by identifying material facts in dispute between the parties. A German complaint can be the most important submission the plaintiff makes to the court.

A German complaint is a map for the dispute, but it is not an itinerary. It facilitates travel without constraining it. Only at its outer edges does it set boundaries. This sets it apart from the complaint of classic American common law pleading, which allowed only one route to the destination.

²⁷⁵ HEINZ THOMAS, HANS PUTZO, KLAUS REICHHOLD & RAINER HÜBTEGE, *ZIVILPROZESS-ORDNUNG* § 253, margin no. 10 (31st ed. 2010) [THOMAS-PUTZO-REICHHOLD, ZPO, since we cite only to sections revised by Reichhold].

²⁷⁶ See text at note ** *infra*.

²⁷⁷ THOMAS-PUTZO-REICHHOLD, ZPO Einl. II, margin no. 2.

²⁷⁸ THOMAS-PUTZO-REICHHOLD Einl. II, margin no. 5.

²⁷⁹ See LEO ROSENBERG & KARL HEINZ SCHWAB, *ZIVILPROZESSRECHT* § 92, margin no. 22 (17th ed. 2010).

As we discuss below, German courts review complaints for formal procedural requirements and substantive sufficiency before they, and not plaintiffs, serve complaints on defendants.

Substantiation

A German complaint must be “substantiated.” That means that it must state the facts on which it rests as well as identify the evidence to be used to establish those facts. The complaint must state facts so exactly that, based on the information provided, the court could determine that the legal relief sought should be granted, if the allegations are true. Thus the complaint must state all the facts that a legal norm requires for application. The complaint may, but need not, carry through the subsumption of the particular facts alleged under an applicable legal rule. If the plaintiff has more than one possible legal claim, the complaint should state facts that satisfy all the requisite elements of each claim. Facts that do not support one of the elements of a possible claim have no place in a complaint. It is a matter of tactic—disputed among experts—whether the complaint should assert facts that undercut defendant’s possible defenses.

The degree of substantiation required for each fact alleged varies. When a fact is not seriously disputed, it can be stated in general terms. When it is disputed, it should be substantiated precisely. More detail is indicated if the legal concepts involved are indefinite (*e.g.*, negligence). Proffering too little support in the initial complaint is ordinarily not fatal, but good practice is to err by substantiating too much rather than too little.

Plaintiff’s complaint anticipates the court’s final judgment. One might describe the complaint as a draft—from the plaintiff’s perspective—of the judge’s final judgment, or as directions to the judge on how the judge might write the final judgment, or at the least, as the materials on which the judge may base the judgment.

2. Formal Requirements of Complaints

Under § 253 ¶ 2 ZPO (in connection with § 130 ZPO), a complaint must contain:

1. Caption with subject matter and amount in controversy;
2. Request(s) for legal relief;
3. Position regarding invocation of single judge in Landgericht;
4. Introductory sentence;
5. Statement of facts (basis for claim) (*Tatsachenvortrag (Klagegrund)*);
6. Identification of proof;
7. Legal evaluation of the case; and

8. Signature.²⁸⁰

A plaintiff takes the first step toward commencing a lawsuit by filing a complaint with the court. Here, since the amount in controversy is more than €5,000, the proper court is the District Court (*Landgericht*) where John Doh, Jr. lives in Munich (Munich I since he lives in the city, not Munich II in the area). The complaint must include all facts on which the claim rests, not merely what the claim is. Moreover, it must state the means of proof that are to prove the factual assertions, *i.e.*, the complaint must be “substantiated.” Relevant documents in possession of the plaintiff are to be appended to the complaint. Documents in possession of others as well as expected witness testimony are indicated by designation.

Below is a complaint in the case of *Roh v. Doh*. While the demands of the German complaint are particular, in a simple case such as this, the German complaint is not so greatly different from a fuller American complaint.

<p>COMPLAINT</p> <p>In the Matter Of Mary Roh v. John Doh, Jr.</p> <p style="text-align: center;">Berlin, November 15, 2011</p> <p>To the District Court (<i>Landgericht</i>) Munich I Prielmayerstraße 7 80335 Munich</p> <p>-Civil Chamber-</p> <p>COMPLAINT</p> <p>Of the merchant <u>Mary Roh</u>, Bismarkstraße 11, 10400 Berlin</p> <p>-Represented by: Lawyer Harry Hahn,</p> <p style="text-align: center;">- P l a i n t i f f -</p> <p>against</p> <p>the merchant <u>John Doh, Jr.</u>, Kaiserplatz 11, 84471 Munich</p> <p style="text-align: center;">- Defendant -</p> <p>For repayment of a loan</p>
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²⁸⁰ See MARIUS BREUCKER, ANWALTSSTRATEGIEN IM ZIVILPROZESS: AUßERGERICHTLICHE UND GERICHTLICHE MANDATSBEARBEITUNG 93 (2006).

Amount in controversy: €60,000.

In the name of and on behalf of the Plaintiff I bring this Complaint and request scheduling of an oral hearing, in which I will petition,

to adjudge the Defendant to pay to the Plaintiff €60,000.
together with 5 % interest over Prime Rate since April
16, 2011.

Justification:

I.

Plaintiff and Defendant, whose father has been a friend of Plaintiff for many years, are both independent Honda Automobile dealers.

At the traditional spring party of the regional Honda dealers on April 15, 2011 at the Hotel Kaiser Hof in Berlin Defendant asked Plaintiff for a loan in the amount of €60,000.

At the time Defendant was engaged to be married to Plaintiff's only daughter; his urgent request for money was a complete surprise to Plaintiff. Defendant justified it with the explanation that his company had a sudden cash shortfall. Since this problem was only temporary, he did not want to go to his father—the regional Honda distributor—with it. He did not want his father to get the impression that he was having trouble managing his company.

Proof: Testimony of the Parties

Since Plaintiff wanted to help Defendant, her friend's son and her own prospective son-in-law, she promised to transfer the requested sum of money as quickly as possible. Both agreed that Defendant would pay the money back as soon as the financial problem was overcome and in any case no later than August 15, last year.

Proof: Testimony of the Parties

On the following day, April 16, 2011, Plaintiff transferred the money requested to Defendant's company's account at the Deutsche Bank, Munich, Account No. 22 38 40, Bank Identification No. 700 700 10.

Proof: in case of dispute, submission of the application for transfer and the account excerpt of the bank.

Plaintiff has to this day not paid the money back. When the parties met at a meeting of dealers September 7, 2011 in Berlin, Plaintiff asked Defendant, why he had not yet paid the loan back as he had promised. She explicitly demanded that he immediately repay the loan. Defendant reacted astonished. He replied that there was nothing to repay; the transfer of €60,000 was clearly a gift. Plaintiff was speechless.

Proof: Testimony of the Parties

II.

A Complaint is required because Defendant not only has not repaid the money, he has expressly refused repayment. Pursuant to § 488(1) of the Civil Code (BGB) Plaintiff is obligated to repay the loan.

Under § 286(1) BGB Defendant has been in default on his repayment obligation since April 16, 2011. Because he has not repaid the loan, he must also pay default interest at the level provided in § 288(1) BGB.

Proof: Bank confirmation if disputed.

Assignment of the case to a single judge is acceptable.

Harry Hahn
Lawyer for Plaintiff

3. Joinder of Claims, Splitting of Claims and Joinder of Parties

Joinder of Claims

The German system of pleading facts makes raising different legal grounds for the same factual transaction unnecessary. Nevertheless, if lawyers have in mind different legal grounds, they need to allege facts sufficient to support each of those claims.

In our case Hahn will write a complaint that alleges facts sufficient to support the basic claim of a loan by Roh to John Doh, Jr.: she and defendant Doh, Jr. agreed to a loan of €60,000 which loan, after due demand, Doh, Jr., has failed to repay. Hahn will take care, however, in the event that that claim fails and Doh, Jr. is successful in his assertion that the payment was gift, to allege facts that prove it was a gift conditioned on the marriage of Doh, Jr. to Roh's daughter Rosa, and that that condition failed and, therefore gives rise to a right under principles of unjust enrichment to its return.

The German system offers no incentive such as punitive damages to encourage Roh to add different legal grounds for the case against Doh, Jr. Roh can get her money back only once; so as long as she has a right to the money under either her or Doh, Jr.'s view of the facts, there is no point in stretching existing legal grounds or creating new ones. Such imagination would only serve to complicate her case and delay her recovery.

As in the American system, Roh, if she has other claims against Doh, Jr. based on other facts, may raise those claims in this lawsuit, provided the court has jurisdiction over those claims. Adding different factual grounds for relief could create additional court and attorneys' fees, but at a lower level as if Roh brought the claims as separate lawsuits.

Here we assume that Hahn writes the complaint to allege facts supporting the contract claim and additional facts sufficient to support an unjust enrichment claim for repayment of a conditional gift.

Claim Splitting Instead of Claim Joinder

Instead of joining claims to improve one's negotiation position, the German system of loser-pays legal fees encourages splitting claims to reduce litigation risks. For example, if defendant failed to make payments when due, plaintiff may reduce litigation risks by suing only for one missed payment. Suit for the single payment will disclose, at lower risk, any defense defendant has. If plaintiff wins, defendant may pay all amounts due without further plaintiff having to bring another lawsuit. If defendant fails to pay, the earlier judgment in the first suit will not foreclose, but may facilitate, a later suit for the other missed payments.

Joinder of Parties

Joinder of parties is only exceptionally required, most commonly, "if the disputed legal relationship of all members of the suit group can only be determined on a unitary basis."²⁸¹ In other cases, while joinder is possible, it rarely raises issues of litigation strategy comparable to those it presents in the United States, where it is frequently used to create or destroy federal diversity jurisdiction. The greater precision of the German system in determining liability and its extent, the lower costs of litigation in general, and the loser-pay allocation of expenses, discourages adding additional parties just to bring in more defendants who might contribute to a settlement. The greater control of proof-taking likewise strips joinder of advantages it might have in the United States in widening discovery (discussed in Chapter 6).

3. Handling Complaints

As in the United States, in Germany plaintiffs commence lawsuits by filing complaints with courts. Unlike in the United States, the filing fees can be substantial and can themselves deter litigation. The fee is based on a percentage of the amount in controversy (*Streitwert*) and constitutes an advance on eventual court costs. In Roh's case against Doh, with an amount in controversy of €60,000, the filing fee would be €1,668. If she prevails, Doh will be responsible for paying it.

In Germany, once Roh has filed her complaint and paid the fee, the court will assign a judge or judges to the lawsuit. While formerly German district courts assigned three judges, today in cases such as this, they assign only one. To prevent corruption of civil justice, the court assigns a judge predetermined by the court's organization plan. In Germany, litigants have a constitutional right to what is termed their "statutory judge" (*gesetzlicher Richter*). Each year the court issues a plan that abstractly assigns cases based on subject matter to specific chambers of judges within the court.

²⁸¹ § 61 ZPO (as translated in MURRAY & STÜRNER, *supra* 171, at 202.

In *Roh v. Doh* the judge assigned will be a member of a civil chamber. Each chamber has its own special competencies beyond just civil or criminal matters. Specific chambers handle specific types of case, *e.g.*, construction cases. There are special commercial law chambers which may use lay judges alongside a professional judge.²⁸² Specialization facilitates judicial familiarity with particular areas of law and with the environments from which those cases come. In those cases where three judges are appropriate, all judges come from the same chamber. One of the chamber's judges is the chairman of the chamber and has administrative responsibilities for the chamber and its personnel.

Reviewing Complaints before Serving

As in most American jurisdictions, in Germany plaintiffs file complaints with courts to commence lawsuits. While in America courts only exceptionally serve complaints, in Germany they always do. Moreover, while in America, courts never review complaints before they are filed, in Germany they always so

In Germany the judge who is assigned the case on filing, reviews it before directing it to be served. The judge tests the complaint for procedural permissibility (*Zulässigkeit*) and for substantive soundness (*Schlüssigkeit*). Procedural permissibility refers to whether the complaint adequately alleges formal prerequisites for litigation (*e.g.*, jurisdiction.); substantive soundness relates to whether the complaint alleges facts, which if true, and evidence which if credited, would support ordering a legal remedy.

Procedural permissibility. The judge first reviews the complaint for procedural permissibility. If one or more procedural prerequisites is absent, the judge is to dismiss the complaint on the basis that is most easily and quickly determined. The procedural prerequisites of German civil procedure are familiar to American lawyers. Five correspond to requirements of the American Federal Rules of Civil Procedure, Rule 12(b), nos. (1) to (5): (1) subject matter jurisdiction, (2) personal jurisdiction, (3) venue, (4) process, and (5) service of process. In American federal civil procedure, however, these issues are reviewed—ordinarily only upon a party's initial response to service of a complaint—if the defendant requests such a review.

Substantive soundness. If the complaint is procedurally permissible, then the judge examines it for substantive soundness. The judge is required to examine all bases for the claim which seriously come into question. As with the review for permissibility, the judge is to conduct the review in the most economical order.

In reviewing for substantive soundness the judge must examine whether the individual assertions of the plaintiff's submissions satisfy the abstract elements of the claim made. The judge is not to take into account factual allegations that are not substantiated.

²⁸² §§ 93 et seq. GVG.

Responding to deficiencies. If the judge finds that a complaint is deficient on procedural grounds, the judge is not to dismiss the complaint immediately, but is to call the deficiency to the attention of the plaintiff and to request supplementation.²⁸³ If the judge finds that the complaint is deficient on substantive grounds, the judge is to serve the deficient complaint,²⁸⁴ but under the judge's general duty of elucidation discussed below, it to notify plaintiff promptly of the deficiency.²⁸⁵

Challenging Sufficiency of Service and of Complaints

That German courts review complaints before serving them, does not preclude defendants from challenging the sufficiency of either. If defendant makes a challenge—most commonly to procedural permissibility—the court may hold a hearing. If the court finds a complaint impermissible on grounds of no subject matter jurisdiction, or on grounds of improper venue, on application of plaintiff, it is to transfer the case to the correct court. Its decision to transfer cannot be appealed and binds the transferee court.²⁸⁶ If plaintiff fails to make such application, the court must dismiss the claim. If the court finds the complaint impermissible other grounds, it is to dismiss the case.²⁸⁷

Responding to Complaints

As in the United States, once John Doh, Jr. is served with the complaint, the lawsuit begins in earnest. In Germany, defendants have the same four alternatives as in the United States: acquiesce, default, answer on the merits and challenge the sufficiency of the complaint.

Acquiesce. Acquiescing is largely the same in Germany as in the United States, although in Germany, thanks to the cost system, defendants may be less likely than defendants in the United States to receive complaints that are not preceded by formal demand letters.

Default. German law does not permit a clerk to enter a default judgment against a defendant who has failed to appear.²⁸⁸ While the court is not required to hold a hearing, it must (again) review the plaintiff's complaint for soundness to determine that the complaint sets forth the existence of all facts necessary to uphold a legal claim and make certain that the complaint does not itself set out facts that if proven would fulfill an affirmative defenses that would negate the claim.

Answer. Once the complaint is served, a defendant who chooses to

²⁸³ THOMAS-PUTZO-REICHOLD, ZPO Vorbem. 253, margin no. 12, at 407.

²⁸⁴ THOMAS-PUTZO-REICHOLD § 253 Margin No. 38.

²⁸⁵ THOMAS-PUTZO-REICHOLD § 139 Margin Nos. 15ff.

²⁸⁶ § 281 ZPO.

²⁸⁷ § 280 ZPO.

²⁸⁸ § 331(3) ZPO.

contest the case, must respond with an answer. The answer is subject to requirements similar to those governing complaints: it must be true, complete, specific, and substantiated. The court will then review the complaint and the answer for materiality, *i.e.*, materiality to the relationship between assertions of the defendant and those of the plaintiff.

Directing further Proceedings

Coincident with preliminary review the judge determines how the case is to proceed further: whether the case will use additional written proceedings or will use a so-called early first hearing. The judge's choice is purely pragmatic: the judge selects the method that the judge thinks is more likely in this case to be more efficient, *i.e.*, is more likely to simplify and hasten framing of the material and disputed issues.

Most German judges prefer early oral hearings in most routine, contested cases. They regard written proceedings as productive of complexity. They see the oral hearing as the means to move the case along expeditiously and dynamically. Most judges direct oral hearings as soon as possible. Through oral hearings points in dispute can be quickly clarified; events and dates can be mutually acknowledged. Routes to settlements can be developed

Prior to the first hearing, or prior to the exchange of further written pleadings, as the case may be, the judge is required to prepare future proceedings. Preparations may include: (1) directing 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 production of documents or things and making premises and other things available for observation. In some cases, based on these preparations, the judge may be able to resolve the entire case at the first hearing.

We consider the first hearing in Chapter 6.

D. Korea

Korean pleading practice parallels the practice of the German system on which it is based: plaintiff commences a lawsuit by filing with the court a complaint that sets out a claim of right and establishes the subject matter of the controversy, a judge reviews the complaint for procedural and substantive sufficiency, the court serves the complaint, the defendant responds to the complaint, and the judge uses the pleadings to narrow the case and take it in the direction of decision. As in Germany, pleadings define the boundaries of the lawsuit and facilitate reaching a final decision according to law.

1. Substantive Requirements of Complaints

While Korean pleading practice in general outline parallels German practice, it differs in particular respects as to what it requires of complaints. While Korean practice is similarly concerned with setting out the matter in controversy, it does not follow the maxim *da mihi factum, dabo tibi ius* that makes unnecessary party identification of the legal basis of the claim. Korean practice requires plaintiffs state the applicable legal rule. In this respect, Korean practice resembles historic American common law pleading. In a further departure from German practice, Korean practice allows plaintiffs to state facts generally and does not require that they be substantiated. In this respect, it resembles modern American pleading. The difference is apparent in how differently Korean practice defines the matter in controversy.

As we have seen, German practice is oriented toward a definition in fact of the matter in controversy. Korean practice draws a distinction—not always easily understood by non-Koreans, or even by Koreans—between the “gist of the claim” (청구취지, *cheong gu chi ji*) and the “grounds for the claim” (청구원인, *cheong gu ~~원인~~*). Academic commentary defines the claim (청구, *cheong gu*) to be plaintiff’s assertion of a substantive right against defendant which he or she requires the court to adjudicate in the lawsuit. It sees the claim as defined both by its gist and by its grounds. The gist of the claim, which corresponds to the German *Anspruch*, addresses the legal basis, while the grounds, which correspond to the German *Sachverhalt*, concern the factual relationship. In common usage, the term claim (청구, *cheong gu*) is used interchangeably with and as a synonym for “matter in controversy” (소송물, *sosongmu*), *Streitgegenstand* in German), “subject of the action” (소송의 객체, *sosong eo kaekche*), and “subject of the adjudication” (심판의 대상, *sympal eo daesang*).

Alleging facts. The factual requirements that Korean complaints must satisfy tend toward the looser requirements of American notice pleading. Korean complaints do not have to state the ground for the claim in the broad sense of identifying facts that support every constituent element of the legal rule. They are sufficient if they identify facts that establish the claim in a narrow sense that permits court and defendant to distinguish this claim from other claims. Since Korean complaints are not required to allege all material elements, they likewise need not identify evidence necessary to prove those element, *i.e.*, they need not be substantiated. These looser requirements notwithstanding, better lawyers usually state their clients’ claims in the broader sense. In this way they can give the court a better idea of their clients’ cases.

Identifying the legal rule. While Korean procedure spares plaintiffs from identifying all material elements of the applicable rule and of substantiating the facts that they assert, it does require that they identify the legal rule relied on. It makes that requirement meaningful by limiting judges to ordering remedies only on the legal basis claimed. While the legal basis is

not invariably fixed finally in the complaint, usually it is. Once plaintiff finally fixes the basis of the claim, the plaintiff's choice binds the court. Thus, for example, where plaintiff has claimed breach of contract, the court could not then find for plaintiff on a tort ground. This requirement is reminiscent of historic American common law pleading. While the Korean Supreme Court continues to insist on this approach, scholars criticize it. They see it as particularly inappropriate in *pro se* cases where laypersons are unlikely to appreciate or be able to make the choice.²⁸⁹

Comparing German and Korean complaints. While Korean practice requires plaintiffs to identify legal claims, otherwise it is less demanding of complaints than is German practice. As noted it requires stating facts only generally. It does not require stating all facts necessary to a claim or indentifying the evidence expected to be relied on. These looser requirements may be attributable to the high incidence of *pro se* representation in Korea. In Germany almost all complaints in the District Court are drafted by lawyers; in Korea, more than half are drafted by non-lawyers.²⁹⁰ It would be impractical to hold lay-drafted complaints to the same technical standards as lawyer drafted complaints. Significantly in Germany, in the lowest courts, the *Amtsgerichte*, where parties are not required to use lawyers, complaints are more loosely drafted and are held to less rigorous standards.

2. Formal Requirements of Complaints

The formal requirements of complaints are set out in the Civil Practice Act: (i) identification, including name and address, of parties and their legal representative(s) if any; (ii) gist of the claim; and (iii) grounds for the claim in a narrow sense.²⁹¹ Ordinarily the complaint also includes: (i) case title; (ii) documents to be attached; (iii) the date when the complaint was drawn up; (iv) the name of the court which has accepted the lawsuit; (v) allegations of facts satisfying procedural requisites including competence of the court of the suit; (vi) the factual allegation which the claim is based on, i.e., grounds for the claim in a broad sense; and (vii) special statement regarding evidence upon which the action is founded.²⁹²

3. Joinder of Claims and Joinder of Parties

Joinder of Claims (소의 객관적 병합)

²⁸⁹ See Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 134-135, reprint at 10-11.

²⁹⁰ See Hyun Seok Kim, *Why do We Pursue "Oral Proceedings" in Our Legal System?*, 7 J. KOREAN L. 51, 71-73 (2007), reprinted in LITIGATION IN KOREA 31, 48-50 (Kuk Cho, ed., 2010) (giving levels of participation by lawyers in proceedings).

²⁹¹ § 249 KCPA.

²⁹² § 254 (4) KCPA.

Joinder of claims (소의 객관적 병합; *so ui kaekgancheok byunghap*) arising out of separate factual events is available when the following conditions are satisfied: (i) the adjudication of each of two or more claims can be subject to the same kind of proceedings; and (ii) the court is competent to adjudicate each of the claims.²⁹³ The claims, as a rule, need not be related to each other.²⁹⁴

The court, upon its own authority, reviews whether requirements for joinder of claims are met. When it believes the requirements are not satisfied, it may not dismiss the case but must adjudicate each claim independently as if it had been asserted in a separate action.²⁹⁵ However, it must transfer one of claims to another court if it finds that the claim is within exclusive competence of that court. §§ 31, 34 KCPA. After requirements of joinder of claims are found to be met, the court determines whether each claim, standing alone, complies with procedural requisites. The court is to dismiss those claims that it finds do not comply and is to proceed with those that do.

Joinder of Parties (소의 주관적 병합)

There are several procedural devices by which the court allows parties or nonparties to litigate together.²⁹⁶ For reasons similar to those discussed with respect to the German system, joinder of parties does not lead to strategic issues the way it does in the United States.

Fees Due on Filing

Plaintiffs must pay upon filing of complaints a “stamp fee.” The fee is determined by the amount in controversy. It starts at 5% for an amount in controversy of less than ₩10 million and, as a percentage, declines from there. In this case Roh would be required to pay ₩342,500. If plaintiff prevails, plaintiff receives the fee back and defendant will be responsible for paying it.

4. Handling Complaints

Procedural permissibility. In Korea, as in Germany, the court reviews the complaint for procedural permissibility before serving it on defendant. Where the case is before a three-judge panel, the presiding judge is

²⁹³ § 253 KCPA.

²⁹⁴ See LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 189-191.

²⁹⁵ § 141 KCPA.

²⁹⁶ LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 185-189.

responsible for the examination.²⁹⁷ The judge makes sure that the complaint meets procedural prerequisites (소송요건, *sosong yokeon*) as to form, party competence (당사자능력, *dangsaja nuing'ryuk*), procedural capacity (소송능력, *sosong nuing'ryuk*) and subject matter jurisdiction. If the judge finds the complaint defective, the judge is to provide plaintiff an opportunity to make necessary corrections. For example, if plaintiff provides an incorrect address, and the judge detects it, the judge will direct plaintiff to correct the mistake within a reasonable time. If plaintiff does not or cannot make the correction timely, the judge is to dismiss the complaint. Plaintiffs may appeal dismissal orders immediately.²⁹⁸

Substantive soundness. Unlike in Germany, in Korea the judge does not review the complaint for substantive soundness. The judge does confirm that the complaint states the gist and the grounds for the complaint. While the judge does not evaluate those, if the judge considers the claims made legally groundless, the judge is to follow the procedures just outlined and is to direct plaintiff to revise the complaint.

While Korean complaints need not be substantiated, when plaintiffs refer in complaints to documentary evidence and fail to include those documents with their complaints, judges may and usually do direct parties to submit them.²⁹⁹

Service of the Complaint

If the judge determines that the complaint satisfies these requirements, the judge will direct the court clerk to serve the complaint on defendants.³⁰⁰

COMPLAINT	
Case	Claim for repayment of a loan
Plaintiff Mary Roh 100 Heukseok Street, Dongjak-Gu, Seoul	
Plaintiff's Procedural Representative Lawyer Harry Hahn 111 Heukseok Street, Dongjak-Gu, Seoul	
Defendant John Doh, Jr. 300 Haewoondae Street, Haewoondae-Gu, Pusan	

²⁹⁷ 254(1) KCPA.

²⁹⁸ § 254(3) KCPA. LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 131-134.

²⁹⁹ § 254(4) KCPA.

³⁰⁰ 7 J. KOREAN L., *supra* note 236, at 135-136, reprint at 12; LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 135-139.

Defendant's Procedural Representative Lawyer Betty Bahn
313 Haewoondae Street, Haewoondae-Gu, Pusan

TENOR OF CLAIMS

1. Defendant shall pay plaintiff ₩7,500,000 and default charge at a rate of 20% per annum from next date of service of this complaint copy to the date of full payment.
2. Defendant shall be liable to all of litigation expenses.
3. Paragraph 1 can be executed provisionally.

The above tenor of claims is sought for judgment.

RATIONALE OF CLAIMS

1. Plaintiff transferred ₩7,500,000 to the account of DohSon Honda LLC run by Defendant on April 16, 2011 and Defendant promised to repay the said amount of money to plaintiff by August 15, 2011.
2. However, arguing that Plaintiff gifted Defendant with the said money, Defendant refused to repay it to Plaintiff even after August 15, 2011.
3. Hence, Plaintiff institutes this action to seek from Defendant the payment of ₩7,500,000 and default charge at a rate of 20% per annum from next date of service of the complaint copy to the date of full payment.

Dated: November 15, 2011

Responding to the Complaint

Acquiesce. Acquiescing is largely the same as in Germany and in the United States. The party who has brought the lawsuit will want to have the costs previously paid to the court.

Default. Korean law does not permit a clerk to enter a default judgment against a defendant who fails to appear. While the court is not required to hold an oral hearing for a defendant who fails to answer, it must review the plaintiff's complaint for soundness to determine that the complaint sets forth the existence of all facts necessary to uphold a legal claim and does not itself set out facts that would suffice to fulfill affirmative defenses that would negate the claim. The failure to answer is deemed an admission of the facts asserted in the complaint. Notwithstanding the default, the defendant may appeal that judgment.³⁰¹

Answer. The defendant contests the complaint by filing an answer with the court. The answer may raise procedural and substantive defenses. In the case of procedural defenses, the judge may order the plaintiff to cure the

³⁰¹ See 7 J. KOREAN L., *supra* note 236, at 127, reprint at 17.

deficiencies, dismiss the complaint, or continue proceedings on the matter generally and as part of those proceedings determine whether the procedural defense is not well founded.

Until the 2002 Reform defendants were not required to respond to complaints. Many did not. Those that did, did so with simple denials that did not give any substantiation. Now defendants are required to respond within 30 days from the date when a copy of complaint was served to the defendant.³⁰² If they fail to do so, the facts on which claims of the plaintiff are based are deemed admitted and the judge may enter judgment without a hearing.³⁰³ In their answers defendants must specifically respond both to the gist of and to the ground for the claim raised in the plaintiffs' complaints.³⁰⁴ Judges are authorized to permit court clerks to urge defendant to substantiate their answers.³⁰⁵

Directions for Further Proceedings

Until the amendments of 2002 subsequent proceedings were written. Since 2002 oral preliminary proceedings such as occur in Germany are preferred.³⁰⁶ This change was undertaken in reliance on the German model.

³⁰² § 256 KCPA.

³⁰³ § 257 KCPA. See Moon-Hyuck Ho, *Zur Reform des koreanischen Zivilprozessrechts im Jahr 2002*, RECHTSREFORM UND DEUTSCHLAND UND KOREA IM VERGLEICH 87, 89 (Thomas Würtenberger, ed., 2006).

³⁰⁴ Korean Civil Procedure Rule § 65(1). (The Rules are promulgated by the Supreme Court and complement the KCPA.)

³⁰⁵ See Korea Civil Procedure Rule 65(2).

³⁰⁶ See Kwon, *Korea: Bridging the gap*, *supra* note 73, at 179; Kwon, *Litigating in Korea*, 7 J. KOREAN L., *supra* note 236, at 127-128, reprint at 17-18.

CHAPTER 6

PROCESS

THE RIGHT TO BE HEARD



Contemporary Korean Court Proceeding

The civil action has commenced. Mary Roh has filed a complaint; John Doh, Jr. has interposed a defense. They have reached the critical point in their lawsuit when by “the course of the law of the land,” they are to be heard in the cause before the court.

In this chapter we examine “process.” Process occurs in the period after a lawsuit is commenced by party pleading and before it is concluded in judicial judgment. Process is the legal consideration of material facts and of applicable law. If parties dispute which facts are true, or which are material, process provides them opportunity to persuade the court which are material and to present proof to the court of which are true. If parties disagree with which law governs their dispute, or interpret law differently, process provides them opportunity to express their views on governing law.

At the conclusion of process, the court applies the determined law to the facts found to produce the characteristic product of civil litigation: a decision according to law of the parties’ rights and duties. That decision is known as a judgment and is the subject of Chapter 7.

In this chapter, after an introduction of process generally and of the centrality of the right to be heard to process, we discuss process in each of our countries specifically and how process might unfold in the case of *Roh v. Doh*. In our discussion we consider two remarkable differences between process in the United States, on the one hand, and process in Germany and Korea, on the other hand. In the United States, process is bifurcated into two

distinct and consecutive stages, pre-trial and trial. In the pretrial phase, mostly through what is called discovery, the parties' lawyers independent of the court, but with the authority of the court, investigate the facts of the case. In the second phase, trial, the parties' lawyers present their findings to the court for determination. Not until that second phase do parties usually discuss the case with the court. Until then parties are not heard by the court on the facts of the case.

In Germany and Korea, where process is continuous, there is no court-sanctioned private investigation of the case. There is no taking of testimony out of the presence of the court, except such testimony as the court may direct be taken by another court at a distance. In American terms, there is no discovery. The parties may investigate beforehand, but then they do so without authority of the court and without the court's power to compel testimony of uncooperative witnesses. While there is no discovery in German and Korean law, there is in the continuous court proceeding constant opportunity for parties and their lawyers to discuss with the court facts to be found, law to be determined and eventual application of law to those facts.

Below, after giving an overview of American discovery, we discuss three perspectives on pretrial discovery: contemporary, non-American and that of the drafters. For many Americans today, civil litigation without discovery is unthinkable. For many non-Americans, American discovery is unthinkable when unrelated to material facts in dispute. For the drafters, discovery has become something different than what they had in mind.

The Right to be Heard

The right to be heard is fundamental to fair process. It means that one is fully informed about the proceeding, that one may give one's views on legal and factual questions, and that one's views are taken into account before the court reaches its decision.

In the United States the due process guarantees of the Fifth and Fourteenth Amendments of the Constitution "include a right to be heard and to offer testimony."³⁰⁷

In Germany the constitution (Basic Law, *Grundgesetz*) explicitly guarantees a right to be heard: "In the courts everyone is entitled to a hearing in accordance with the law." Article 103(1).

In Korea, the right to be heard is a fundamental tenet of constitutional law. Article 27(1) of the Korean constitution guarantees a right to be heard; although stated in terms of criminal process it is recognized to be of general applicability.³⁰⁸

³⁰⁷ *Rock v. Arkansas*, 483 U.S. 44, 51 (1987).

³⁰⁸ See generally Jibong Lim, *Korean Constitutional Court and the due process clause*, in *LITIGATION IN KOREA*, *supra* note 236, at 160.

Determining Law and Finding Facts

Process prepares the way for judgment. It clarifies for the matter in controversy the issues in dispute between the parties. It identifies facts material to the parties' claims of right and duty. It provides opportunity to dispute which facts are material and which are true. It determines the law to be applied. It provides opportunity to dispute the meaning of that law. By identifying material facts and determining the law to be applied, it structures the case and makes it ripe for decision.

Thanks to the pervasive presence of Hollywood movies and American television productions, the American public and much of the world identifies civil court process with trial. Yet trial is only one part of American civil process and a vanishing part at that. The Federal Rules of Civil Procedure address these two stages in separate subdivisions: Title V, "Disclosures and Discovery," and Title VI, "Trials." Contemporary American trials, when they happen, provide parties with opportunity to present to courts results of their pretrial investigations and to produce a picture of their theory of the case. In most American cases pretrial is all the process there is; there is no trial.

Court proceedings in Germany and Korea are not bifurcated. There is no trial. There is no single event where parties present to courts their theory of the case. There are structured proceedings in which judges determine whether facts exist that fulfill the elements of a legal rule. We do not use the term "trial" to describe German or Korean court processes. We title this chapter "Process" instead of "Trial" not only to be inclusive of all three systems, but to remind American readers that in the great majority of American cases trials are not held.

Day in Court or Inquisition

In the United States, among the public, the right to be heard is known as the right to one's "*day in court*."³⁰⁹ The right to a day in court is one of the most firmly rooted, long-standing, and widely-held ideals in American law. A day in court is one's chance to present one's argument in court. One gets "to tell it to the judge," *i.e.*, "talk to someone who can do something about your problems." It is a right to be heard, but it is more than that. It prefers oral testimony in open court, subject to cross-examination, to other forms of proof.

The opposite of the day-in-court in American popular perception is the inquisition. The greatest of Anglo-American legal historians, Frederic William Maitland, relates that in the twelfth century Pope Innocent III introduced the new procedure of the inquisition to combat heresy. The inquisition procedure had three characteristics: "The judge proceeds *ex*

³⁰⁹ *E.g.*, *Rock v. Arkansas*, 483 U.S. 44 at 51 (1987).

officio either of his own motion, or on the suggestion of a promoter ...; he collects testimony against the suspect, testimony which the suspect does not hear; it is put in writing.”³¹⁰ Under the procedure of the inquisition, the suspect may never be heard by the judge.

One unfortunate aspect of contemporary discussions of comparative civil procedure is that American scholars often call civil law systems of civil procedure “inquisitorial, even as they acknowledge that such descriptions are misleading. As we discuss in this chapter, German and Korean systems of civil procedure are not inquisitorial. German and Korean judges do not investigate anything *ex officio*. They are strictly limited by submissions of the parties. Judges cannot consider matters not raised by parties and cannot take evidence not proposed by parties. Judges do not collect testimony in private, but only in open hearings, in the presence of the parties, of the parties’ lawyers and of the interested public. Proceedings are oral. The parties themselves, and not just their lawyers, address the court directly and participate personally in the proceedings. The substance of testimony, but not the testimony itself, is put in writing. There are no verbatim transcripts such as are usual in the United States.

It is ironic that American scholars describe civil law process as inquisitorial, for not only is process in Germany and Korea not inquisitorial, present-day American process better fits Maitland’s definition of the inquisition. As we will discuss, the bifurcation of discovery and trial has led to a world in which trial has vanished and in which American litigants almost never get to “tell it to the judge” or to a jury. Trial, its advocates say, is dead.³¹¹ Instead of trial American parties are subjected to discovery by the other side. In discovery, as in the inquisition, the investigator, *i.e.*, the other side’s lawyer, proceeds *ex officio*, either of his or her own motion, or on the suggestion of a promoter (*i.e.*, his or her client). He or she collects testimony in private—usually in the lawyer’s private conference room, without the public present, which often the party against whom the evidence is collected does not hear. Finally that testimony is put in writing verbatim for use later. No judge is present. In most cases the only “hearing” American parties ever get is from lawyers in the case.³¹² Parties to American litigation do not expect a kind of Spanish Inquisition.³¹³ But that is what they get, while their

³¹⁰ 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 657 (2nd ed., 1899).

³¹¹ See, e.g., ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009).

³¹² See, e.g., Mark Wolf, *The purpose-driven interrogatory response*, TRIAL, vol. 44, no. 12, 48 at 49 (Dec. 2008).

³¹³ MONTY PYTHON, THE SPANISH INQUISITION SKETCH (Flying Circus, Series 2, Episode 2, first broadcast Sept. 22, 1970), transcript at <http://www.montypython.net/scripts/spanish.php>.

counterparts in Germany and Korea get the adversarial procedure that Americans have long valued.³¹⁴

A. United States

The vanishing trial may be the most important issue facing our civil justice system today.

Patricia Lee Refo, Chair, Section of Litigation, American Bar Association (2004)³¹⁵

Trial is understood to determine material issues of disputed facts in order to permit courts to apply law to facts to determine rights and resolve disputes.³¹⁶ As expectations of trials have moved beyond these relatively modest ambitions, the number of trials has declined dramatically.

Mary Roh has less than a two percent chance of getting a trial. Although trial by jury is said to be the “backbone of the American justice system” and the “hallmark of [American] participatory democracy,” it is, as Professor John H. Langbein acidly, but accurately, observes, “a goner.”³¹⁷ Even insiders acknowledge that “more trials are held on TV than in the courtroom.” They see that “the trial has vanished as a means to resolve disputes.”³¹⁸

We cannot stress this point enough: while trial, in particular trial by jury, is *the* model for American legal procedures, while it is what Americans think of when they think of legal process, and while it is what American films present to the world as justice, it is a rare bird nearing extinction. To characterize the American system as a jury trial system is wrong. More accurate is to say that the American system is a process with a remote possibility of trial of any kind.

³¹⁴ Cf., *Crawford v. Washington*, 541 U.S. 36, 41 (2004) (Scalia, J., for the Court: “The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.”). See also *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (Scalia, J. for the Court: “What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. ... Our system of [criminal] justice is, and has always been, an inquisitorial one at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable.”)

³¹⁵ *The Vanishing Trial*, LITIGATION, vol. 30, no. 2 at 4 (2004).

³¹⁶ ROBERT P. BURNS, A THEORY OF THE TRIAL 10-33 (2001) (Chapter I “The Received View of the Trial”).

³¹⁷ John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trials*, 15 HARV. J. L. & PUBLIC POLICY 119 (1992).

³¹⁸ Kenneth P. Nolan, *Our Practice, It's A-Chaangin'*, 33 LITIGATION No. 2, 63, 64 (Winter 2007).

Allow us to bring home the point: *trials hardly ever happen*. New judicial clerks (interns) are told: “A few actions eventually wind their way through the lengthy process of dispositive motions and settlement conference to reach trial.”³¹⁹ Experienced judges acknowledge: “The vast majority of cases do not go to trial.”³²⁰ A proposal for reinvigorating the American litigation system sets a goal that every litigator “takes at least one case to trial every five years.”³²¹ Read that again: *one case in every five years* for a professional litigator. And that is the goal. An “experienced” litigator may have thirty trials in his or her career. There are actors who have made more trial movies than some “trial lawyers” have had trials.

The numbers are clear. In the year ending September 30, 2009, a typical year, 276,397 civil cases were filed in the federal court system. Of all the cases pending that year there were only 3,154 trials aimed at final judgments. Of these, 2,138 were jury trials and 1,026 were non jury trials. In addition, there were 2,146 contested hearings in matters not aimed at final judgments. Even counting those contested hearings as “trials,” not even one case in fifty got a “day in court.” In the United States District Court for the District of Maryland, that is, in the court of *Roh v. Doh*, in 2009 there were only thirty civil trials. The thousand federal judges of first instance averaged only three civil trials a year each (two jury and one non-jury).³²²

State courts were no more productive of trials. We do not have numbers for bench trials, but the number of jury trials is not impressive. A study conducted by the National Center for State Courts and the State Justice Institute estimated that in 2006 all American state courts combined—in a country of 300 million people—conducted 45,459 civil jury trials (30.6% of 148,558 jury trials of all kinds).³²³

To put these numbers in perspective, we look to the courts in Bavaria. Bavaria is just one German state of sixteen; it has a population of 12½ million people, *i.e.*, about one twenty-fourth of the population of the United States and about double the population of Maryland. Its first instance courts of general jurisdiction are the *Landgerichte*; their jurisdiction in civil matters

³¹⁹ CALVERT G. CHIPCASE, FEDERAL DISTRICT COURT LAW CLERK HANDBOOK 20 (American Bar Association, 2007).

³²⁰ PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION: A WHITE PAPER OF THE AMERICAN JUDGES ASSOCIATION, THE VOICE OF THE JUDICIARY 17 (Judges Kevin Burke & Steve Leben, Sept. 26, 2007), available at <http://aja.ncsc.dni.us/hrdocs/AJAWHITEPAPER9-26-07.pdf>.

³²¹ Brad D. Brian, Section Chair’s Opening Statement, *Have a Litigation Plan in Litigation—It Works and It’s Cheaper*, 32 LITIGATION No. 2, 1, 73 (Winter 2006).

³²² JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13 (TABLE Judicial Caseload Indicators), 38 (Table 12), 388-390 (Table T-1). (2008), at <http://www.uscourts.gov/judbus2008/contents.cfm>. About one-third of the judges are senior judges who are semi-retired. The same thousand judges also conducted a like number of criminal trials (3052 jury trials and 308 non-jury trials).

³²³ NATIONAL CENTER FOR STATE COURTS & STATE JUSTICE INSTITUTE, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 7 (2007).

begins at €5,000. In 2008 there were 59,192 new civil cases were filed. That year the *Landgerichte* concluded 53,231 cases. In other words, the Bavarian courts alone concluded more civil cases than all American courts together conducted civil jury trials. The Bavarian *Landgerichte* as courts of first instance held 50,827 hearings, of which 13,854 included the taking of evidence. In the concluded cases, the courts issued contested judgments in 14,261 cases, *i.e.*, 23.9 % of cases (not the 2% typical in America). Another 16,943 cases ended in court-supervised settlements (28.4%). The balance of cases concluded with other forms of decisions, with default judgments, transfers to other courts, and other dispositions.³²⁴

American judges realize that, since the vast majority of cases do not go to trial, they cannot rely on trials to provide litigants with “a feeling of respect, voice and inclusion. Their impressions of judges and our justice system—for better or worse—largely will be formed by their participation in ... calendar calls, and other settings, not trials.”³²⁵

Cost. Trial has vanished for several reasons. One reason is cost. Even a modest trial in a simple case, exclusive of comparable costs of pretrial, can cost each side \$20,000. Less modest trials in more complicated cases can cost many times that amount. Since in the American system each side pays its own lawyers, any recovery a plaintiff recoups is reduced substantially; any victory a defendant wins is potentially pyrrhic.

Risk. Another reason that trials have vanished is risk. When stakes are large enough—perhaps several hundred thousand dollars or more—while expense may be tolerable, the risk may not be. The final decision, whether by jury or by judge, is not well predictable, either of who wins or of remedies awarded. Even the strongest of cases has can be lost by a misstep in production or presentation. It is comparable to taking a chance in the lottery. Moreover, the risk is not that of parties alone. Lawyers fear for their reputations should they lose one of these rare battles. As one insider observes: “And ever present is the thought ... if I shoot craps, my rep[utation] is mud and the client bids me and the many years of profitable billing adios. Instead of a big time rep[utation], accolades, and a corner office, I’m a shrub, earning a living, never trusted with another big one.”³²⁶

Inaccuracy. Yet a third reason trials have vanished is lack of accuracy. At trial there is always the possibility of the unexpected: the witness who says too much, or says too little, or does not appear; the facts that previously were unknown that surface only at trial; the new legal theory that suddenly finds acceptance; the lawyer, party or witness with whom jurors finds sympathy or spite; and so on. In the American form of trial, if the

³²⁴ BAYERISCHEN STAATSMINISTERIUMS DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, 2913-J JUSTIZSTATISTIK IN ZIVILSACHEN ... FÜR 2008 (JSTAT 2008) VOM 16. JUNI 2009 AZ.: 1441 – VI-5769/09 at <https://www.verkuendung-bayern.de/files/jmbl/2009/05/anhang/JMBI-500-J-24.pdf>.

³²⁵ AJA WHITE PAPER 2007-9-26, at 17.

³²⁶ Nolan, *supra* note 318, at 64.

unexpected arises, often little can be done: the case must be resolved by jurors as soon as possible, with as few adjournments as feasible. Fear of the unexpected created discovery and nurtured is gigantic growth.

In place of trial, pre-trial discovery prevails. As we shall see, however, discovery does not provide parties a day-in-court. Discovery is a private affair where the parties' lawyers have little to do with the judge and the parties even less. In discovery parties are subject to inquisition-like procedures.

1. Pretrial Process

The pretrial phase consists of pretrial conferences, discovery and pretrial motions. Today, discovery, when it occurs, dominates. As we discuss below, that was not the intention of the drafters of the Federal Rules of Civil Procedure. They had in mind a process having greater resemblance to civil law process

Since in today's American scene discovery dominates, we address discovery first and give it the greatest attention among pretrial devices. We examine it at length in order to give readers an idea of just how extensive it can be.

a. Discovery

Pretrial discovery, or negotiation in its shadow, is the reality of American civil procedure. In pretrial discovery lawyers for the parties gather facts of the case. In theory—but rarely in practice—they later present those facts to a court at trial. Lawyers conduct discovery independent of the court yet with the power of the court to compel participation; they examine not only parties to the lawsuit, but third parties as well.

Discovery permits lawyers to “fish” for new grounds to hold defendants liable. It helps them develop legal theories of the case. It does not limit them to legal syllogisms. It allows them to conduct a practically unbounded inquisition free of court control.

Some comparativists see discovery as part of American legal culture, but in historical terms, it is a recent innovation. Only two generations ago, it was not a routine feature of American litigation. Pretrial discovery was the most notable innovation of the Federal Rules of Civil Procedure in 1938; it was a striking and imaginative departure from tradition. Before 1938 there had been only limited, special purpose, usually issue-focused discovery, available only in some states.³²⁷ When adopted nationwide, no one imagined its present day scope. Discovery was to complement and supplement trial, but not to substitute for it.

³²⁷ See GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* (1932).

Today discovery is routine and trial is exceptional. In a day of “notice pleading” and of “vanishing trials,” in many cases discovery *is* American litigation. Very few cases end in judgments after trial; more cases end in what are called “summary judgments” (more on this below) after some discovery has taken place. Many cases—perhaps the majority—have some form of discovery. In the federal system, all cases are subject to mandatory pre-trial disclosure. While the extent of discovery is a matter of debate, cases conducted without discovery settle in the shadow of discovery.

Scope of Discovery. Discovery as practiced today gives parties license to explore facts that underlie or are merely tangentially related to their dispute. In practice, in the absence of meaningful judicial supervision, parties inquire into affairs far removed from the matter in controversy. According to the American College of Trial Lawyers Report, discovery is “limitless.”³²⁸ The Federal Rules authorize discovery of all matter “that is relevant to any party’s claim or defense.”³²⁹ “Relevant information,” according to the rule, “need not be admissible at trial, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Moreover, for good cause and upon application, the court may dispense with even the limp limitation of discovery to claims and defenses and “order discovery of any matter relevant to the subject matter involved in the action.”(Emphasis added.)

The restriction to matters that are “relevant to any party’s claims or defenses” limits little, when claims and defenses are ill-defined in pleadings (see Chapter 5). Moreover, lawyers easily get around that modest limitation by stating multiple claims or by joining multiple defendants. Little in the law discourages them from adding claims or parties or even imagining new legal claims. The law allows lawyers to assert claims not presently recognized in law so long as they have a “non frivolous argument for extending, modifying, or reversing existing law or for establishing new law.”³³⁰

Little is safe from discovery. The only matters not subject to discovery are: confidential communications between client and lawyer; certain materials prepared for use at trial; and electronically stored information “not reasonably accessible because of undue burden or cost.”³³¹ Culling these materials and approving their exclusion from otherwise permitted discovery can be a major expense in itself. One of the few ways in which judges are involved in discovery is to review those exclusions. In other words, judges decide not what parties must disclose, but what they are allowed *not* to disclose. It is a privacy advocate’s nightmare.

Supervision of Discovery. Discovery was designed to take place without direct judicial supervision. Lawyers take depositions of witnesses,

³²⁸ AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note 42, at 9 (2009)..

³²⁹ FED. R. CIV. P. 26(b)(1).

³³⁰ FED. R. CIV. P. 11(b)(2).

³³¹ FED. R. CIV. P. 26(b).

including depositions of third party witnesses, examine documents, and exchange interrogatories all out of the physical presence of judges and without prior court approval. Although lawyers enjoy the power of the state to compel participation, the state takes no notice of what lawyers do in its name until someone formally complains to the court.

Discovery rules anticipate a minimum of court supervision. While they permit court intervention, they do not require it and, in practice, direct judicial conduct of discovery almost never occurs. The usual judicial role in pretrial discovery is to approve party plans, to determine deadlines, and to decide occasional disputes about conduct of discovery. Lawyers, not judges, decide which witnesses to call and which information to demand. The judicial role is that of a keeper of the calendar.

Strategic Uses of Discovery. Professor Sunderland, the drafter of the discovery rules, envisioned that pretrial discovery would eliminate issues for trial. So if an applicable rule had six elements, discovery might make clear that there was no material dispute between the parties on all but two elements. Discovery would, he hoped, facilitate party agreement before trial on which issues remained for determination at trial. He envisioned that summary judgment motion might resolve other issues before trial.

The focus of discovery has not turned out as Sunderland expected. While trial lawyers do use discovery to clarify issues at trial, most also use it to develop their “theory of the case” or to develop new theories and to reach other strategic and tactical objectives.

Discovery Supports Summary Judgment. Summary judgment is a judicial determination, that with respect to specific issues or with respect to the case as a whole, there are no genuine disputed issues of material fact and that the court may give judgment as a matter of law. Litigating lawyers use discovery to support summary judgment motions. When they do, they use discovery in the way Sunderland intended. We discuss summary judgment below under pretrial motions.

Sunderland hoped that summary judgment would eliminate issues of all sorts; today summary judgments serve principally to eliminate very weak cases, or at least, very weak legal claims (*i.e.*, parts of cases). In these cases discovery may be able to establish that there are “no material issues subject to genuine factual dispute.” But this is a high bar that moving parties can vault over in few cases. Why? First, American procedure permits parties to characterize their claims legally in a great variety of ways. Second, most lawsuits turn on different understandings and evaluations of fact. Summary judgment in many cases fails, or is not usable, because a competent lawyer can conjure up an issue of material fact.

Discovery Supports Case Theory Development. A common use of discovery is to assist lawyers in developing a theory of the case. A case theory is a thematic story that lawyers write for jurors (and judges and the press) to relate to. It includes the facts that form the elements of a cause of action, but the cause of action lies in the background. The theory of the case

makes the parties' story comprehensible to non-lawyers; it puts the parties' claims on a footing laymen can understand. It is considered the organizing principle for all that the trial lawyer does.

Lawyers conduct discovery to prepare to present their parties' versions of disputed events. It is as if each party is writing its own screenplay for a trial production. Discovery is the necessary background research for the screenplay. At trial, should a trial occur, each side produces the screenplay that its lawyers have written with help of discovery. Discovery used in this way is deliberately duplicative: first gather evidence in discovery, then present at trial the most favorable evidence collected.

Discovery helps lawyers determine which among several different conceivable case theories is likely to be the strongest. It permits probing the basis, strengths and weaknesses of the opposing side's case theories.

As lawyers became accustomed to sweeping discovery, they adapted it as a tool to develop case theories and to press process into previously unreached regions. Now discovery is said to aid in private regulation of "the social and economic fabric of the country."³³² For lawyers who see themselves as engaged in private regulation, discovery is an end in itself. It is divorced from specific claims. They demand that adversaries not object to discovery, but should facilitate mutual knowledge of all facts.³³³

Case Theory as Substitute for Legal Syllogism. The "theory of the case" has come to substitute for the syllogistic order of historic forms of common law and code (fact) pleading. While no rule requires parties to develop a theory of the case, practical needs of lawyers impel them to do so. An American trial is "really a struggle between ... opposing stories."³³⁴ According to Justice Antonin Scalia: "By and large I think it does work to have each side take the best shot at presenting the truth in favor of that side's case and let the jury decide between the two."³³⁵

Tactical Uses of Discovery. Lawyers have a variety of tactical uses for discovery, some envisioned by the drafters of the discovery rules and some not. Uses include:

- establishing material facts that fulfill elements of one or more legal claims asserted by their clients (the main original basis for discovery);

³³² STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 37-42, 152 (2006).

³³³ *See, e.g.*, Mark Kosieradzki & Kara Rahimi, *Keeping discovery civil*, 44 *TRIAL*, No. 6, 30-31 (June 2008).

³³⁴ MARILYN J. BERGER, JOHN B. MITCHELL, RONALD H. CLARK & MONIQUE C.M. LEAHY, *PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY* 17 (2nd ed. 2007) (quoting JOHNNIE L. COCHRAN, *JOURNEY TO JUSTICE* (1996)).

³³⁵ TRUTH ON TRIAL, 8 ANNENBERG ETHICS IN AMERICA at 53rd minute (Columbia University Seminars on Media and Society, 1989, ISBN 0-89776-526-5)
<http://www.learner.org/resources/series81.html?pop=yes&pid=198>

- narrowing the issues in dispute between the parties to facilitate conducting trials and to promote settlements without trials;
- “pinning down,” that is getting parties and witnesses to commit to particular positions and, in some instances, to admit particular facts;
- evaluating and even undermining (“impeaching”) the credibility of witnesses;
- perpetuating evidence, that is recording evidence that may not be available at trial;
- influencing the other side to settle the case by demonstrating one’s own resolve or by requiring it to disclose sensitive information that it would rather not disclose (this is considered ethical); and,
- grinding weaker opponents into submission by imposing on them burdens they cannot meet (this is considered unethical, but is not uncommon).

Freedom to shape discovery bestows on lawyers opportunities to pursue procedural advantages that seem to some misuse. To win time, they order unnecessary depositions or drag out necessary ones. To exert force on financially weak parties, they direct burdensome discovery methods. The opposing side must ordinarily carry those costs, because there is no routine fee-shifting. The opposing party incurs aggravation, distraction and loss of time that is never recompensed.

Freedom to shape discovery empowers lawyers to render some claims worthless. A judgment for \$10,000 is worse than worthless if accompanied by discovery costs of \$10,000. Some lawyers conduct discovery less for party advantage and more for lawyer fees.

Discovery has many ends other than finding facts to fulfill legal rules. Arguments of opposing counsel are fought in discovery. Witnesses are questioned and documents examined in order to coach out admissions or to find documents which support one's own point of view. The dream goal is an oral or written admission of the entire case for one side (“smoking gun”) or at least important parts. Much time is wasted searching for such admissions.

Lawyers use discovery to give shape to the case and to secure the general outlines of their theory of the case. They try to pin potential witnesses down. If a witness in a deposition in discovery says “A”, it is very hard for the witness to say “B” later, including at trial. “Mr. Witness, are you lying now, or were you lying then?” the inquiring lawyer will ask. In deposition the testimony of witnesses is recorded word-for-word. The lawyers write a “record” in this procedure, that in certain cases can later be presented to the judge or that the lawyers can read to jurors. Faced with fatal risks, only foolish lawyers fail to prepare witnesses for interrogation. Lawyers drill witnesses on wording of answers; they remind them to answer only exactly what is asked. They conduct practice interrogations recorded for

review. Such preparation strikes foreign observers as strange; in many systems it is unethical.³³⁶

b. Discovery Procedures

Required Initial Disclosure. All parties, without awaiting a discovery request, must provide to all other parties: (1) names and contact information of any persons likely to have discoverable information that the disclosing party may use to support its claims or defenses; (2) a copy or description of all documents, electronically stored information and tangible things that it has in its possession which it may use to support its claims or defenses; (3) a computation of damages claimed by the party; and (4) a copy of any insurance agreement that may provide coverage in the matter.³³⁷ This required initial disclosure is a relatively new innovation. It is considered separate technically from discovery. It was hoped that it would expedite cases; it does not seem to have worked out that way.

Planning discovery. The parties are required to confer “as soon as practicable” to attempt in good faith to agree on a “discovery plan.” The discovery plan must state parties’ views and proposals on six matters of how they anticipate conducting discovery.³³⁸ While the Federal Rules authorize judges to be “managerial,” that is, to adopt an involved approach to lawsuits, most judges are not managerial in most of their lawsuits. Reports to the contrary are exaggerated.

After the parties, really their lawyers, have met on the discovery plan and submitted it to the court, the judge determines deadlines to complete discovery. From that moment the parties’ lawyers individually order—often after prior consultation with other parties’ lawyers—discovery. They can order the discovery of other parties to the lawsuit and even of third parties not participating in the lawsuit, provided that they comply with the rules governing discovery. For most forms of discovery, persons subject to discovery “requests” must comply, unless they seek from the judge a “protective order.” Lawyers are cautioned not to run to the judge with minor disagreements regarding discovery.

The central role of the lawyers in discovery is reminiscent of the central roles the lawyers had in special pleading in the nineteenth century. Then the adversary lawyers through pleading agreed on the issue to be resolved by the court. Today, discovery follows that same model. Different from those days, however, is lawyers have the power of the court to compel testimony.

³³⁶ See generally WITNESS COACHING UND ADVERSARY SYSTEM; DER EINFLUSS DER PARTEIEN UND IHRER PROZESSBEVOLLMÄCHTIGEN AUF ZEUGEN UND SACHVERSTÄNDIGE IM DEUTSCHEN UND U.S.-AMERIKANISCHEN ZIVILPROZESS (2004).

³³⁷ FED. R. CIV. P. 26(a)(1).

³³⁸ FED. R. CIV. P. 26(f)(3).

c. Means of Discovery

There are four principal means of discovery:

- (1) oral testimony (Rule 30 depositions by Oral Examination);
- (2) viewing (for parties, Rule 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes; for parties and non-parties, Rule 30(b)(2) Producing Documents as part of Rule 30 Depositions by Oral Examination);
- (3) written responses (for all persons, Rule 31 Depositions by Written Questions; for parties only, Rule 33 Interrogatories to Parties and Rule 36 Requests for Admissions); and
- (4) physical examination of persons who are parties (Rule 35 Physical and Mental Examinations).

Once the parties' lawyers have conferred on a discovery plan under Rule 26(f), each may commence his or her own discovery. Neither has to wait on the other.³³⁹ There are few limitations in discovery. One limitation is that a person cannot twice be subjected to deposition by oral examination. Limitations can be overcome by agreement or by permission of the court. How to sequence discovery is a matter of each individual lawyer's preferences. Usually lawyers start by sending written interrogatories and document requests to the opposing party to obtain basic information, continue with evaluating those documents, and finally move on to the more interactive forms of discovery, namely taking deposition testimony on oral examination, first of opposing parties, then of third-party witnesses and finally of experts. In the case of written interrogatories to parties and of document requests, some courts provide standard forms that are presumptively proper.

(i) Written Interrogatories to Parties

Under the Federal Rules of Civil Procedure, each party may require the other party to respond to up to twenty-five written interrogatories; with permission of the court, each may demand more.³⁴⁰ The other party must answer each question in writing and under oath unless he or she objects to it. While as American discovery methods go, this is a relatively inexpensive means of discovery, its usefulness is limited, since the other party's lawyer prepares the answers and usually assure that the answers are not very helpful.

³³⁹ FED. R. CIV. P. 26(d).

³⁴⁰ FED. R. CIV. P. 33.

The Local Rules of the United States District Court for Maryland provide standard form interrogatories. They allow plaintiffs to ask, *inter alia*:

STANDARD INTERROGATORY NO. 5: Identify any persons or entities whom Defendant contends are persons needed for just adjudication within the meaning of Fed. R. Civ. P. 19, but who have not been named by Plaintiff.

STANDARD INTERROGATORY NO. 6: Identify all persons who are likely to have personal knowledge of any fact alleged in the complaint or in your answer to the complaint, and state the subject matter of the personal knowledge possessed by each such person.

STANDARD INTERROGATORY NO. 7: If you have knowledge of any person carrying on an insurance business that might be liable to satisfy part or all of a judgment that might be entered in this action or to indemnify or reimburse the payments made to satisfy the judgment, identify that person and state the applicable policy limits of any insurance agreement under which the person might be liable.

STANDARD INTERROGATORY NO. 10: State the facts concerning the matters alleged in [paragraph ____ of your Complaint] [paragraph ____ of your Answer to the Complaint] [your affirmative defense no. ____].

STANDARD INTERROGATORY NO. 11: If you contend that _____, state the facts concerning such contention.

Standard Interrogatory No. 5 is designed to determine whether defendant will claim that there is any other party that must be joined in the action. Here, such a party might be DohSon Honda LLC (if not named originally), or John Doh, Sr., or Doh Honda Distributing Co. Standard Interrogatory No. 6 serves to identify individuals with knowledge of the case. Its utility is somewhat limited if the plaintiff has served a minimal complaint that alleges few facts. This catch-all search for possible witnesses, however, should preclude the possibility that either party presents a surprise witness at the last moment, since the obligation to disclose continues even after the dates of the demand and of the other party's response.³⁴¹ Standard Interrogatory No. 7 helps the demanding party negotiate a settlement with a clear idea of how much money is available. Standard Interrogatories 10 and 11 are to be the bases for interrogatories that help the demanding party better understand the case, plan that party's further discovery and build that party's theory of the case.

Roh's lawyer Hahn could build on Standard Interrogatories 10 and 11 to develop aspects of the case that on the facts stated are uncertain. In particular, he could try to elicit from John Doh, Jr. information regarding Doh, Jr.'s original request of Roh for money. What was the nature of the business reversals? Since Hahn knows that Doh, Jr. is claiming the money as a gift, he should inquire not only about what Doh, Jr. said when Roh promised the money, but also about business dealings that Doh, Jr. was having at that time. Hahn might also want to inquire into the knowledge and

³⁴¹ FED. R. CIV. P. 26(e).

involvement of DohSon Honda LLC and of John Doh, Sr. in the transfer of the money. Since Hahn might also inquire into the involvement of Doh, Sr. in the business of DohSon Honda LLC to determine if there is a basis for holding him, as a limited liability owner of the company, personally liable for its debts. Hahn is largely free in when and how he poses the interrogatories so long as he remains within the allotted number (25)..

Already here one sees the strategic and tactical possibilities that discovery creates. If Hahn has named either DohSon Honda LLC or John Doh, Sr. as defendants, he has greater opportunities to take discovery directly from them. He also, by taking discovery directly from them, brings to their attention—and their interest—the lawsuit. The additional cost to Hahn and to his client is not high. Even if Hahn has not brought in DohSon Honda LLC or John Doh, Sr. as parties, by including them in the scope of his discovery demands, he generates additional work for John Doh, Jr.'s lawyer and additional expense for John Doh, Jr. While those may be the nefarious purposes for which Hahn widens discovery, they are not so obvious as to appear abusive. The broad scope that discovery allows is broad enough to allow him to inquire into these issues.

John Doh, Jr.—and, if they are parties, DohSon Honda, LLC and John Doh, Sr.—do not have to take these attacks lying down. They can counterattack with interrogatories and other discovery of their own. The Court has its own standard interrogatories for them to use:

STANDARD INTERROGATORY NO. 1: Identify all persons who are likely to have personal knowledge of any fact alleged in the complaint, and state the subject matter of the personal knowledge possessed by each such person.

STANDARD INTERROGATORY NO. 2: Identify all persons who have a subrogation interest in any claim set forth in the complaint, and state the basis and extent of such interest.

STANDARD INTERROGATORY NO. 3: Itemize and show how you calculate any damages claimed by you in this action, whether economic, non-economic, punitive or other.

STANDARD INTERROGATORY NO. 10: State the facts concerning the matters alleged in [paragraph ____ of your Complaint] [paragraph ____ of your Answer to the Complaint] [your affirmative defense no. ____].

STANDARD INTERROGATORY NO. 11: If you contend that _____, state the facts concerning such contention.

These standard interrogatories mirror those allowed plaintiffs. Standard Interrogatory No. 3, which concerns damages, substitutes for No. 7 concerning insurance coverage.

Recall that John Doh, Jr. is enraged at his former fiancé, Rosa Roh. He is looking for ways to get revenge. If there is any claim that he has against Mary Roh that includes Rosa, he might bring it as a permissive joinder, that is, a claim unrelated to Mary Roh's claim against him. Perhaps he gave Rosa a ring, which she has not returned, but that might be in Mary Roh's

possession. Even if there is no such claim that might involve both of them, he would like to entangle Rosa in this suit to the extent possible to make her miserable. While John Doh, Jr.'s lawyer might, to some extent resist those efforts, such resistance is by no means sure. Depending upon how facts turn out, such resistance may not even be required by ethical rules.

In formulating defense strategies for John Doh, Jr., his lawyer will look for anything that might support the assertion that the money paid was a gift. To that end, he might pose questions related to past gifts made by Mary Roh. He might ask her about the relationship between her daughter Rosa and John Doh, Jr. and about their pending marriage. He could inquire into the tax returns of Roh, because federal law requires that givers of gifts pay a gift tax on gifts above a certain amount (\$13,000 in 2009). As with her adversary, there is little that encourages Doh's lawyer to moderate her demands and much that pushes her to make discovery painful.

Interrogatories to parties often are just the salvo in what can become a discovery war.

(ii) Requests for Documents

Each party may require the other party to make available for copying any document, electronically stored information, or other tangible thing, if the information or object sought is not privileged and is relevant to any party's claim or defense.³⁴² Information sought need not be admissible at trial to be relevant, so long as it appears reasonably calculated to lead to discovery of admissible evidence.³⁴³ The party must specify the type of documents sought, but does not have to identify the precise documents. This is an example of the infamous "fishing expedition" permitted by American civil procedure³⁴⁴ and prohibited by the German *Ausforschungsbeweisverbot* (prohibition of investigative evidence).

Such discovery is routine rather than rare in American litigation. Parties in the United States often try to discover in their opponents' warehouses a single document that could clinch their case against the other. They look for what is known as the "smoking gun." That rarely do they find the smoking gun does not daunt them in seeking for it. Even in days before electronic discovery parties might demand production of hundreds of thousands of pages of documents found even in foreign countries all in vain searches for a smoking gun.

The Court's own Standard Requests for Production of Documents allow Hahn to demand of John Doh, Jr., and of any other party to the suit (remember DohSon Honda, LLC or John Doh, Sr. might be parties):

³⁴² FED. R. CIV. P. 34.

³⁴³ FED. R. CIV. P. 26(b)(1).

³⁴⁴ See *Hickman v. Taylor*, 329 U.S. 495, 507 (1945).

Standard Requests for Production of Documents

1. All documents referred to in your Answers to Interrogatories.
2. All statements [made in a writing signed by the party or made orally and recorded or transcribed verbatim] which were previously made by this party and any of its present or former directors, officers, or employees, concerning the action or its subject matter.
3. All documents (including, but not limited to, correspondence, notes, memoranda, and journal entries) which relate to, describe, summarize, or memorialize any communication between you and [Name], or anyone known or believed by you to have been acting under the authority of [Name], concerning the occurrence.
4. ... [relating to expert witnesses]
5. All contracts or agreements entered into between Plaintiff and Defendant concerning the occurrence or transaction.
6. All documents concerning your claim for damages or the methods used to calculate such alleged damages.
7. All documents concerning any release, settlement, or other agreement, formal or informal, pursuant to which the liability of any person or any entity for damage arising out of the occurrence which is the subject matter of this lawsuit has been limited, reduced, or released in any manner. This request includes all agreements by one party or person to indemnify another party or person for claims asserted in this litigation.
8. All insurance policies under which a person carrying on an insurance business might be liable to pay to you or on your behalf all or part of the damages sought in this action.
9. All documents received from or provided to any other party to this action since the filing of the Complaint, whether provided informally or in response to a formal request. All documents referred to in the Complaint and other pleadings

The default rule of American discovery is disclosure. The lawyer for one party demands disclosure and the lawyer for the other party must comply, unless he or she has a valid objection. Valid objections are few. That disclosure is burdensome is not a valid objection; disclosure must be *unduly* burdensome to sustain an objection. Rarely is it.³⁴⁵ If part of a request is objectionable, the objecting lawyer “must specify objection to part of the request and permit inspection of the rest.”³⁴⁶ While courts have wide authority to direct and limit discovery through “protective orders,” they do not use that authority to routinely supervise discovery, but only exceptionally on motion of a party.³⁴⁷ In Germany or in Korea, before one must turn one’s private papers over to the other side, a judge must issue an affirmative order; in the United States, to prevent a private paper from being turned over requires a court-issued protective order.

While lawyers may issue wide-reaching requests for discovery with little fear of court intervention, that busy judges have little interest in deciding discovery motions sometimes is productive of less disclosure rather than more. Unscrupulous lawyers realize that they need not fully comply with discovery orders if judges are not likely to favorably receive motions to

³⁴⁵ Cf. FED. R. CIV. P. 26(b)(2).

³⁴⁶ FED. R. CIV. P. 34(b)(2)(C).

³⁴⁷ FED. R. CIV. P. 26(c).

compel discovery. The result is that the lawyers determine fairness of process.

Only three types of documents are exempt from discovery without protective orders: confidential communications between lawyer and client (“attorney-client privilege documents”), certain trial preparation materials (“attorney work product”), and “electronically stored information ... not reasonably accessible because of undue burden or cost.”³⁴⁸ Culling attorney-client privileged and work product documents from larger files can be problematic and costly. Typically, as provided in the Maryland Standard Requests, parties claiming exemption must assert the claim on document-by-document basis. We reproduce the instruction in its entirety to demonstrate the demands of American discovery:

2. Whenever in this Request you are asked to identify or produce a document which is deemed by you to be properly withheld from production for inspection or copying:

A. If you are withholding the document under claim of privilege (including, but not limited to, the work product doctrine), please provide the information set forth in Fed. R. Civ. P. 26(b)(5) and Discovery Guideline 9(c)(ii)(b), including the type of document, the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable this party to assess the applicability of the privilege or protection claimed by you;

B. If you are withholding the document for any reason other than an objection that it is beyond the scope of discovery or that a request is unduly burdensome, identify as to each document and, in addition to the information requested in ¶2.A, above, please state the reason for withholding the document.

3. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration, the date of the redaction or alteration, and the person performing the redaction or alteration. Any redaction must be clearly visible on the redacted document.

4. It is intended that this Request will not solicit any material protected either by the attorney/client privilege or by the work product doctrine which was created by, or developed by, counsel for the responding party after the date on which this litigation was commenced. If any Request is susceptible of a construction which calls for the production of such material, that material need not be provided and no privilege log pursuant to Fed. R. Civ. P. 26(b)(5) or Discovery Guideline 9(a) will be required as to such material.

5. If production of any requested document(s) is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

³⁴⁸ FED. R. CIV. P. 26(b)(2)(B).

In a modest case such as *Roh v. Doh*, document discovery might eat up only a dozen hours. In a larger case, months of lawyers' time and millions of dollars in fees can be devoured. But with document discovery, sometimes the battle has just been begun.

(iii) Depositions

Each party may take the sworn testimony upon oral examination (“deposition”) of *any* person, including that of someone who is not a party to the lawsuit. The party’s lawyer, without prior approval of the court, has authority to compel attendance through an order known as a subpoena.³⁴⁹ A person who fails to comply with a subpoena is subject to sanction including fine and imprisonment. This is so easily said in describing procedures in the United States, and for Americans so easily read, that we remind American readers how remarkable this authority is: a private lawyer, without judicial approval, may compel attendance of a person in a private matter under threat of fine and imprisonment by the state!

Lawyers use depositions to develop their theory of the case, to evaluate potential witnesses and to pin down the testimony of witnesses. If later a witness says something different—say at a trial—the lawyer can “impeach” that later testimony by bringing out the prior testimony.

Lawyers usually hold depositions in their own offices or, when in distant cities, in offices of colleagues. It is extraordinary for a judge to participate in a deposition. Usually depositions are held before persons authorized or appointed to “administer oaths.”³⁵⁰ Typically that is a private person, called a “court reporter.” The court reporter, however, only records or transcribes verbatim the testimony of the witness; the court reporter does not question the witness or resolve any aspect of the testimony. Objections to questions are usually stated on the record and the witness is then instructed to answer leaving to later resolution whether the information disclosed can be used at trial. The party requesting the deposition bears the cost of its recording; each party, however, pays for his or her own copies of transcripts of the testimony. Typically that charge is several dollars a page. Ordinarily each side orders its own copy.

That depositions often are long is a practical consequence of American procedures. To spare all persons inconvenience, the Federal Rules provide that no witness may be deposed a second time without permission of the court.³⁵¹ That compels lawyers to use this possibly unique opportunity to ask all questions that might conceivably be material in the case. That that will include many questions not in the end relevant to decision follows from the

³⁴⁹ FED. R. CIV. P. 30(a)(1).

³⁵⁰ FED. R. CIV. P. 28(a).

³⁵¹ FED. R. CIV. P. 30(a)(2)(A)(ii).

interdependent nature we have already discussed of finding facts, determining law and applying law to facts.

Depositions require substantial preparation and significant post-deposition review. Lawyers are advised to prepare “their” witnesses beforehand. Typically that preparation should be at least as long as the deposition itself. Lawyers are advised to prepare by having mock depositions first. After a deposition is over lawyers may engage assistants to digest the transcripts of testimony.

All of these preparations make depositions expensive, particularly when lawyers journey to distant cities to participate in them. American lawyers do not generally delegate taking testimony to other lawyers in distant cities. Thus, even in pedestrian cases where only a few depositions are taken—say only three, one from each party and one from one witness—and the matters concerned are not complicated, one can expect twenty hours of lawyers’ time (on each side), which when one adds travel time, accommodations, court reporter fees, transcripts fees, fees for assistant time in digesting, produce deposition expenses approaching or surpassing \$10,000 for each side. In high value cases, these numbers are many times that.

Today the Federal Rules recognize the burdens that depositions may impose on parties. They therefore limit the number of depositions that may be taken. Since limits are not proportionate to the amount in controversy, but are numerical on a case basis, they do not protect parties in pedestrian cases such as *Roh v. Doh*. In the cost of pedestrian cases they are practically pathetic: each party, without court permission, may take no more than *ten* depositions. Each deposition may last no longer than one day of seven hours. That means, without court approval, the two parties in *Roh v. Doh* are limited to 140 hours each in actual deposition time. With a like period of time for preparation, they are limited to 280 hours on each side, or a total of 560 hours. At a modest charge of \$300 per hour for lawyer time, the limit is then \$168,000: better than double the amount in controversy. And the estimated maximum does not count the ancillary costs recording, transcribing and digesting the testimony. Of course, that is only the maximum allowed, and is not likely to be reached in a case like *Roh v. Doh*. Yet a lawyer determined to run up costs could do it in such case to the destruction of the other side’s claim. To make matters worse for the expense conscious party, with court permission, the lawyers can take as many depositions as the court is prepared to allow.

(iv) Expert Testimony³⁵²

³⁵² See, generally, EXPERT WITNESS HANDBOOK, Oct. 2008 issue of TRIAL, J. AM. ASS’N FOR JUSTICE, vol. 44, no. 10 (Oct. 2008); Robert J. Shaughnessy, *Dirty Little Secrets of Expert Testimony*, LITIGATION, vol. 33, no. 2, 47 (Winter 2007)..

We have kept *Roh v. Doh* simple and do not see in it an opportunity to have the testimony of an expert. Experts are commonly used in civil litigation particularly in larger cases. They are less common in the ordinary cases that are the focus of this book. How they are used varies from jurisdiction to jurisdiction.

In the scholarly discussion of comparative procedure, the role of experts looms large.³⁵³ Perhaps this is because scholars pay more attention to the “big” cases, where experts are usual, than to ordinary cases, where experts are uncommon. Perhaps it is because differences in how experts are chosen and used are so great. It is said that explanation of American practices to non-Americans causes “amazement... bordering on disbelief.”³⁵⁴ Here we offer only a thumbnail description of differences. Elsewhere we have discussed differences in detail.³⁵⁵

In Germany and in Korea, experts are appointed by the court and are neutral. The costs of experts are born, as are other court costs, by losers. Ordinarily there is only one expert for one topic in a case. The expert is the expert for the court and not for one party or for another. The expert acts as a neutral interpreter of facts.

In the United States, usually each side picks, pays and presents its own experts. The experts are practically advocates for their sides. Typically they conference with the lawyers who chose them before they testify in depositions or trials. Lawyers choose experts known to present their parties’ views. While American judges have long had authority to appoint experts for the court, rarely do they exercise that authority.

d. Discovery in Roh v. Doh

In Chapter 3 our hypothetical Mary Roh met for the first time with her lawyer Hahn. She has now returned to review the complaint that he has drafted and to ask what is next.

Roh: OK. The complaint looks fine, counselor. So tell me, how long this is all going to take?

Hahn: That’s hard to say. Most cases settle; they can be very short indeed. If we are lucky, Doh will give in without putting in an answer. Nationwide, in the federal system, the median time from filing to disposition is less than nine months. If, on the other hand, Doh wants to drag this out, or if he just wants a trial, it could be a lot longer.

Roh: How much longer? How long would it take to go through trial?

³⁵³ See, e.g., Reitz, *supra* note 37.

³⁵⁴ Langbein, *The German Advantage*, *supra* note 32, at 835.

³⁵⁵ James R. Maxeiner, *The Expert in U.S. and German Patent Litigation*, 1991 INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW [IIC] 595, published in German as *Der Sachverständige in Patentrechtsstreitigkeiten in den USA und Deutschland*, GRUR INT. 1991, 85.

Hahn: If we were to file in the Eastern District of Virginia, not that long: maybe only ten months. There they have what's called the "rocket docket." But in Maryland or in the District of Columbia, you are looking at two years. We might get by with a bit less, since this is a fairly simple case. But we have to do Maryland or D.C. We couldn't really think about Virginia, because we don't have a good case for personal jurisdiction there.³⁵⁶

Roh: So what's coming? What do I have to look forward to?³⁵⁷

[Discovery Plan]

Hahn: Even for a case as straight-forward as this, we will create a discovery plan. We do that in all cases. It's a kind of roadmap for collecting the evidence that we will need to prove the elements of your case at trial. A discovery plan keeps us focused as we move toward trial. It helps us set priorities in spending legal fees getting ready for trial.

Roh: So will Doh's lawyer agree to that?

Hahn: The plan that I am talking about is just for us. It doesn't limit Doh's lawyer in any way. All of this discovery is pretty much up to the parties. We can't predict, for example, how many depositions Doh's lawyer will want and how long they will take. We are required to confer with Doh's lawyer to plan for discovery. In a case such as ours, that's likely not to mean much more than we agree on a deadline when all discovery has to be completed. We can push for six months here.

Roh: Is there no limit on the extent of discovery?

Hahn: Oh, no. Of course there is a limit. Each side can't take more than ten depositions without court permission. Each deposition can't last more than one seven hour day.

Roh: Hmm, each side, ten depositions at seven hours each @ \$300 an hour, that's already \$21,000!

Hahn: In this case, we are not likely to have more than three or four depositions. And I doubt that any will come close to lasting seven hours.

Roh: What are our discovery options?

Hahn: There are five types, but to save time, let me talk now only about the three that we are sure to use: written questions (they're technically "written interrogatories."), document demands and depositions.

[Written Interrogatories and Document Demands]

Hahn: We use written interrogatories in part, to get information that will help our case, but we principally use them to get leads for witnesses and information that we may not

³⁵⁶ The timings given are based on Table C-5/ U.S. District Courts—Media Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of disposition, During the 12-Month Period Ending September 30, 2009, in JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR JAMES C. DUFF, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C05Sep09.pdf>

³⁵⁷ For a similar and fuller dialogue, which contributed to this one, see KEN MOSCARET, MYLAWCOACH, TIPS FOR UNDERSTANDING - AND NEGOTIATING WITH - YOUR ATTORNEY, www.mylawcoach.com (2008).

know about and to find out which witnesses and information the other side, here Doh, plans to use to support its case. That way we won't be surprised at trial, if he produces a witness who claims to have been present when the loan was made, or says that you later said to the witness that the money was gift.

Hahn: I will write the interrogatories, but both to save you money and to make sure that Doh's lawyer doesn't object to what we ask, I will start from a form set that the court provides. I am not allowed to ask more than twenty-five questions. But in a straight-forward case like this, that will be enough..

Roh: I suppose that Doh will send us interrogatories too?

Hahn: You can be sure of that. But we will have thirty days to answer them. You will have to do the answering. It's quite serious business: It's as if you were in court. You will have to swear that your answers are true, like you were a witness in court. A false answer theoretically could land you in jail for perjury..

Roh: Wow. I have to answer them myself?

Hahn: Not alone. I am allowed to help in a few ways. Doh's lawyer will send the questions to me and not to you. I will look them over, While there are not many grounds for you to refuse to answer, I will object to those questions that are out-of-bounds. Then I will send them on to you.

Roh: What will I do with them?

Hahn: If you haven't done so already, you will need to find anything that you have, such as e-mails, letters, hard drives, CDs, flash drives, Blackberries, that relate in any way to your claims in this case. Some of the questions are sure to ask for that information. You will need it anyway to make sure that in answering the questions, you do not inadvertently say something different than what the records say. So once you find the records, you will need to review them all.

Roh: That doesn't sound too bad. I don't think that we exchanged more than an email or two. I probably deleted them anyway. Basically, we had a conversation where he asked for the money and then another conversation where I demanded the money back since he hadn't repaid as he told me he would.

Hahn: Not so fast. Doh is likely to ask you for any information you have about the claim.

Roh: Didn't I just tell you everything? What else is there?

Hahn: Basically you are going to have turn over anything you have that relates to Doh, not just to this deal. His lawyer is likely to say, since you are claiming, if this is not a loan, it was a conditional gift, their side needs to know all about your daughter's engagement with Doh. Did any of your emails talk about that? Do you do face-book? Do you twitter? Doh's lawyer will want it all. And just because you think you deleted a message, does not mean that it's not still on your hard drive.

Hahn: This is very important: don't delete anything. That would get us into terrible trouble.

Roh: Now I'm nervous. I've got to look through all this private stuff and turn it over to Doh? And I've got to be sure my answers are all OK?

Hahn: Yes. If there is something really sensitive, we could ask the judge for what is called a “protective order,” either to avoid having to turn it over altogether or at least to limit it to being viewed by Doh’s lawyer.

Hahn: As for worrying about getting your answers right, don’t. I will go over them with you before we turn them over to the other side.

Roh: And that’s just one of the discovery options. What were the others?

Hahn: Document demands and depositions. In this case, since it is straight-forward, we may serve our document demands with our written interrogatories. Once we have the answers to the questions and get the documents, we will know better whether we will need to get documents from anyone else and which people, if any, besides Doh we will need for depositions.

Roh: Documents from other people? Like whom?

Hahn: Maybe from the bank.. Maybe from his dad. Maybe from their company, DohSon Honda LLC. We can make third parties turn over documents.

Roh: I suppose you have to ask the judge to order that?.

Hahn: Not really. We have to get a subpoena from the clerk of the court, but we get that in blank and fill it in ourselves.

[Depositions]

Roh: So we are now up to depositions? We have been talking about depositions, but I am not sure what they are. Do we go to court for them? Does the judge ask witnesses questions?

Hahn: No. You’re right in one sense: it is a formal questioning and answering. It’s like being in court, in that you have to answer truthfully subject to penalties for perjury. But depositions hardly ever take place in court or with a judge present. Usually, they take place in a conference room in the office of the lawyer who asks for the deposition. So, here, when your deposition is taken—and it almost surely will be—it would be in the office of Doh’s lawyer in Maryland.

Roh: So whom will we depose?

Hahn: Certainly we will depose Doh. If Doh’s answers identify no other witnesses, we won’t need other depositions. If they do identify other witnesses, however, we probably will want to take their testimony in depositions before trial.

Hahn: If there is a third party, say Doh’s dad, your old friend John Doh, Sr., he can bring a lawyer if he wants.

Roh: So depositions are public?

Hahn: No. While a witness can always bring a lawyer, and a party, like you or Doh, can always attend, with or without a lawyer, that’s about it. Anyone else would have to know beforehand. In a case like this, the only people likely to be in attendance are the lawyers for both sides, the witness and the court reporter.

Roh: The court reporter? Who is that?

Hahn: In theory, an officer of the court who presides over the deposition. In practice, the court reporter is there to take down, verbatim, every word the witness or the lawyers speak in the deposition. Court reporters prepare transcripts (for which they charge handsomely) that are then given to the witness for review, correction and approval.

Roh: So what happens at a deposition?

Hahn: If I am the one taking it, I get to ask the witness a lot of question. The witness pretty much has to answer them all. The witness is sworn, like in court, and has to answer truthfully.

Roh: What is the purpose of a deposition?

Hahn: There are two main purposes. On the one hand, I want to know what the witness will say at trial and which documents the other side will use. That way, I won't be surprised. On the other hand, once we know what we all plan to say, we may be able to agree on what happened and settle the case, or at least see where we disagree, so we can focus the trial on those issues.

Roh: What will Doh's lawyer do when you are asking questions?

Hahn: Not much. Some lawyers say not more than "twiddling their thumbs."³⁵⁸ Doh's lawyer's principal role will be preparing Doh for the deposition. At the deposition, the lawyer pretty much has to let me ask my questions. The lawyer can object, but Doh will have to go ahead and answer.

Roh: So why would Doh's lawyer bother to come to a deposition of their witness?

Hahn: Principally to get an idea how that witness would look in testifying at trial. Also to make sure the witness does not slip up in answering questions.

Roh: Ok. They will take my deposition. What should I expect?

Hahn: I will prepare you beforehand. We will need to meet for half day to do that. It might be less time than that; it might be more. We will review any documents that they require you to bring. I will also go to the deposition with you—to keep them honest—and I will object to any improper questions.

Roh: Can you give me a preview of the preparation?

Hahn: We will go into that at length. But there are three key points that I will stress over and over again: (1) always tell the truth; (2) do not volunteer anything, and (3) always listen carefully to the question and pause before answering it. For example, if Doh's lawyer asks you, "do you know what time it is?" Answer, "yes, I know what time it is." Do not volunteer that it is two o'clock. Listen for the trick or misleading question. If you are unsure what a question means, ask to have it explained.

Roh: I suppose you will charge for the time in preparation?

Hahn: Yes.

³⁵⁸ George A. Hovanec, Jr. & David S. Wachen, *Preparing Fact Witnesses For Deposition*, THE PRACTICAL LITIGATOR, 7 (July 2005).

Roh: Ok. I am beginning to understand all this pre-trial discovery.. So when do I get my day in court to tell it to the judge,.

Hahn: Not until the trial, if there is one.

e. Discovery's Flaws

From the foregoing discussion, it is apparent that discovery has serious flaws not only for efficiency, but for accuracy, fair hearing and access as well. Some critics see those flaws as fatal.³⁵⁹ While these flaws were partly recognized in 1938 when the rules were introduced, the magnitude of their effect has increased in time as inventors created copiers and emails and as lawyers invented new uses for discovery beyond those planned by its inventors. Here are some flaws that critics note:

Discovery's extent is determined by the other party. Each party determines for itself how much discovery to demand. There is a well-noted asymmetry: the party that demands the discovery does not bear most of the costs of compliance. There is little incentive for parties to forego discovery.

Discovery is duplicative. If trial does occur, discovery is wasteful: witnesses testify twice, once in discovery and once at trial. That inefficiency might not be fatal were applying law simple and were use of discovery occasional. But applying law is rarely simple and use of discovery is routine.

Discovery multiplies issues geometrically. While the purpose of discovery was to help narrow issues at trial, the reality is that it multiplies their numbers in the process as a whole. Our discussions of pleading in Chapter 5 and of law applying in Germany in Chapter 7 show that the process of law applying is a back-and-forth one where one ranges from law to facts and back again, as applicable law and facts being found are compared one with another in preparation for an eventual subsumption of the found facts under the governing law. American discovery denies this reality. It compels lawyers pretrial to investigate all possible facts on all possible legal theories. That could work only if from the outset there were only one possible legal theory with but one class of facts that would fulfill a claim. That was the assumption of common law pleading which in practice was proven unworkable. Seventy years of experience with party-managed discovery proves it unworkable.

Discovery broadens its reach to address the back-and-forth problem of law-applying. The bifurcated system pushes lawyers to conduct such discovery. To prepare for the concentrated trial, they prepare for all possible issues. Since complaint and answer rarely substantially reduce issues before discovery commences, the facts that need to be proven are not yet known. Accordingly, requirements for discovery potentially are enormous. Lawyers

³⁵⁹ See John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 518-520 (2000); Frank H. Easterbrook, *Discovery as Abuse*, 69 BOSTON U.L. REV. 635 (1989).

seek to clarify all of the elements of all of the causes of action that might govern. For example: a plaintiff raises four different claims. Each claim contains five different elements. Already without reference to defenses or supporting facts the lawyers have some twenty points to clarify in order to prepare for trial. While resolution of one issue might dispose of all four claims, ordinarily there is no way to achieve that resolution until all issues have been discovered.

Discovery is extended by indeterminate law. Discovery would be difficult enough were it certain which laws applied and what they mean, but that is not the case in the United States. Judge Frank H. Easterbrook said it well: “Legal uncertainty is the godfather of discovery abuse.” All too many American rules, Easterbrook observes, “make everything relevant and nothing dispositive.” “Lawyers cannot limit their search for information in discovery, because they do not know what they are looking for. They do not know when to stop, because they never know when they have enough.”³⁶⁰ Discovery of this sort is not theoretical: it is a daily occurrence.

Discovery is disputatious instead of cooperative. The ideal of discovery is cooperation: the parties with a minimum of judicial supervision exchange information and evidence cooperatively. The ideal conflicts with the adversarial reality of Anglo-American litigation.³⁶¹ Many American litigators practice the famous aphorism of English law reformer Lord Brougham: “an advocate in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty.”³⁶² Clients want to win. Where they cannot win, many prefer delay to defeat.

Discovery rewards lawyers for using it. Nor is it hard for some litigators to reconcile themselves to zealous advocacy. They are paid on the basis of hours spent on a matter. The more they discover, the more they are paid. It is not surprising that brief testimony of witnesses such as is common in Germany or Korea, is unusual in American discovery. Whereas in Germany or Korea often half an hour or even less may be all that is allotted for a witness’s testimony, in the United States one figures testimony in terms of half-a-day or days.

2. Four Perspectives on Pretrial Discovery

Discovery looms large in differences among our legal systems. As much as any feature of American civil procedure it accounts for conflict between

³⁶⁰ Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 641, 644 (1989). The American system has legal uncertainty in abundance. See Maxeiner, *Legal Indeterminacy made in America*, *supra* note 44.

³⁶¹ See Beckerman, *supra* note 359, at 520-523.

³⁶² 2 THE TRIAL OF QUEEN CAROLINE 3 (1821).

the United States and the rest of the world. Because of its importance, we address four comments to pretrial discovery. First, we explain why American law professors find it difficult to imagine a system of civil procedure without pretrial discovery. Second, we discuss why many non-American jurists feel little need to borrow American-style discovery for their own systems. Third, we note that the historic perspective of drafters and proponents of the Federal Rules of Civil Procedure in 1938 which did not include changes in American process practices as actually occurred. Fourth, we observe that the drafters complemented their proposals for discovery with pretrial conferences and pretrial motions for summary judgment possibly with civil law alternatives in mind.

a. Contemporary American Perspective on Discovery

Some American law professors find absence of pretrial discovery in foreign procedural systems such as in the German and Korean disconcerting. Professor Stephen N. Subrin speaks for many when he says: “We do not think that judges would ferret out negative aspects of our opponent’s case and positive information to prove our own claims or defenses with the same motivation and intensity that self-interest propels.” He acknowledges, however, that the career judges one finds outside the United States might be more reliable in this task than would be their politically-appointed or elected American counterparts.³⁶³

Professor Subrin and Professor Margaret Y.K. Woo observe elsewhere how discovery “helps to ensure that even less powerful litigants lacking initial information can commence suit and obtain the necessary proof in support of their case. This is especially necessary in cases in which it is an impoverished individual litigant who is suing a corporate defendant that controls much of the relevant information.”³⁶⁴ They acknowledge, however, that perhaps such discovery is necessary only where “civil litigation serves an expansive public function in regulating the social and economic fabric of the country” and may not be required in legal systems that serve “mainly to resolve individual disputes.”³⁶⁵

In discussing American views of discovery, we remind readers that while many American jurists—mainly trial lawyers and law school professors—fervently support contemporary American discovery, many other Americans—jurists and non-jurists—do not. The American legal community does not speak unison on this issue. Many Americans, within and without the legal community, oppose the practically unbounded development of discovery that has developed since discovery was introduced

³⁶³ Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 302 (2002).

³⁶⁴ SUBRIN & WOO, *supra* note 211, at 124, 144.

³⁶⁵ *Id.* at 152.

in 1938. On the other hand, even Americans who oppose broad discovery, are likely to wonder how non-American systems can get along without at least some discovery to avoid surprise and to disclose material evidence held by the other side.

b. Non-American Perspective on Discovery

Few jurists from civil law systems feel that absence of American-style discovery is detrimental. Many regard American discovery as anathema and its absence in their systems as virtue.³⁶⁶ That one non-American jurist has proposed in a thorough and well-argued study to adopt or at least to adapt American discovery to civil law systems is remarkable for its possible uniqueness.³⁶⁷ Others, such as our co-author Professor Lee, are interested in learning from American experiences in fact-finding to inform their own country's practices of fact-finding, but do not seek adoption of American discovery.

Why do civil law jurists fear broad discovery and not lament absence of even narrow discovery from their systems? Let us offer you our views.³⁶⁸

They see broad discovery as destructive of the rule of law. Civil law jurists fear broad American discovery for the same reasons that many Americans do: it is a private inquisition. Professor Rolf A. Stürner, who is too polite to use the term, speaks for many non-American jurists when he describes American discovery with attributes reminiscent of the historic inquisition:

[T]he pretrial discovery process is left almost entirely to the lawyers and provides very broad possibilities for discovery without requiring a substantial and specified complaint or defense; parties and third parties have an almost unlimited duty to co-operate in pretrial discovery proceedings by means of answering interrogatories and depositions, production of documents and things and entry upon land; failure to comply with any such order will be sanctioned as contempt of court and causes procedural disadvantages.³⁶⁹

³⁶⁶ See, e.g., DIE JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA—THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA (Walther J. Habscheid, ed., 1986); ROLF A. SCHÜTZE, PROZESSFÜHRUNG UND –RISIKEN IM DEUTSCH-AMERIKANISCHEN RECHTSVERKEHR (2004). See also LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 151-163; REMME VERKERK, FACT-FINDING IN CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (2010).

³⁶⁷ See KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW (2003).

³⁶⁸ For another view, see ROLF STÜRNER, WHY ARE EUROPEANS AFRAID TO LITIGATE IN THE UNITED STATES (2001).

³⁶⁹ Rolf A. Stürner, *Der Justizkonflikt zwischen U.S.A. und Europa*, in JUSTIZKONFLIKT 3, 59 (English from published summary).

As we have seen the principal purpose of civil procedure is determination of rights and duties among private parties according to law. Civil procedure serves, as Professors Subrin and Woo remark, mainly to resolve individual disputes. For most of the world, its purpose is not to provide procedures to investigate as yet undiscovered violations of rights or to create new rights and duties. The former, investigation, is for the public executive under rule of law control, while the latter, legislation (*i.e.*, creation of new rights), is for the legislature under political control. Neither control is present in private litigation. Such use of civil procedure when not merely incidental to dispute resolution conflicts with conceptions of the rule of law. Only in the United States does one find a substantial constituency for broader purposes of civil procedure.

They see better ways to accomplish narrow goals of discovery. The original uses of discovery were to avoid surprise at trial and to give one side access to evidence held by the other.

Surprise. In the German and Korean systems surprise is not a major issue. Any problems of surprise are not so serious as to warrant an extensive and expensive discovery system. The German system in most cases by its ordinary working precludes surprise: the parties, in their pleadings, must identify the evidence on which they plan to rely; the judge, before taking evidence, must issue a formal decision stating the evidence to be taken and which disputed facts it concerns. § 359 ZPO. The Korean system has the latter but not the former requirement. In both systems, should surprise arise in the course evidence taking, judges are obligated by their duty of elucidation to provide the other side opportunity to deal with the surprise. They may take a measure so simple as to adjourn the proceedings for a few days or a few weeks.

Evidence held by others. That evidence necessary to one party's case may be held by another party who has no interest in disclosing it, is a common problem in procedural systems. Jurists in Germany and Korea have long recognized it as such. Few, if any, however, consider it such a serious problem as to warrant intrusive American discovery. They see the problem as an exceptional one that can be better dealt with in other ways.

In many cases there is no material, undisclosed evidence. It is a truism of litigation the world over that many cases are determined by how one views facts as much as by which facts one sees. An American, Thomas A. Mauet, makes the point: "Litigation outcomes are usually decided according to which party's version of disputed events the fact finder accepts as true."³⁷⁰

In cases where there might be material, undisclosed evidence, there are ways less intrusive and less expensive than American style discovery to address the problem. These include:

1. *Better rule drafting.* How rules are drafted can make discovery unnecessary. A common use for discovery in the United States is to

³⁷⁰ THOMAS A. MAUET, PRETRIAL 19 (7th ed. 2008).

determine the state of mind of a party, *i.e.*, did a party act intentionally, knowingly, recklessly or negligently. This is a subjective element; by recasting a rule in objective terms, resort to evidence held by the other party may no longer be needed.³⁷¹

2. *Shifting the burden of proof.* In civil lawsuits, ordinarily plaintiffs have the burden of producing all the evidence necessary to establish their claims of right. Should they require evidence held by the other party, if there is no change in the ordinary rules, they will lose because the other side refuses to disclose. Long an approach to dealing with this evidentiary problem is to shift the burden of proof. A classic example is product liability law in the European Union.

3. *Requiring production as substantiation.* Even without formally shifting the burden of proof, judges in Germany and Korea can rely on the duties of elucidation of judges and parties and on their own duties as judges of evidence practically to force disclosure. Once one party establishes a point prima facie, when the other side seeks to rebut it, the judge insists on that party producing all evidence relevant to the question. The judge may have to probe to find out what evidence exists, but having determined that it does exist, if the opposing side fails to produce it, draw negative conclusions.³⁷²

4. *Enhance judicial authority to compel disclosure.* In 2002 the German Code of Civil Procedure was amended to give judges authority to require plaintiffs, defendants and third parties to produce documents which either plaintiff or defendant refers to. § 142 ZPO. Similarly, in Korea parties are under an obligation to produce documents quoted in lawsuits. § 343 (1)1.³⁷³ In part thanks to the international brouhaha over American discovery, in both Germany and Korea today there is some discovery that did not exist before.

c. Historic American Perspective on Discovery

The Intended Purpose of Discovery. Americans owe modern day discovery to dissatisfaction with the efficacy of framing fact issues for trial under common law and code pleading. In both systems parties would appear at trial uncertain of which issues they would have to meet; they might be “ambushed” by the opposing party with some new issue or some unanticipated witness. Recall that American pleadings have never required parties to identify witnesses or other evidence. There was a felt need for “some additional device or devices for the clarification of issues and for the elimination of fake claims.”³⁷⁴

³⁷¹ See JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY 15 (1986).

³⁷² Professor Kwon informs us that as a judicial clerk he frequently saw judges take this approach.

³⁷³ See LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, at 159-163.

³⁷⁴ GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 8 (1932).

Professor Sunderland, the drafter of the original discovery provisions of the Federal Rules, believed that “[m]uch of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result[ed] from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest[ed].”³⁷⁵ Sunderland envisioned that through discovery the parties would develop facts sufficient to permit summary judgment motions to dispose of cases—both strong and fake—where there were no genuine issues of disputed material fact and otherwise to facilitate clarifying issues for trial.

We have found nothing in the historic record that suggests that Professor Sunderland, or any of his colleagues, intended for discovery to displace trials or for lawsuits to go beyond the historic purpose of determining private rights to resolve disputes.

Sunderland saw pretrial proceedings as complementing and not as undercutting trials. Pretrial was to be the salvation of “elaborate and expensive” trial proceedings. It would withdraw issues from the trial agenda where historic pleading had failed. Sunderland saw the weakness of pleading in failure to test factual allegations of the parties. The parties could assert or deny whatever they chose. Discovery would test those allegations. Discovery would indicate the “real points in controversy, in spite of pleadings which confuse or mislead.”³⁷⁶ It would assure litigants their day in court in a trial following discovery.³⁷⁷

Discovery as originally adopted was directed to disputed issues of material fact and not to development of new claims. Until 1946, document discovery was limited to things “which constitute or contain evidence material to any matter involved in the action” and then only upon a showing of good cause.³⁷⁸ Depositions were of matters relating to the claims or defenses of the parties.³⁷⁹ Rule 27, which allowed for discovery prior to commencing the action, was not appropriate to enable one to draw a complaint.³⁸⁰ In other words, discovery was to be directed to material matters in dispute and not to development of new theories of recovery.

d. Civil law methods as utopian ideal for American pretrial?

³⁷⁵ Edson R. Sunderland, *Foreword*, in *id.*, at i.

³⁷⁶ *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 218-219 (1937).

³⁷⁷ *Accord*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 318-319 (1938).

³⁷⁸ 1938 text FED. R. CIV. P. 34.

³⁷⁹ 1938 text of FED. R. CIV. P. 26(b). See AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note 42, at 8.

³⁸⁰ Edson R. Sunderland, in RULES OF CIVIL PROCEDURE FOR THE COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES CLEVELAND, OHIO, July 21, 22, 23, 1938, at 293 (William W. Dawson, ed., 1938).

While an extensive survey of the historic record is beyond the bound of this book, we think it worthwhile to point out that the vision of Clark and Sunderland may have been closer to civil law approaches than is generally supposed. While their vision reduced the role of pleading, it did not abandon applying law to fact. Pretrial conferences and motions for summary judgment were to substitute.

Both Clark and Sunderland saw framing issues as an important part of procedure. Clark wrote of a choice between civil and common law methods. The civil law method, he commented, is the simpler: “direct questioning of the parties by the ... judge;” the Anglo-American system was otherwise: “development of the issues by the parties themselves by written statements in advance of direct hearing of the parties. He endorsed moving American procedure in the civil law direction: “[w]e tend towards the civil law system; we shall probably not reach it for many generations, if at all.”³⁸¹

Sunderland envisioned that pretrial conferences and motions for summary judgement would take over much of the work in framing issues. In one proposal in Michigan made with Sunderland’s participation, the goal was “the virtual elimination of pleadings, substituting a pretrial conference as a means of determining the issue involved in the case.”³⁸² Backers of pretrial conferences saw in them “greater potential for serving the public good” than any of the other new developments.³⁸³

Sunderland saw a role for judges in framing issues in the new pretrial conferences. On the eve of implementation of the 1938 Rules he wrote: “there is no reason the court should not itself take a hand in the investigation, supplementing the proceedings and the discovery which the parties have obtained, by direct interrogation of counsel or parties in the presence of each other, with a view to eliminating issues through admissions or through the withdrawal of allegations or denials, or by obtaining the consent of the parties to the limitation or simplification of proof.”³⁸⁴

Summary judgment, reformers hoped, would make the system “efficient” by clearing out baseless claims.³⁸⁵ They saw summary judgment as a device to reach “speedy disposition of many cases” where there was “no real cause of action or defense.”³⁸⁶

³⁸¹ Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542-543 (1925) = [CHARLES E. CLARK, HANDBOOK OF CODE PLEADING, Ch. 1 (1925).]

³⁸² REPORT OF THE COMMITTEE ON PRE-TRIAL PROCEDURE, 63 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 534, 541 (1938).

³⁸³ *Id.* at 534.

³⁸⁴ Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 218-219 (1937).

³⁸⁵ Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 98-99 (1988).

³⁸⁶ Clark, *supra* note at 381, 536; *cf.* FED. R. CIV. P. 56 (advisory comm.’s note to original rule.).

Had these devices been used as Sunderland and Clark had hoped, American civil procedure might look a lot different today. Sunderland recognized that he needed the support of judges to make these devices work. When asked why he had not made pretrial conferences mandatory, he replied—to laughter: “There is no use in making it mandatory because nothing will be accomplished without the sympathetic interest of the judge, and you can’t force him to be sympathetic.”³⁸⁷

There is irony that neither pretrial conferences nor motions for summary judgment received sympathetic interest. When Clark introduced his federal rules to the American Bar Association, he recalled the “cold, not to say inhuman, treatment” which the Field Code received from New York judges.³⁸⁸

3. Pretrial Conferences

When the federal rules were adopted, it was hoped that pretrial conferences would have considerable value in simplifying issues, guiding the course of the trial, and in doing much “to eliminate the ‘sporting’ approach to the lawsuit by securing the cooperation of the court and opposing counsel for the more efficient disposition of cases.”³⁸⁹ The concept of the pretrial conference was new to their decade: it was based on experiences from the early 1930s in principal drafter Sunderland’s home state of Michigan. Until then the prevailing theory had been—following common law pleading ideals and as continued with code pleading—that lawyers for the parties prepared the trial without judicial involvement. While discovery is used more frequently than the drafters of the Federal Rules expected, pretrial conferences and summary judgments motions are used less frequently than they expected. These two devices were to guide courts towards deciding issues and to limit discover. In this subsection we address what pretrial conferences have turned out to be. In the following subsection we consider motions for summary judgment.

A pretrial conference today is an informal meeting of the judge with the lawyers for the parties. The parties themselves are not normally present and their appearance cannot usually be compelled. Pretrial conferences are ordinarily held either shortly after pleadings are exchanged or just prior to trial. In the former case, they mostly concern timing of discovery; in the latter they work to schedule pretrial motions and to prepare for trial.

³⁸⁷ RULES OF CIVIL PROCEDURE FOR THE COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES CLEVELAND , OHIO, July 21, 22, 23, 1938, at 299 (William W. Dawson, ed., 1938).

³⁸⁸ Charles E. Clark, *Statement, The New Federal Rules of Civil Procedure*, 61 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 428, 439 (1936).

³⁸⁹ James A. Pike, *The New Federal Rules of Civil Procedure*, 12 [California] STATE BAR J. 223, 224-225(1937).

Whether there is a pretrial conference in any given case is in the discretion of the judge. Rule 16 authorizes, but does not compel judges to conduct pretrial conferences. This means that practice in any one case is dependent upon the judge assigned to that case. Practices vary widely in frequency and substance. The training and organization of American judges, moreover, is not especially conducive to development of common practices.

Today the most common use of pretrial conferences seems to be scheduling or debating discovery. Judges discuss with the parties the dates by which discovery must be concluded, or one party accuses the other of not following the rules in some aspect of discovery. Amendments to Rule 16 since 1938 explicitly assign a scheduling function to judges: now judges must issue scheduling orders setting specific deadlines for joining other parties, amending pleadings, completing discovery and filing motions.³⁹⁰ The conference itself, however, remains optional.

Another use for pretrial conferences is promotion of settlements. In some cases judges use pretrial conferences to persuade parties to settle.

Use of pretrial conferences to simplify issues—the principal purpose in the minds of the drafters—has not attained the importance that they had hoped for. That use seems a distant third.

The lack of importance of pretrial conferences is demonstrated by the low level of attention they receive in manuals devoted to pretrial litigation. Some authors omit the topic altogether; others who address the topic, tack it on at the end of the book out of a feeling of obligation rather than out of conviction that this “ill-defined” institution has importance. They ask: how could a manual on pretrial litigation omit something called a “pretrial conference”? They counsel: “Obviously, it is a good idea to attend a pretrial conference if the court schedules one.”³⁹¹

Some judges use pretrial conferences vigorously in order to move cases along. Depending on the judge, they may encourage faster discovery, issue simplification or settlement, or all three. Vigorous use is known—sometimes pejoratively—as “managerial judging.” Critics of managerial judging worry that judges in their zeal to move cases along may deny parties their right to be heard or may do them injustice. Scholars sometimes, incorrectly, compare managerial judging to civil law judging. The goal of managerial judging is conclusion of the dispute; the goal of civil law judging is likewise conclusion of disputes but with the important difference, as we shall see in Chapter 7: conclusions based in application of law to facts.

In the absence of effective pretrial conferences, American civil process relies, as it always has, on lawyers working out among themselves the material issues in dispute for trial. That it is not an entirely illusory hope; it does happen in some cases. Typically in cases of successful lawyer issue

³⁹⁰ FED. R. CIV. P. 16(b)(3)(A).

³⁹¹ ROGER S. HAYDOCK, DAVID F. HERR & JEFFERY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 677-680 (6th ed. 2007).

framing, lawyers for both sides are competent and confident and their clients are content to get from the court decisions according to law. Those lawyers identify and focus on true issues; they limit trial to those issues and, as a result, may shorten trial substantially, from say a week to a half day. America's law reformers had lawyers such as these in mind when they have invested lawyers with issue-simplification. Were men angels, perhaps their systems would have worked. But in the real world of American litigation, lawyers do not learn to simplify issues. They are trained "to think that every issue should be contested, every witness attacked, and every opponent destroyed."³⁹²

4. Motions for Summary Judgment

Another feature of pretrial process is the motion for summary judgment. Originally, it was conceived of as an issue simplification measure; today it is more commonly used as a way to dispose of legally unfounded suits. As with pretrial conferences, and most of modern day pretrial as routine measures, it is an innovation of the first part of the twentieth century. Unlike pretrial conferences and extensive discovery, it was in wide-spread use before adoption of the Federal Rules.

A summary judgment is a form of judgment without jury. Since it does not involve a trial, it does not include the same kind of findings of fact or conclusions of law discussed in Chapter 7. Rather, it determines specific issues of law or fact. As originally envisioned for the Federal Rules it was as much tool to supplement pleading as a judgment of the case.

A party is entitled to summary judgment, either on the whole case or on a specific issue, if it can "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."³⁹³ The other side defeats the motion by showing that there is a "genuine issue of material fact."

Motions for summary judgment are reminiscent of common law pleading: plaintiffs seeking summary judgment assert that they have alleged all elements of a particular legal claim, that there is no genuine issue of material fact about any of those elements, and that on these facts, they are entitled to judgment. In other words, the law is clear, the facts are clear, and applying the law to these facts produces the decision sought.

Either side may make a motion for summary judgment. Parties oppose motions for summary judgment by raising a legal issue, a factual issue or an issue of applying law to facts. In a testimony to the uncertainty of American law, defendants are counseled against making summary judgment motions for fear that judicial denial of their motions will educate plaintiffs on what they need to show.

³⁹² Elliott Wilcox, *Sifting the Issues with Stipulations*, TRIAL, vol. 44, no. 7, p. 39 (2008).

³⁹³ FED. R. CIV. P. 56(c).

Motions for summary judgment differ from common law pleading in two important respects: unlike in common law pleading, parties opposing summary judgment motions are not limited to challenging one point of law or fact. They may raise as many challenges as they like. Second, motions for summary judgment may involve proof of facts. In addition to the pleadings each side may submit supporting affidavits (*i.e.*, sworn statements based on personal knowledge), which may be supplemented by depositions and answers and answers to interrogatories.³⁹⁴ In determining summary judgment motions, judges decide without hearing parties or witnesses but by examining pleadings and by “interrogating the attorneys.”³⁹⁵ Again we see a lost opportunity to give parties a day in court: the proceedings are usually written and without involvement of the parties themselves.

Summary judgment, reformers hoped, would make the system efficient by clearing out baseless claims.³⁹⁶

Their hopes were dashed. At first, summary judgments were rarely granted, because the standard that the reformers set was interpreted restrictively. Now that standards have relaxed, summary judgment is under attack for denying parties their day in court and their right to jury trial.

That summary judgment—even after standards have been relaxed—is used only occasionally, is not surprising. The rule requires that moving parties show that there is no “genuine issue of material fact.” Since nothing compels litigants to admit facts, motions for summary judgment are difficult to win when opposed by opponents determined to show that the *is* an issue. The rule provides scant support in facilitating assistance in that the obligation to respond that it imposes requires only setting out “specific facts showing a genuine issue for trial.”³⁹⁷ Even mediocre lawyers in all but the simplest of cases ought to be able to raise an issue of disputed fact. Before the 1980s, parties seeking summary judgment found it almost impossible to meet the standard. In the mid-1980s the Supreme Court decided a trilogy of cases that taken together are seen to invigorate the procedure. Even as reinvigorated however, summary judgment can only deal with claims largely lacking in merit and cannot deal with claims requiring complex application of law to facts.³⁹⁸ That limited use is said to deprive parties of the right to be heard in a trial by jury.

Summary judgment does deprive losing parties of their day in court. While they still are heard, they are heard only in the motion papers and affidavits they are allowed to submit; judges decide, without ever personally hearing parties or taking testimony of witnesses, that parties’ claims are

³⁹⁴ FED. R. CIV. P. 56(e).

³⁹⁵ FED. R. CIV. P. 56(d)(1).

³⁹⁶ See Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 536 (1925); cf. FED. R. CIV. P. 56 (advisory committee’s note to original rule).

³⁹⁷ FED. R. CIV. P. 56(e)(2).

³⁹⁸ See Jonathan T. Molat, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 45 (2003).

without merit.³⁹⁹

In denying parties a day in court, summary judgment procedure also denies trial by jury. The justification is that the right to trial by jury extends only to trial of issues of fact; where summary judgment is granted, the court finds that there is no genuine issue of fact. Proponents of jury trial contend that even that decision is outside the authority of judges and is reserved to juries.⁴⁰⁰

5. Trial

Had we published this book a century ago, we would have devoted the American portion of Chapter 6 entirely to trials. Since then, practitioner guides to trials have been replaced by guides to pre-trial, and student texts have practically eliminated coverage of trials.⁴⁰¹ Now that trials are rare, we limit our discussion to some major points. That Americans organize court procedures around events that hardly ever happen is odd. That they do demonstrates the iconic nature of trial.⁴⁰²

There are two principal types of trials: trials with juries and trials without juries (“bench trials”). In jury trials, as we discuss in Chapter 7, juries decide issues of fact, while judges preside over the trial and decide issues of law. In bench trials, *i.e.*, non-jury trials, judges do it all.

The jury trial model dominates law-applying by civil judicial process. There can be no bench trial if the parties do not waive jury trial. There can be no summary judgment if there are facts for jurors to determine. Even when parties apply the law to themselves by settling cases, they do so based on their beliefs as to what jurors would decide.

Trial, from summoning of jurors at its beginning to delivering the jurors’ verdict at its end, offers unscrupulous lawyers ample opportunities to distort the truth.⁴⁰³

³⁹⁹ See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U.L. REV. 982 (2003).

⁴⁰⁰ See Suja A. Thomas, *Symposium: The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (2008).

⁴⁰¹ See, e.g., KEVIN CLERMONT, *PRINCIPLES OF CIVIL PROCEDURE* 88-112 (2nd ed., 2009) (24 pages out of 478 pages); ISSACHAROFF, *CIVIL PROCEDURE*, *supra* note 51, at 188 (noting the book gives “little attention” to trial and appeal); JOHN B. OAKLEY & VIKRAM D. AMAR, *AMERICAN CIVIL PROCEDURE: A GUIDE TO CIVIL ADJUDICATION IN U.S. COURTS* 184-188 (2009) (five pages out of 288; noting “a very brief overview” is sufficient for their guide).

⁴⁰² *Accord*, ROBERT W. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM* 212 (National Center for State Courts, 1999).

⁴⁰³ *Cf.* WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIAL HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT* (1999). The problems of the criminal trial are similar if more severe.

The Jury

A common law jury is a group of lay persons engaged to decide criminal or civil cases. The jury is an institution of mythological proportions in the legal lore of the United States. While other common law countries have abandoned juries in civil cases and make sparing use of them in criminal cases, American adoration of the institution of the jury is stronger now than ever, even as actual use of juries is rarer than ever.⁴⁰⁴

Americans value trial by jury, not because juries efficiently effectuate law, but because juries invest the law with the people. A former President of the American Bar Association praises juries as “democracy of the people and for the people, as envisioned by the founders of this country.”⁴⁰⁵ American jurists do not deceive themselves: they see efficiency costs. Jury advocates believe that benefits that juries provide for other value compensate for lost efficiency. In criminal justice, that value is protection of individuals against the state. Justice Antonin Scalia, writing for the United States Supreme Court, contrasted the jury-model with an efficiency model of the civil law: “There is not one shred of doubt . . . about the Framers’ paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.”⁴⁰⁶ In civil justice the value of the jury is amelioration of harsh law. Justice, later Chief Justice Rehnquist, observed that the founders who advocated right to civil jury trial were “not animated by a belief that use of juries would lead to more efficient judicial administration; [they] believed that a jury would reach a result that a judge either could or would not reach.”⁴⁰⁷

Right to Trial by Jury in Civil Cases

The founders of the United States embedded in the nation’s fundamental rights a right to jury trial not only in criminal cases, but in civil cases as well. Article VII of the Bill of Rights of the United States Constitution provides that “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried

⁴⁰⁴ In the last third of the 19th century the institution of the jury was subjected to strong criticism. See, e.g., MARK TWAIN (SAMUEL L. CLEMENS), *ROUGHING IT, FULLY ILLUSTRATED BY EMINENT ARTISTS* Chap. XLVIII, 343 (1892, first published 1872) (“The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago.”)

⁴⁰⁵ Robert J. Grey, Jr., *Foreword*, NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 10 (2007).

⁴⁰⁶ *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

⁴⁰⁷ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343-344 (1979) (Rehnquist, J., dissenting).

by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.” Article 5 of the Maryland Declaration of Rights of the Constitution of the State of Maryland preserves the common law right of jury trial generally. Article 23 provides specifically for civil proceedings that “The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of \$10,000, shall be inviolably preserved.” There are similar provisions in other state constitutions.

The right to jury trial may be waived. If neither party requests (“demands”) a jury, trial proceeds by judge alone.⁴⁰⁸ The Maryland Constitution explicitly provides that the parties may submit any issue to trial by the court without the aid of jury.⁴⁰⁹

The constitutional right is written in the language of eighteenth century pleading: “fact” or “issues of fact.” The 1848 and 1938 reformers could have used the scope of right to trial by jury to restrict jury decisions to specific issues of fact (*e.g.*, was it defendant who kicked plaintiff). They did not. Instead of limiting juries, their handiwork tended to extend jury power and authority. For example, while Rule 38 allows a party to specify an issue or issues for jury trial, it provides that if the party fails to specify an issue, then there is to be a jury trial of all issues.

American enthusiasm for jury trial is not unbounded. Long have American jurists recognized that giving all cases jury trials “would unavoidably render the dispatch of litigation perfectly impracticable”⁴¹⁰ Long have American judges refused to extend the constitutional right to jury trial beyond its historic scope of actions *at law*, *i.e.*, cases brought in courts of law. When courts of equity were merged with courts of law—a process that began before 1848 and continued as late as 1984 in Maryland—judges restricted the constitutional right to actions at law. Already then jurists foresaw that maintaining the distinction would create “much delay and litigation.”⁴¹¹

Use of juries has expanded beyond historic limits. Merger of courts of law and of equity led to “equity conquering common law.” Juries decide today where formerly courts of equity without juries would have decided. Equity pleading and procedures, created for courts without juries, are now routine in all courts.⁴¹² Contemporary American law reformers should bear

⁴⁰⁸ FED. R. CIV. P. 38, 39(b).

⁴⁰⁹ Art. IV, sect. 8(a). CONST. MD.

⁴¹⁰ Samuel Smith Nicholas, *Chapter XVIII. 1849. Law and Constitutional Reform. Jury System.*, in 1 S.S. NICHOLAS, CONSERVATIVE ESSAYS LEGAL AND POLITICAL 361, 362 (1863).

⁴¹¹ *Id.* With respect to Maryland, see Richard W. Bourne & John Lynch, Jr., *Merger of Law and Equity Under the Revised Maryland Rules: Does It Threaten Trial by Jury?* 14 U. BALT. L. REV. 1 (1984); Charles A. Rees, *Preserved or Pickled? The Right to Trial by Jury After the Merger of Law and Equity in Maryland*, 26 U. BALT. L. REV. 301 (1997).

⁴¹² See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

in mind that contemporary customs are not constitutionally compelled. The constitution right requires only that juries find facts; it does not require that they apply law.⁴¹³

Jury Selection (voir dire)

Unlike judges, jurors in America are not on stand-by in the courthouse waiting for parties to bring lawsuits to them for decision. Citizens are called to serve as jurors to decide specific cases in which one or the other of the parties has requested a jury trial. When a jury is constituted for a particular case, that case is then held immediately in one proceeding concentrated on successive days one after another with as few breaks as possible.

That jurors are selected to serve only for particular cases rather than being on call and that they serve only in concentrated periods is a continuation of practices that developed when communications were limited and transportation difficult. That it continues today is a consequence of inertia and of the compelled nature of jury service: involuntary jurors want to complete their service as quickly as possible. In other countries, where there are analogues to juries in lay judges, laymen are elected for terms and do intermittent duty as the needs of cases require. For example, the German system uses lay judges in certain commercial cases and generally in serious criminal ones. These lay judges are on standby;⁴¹⁴ they serve five year terms.⁴¹⁵ Their service is voluntary.

Choosing jurors for a particular case takes place in a specific stage of trial practice known as “voir dire” (“to hear them say”). Court personnel rely on lists of adults in the community to select randomly people for possible jury service. Since there is no registration of residence requirement in the United States, lists typically used are lists of registered voters or licensed drivers. This can skew demographic representation and is sometimes objected to.

In the course of voir dire potential jurors are questioned to determine their suitability for jury duty. The questioning is not directed toward finding jurors most suited to decide cases, but to weed out potential jurors who might be biased against one party or another. Where there is a clear conflict of interest, the judge may of his or her own motion “strike” that potential juror for “cause” and most certainly will strike such a potential juror upon motion of a party. In other cases, however, where there is no clear conflict of interest and no explicit bias, a party may challenge a juror only if the party exercises one of a limited number of “preemptory” challenges. A preemptory challenge permits a party to strike a potential juror for no stated reason at all.

⁴¹³ Cf. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14545) (Story, J., on circuit).

⁴¹⁴ § 105 GVG.

⁴¹⁵ § 108 GVG.

Use of preemptory challenges based on grounds that violate equal protection law (*e.g.*, race discrimination), is prohibited in criminal cases.⁴¹⁶

Voir dire practices among the states and even within the federal court system vary in how extensive questioning of potential jurors is and in how questioning is shared among lawyers and judges. In some courts, lawyers, out of presence of judges, interrogate jurors. Jurors subject to lawyers' questioning sometimes feel that they are on trial. In other courts, lawyers ask questions, but in the presence of judges. In still other courts, judges take the lead in asking questions and permit lawyers to inquire only after the judges are done. In some courts, questioners interrogate potential jurors individually; in others, they ask questions only of panels of potential jurors.

Jury selection can play a major role in civil as well as in criminal cases. It can become a "tug-of-war" between lawyers.⁴¹⁷ Yet the trend seems to be toward more expansive rather than more limited voir dire. Opponents of limited voir dire fear that asking only a few questions may cause lawyers to miss potential bias.⁴¹⁸ The less limited voir dire is, however, the greater is the possibility of using it for purposes for which it is not intended. Trial lawyers readily acknowledge that they conduct voir dire not only to identify potential jurors who are biased *against* their clients, but to find potential jurors who might be biased *for* their clients and to begin to persuade eventual jurors to decide for them and for their clients.⁴¹⁹ To help them do this, trial lawyers engage consultants to identify those people who as jurors might be likely to decide for their clients.⁴²⁰ Even opponents of limited voir dire ask: "can a good attorney stack the jury?" They answer: "yes."⁴²¹

The search for unbiased jurors can become a race to the bottom. Judge Seymour D. Thompson, who was one of America's first jury trial experts, acerbically compared the Swedish jury—"composed of men of the highest probity, chosen by the electors for a term of years," with the American jury—"composed of men who are selected for the purpose of a single trial ... twelve dolts, selected because they are ignorant of the facts of the case about to be tried, no matter how notorious"⁴²²

Costs of Voir Dire

⁴¹⁶ *Georgia v. McCollum*, 505 U.S. 42 (1992).

⁴¹⁷ Gregory E. Mize & Paula Hannaford-Agor, *Toward a better voir dire process*, TRIAL, Vol. 44, No. 3, March 2008.

⁴¹⁸ VIDMAR & HANS, *supra* note 405, at 91.

⁴¹⁹ See Chris O'Brian, *Connecting with prospective jurors*, TRIAL, Vol. 43, No. 10, October 2007.

⁴²⁰ See AMY J. POSEY & LAWRENCE S. WRIGHTSMAN, TRIAL CONSULTING (2005).

⁴²¹ VIDMAR & HANS, *supra* note 405, at 99-100.

⁴²² 1 SEYMOUR D. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL v (1888).

Voir dire imposes considerable costs on individual cases, on the civil justice system as a whole, and on individual jurors. One study concludes that nationwide, in civil and criminal cases, jury selection on average requires between 2.3 and 3.8 hours.⁴²³ While that might not sound like a great deal of time, it is a tax on every ordinary case that contemplates a jury trial. If jury selection takes only three hours in court, that suggests that lawyers for both sides will together devote ten to twenty hours to the process, or the equivalent of several thousands of dollars. Lawyers commonly spend an hour outside court for every hour they spend inside the courtroom. To get full value of voir dire, lawyers are advised not to do it alone, but to include a colleague.

Besides the time lawyers spend on the project, judges and potential jurors also participate. To obtain a jury of six, a court may summon twenty, fifty or more potential jurors. In celebrated cases, the court may summon hundreds of potential jurors.⁴²⁴ Even in ordinary cases, resource commitments may be high. In a relatively routine tort claim against the police department, close to one hundred potential jurors might be summoned. They might spend the better part of a day awaiting questioning by a staff of ten lawyers, court personnel and the judge. All-in-all, perhaps nine hundred hours could be devoted to selecting jurors for that one case. That is one person working full time for half a year!

Why does the American legal system devote such resources to ferreting out biased jurors? Are Americans by nature more biased than their counterparts abroad? No. Americans are not especially biased, but as we shall see, American juries are only loosely controlled by law so deciding who decides the case can be outcome determinative.

Trial

The contemporary American trial is structured to permit each side to tell its story; the judge is passive. In a nutshell, this is the sequence: the lawyers for the parties begin their clients cases with opening statements. In the opening statements the lawyers tell the court, i.e., the judge and the jurors, if this a jury trial, what they plan to prove to justify finding for their clients. The lawyers set out a legal theory of the case, a factual theory and a theme. Following the opening statements, first the plaintiff's lawyer, then the defendant's lawyer, presents witnesses. After the presenting party questions a witness, the opposing party is permitted to ask questions ("cross-examination). After both sides' lawyers have presented their cases, they make closing statements. The legal theory is only a part of the more important larger theme: "the moral-political claim the case makes on the jury's sensibilities." The judge then instructs jurors in the law and sends the

⁴²³ See VIDMAR & HANS, *supra* note 405, at 89.

⁴²⁴ See VIDMAR & HANS, *supra* note 405, at 89 (reporting panels of 600 and 864).

out to decide the case. If trial is before a judge alone, the judge retires to reach his or her decision.

Trial—in the two percent of cases where they occur—is where parties, through their lawyers, finally get their day-in-court. At long last their lawyers offer to the court the proof of their claims of right. Finally, they get to have their lawyers present their view of how law applies to facts in their case. Yet even in this end stage parties do not get to explain to the court why they are complaining.

Taking Evidence

Lawyer Control of Testimony Taking. Lawyers for parties shape trials. They determine the order of witnesses. They place the questions. Once one side finishes with “its” witness, the other side “cross-examines” the witness. In the view of the trial bar, judges should be silent. They should accept repetition rather than restrict lawyers in presenting and questioning witnesses. Think of Hollywood trial movies. Taking evidence is all part of a play. Justice Scalia reminds us that play is “a very good word for what the common law, adversary trial” is.⁴²⁵

Just as good play directors coach their actors before performances, so too do good trial lawyers coach their witnesses before trials. Just as good directors guide their players with scripts, good lawyers write scripts to guide their actors. Both good directors and good lawyers remind their subjects to avoid rote memorization. Good lawyers advise their witnesses to use their own words and to use their scripts only as guides. Lawyers want their witnesses to give the impression that their testimony comes completely from their own recollection, even if the truth sometimes is otherwise.

Cross-examination. To counteract coaching American civil procedure offers the celebrated institution of cross-examination. Once cross-examination was said to be the “greatest legal engine ever invented for the discovery of truth.”⁴²⁶ As trial has vanished, so too has cross-examination: no trial—no cross. Hollywood can preserve its memory, but not its role. Even in its heyday, however, cross-examination was often more a steamroller that flattened truth than an engine that uncovered it.

One practitioner’s rule of cross-examination is that the cross-examining lawyer should not ask a question that the lawyer does not know the answer to beforehand. The lawyer should not be surprised by the answer of a witness. Another practitioner’s rule is that the lawyer should pose only leading questions. A leading question suggests its answer: *e.g.*, “Mr. Witness, you

⁴²⁵ TRUTH ON TRIAL, 8 ANNENBERG ETHICS IN AMERICA at 54th minute (Columbia University Seminars on Media and Society, 1989, ISBN 0-89776-526-5)
<http://www.learner.org/resources/series81.html?pop=yes&pid=198>.

⁴²⁶ 3 JOHN H. WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 2nd ed., 1923).

work for the post office, don't you?" The lawyer should not give the witness opportunity to explain. The goal of cross-examination is "control" of the witness's testimony. Sought is nothing less than the "successful debilitation" of the witness, or as colloquially put by one author, "cracking the egg."⁴²⁷

American cross-examination when it occurs can be brutal. Then its focus likely is not a material point in dispute between the parties, but witness credibility. American lawyers are advised to "set up" and "destroy" witnesses. A basic technique to attack witness credibility is to confront the witness with inconsistent statements. One litigator counsels: "Prior inconsistencies, like rare coins, are not easily found. They must be discovered or created." They are discovered by searching the record closely: by examining everything relevant that the witness has ever said. Prior inconsistencies are created in discovery and at trial. In discovery, lawyers get opposing witnesses to commit themselves to positions that they may later contradict or retract. Lawyers prolong depositions and repeat questions to encourage inconsistent statements. At trial, lawyers "lead" witnesses to desired answers. They cut witnesses off rather than allow narrative answers. They surprise witnesses to generate conflict. They look for weakness. With one incorrect statement, they can impeach a witness who testified correctly to ten facts.

Law of Evidence. Another expensive feature of American trials which contributes to their expense and impending disappearance is the American law of evidence. It has no exact counterpart in modern German or Korean law. The American law precludes parties from offering certain evidence even though material to disputed issues of fact. It bars the evidence, usually because the evidence is thought unreliable or prejudicial. The best-known example of precluded evidence is hearsay. Hearsay evidence is evidence of an out-of-court statement which is offered in court to prove the truth of the content. In our case, a witness might testify that she overheard Mary Roh telling her daughter Rosa that the money she gave John Doh, Jr. was a gift. The statement is hearsay and falls under the hearsay rule. It is admissible only because it falls under an exception to the rule (here, an admission of a party.)

The law of evidence controls juries. In bench trials, where there is no jury, some judges do not apply evidence law strictly. They allow lawyers to offer most any evidence, and then give it the value that they believe it should have. Their practice is closer to the practice in Germany of free evaluation of evidence.

Jury Manipulation

⁴²⁷ Hayes, *Cracking the Egg: Cross-Examining the Expert in a Patent Case*, 25 TRIAL, No. 6, 56 (June 1989).

Trials generally permit of many “dirty tricks.” Trials by jury are all the more subject to deception. Above all criminal trials—where sanctions can be severe—admit of and sometimes approve of defeating truth.⁴²⁸ Since trials are such unusual occurrences today, we do not detail how they permit defeating truth, any more than we dwelt on how discovery, today’s institution of choice can frustrate truth and justice. In this book aim to describe how processes unfold when conducted properly.

Jury Instruction and Jury Decision

After the lawyers have presented their clients’ witnesses and concluded their closing statements, the judge directs the jurors in the law and in its application. That is, the judge orally instructs the jurors about the elements of applicable legal rules.

The parties’ lawyers commonly propose the instructions. The judges choose between their proposals piecemeal and amend and add to them as they see fit. Before judges give instructions they must inform the parties’ lawyers of the substance of instructions and must provide them with opportunity to object.⁴²⁹ Drafters often rely on books of standard instructions. Some of these books have official or semi-official status. Judges read the selected instructions to jurors. While judges realize that jurors often do not understand instructions, the law presumes conclusively that they do.

Instructing juries is not interactive; judges read instructions and jurors listen. Should jurors have questions during the course of their deliberations, they can submit these to the judges. Typically judges read back what they read originally. Proposals to improve jury application of law to facts have been modest. Even seemingly minor reform measures, such as giving jurors printed copies of instructions, instructing them at the beginning rather than the end of the trial in substantive law, allowing them to take notes during trial, and allowing them to ask questions of witness, encounter stiff opposition.

Americans take the present form of jury instruction for granted. They little discuss what courts do not do to help jurors decide. For examples, at the outset of cases, before party lawyers present their theories of the case, judges rarely instruct jurors in what the law requires. They leave that instruction to the end of the case, when both sides have had their say. At trial begin, and along the way, judges tell jurors no more than the barest essentials of how cases are conducted. During trial, they do not guide jurors in picking out from conflicting testimony factual elements necessary to applying law to the cases at hand. As witnesses testify, rarely do judges comment to jurors on

⁴²⁸ See, e.g., JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003); PIZZI, *supra* note 403; *THE TRIAL ON TRIAL: VOL. 1, THE TRUTH AND DUE PROCESS* (ANTONY DUFF, *et al.*, ed. 2004).

⁴²⁹ FED. R. CIV. P. 51.

credibility of witnesses. Even at trial end, judges' instruct jurors only on the bloodless bones of the law: the abstract legal rules. Above all they do not do, as English courts do and as American courts once did, comment on the alleged facts presented by the parties.⁴³⁰ After jurors deliberate, they return and deliver verdict. We discuss verdicts in Chapter 7.

B. Germany

In the courts everyone is entitled to a hearing in
accordance with the law.

Art. 103(1) Basic Law [Constitution]
of the Federal Republic of Germany (1949)

Much as Hollywood has given the world its picture of American procedure, American law professors have given Americans a similarly misleading picture of German civil procedure. The typical American view of civil law civil procedure is an inaccurate comic-book caricature. For example, Justice Antonin Scalia sees as the only alternative to the adversary system an “inquisitorial system.”⁴³¹ American scholars, notwithstanding Continental lawyers’ “vehement objections,” still adopt “inquisitorial” as a “convenient shorthand” for civil law civil proceedings and see in them “an official inquiry.”⁴³² Their picture is that of the “subsumption automat” or of the slot machine justice of colorful critiques of a century ago. Some see in the civil law judge almost a government toady who single-mindedly, lacking a “creative role,” applies the law without “asking whether a syllogistic result produces the kind of result the rule contemplates.”⁴³³ “Their image is that of a civil servant who performs important but essentially uncreative functions.”⁴³⁴ They see a “core of professionally trained and closely supervised” judges who maintain “tight control over the business of fact

⁴³⁰ See JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 513-522 (2009); Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 233-239 (2000).

⁴³¹ TRUTH ON TRIAL, 8 ANNENBERG ETHICS IN AMERICA at 54th minute (Columbia University Seminars on Media and Society, 1989, ISBN 0-89776-526-5) <http://www.learner.org/resources/series81.html?pop=yes&pid=198>. See also Crawford v. Washington, 541 U.S. 36, 43-48 (2004).

⁴³² Oscar G. Chase, *American 'Exceptionalism' and Comparative Procedure*, 50 AM. J. COMP. L. 277, 283 (2002); SUBRIN & WOO, *supra* note 211, at 143.

⁴³³ Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 97, 103 (1998).

⁴³⁴ JOHN H. MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 37 (3rd ed. 2007). *Accord*, RICHARD A POSNER, *HOW JUDGES THINK* 133 (2008); VICKI C. JACKSON & MARK V. TUSHNET, *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 160 (2002) (quoting Merryman).

presentation” thus eliminating volatility and unpredictability, but at the “expense of other values.”⁴³⁵

The comic book picture of the civil law judge as grand inquisitor mindlessly applying rigid rules without attention to equities of individual cases is wrong. In the German civil justice systems, in each individual case the judge decides whether to apply precise statutory provisions or to rely on one of the “general clauses” of the Civil Code or other laws that authorizes taking into account equitable considerations not directly covered by statutory rule.⁴³⁶

Rather than permit judges or administrators to depart *ad hoc* from legal rules, the German ideal is to write rules that provide for valuing by judges or administrators in individual cases. Well-written rules give rule-appliers opportunities to take into account individual circumstances. They have escape clauses that permit foregoing their application where application would be inappropriate; they have general clauses that permit applying rules to cases that otherwise might escape application. Writing escape clauses and general clauses that are consistent with the rule of law is part of the legislator’s art.

Article 20 of the German constitution (Basic Law) commands equitable application of statutes. Its section 3 provides that the judiciary is bound in all it does by “statute and justice” (*Gesetz und Recht*). In every case judges are to be alert for a possible unjust applications of statutes.

1. The Nature of German Civil Process: Judgment as Goal of Process

The goal of German civil process is a judicial judgment. That goal keeps the process focused on application of existing legal rules to facts in the instant case. At the end of the process, what legitimates the outcome is a rational judgment more than presentations in court. The individual elements required by statute to establish a legal claim are the “spectacles” through which judges view cases. What can be seen through the spectacles matters; everything else is irrelevant.⁴³⁷ Freed from entertaining party presentation of competing stories, judges focus on material points in dispute to find just those facts necessary for decision. From beginning to end of process, rules of procedure direct parties and court to finding facts necessary to fulfilling requirements of applicable rules.

Thus German civil process is *not* a drama in which lawyers write scripts, produce plays and play roles. It is *not* a battle in which lawyers as champions

⁴³⁵ Oscar G. Chase, *Legal Processes and National Culture*, 5 *CARDOZO J. INT’L & COMP. L.* 1, 17-18 (1997).

⁴³⁶ Ernst Fraenkel, *The Labor Courts in the German Judicial System*, in FRIEDA WUNDERLICH, *GERMAN LABOR COURTS* (1946), reprinted in ERNST FRAENKEL, *GESAMMELTE SCHRIFTEN*, vol. 3, *NEUAUFBAU DER DEMOKRATIE IN DEUTSCHLAND UND KOREA* 360 (Gerhard Gühler, ed., 1999).

⁴³⁷ JOACHIM HRUSCHKA, *DIE KONSTITUTION DES RECHTSFALLES, STUDIEN ZUM VERHÄLTNIS VON TATSACHENFESTSTELLUNG UND RECHTSANWENDUNG* 22, 23-24 (1965).

compete against each other and judges watch for dirty tricks. On the other hand, *neither* is it a government investigation into peoples' lives. It is not inquisitorial.

We cannot stress this point enough. Many American academics persist in believing that the only alternative to the adversary system that they know is an inquisitorial system of their imagination where judges conduct inquests for the state and lawsuits become “pretext[s] for the realization of state policy.”⁴³⁸ That judges have more active roles in how proceedings are conducted does not turn judges into inquisitors or lawsuits into inquisitions.

In German civil justice the state has no interest in whether plaintiff or defendant wins the case. The state is interested that the party who wins the case, whether it is plaintiff or defendant, is the party who, according to law and justice, has the superior claim of right. When that is the case, peace is maintained in society. Parties can work with one another faithfully according to law secure in the knowledge, that should one party fail to follow the law, the party can go to court for protection. Already a century ago some Americans recognized these truths about civil law proceedings.⁴³⁹

Contemporary German civil process is *cooperative*. It facilitates reaching judgments quickly and cheaply based on substantive truth and law. It is an explicit rejection of some process that predated the 1877 Code of Civil Procedure, which had been based, like American process still is, on a kind of “battle-between-the-parties” model.⁴⁴⁰ In German process, parties present to the court facts of the matter in controversy. The court structures the dispute according to law in order to reach its own legal judgment or to help parties to reach their own settlement. The Roman law maxim applies: “*da mihi factum, dabo tibi ius*”—give me the facts, and I will give you the [resulting] right.⁴⁴¹

German process is itself not subject to strict formal rules in order to permit judges efficiently to determine whether a party, usually plaintiff, has proven facts sufficient to authorize the court to order legal remedies. Judges do not choose between two subjective presentations of one factual event—as an American court might—but determine whether elements of a legal rule are objectively fulfilled.

In German civil process judges are strictly limited by the matter in controversy to materials presented by parties. They can do no more than

⁴³⁸ See, e.g., FRANKLIN STREIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* 211 (1994).

⁴³⁹ See, e.g., Axel Teisen, *Continental and Common Law Procedure Contrasted—An Interesting Side-Light on Reform in Pleading and Practice*, 74 *CENTRAL L.J.* 22, 45-47 (1912).

⁴⁴⁰ See C.H. van Rhee, *Introduction in EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 12 (C.H. van Rhee, ed., 2005).

⁴⁴¹ Cf. P. Oberhammer & T. Domej, [*Powers of the Judge*] *Germany, Switzerland and Austria*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 295.

pronounce legal rights applicable to the controversy.⁴⁴² They have no authority to investigate. It is wrong to characterize German civil process as investigative or inquisitorial.

In structuring lawsuits German judges identify legally material facts in dispute. American lawyers recognize this activity as issue narrowing. It is for them an activity largely the province of lawyers and not of judges. German judges clarify more than just issues; they clarify what parties want. American lawyers know no direct counterpart in formal process, but may recognize this as an activity that they engage in when negotiating settlements. No one knows better which facts the parties dispute and what the parties want than the parties themselves. Accordingly German civil process involves parties in lawsuits—it gives them voice—from the very first formal proceeding.

Judges work with parties to clarify those matters that are in dispute and to separate them from those matters that are not in dispute. It can take 90% of the time of the judge in the case just to find out from many inconsistent statements what it is that the parties really want to say, what they are contending, and what they think the case is really about.⁴⁴³

That German judges work with parties does not turn judges into inquisitors or convert private lawsuits into state-sponsored inquests. Throughout the process judges take pains to give parties opportunity to take positions on all material matters (*Recht auf rechtliches Gehör—right to be heard*). There are no surprise decisions.

To be sure, German lawsuits are not football matches between two opposing sides. They are not battles of champions. German judges do not preside passively over football matches to count points and to make sure that neither party plays dirty. That German judges are not passive does not make German proceedings any less competitive.

For readers drawn to common law sports analogies, we offer one for the civil law. A football match is only one of many kinds of competitive sports contests. While American civil proceedings are likened to football matches and American judges to passive football referees, we liken German civil proceedings to athletics contests, such as high jump, where referees direct contestants in their competition. The high jump is no less an adversary contest because referees check contestants in for the competition, change the order or location of events, direct contestants where to practice, tell them what they must do, show them where they are to begin their jumps, signal when they may begin, measure how high they have jumped, consider all available evidence to reach a fair determination that contestants have—

⁴⁴² See, e.g., HARRIET WEBER, VERGLEICH, SCHLICHTUNG, MEDIATION IN DEUTSCHLAND, REFERAT FÜR DIE GEMEINSAME TAGUNG FÜR RICHTERINNEN UND RICHTER SOWIE STAATSANWÄLTINEN UND STAATSANWÄLTE AUS ÖSTERREICH, BAYERN UND DER SCHWEIZ 10 (2007).

⁴⁴³ See Oskar Hartwig, *The Art of Framing the Case under English and German Rules of Pleading*, in OSKAR HARTWIG, TATSACHEN- UND NORMARBEIT IM RECHTSVERGLEICH: AUSGEWÄHLTE AUFSÄTZE 77, 86 (2003).

within the rules—cleared the bar, check all final measurements, measure and raise the crossbar, inform contestants when they have failed to correctly clear the high bar set, and determine whether they should have another chance to clear the bar.⁴⁴⁴

2. The Process in Outline

As we have seen, after reviewing the plaintiff's complaint, the court serves it on the defendant. At that time the court directs the parties either to appear for a preliminary hearing (*früher erster Termin*, “early first hearing”)⁴⁴⁵ or to engage in a further written preliminary proceeding.⁴⁴⁶ In the ideal case, following these preliminary proceedings, the court determines the case in a single, comprehensive, “concentrated” principal hearing (*Haupttermin*).⁴⁴⁷ Insofar as this occurs, it assumes that parties have been able to develop all necessary factual information beforehand.

Preceding the main hearing, or preceding the preliminary hearing if the court holds one, the court ordinarily confers with the parties on a possible settlement of the case.⁴⁴⁸ If settlement discussions fail, the court proceeds to the main or preliminary hearing as the case may be. In the event that the court conducts a preliminary hearing, it is not required to hold a subsequent main hearing, but may accomplish the two together.⁴⁴⁹ In the main hearing the court introduces the matter in dispute. Then the lawyers for the parties state what they are seeking. Usually plaintiff's lawyer refers to the complaint and reiterates the specific relief requested there. Typically defendant's lawyer refers to the answer and requests dismissal of the complaint. The court then discusses the case with the lawyers and hears the parties themselves. There is no prescribed order to these proceedings.⁴⁵⁰ Following these discussions, ideally the court proceeds in that same hearing to take such evidence as may be necessary to establish or defeat the requests of the parties. In fact, evidence taking often is deferred to a subsequent hearing or is not ever needed.

The goal of the preliminary hearing—or of written preliminary proceedings—is to identify the probably applicable legal rules, their constituent elements, and which facts material to their application are in dispute. Legal historians may note similarities to the oral pleadings of the early common law when pleadings were oral. Determination of which rules might be applicable is tentative. While the court is to direct attention of the

⁴⁴⁴ See USA TRACK & FIELD, 2009 COMPETITION RULES, Rules 125-127, 142, 148, 180-182.

⁴⁴⁵ § 275 ZPO.

⁴⁴⁶ § 276 ZPO.

⁴⁴⁷ § 272(1) ZPO.

⁴⁴⁸ § 278(2) ZPO.

⁴⁴⁹ HEINZ THOMAS, HANS PUTZO, KLAUS REICHOLD & RAINER HÜBTEGE, ZIVILPROZESS-ORDNUNG § 272 margin no. 3, at 448 (29th ed. 2008).

⁴⁵⁰ See HANS-JOACHIM MUSIELAK, MEIN RECHT VOR GERICHT 46-48 (1995).

parties first to the factual elements of those rules most likely applicable, the parties are not precluded from returning to those rules not first considered should it appear later that they are relevant.⁴⁵¹

In the preliminary hearing the court calls attention of the parties to those facts material to possibly applicable rules on which the parties do not agree. The court asks the party bearing the burden of proof for that element to present the necessary proof. The court may also alert the other side that at some point that, if the proposing party presents what it needs to, the burden of proof may shift to it. No longer will it be sufficient to challenge the proponent's proof, but it will be necessary to bring its own affirmative evidence. A classic example is product liability.⁴⁵² Once a plaintiff makes certain showings, then it is up to the defendant to bring forward evidence that rebuts that showing. This is one way the German system avoids resort to discovery.

Process continues as a cooperative rather than combative undertaking to refine the points in dispute through finding points of common ground on which the parties can agree and to locate those points on which they disagree. Only when facts are found to be material and in dispute does the court—on party application—order taking of evidence; separate direction for each item of evidence and for each witness is required. In German civil process taking of evidence is secondary; hearing of parties is primary. It is to the parties in person—and not to their lawyers—that the court directs its first attention, either in the early hearing just discussed or in a main hearing to which we now turn.⁴⁵³

3. The Oral Hearing and the Right to be Heard

The main hearing is obligatory and oral.⁴⁵⁴ It is the crucial core of German civil procedure.⁴⁵⁵ The Code of Civil Procedure requires the parties to conduct their case orally before the court. The parties begin the oral hearing by addressing their requests for relief to the court. They are to present their positions on the legal controversy with respect to both fact and law. While they may refer to documents, they are not to read from them. Parties, even when represented by

⁴⁵¹ Cf. § 282 ZPO (*Rechtszeitigkeit des Vorbringens*).

⁴⁵² Andrew Hammel, *Review* [of McClurg *et al.*, *Practical Global Tort Litigation*], 56 AM. J. COMP. L. 226, 227 (2008). ("Germany has a specific products-liability statute, but German courts still mainly apply doctrines developed in a line of precedent started with the *Fowl Pest* decision of 1968. BGH Decision of Nov. 26 1968, BGHZ 51, 91. The *Fowl Pest* line of cases, which interprets the language of the famous Section 823(1) of the German Civil Code, technically requires the plaintiff to prove negligence. However, liability is presumed once a defect is proven, subject to the manufacturer's rebuttal by careful documentation of its quality-control and "product observation.")

⁴⁵³ HARRIETT WEBER, at 12.

⁴⁵⁴ §§ 128, 272 ZPO.

⁴⁵⁵ THOMAS-PUTZO-REICHHOLD § 272 margin no. 1, at 447 ("*Kernstück*").

counsel, are allowed—and sometimes required—to address the court.⁴⁵⁶ The court is not permitted to rest its decision in the case on matters not addressed in an oral hearing.

Before the 1877 Code of Civil Procedure in some German states civil proceedings were written. The Code of Civil Procedure prefers oral over written proceedings. It reflects a decision that the oral proceedings better facilitate factual clarification and case structuring. A list of benefits of oral proceedings includes:

1. Truth-finding. Oral proceedings permit a better and immediate impression of the presentations of the parties and of the testimony of witnesses and experts. The court can, and frequently does require personal appearance of the parties; parties cannot delegate that responsibility to their lawyers.

2. Process expedition. By bringing the parties together for discussions of the case and for testimony of witnesses a faster clarification of facts and law is possible than is the case in purely written proceedings.

3. “Equality of Arms” (*Waffengleichheit*). Particularly in the lowest court, where parties may not be represented by counsel, oral hearings even the playing field. In all cases, however, the immediacy of the oral discussions and the active participation of the judge makes possible downgrading the importance of differing levels of presentation and promotes basing decision more on the merits of the case.

4. Dispute resolution. In oral hearings judges facilitate settlement by structuring the matters in dispute. Structuring the case helps the parties reach a settlement of the case more expeditiously and more closely aligned with their legal rights. The parties can see which rules will determine the decision and which facts are essential. Some judges consider structuring one of their most important judicial duties. The judge is to promote settlement at all times during the case. Should promotion of settlement conflict with the judicial rule, the judge may refer the parties to another judge for settlement negotiations as such.⁴⁵⁷

5. Public resolution. The public can attend and observe oral hearings. The public cannot do that when proceedings are written.⁴⁵⁸

Hearing of the Parties (die Parteianhörung)

Most features of German civil procedure have their counterparts in American civil procedure; while those counterparts may have different foci or function somewhat differently, parallels are nonetheless clearly recognizable. The German *Parteianhörung*, the hearing of the parties, on the other hand, has no counterpart in American civil procedure. In the hearing of the parties, the

⁴⁵⁶ § 128 ZPO.

⁴⁵⁷ § 278(1)+(5) ZPO.

⁴⁵⁸ MANFRED WOLF, *GERICHTLICHES VERFAHRENSRECHT* 155 (1978).

judge discusses the case directly with the parties and their lawyers. These discussions are not evidentiary. They do not constitute taking testimony of the parties. The judge clarifies the contentions of the parties and draws out the material issues in dispute between them. In short, the judge does what historic common law pleadings were, supposed to do: to ascertain the subject for decision.

German civil procedure distinguishes between hearing parties and taking their testimony for purposes of proof. The former is a requirement and feature of every case; the latter is exceptional and usually occurs only if no other evidence is available. The choice of words in German conveys the difference: the verb *anhören*, as in *Parteihöring*, means to listen; the verb *vernehmen*, as in *Parteivernehmung*, means to examine. The physical setting in which the two take place likewise demonstrates the difference. In hearing parties, parties sit with their lawyers and discuss the case in free interchanges with judge and lawyers. In taking of party testimony, on the other hand, parties are called to the witness chair, seated between the two sides, instructed in their obligation to tell the truth, may be sworn and are questioned formally by judge and lawyers.

A hearing of the parties personally is not mandatory; it may take place through lawyers for parties. The Code provides, however, that the court should on its own motion direct personal appearance of parties whenever personal participation is likely to assist in clarification of facts. Even in that case, however, if a party is at a great distance from the courthouse or there is some other important reason not to presume a party's personal appearance, the court should refrain from such an order.⁴⁵⁹

German civil procedure puts the hearing of the parties at the beginning of the first oral hearing—right after their lawyers summarize their claims. The idea is that the persons best informed about the facts of the case are, as a rule, the parties themselves. And it is the facts of the case that are the focus of court proceedings.⁴⁶⁰

Surprising as it is for readers from non-common law jurisdictions, at no time do parties routinely in American civil procedure ever meet together with the judge or jurors to discuss the case. While American civil procedure zealously safeguards a right to a day-in-court, that right secures only formal presentation of the parties' case at trial or in written submissions of their lawyers to the court. Both types of presentation have all the spontaneity and interaction of a scripted press release. Moreover, most factual disputes must await resolution at trial; only if there is no genuine issue of fact is there even possibility of "short-circuiting" the cumbersome pretrial discovery.⁴⁶¹ Today, since trials have vanished, in the

⁴⁵⁹ § 141(1) ZPO.

⁴⁶⁰ Hans Dieter Lange, *Parteihöring und Parteivernehmung*, 2002 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 476.

⁴⁶¹ See JONATHAN B. WILSON, OUT OF BALANCE: PRESCRIPTIONS FOR REFORMING THE AMERICAN LITIGATION SYSTEM 31 (2005).

vast of majority of cases, parties never get to tell anyone other than their lawyers, or their adversaries' lawyers their side of the case.

In German civil justice hearing the parties at the outset of the case serves important functions. These include: clarification of factual assertions of parties; involvement of parties in process, thus allowing them to “blow off steam and promoting their acceptance of the outcome; and facilitation of settlements.

Clarification of factual assertions is the most important of these. With parties present, the judge can learn directly whether parties understand what lawyers are saying on their behalf. From parties—the persons most likely to have first-hand knowledge—the judge can garner a fuller understanding of fact contentions. From the parties the judge understand can receive correction. Discussions with lawyers alone lack the same opportunities for immediate correction and supplementation. Lawyers for the parties may give a one-sided version of facts in the case. Removing the lawyer filter reduces opportunities for manipulation of proceedings and raises the standing of process in public perception.⁴⁶²

Discussions with parties can lead to a broadening of the field of factual consideration. There may be more to the case than is apparent on the surface of the pleadings. Here, judges must be careful that they do not cross the line and consider matters that the parties have not placed before the court. German civil procedure does not accept civil judges conducting investigations *ex officio*.⁴⁶³

Beginning judges receive formal classroom instruction and training from their colleagues in how best to hear parties. Different judges have different styles in hearing parties. Most adjust their approaches to needs of individual cases. Best practice avoids questions that focus on eliciting short, specific answers to questions directly raising elements of the legal claim; best practice encourages witnesses to state their testimony in unstructured narrative answers, i.e. free statements of the case. Best practice, however, requires care that parties not be allowed to wander too far from the subject of the lawsuit and thus squandering everyone's time.⁴⁶⁴

To Americans accustomed to formal exchanges between judge and counsel, the hearing of the parties to clarify issues is remarkable. By American standards, these hearings are intensely interactive, comparatively cooperative, and informal.⁴⁶⁵ These discussions are neither American-style discovery nor American-style trial. Their focus is on identifying material issues of fact that are actually in dispute between the parties; it is not on uncovering unknown facts or on proving known ones or on possible presentation of a narration later. The judge probes potential claims and facts needed to support the claims. In essence, the

⁴⁶² Lange, *supra* note 460, at 477-478.

⁴⁶³ Lange, *supra* note 460, at 479.

⁴⁶⁴ Lange, *supra* note 460, at 479.

⁴⁶⁵ See PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 256-259 (2004) (describing them at length).

judge turns to the party and the party's lawyer concerned and asks: "Now on this issue are you seriously going to dispute the fact?"

The Obligation to Elucidate Facts Truthfully (§ 138 ZPO)

When the judge turns to the parties with a question whether they intend to dispute an asserted fact, they are not allowed to respond: so let the other side prove it. Parties are not permitted the deft avoidance possible in response to American written requests to admit. Section 138 ZPO imposes on parties a duty of cooperation in clarifying the issues in the case. Section 138(1) ZPO requires parties to give declarations concerning facts completely and truthfully; section 138(2) ZPO requires that they state their positions with respect to facts asserted by the opponent.

Section 138(3) ZPO provides that an asserted fact is to be treated as admitted if the other party is silent and fails to contest it. Section 138(4) ZPO provides that only in limited circumstances does a declaration of lack of knowledge serve to put a matter in dispute. Moreover, section 138(2) ZPO is interpreted to require that a mere denial of fact is not sufficient to put a fact in dispute. A party in most cases must explicitly contest the fact asserted, and if the fact asserted is known or could be known to the party, then the party must substantiate its contrary contention with facts known to it. Thus, if in the course of the hearing or already in pleadings, one party admits a fact asserted by the other, there is no need to prove the fact. In relatively short order the judge can inform the parties of the applicable legal rules and get their agreement on which matters of fact are material to those rules and are in dispute.

The Right to be Heard (Recht auf rechtliches Gehör)

Clarification of which disputed facts are material presupposes that court and parties have a good idea what the applicable legal rule is and what its elements are. Section 139(2) ZPO recognizes this when it requires that the court call to the parties' attention any legal rule that it intends to apply.

Modern American and German civil process share an aversion to surprises. The guiding principle of American process is: no surprises at trial, no surprise witnesses and no surprise testimony.⁴⁶⁶ Surprises undercut the right to a fair hearing. How the two systems go about preventing surprises helps understand differences between them. The American rule is directed to lawyers and to surprise at trial. Parties have panoramic discovery so that they may know all that there is to know about the case. If they fail to take

⁴⁶⁶ David A. Sklansky and Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L. J. 683, 713 (2006). The golden rule of German process is: surprise decisions are forbidden. Helmut Rüßmann, *Grundregeln der Relationstechnik*, <http://ruessmann.jura.uni-sb.de/zpo2004/Vorlesung/relationstechnik.htm>.

advantage of this opportunity, they have only themselves to blame for resulting surprises. If they fail to appreciate the significance of information that they uncover, or fail to present that information to the court, the fault is all theirs. If unthinking a plaintiff fails to present evidence on an element material to the claim, the court on motion of the defendant will dismiss the case halfway through trial for failure to prove a prima facie case without ever giving plaintiff an opportunity to make up the oversight.

The German rule of § 139 ZPO, on the other hand, is directed to judges. It fulfills the right to be heard guaranteed by the German constitution. The rule requires that the court decide no material and disputed issue without first giving each side an opportunity to address that issue. If a plaintiff overlooks an element of claim, it is the judge's duty to call that issue to the party's attention; if the judge fails in that duty, the forgetful party has ground for appeal. The American practice of dismissing the case without giving opportunity to address the overlooked issue violates fundamental human rights guarantees. Civil justice is a process designed through a fair proceeding to reach a materially just result. Allowing one party to win because of the oversight of the other makes process a game and, might we say, civil justice "uncivilized"?

Judge's Duty of Elucidation (§ 139 ZPO)

Section 139 ZPO is said to be the Magna Carta of German civil procedure.⁴⁶⁷ It requires that judges discuss all aspects of cases with the parties thoroughly. It eliminates surprises more completely than discovery and does so without discovery's costs in time and money. Section 139(2) ZPO requires that the judge call to a party's attention and give the party an opportunity to comment on any non-trivial issue that the party has apparently overlooked or has considered insignificant. The same applies where the judge's understanding of a point of fact or law differs from the understanding of a party.

Authority for judges facilitating party presentations of their cases predates the 1877 Code. Over time that authority, which once might be little exercised in judges' discretion, has been transformed to a duty⁴⁶⁸ that sometimes is seen as nearly absolute.⁴⁶⁹ In its current formulation section

⁴⁶⁷ Ekkehart Reinelt, *§ 139 ZPO – Die richterliche Prozessförderungspflicht in der Praxis*, BAYERISCHER ANWALTBRIEF 1 (Nov, 2007) at http://www.anwaltsbrief.de/Bayern/Artikel/2007-11_Paragraph_139_ZPO_Richterliche_Prozessfoerderungspflicht.html (citing (Baumbach/Lauterbach 65. Auflage 2007, Rd.-Nr. 1).)

⁴⁶⁸ See EGBERT PETERS, *RICHTERLICHE HINWEISPF LICHTEN UND BEWEISINITIATIVEN IM ZIVILPROZESS* (1983) (the book's topic is the development of the requirement largely since 1877).

⁴⁶⁹ See Ekkehard Schumann, *Die absolute Pflicht zum richterlichen Hinweis*, in *FESTSCHRIFT FÜR DIETER LEIPOLD ZUM 70. GEBURTSTAG 175* (Rolf Stürmer *et al.*, eds., 2009).

139 imposes on the court the duty to clarify with the parties' the intended basis for decision before deciding. The section reads in English translation:

(1) The court is to discuss with the parties the relevant facts and issues in dispute from a factual and legal perspective to the extent reasonable and to raise questions. It is to cause the parties timely and completely to declare their positions concerning all material facts, especially to supplement insufficient references to the relevant facts, to designate the means of proof, and to set forth claims based on the facts asserted.

(2) The court may base its decision on a claim, other than a minor or auxiliary claim, on a point of fact or law which a party has apparently overlooked or considered insignificant only if the court has called the parties' attention to the point and given opportunity for comment on it. The same provision applies if the court's understanding of a point of fact or law differs from the understanding of both parties.

(3) The court is to call attention to the court's inclinations which exist with respect to those points which may be noticed on the court's own motion.

(4) [Guidance⁴⁷⁰] according to this requirement [is] to be communicated and documented in the record as early as possible. Their rendition can be proven only through the content of the record. Only evidence of forgery of the record can be received to contradict its contents.

(5) If a party is not prepared to respond immediately to a judicial request for clarification the court on the motion of the party may set a time limit for further clarification by written argument.⁴⁷¹

Judges are to give guidance as early as need becomes apparent and whenever they think that it might be helpful. Judges have freedom in how and when they give guidance. They may give it in writing before hearings or orally during hearings. In either case, judges are to include in the case protocol a writing recording the guidance, if given orally, or the guidance itself, if

⁴⁷⁰ In original translation "hints and feedback."

⁴⁷¹ Section 139 ZPO, *as translated* in PETER MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 167-168 (2004).

given in writing. Judges are to serve the written record of the guidance on the lawyers.⁴⁷²

Many judges give guidance frequently, while others do not. Frequency of use is largely a matter of judges' personal styles. Judges who prefer oral hearings often prefer oral guidance in order to intensify collaboration in the hearings. Other judges prefer to give guidance before hearings in order better to structure hearings. Lawyers need not await judicial interventions, but may at any time ask judges for guidance.⁴⁷³

While guidance has long been possible, originally it was not mandatory. It first became mandatory in those courts where parties appeared without lawyers. Today it is mandatory in all courts. The duty safeguards each party's right to a fair hearing. It protects the party from choice of a bad lawyer or of a good lawyer having a bad day. At first blush it seems superfluous when parties are represented by professionals. Can't lawyers be expected to know the elements of cases? Surely they can, but not all lawyers are good lawyers and even good lawyers may not be able to anticipate the direction of judges' thought processes. Resolution of cases should not depend upon which party is able, either through money, knowledge or luck, to hire the better lawyer.⁴⁷⁴

The obligation of judges to discuss cases fully with parties does not turn judges into inquisitors. It does not authorize judges to investigate cases. Parties still control whether cases continues and what evidence courts take. Judges are to be neutral facilitators for both parties.⁴⁷⁵

4. Taking of Proof

The court's discussion of facts can obviate need to take evidence in whole or in part. Should a party, in course of proceedings, oral or written, admit a fact asserted by the other, there is no longer need to take proof of it. Should a party assert a fact, if the other party remains silent, that party is deemed to have admitted it.⁴⁷⁶ The latter party's denial ordinarily is not sufficient to put it in dispute and to require taking proof.⁴⁷⁷ The statute is interpreted to require that a

⁴⁷² This is also necessary to avoid unfounded appeals, since there no verbatim transcript of proceedings is made in Germany as is the practice in the United States

⁴⁷³ See, e.g., *MCCLURG et al*, *supra* note XXX, at 62-63.

⁴⁷⁴ ROLF STÜRNER, *DIE RICHTERLICHE AUFKLÄRUNG IM ZIVILPROZESS* 19 (1983). Common wisdom in common law countries is to the contrary. See, e.g., Justice Antonin Scalia, in "Ethics in America: 8. Truth on Trial," recorded February 13, 1988 (Public Broadcasting System, 1989) at <http://www.learner.org/resources/series81.html?pop=yes&pid=198> [53:30] ("The only alternative [to the adversary system] is to go to the inquisitorial system and have an investigating judge. And then you are going to win or lose depending on how good a judge you happen to have gotten. At least when you pick your lawyer, you know that if he's bad, it's your fault.")

⁴⁷⁵ STÜRNER, *DIE RICHTERLICHE AUFKLÄRUNG*, *supra* note 474, at 14-18.

⁴⁷⁶ § 138(3) ZPO.

⁴⁷⁷ § 138(4) ZPO.

party must explicitly contest a fact asserted to put it in dispute and, if the fact asserted is known or could be known to the party, then the party must substantiate its contrary contention with facts known to it.⁴⁷⁸ Thanks to such structuring, many cases conclude without oral testimony of witnesses. This may be true of well more than half of all cases filed.

When it comes to taking testimony of witnesses, German civil justice is just-in-time justice. Judges take proof only on party request and only after a judge so orders.⁴⁷⁹

Where witness testimony is taken, framing issues helps focus and expedite testimony that is taken. Judges are to order taking proof only when necessary to convince them of the truth or untruth of particular facts that are disputed by parties and that are material to their decision. Judges are not to take proof of undisputed facts, facts generally known to them, facts presumed by statute to be true until the contrary is proven, favorable facts established by the other party's submissions, disputed material facts established by undisputed facts, disputed facts the truth of which the judge is convinced of without taking evidence, and facts not necessary for the judgment (e.g., two alternatives for granting relief are allowed and one is already acknowledged).

Judicial control of proof-taking promotes efficiency and protects privacy of parties and non-parties alike. Process takes proof only when relevant to material disputed facts. Parties to the lawsuit and non-parties as well are spared unnecessary but expensive intrusions.

Judicial control of proof-taking does not prevent parties from insisting on taking evidence that believe is relevant to deciding material issues in dispute. Many German judges of first instance courts believe that a sure route to reversal on appeal is rejection without strong justification of application to take evidence. Such refusals count as a violation of the judicial duty of elucidation under ZPO § 139.

Witness Testimony

American lawyers can recoil at the idea that parties' lawyers do not take the lead in questioning witnesses. How are they to present their most persuasive case? But in German process, judges are not looking to be persuaded to a subjective position. Rather they need to know for their application of law, whether a particular witness has information that supports or undermines their objective determination whether a material fact in dispute needed to fulfill an element of a legal rule is true or not.

The format of witness testimony is intended to facilitate objective determination of fact by courts. In Germany, unlike in the United States, parties are not to coach witness beforehand. Judges and lawyers are to meet witnesses

⁴⁷⁸ See § 138(2) ZPO.

⁴⁷⁹ See generally John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 824 (1985).

for the first time in court. German judges believe, as American lawyers do too, that information obtained at first questioning from witnesses is more likely to be accurate.⁴⁸⁰ Again in Germany, and unlike in the United States, witnesses are not to be asked leading questions that suggest answers, but are to be given open-ended questions. Finally, in Germany, and unlike in the United States, judges are to direct witnesses toward material facts that are in dispute and are not to sit silently while witnesses discussing other matters not relevant to determination of the case.

Party Testimony

German civil process, as we have seen, historically has preferred hearing parties as disputants stating their positions, rather than as witnesses testifying on material disputed facts. The Code of Civil Procedure has intricate procedures that govern taking party testimony. It brings them together in a special section: Title 10, Proof Through Party Testimony.⁴⁸¹ While the historic preference remains, for decades restrictions on party testimony to disputed matters of fact have been relaxing. One factor contributing to this breakdown is increasing recognition that often only parties know facts crucial to determination of lawsuits. Fairness requires that both sides have opportunity to present testimony on material disputed points, even when for one side, only party testimony is available. Decisions of the European Court of Human Rights, although directed to other nations' proceedings, have accelerated this development.⁴⁸² As a result, in Germany today, party testimony is no longer rare but routine.

Deferred Issue Decision-making

Case structuring and issue framing are powerful tools for efficient conduct of civil justice, without the injustices of common-law single-issue pleading, because German judges defer final decisions of individual aspects of cases until they decide the case as a whole. German judges decide finally no issues before their time. The critical moment in a German lawsuit is how law applies to facts as of the date of the last oral hearing. German parties do not have to commit irrevocably early in the lawsuit to a single theory of the case or to a single governing rule. While judges are authorized to reject evidence for being offered too late, and often do that, their enthusiasm for such expediting measures is tempered by their ever-present § 139 ZPO duty of elucidation that guarantees parties their constitutional right to be heard.

⁴⁸⁰ Cf. THOMAS A. MAUET, PRETRIAL 19 (7th ed. 2008).

⁴⁸¹ §§ 445-455 ZPO.

⁴⁸² See PETER MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 291-293 (2004) (noting the decision in *Dombo Beheer B.V. v. The Netherlands*, 18 EHHR 213 (1994); P. Oberhamer & T. Domej, [Party Interrogation as Evidence]: *Germany, Switzerland and Austria*, in EUROPEAN TRADITIONS IN CIVIL PROCEDURE 255 (C.H. van Rhee, ed., 2005).

While German judges do not finally determine issues until the last oral hearing, along the way, they decide many issues tentatively. For example, where one party has produced credible evidence that establishes a particular fact required to apply a particular rule, and the other party has neither impeached that evidence nor offered an alternative, the court may tentatively take the element as having been proven. Consequently, it is not unusual for lawyers to ask judges “how the court sees the case for the time being.” It is proper for judges to let parties know where their cases are going. These judicial comments are known as “process-directing court comments” (*prozessleitende richterliche Hinweise*). They help lawyers assess chances of winning and costs of continuing.⁴⁸³ German civil justice thus works toward eliminating surprise from process; courts are not to let parties overlook matters material to their decisions.⁴⁸⁴

German civil justice works to sequence issue deciding in a manner that is both efficient and just. Often applicable legal rules cannot be read directly from statute. Instead, it may be necessary to search statutes for rules, compare rule to facts, to revisit statutes in light of facts, and to examine facts again in light of rules. This process of going back and forth was identified in the first part of the twentieth century and has since assumed a place in the description of law application in Germany.⁴⁸⁵ It means that in German proceedings the legal norm as the basis of the claim can emerge for the first time late in the process.⁴⁸⁶ It is what American lawyers do to develop their “theory of the case.”⁴⁸⁷

Fostering Settlement

At every stage of proceedings German judges are obligated to foster settlement of the case or parts of it.⁴⁸⁸ As in the United States, whether a case settles is dependent upon particular interests and concerns of parties.

In Germany the process of preparing cases for applying law to facts promotes settlement. As process proceeds, courts are structuring them for eventual decision. Judges, as they clarify cases, inform parties which claims are stronger and which are weaker; they identify the proof needed. Judges, in helping parties see how their cases are likely to be decided, must do so

⁴⁸³ See ANDREW J. MCCLURG, ADEM KOYUNCU, & LUIS EDUARDO SPROVIERI, PRACTICAL GLOBAL TORT LITIGATION: UNITED STATES, GERMANY AND ARGENTINA at 62-63 (2007).

⁴⁸⁴ § 139(2) ZPO.

⁴⁸⁵ See OSKAR HARTWIEG & H.A. HESSE, DIE ENTSCHIEDUNG IM ZIVILPROZESS: EIN STUDIENBUCH ÜBER METHODE, RECHTSGEFÜHL UND ROUTINE IN GUTACHTEN NUND URTEIL at 78-79 (1981) („Die Lehre vom Pendelblick“).

⁴⁸⁶ Dieter Stauder with David Llewellyn, *Oskar Hartwig's Thoughts on the English Legal System*, in INTELLECTUAL PROPERTY IN THE NEW MILLENNIUM: ESSAYS IN HONOUR OF WILLIAM R. CORNISH (D. Vaver and L. Bently 2004) 47, 51.

⁴⁸⁷ See, e.g., THOMAS A. MANUET, PRETRIAL 21 (7th ed. 2008) (“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’”).

⁴⁸⁸ § 278(1) ZPO.

without undermining parties' confidence in judicial impartiality.⁴⁸⁹ How strongly judges signal to parties the direction of likely resolution in any given case is a matter of style of individual judges as well as their assessment of how such signaling would contribute to conclusion of the case (both in speed and justice). Explicit signaling undercuts confidence in impartiality; it can be counterproductive of settlement. While clear signaling of probable loss sends a powerful message to potential losers to settle, it also encourages likely winners *not* to settle. That message is reinforced by the fee structure, which in the case of settlement, means not only that both parties must now bear their own lawyer's fees, they must now pay their lawyers an additional settlement fee.

5. Process in *Roh v. Doh*

Roh and Doh control which matters the court considers, through their pleadings, and which evidence it takes, through their applications, but the court has charge of the process and determines when it considers which matters. German court proceedings are less rigid than are their American counterparts: there is no certain sequence of events. Contacts among judge, parties and lawyers are less formal. They may contact each other without all parties being present. In Germany information about case and parties can be more freely exchanged than in the United States where there is greater concern that one party speaking with the judge out of presence of the other might compromise the judge's impartiality. (Such suspect conduct is called *ex parte* communication.)

In Chapter 3 Mary Roh met for the first time with her lawyer Hahn. She has now returned to review the complaint that he has drafted and to ask what is next.

Roh: OK. The complaint looks fine, counselor. So tell me, how long this is all going to take?

Hahn: The timing is pretty predictable: I would be surprised if it lasted as long as six months; it might be done in three.

Roh: Oh. You think Doh will give in?

Hahn: No. But the case is a simple one. It's basically your word against Doh's word. I can't imagine a judge in Munich letting it sit on his or her desk for more than three months. So the judge needs to hear both sides. The judge will have our complaint served and should schedule an early first hearing with thirty days. If it turns out that Doh has no witnesses to name, the judge might even finish it that day.

Roh: Do I have to go to the hearing?

⁴⁸⁹ See MURRAY & STÜRNER, *supra* note 482, at 490..

Hahn: If you lived in Munich, in case like this, you probably would. In this case, since Berlin is pretty far from Munich, the judge might not require that you come. If you want the case ended fast, though, you should go. If the judge orders you to go, that's probably a sign that the judge thinks the case might be handled all in one hearing. If that is so, I am inclined to go with you; otherwise we might engage a lawyer in Munich to cover the hearing for me. Do you have a preference? If I go, we can get those costs back.

Roh: If we get a local lawyer, won't we have to pay that lawyer something? After we have done that, will I really save much?

Hahn: It still would probably be a bit cheaper for you. A couple of hundred Euros.

Roh: I guess we can decide that when we see what the judge orders. So what should I expect at the first hearing?

Hahn: When you get to the court, there will be places for you to sit outside the courtroom. You may see Doh there. There might be other people. The case is public, so anybody can come in to watch what happens. It's not too likely that anyone else will be there besides you and me, Doh and probably a lawyer for Doh. We will be told beforehand and can confirm from the schedule posted just when and how long the hearing will be. I would guess it will probably be an hour. If it is any longer than that, that will be another sign that the judge wants to handle this all in one hearing.

Roh: What will it look like there? I have never been in a lawsuit before.

Hahn: It's pretty relaxed. It's not at all like what you may have seen in American movies. We will be called into the courtroom by an announcement. The judge will enter; we will stand as the judge enters. The judge will sit at a fairly simple table, not elevated above the rest of the room, or if elevated, only slightly. The Munich court has only a handful of the old ceremonial courtrooms with the fancy judge's bench like you see in U.S. films and the popular court shows. In front of the judge's table there will be a table for our side and a table for Doh's side. In the vicinity there will be a chair for a possible witness. Behind us will be a couple of rows of chairs for the public. The judge and the lawyers will be in robes. The lawyer for Doh may be pulling the robe on just as we come in. The judge may have on blue jeans under the robe. But the judge will be sure to have on a white tie.

Roh: So what happens next?

Hahn: The judge will call our matter and make sure that everyone summoned is present. The judge will ask any witnesses to step outside into the hall.

Hahn: The judge will then discuss the case with all of us. The judge will first state the basic nature of the case. That means here, that you are asking for €60,000 Euros back on a loan or on a conditional gift. Remember that the judge has already read our complaint. The judge may speak directly to you or to Doh and ask you questions about the case. If you want to ask the judge a question, and the judge is not speaking with you, then tell me and I will ask the judge to let you ask.

Roh: What is the judge looking for? What is the judge going to ask me about?

Hahn: Basically, the judge wants to know what it is that you want from the court. The judge will be looking to understand not only what you want, but will discuss with us the possible legal grounds why you think you are entitled to the money. The judge will be

looking to understand how we plan to prove your claim for the money. The judge will turn to Doh and Doh's lawyer to see why they think you are not entitled the money.

Roh: So the judge is already deciding the case?

Hahn: No. What the judge is doing is trying to find out what the court needs to decide this case and what is available to help. The judge will also be interested in whether there were any witnesses to your conversation with Doh when he asked for the money.. The judge will probe to figure out what you and Doh agree happened and about what you disagree. For example, for the judgment, the court needs to determine that you in fact paid Doh €60,000. Probably that can be handled perfunctorily. But suppose Doh claims the money was never paid. Or suppose Doh says that all that money went to DohSon Honda LLC and did not benefit him at all. Then the judge would have found a material issue of fact in dispute between the two parties that the court will have to decide.

Roh: OK.

Hahn: In the course of all this, the judge will speak freely with the lawyers and their clients. They will speak nearly as freely with the judge. When one of us makes an assertion that might be debated, the judge might turn to you or to Doh and say, you don't disagree with that, do you? If the judge does that, you must answer truthfully. But I will let you know if I have a problem with your answering such a question.

Roh: Good.

Hahn: All of this should not take more than ten or twenty minutes. At the end of the discussion, the judge will ask the lawyers to state their formal requests. We will say, that our request is that the court order Doh to pay you the €60,000 plus interest. Doh will say that our complaint be dismissed and that we pay costs.

Roh: I see.

Hahn: We will then be given an opportunity to state the gist of our cases. I will make our presentation as full or as brief as seems appropriate in light of what the judge has already done up to that point. Were the judge to ask us to make formal applications before the judge discusses the case with us—and many judges do it that way—then I might be inclined to state the case with more particularity. Even still, however, I will make free reference to our complaint.

Roh: OK

Hahn: Insofar as Doh says anything in his answer or in the hearing with which we do not agree, we need to be sure—at least if what he says is material tin the case—to state what it is that we disagree.

Roh: Why is that? What does that mean?

Hahn: The judge will take as true anything that we do not dispute. The judge is looking for what we lawyers call, all the elements of your claim. That's why I said, if it's material, we need to take issue if the statement is untrue. Moreover, it is not sufficient for us to say that we disagree. We must state *why* we disagree. We are supposed to provide a factual basis for disagreement if there is one that we could be expected to know.

Roh: So what's the point of all this?

Hahn: At the end, the judge should have a pretty good idea which rules apply to this case and which facts need to be proven to establish our claim to €60,000. The judge is likely to turn to me and say, "how counselor, do you plan to prove that?" After all, you weren't at the Rob—Doh meeting; indeed no one besides the parties was there.

Roh: And how to you answer?

Hahn: I will answer, I plan to prove the loan through the testimony of my client, Mary Roh, as witness. I would like to request that you make a formal proof decision (*Beweisbeschluss*) that the court take her testimony as witness. I will then state the legal grounds for your testifying as a witness.

Roh: Hold on. Haven't I just been telling me all about the case?

Hahn: Not as a witness. It used to be that we hardly ever allowed parties to testify as witnesses. They were heard only as parties. Their statements could not constitute proof. No, in cases like these, where there are no other witnesses, we permit parties to testify. But then you will testify from the witness chair in front of the court, you may sworn, and in general everything will be like a witness testifying. You won't speak from our table.

Roh: So does the judge grant the request?

Hahn: These days, in all likelihood. Although the judge will not do so until the judge gives Doh and Doh's lawyer a chance to disagree. But the judge then will likely grant the request. Doh's lawyer will probably place a similar request to take the testimony of Doh. The judge will grant that request, too.

Roh: So will I have to testify then?

Hahn: It could be. If time is available, it may well be. But if either Doh or I have a problem with that, we probably will arrange for testimony in a couple of weeks.

Roh: Would you please describe for me what that would be like?

Hahn: The judge will call you to the witness chair. He will explain to you that you must tell the truth. You won't be able to talk with me while you are testifying. The formality will be greater than in the hearing.

Hahn: The judge will start by asking you open-ended questions. You can answer freely. If you are not going in the direction the judge is interested in, the judge may ask a more focused question. Again, however, the judge is expecting that you answer fully and not with mere yes or no answers. In any case, do not answer just with a nod of your head. Once you have given your answers, the judge is likely to ask some pointed questions about the moment in which you and Doh agreed on the money exchange. The judge will be looking for anything that might specifically establish this as a loan or conditional gift. The judge also will be looking to see whether what you say that might establish that should be believed.

Roh: So, I don't have to worry about cross-examination from Doh's lawyer like I see in the krimis?

Hahn: Well, there is no American-style cross-examination, although we do have the term in German now (*Kreuzverhör*), but what we have is not much like what you see in television, at least most of the time. Doh's lawyer and I both will be given a chance to

ask questions. But if the judge has done a good job, the judge will have already asked most important ones.

Roh: Good.

Hahn: As you go along in answering, do not be surprised if the judge from time to time speaks into a dictating machine what your answers are. Unlike in the United States, there is no one taking down word-for-word what you say. The judge is putting down the gist of what you testify. From time-to-time, the judge is likely to ask you to repeat what you said to make sure that the judge gets it right.

After this meeting Hahn files the complaint. The court reviews the complaint, serves it, and sets a date for an early first hearing and receives defendant Doh's answer.

Roh v. Doh is not a complex case. The judge would try to resolve it in a single hearing. In this case, where so much depends on creditability, the judge would order the parties to appear personally.⁴⁹⁰

Pre-hearing Settlement Conference

Prior to the first oral hearing, whether preliminary or main hearing, ordinarily there must be a settlement discussion.⁴⁹¹ Usually it takes place at the first meeting of court and parties.

Sometimes, even before the oral hearing, there are informal contacts through the court about settlement. Perhaps, after the hearing date has been set, one of the lawyers telephones the judge to change the date. The judge might use this opportunity to talk settlement. The judge might ask: "do the lawyers think that the parties want to settle? Is that a realistic hope? Are there obstacles to settlement?"

Informal conversations such as these give judges opportunity to learn information that may not be in the pleadings. For example, in this case, the judge might find out that John Doh, Sr. was wiped out in the financial crisis and that as result, DohSon Honda was sold and John Doh, Jr. lost his job. Doh may not have the money to pay back to Mary Roh. The judge might learn that Roh herself needs cash quickly. The judge could find out that formerly flourishing relations between the Roh and Doh businesses have come to an end, so that she need not concern herself with them in resolving the dispute. For judges to learn the actual effect of the proceedings and of their resolution on the parties helps judges better organize and conduct process. It is not considered improper.

If the parties do not reach a settlement through such informal contacts, the judge is required to raise settlement at the early first hearing. The

⁴⁹⁰ See § 273(2) No. 3, § 278(2) ZPO.

⁴⁹¹ § 278(2) ZPO.

discussion of settlement need not be clearly separated from the conduct of the early first hearing itself, but may be folded into it.

Early First Hearing

When parties and their lawyers arrive for the hearing, the judge will greet them and formally note their appearance in the record of the proceedings. Many judges lay great weight on developing a good rapport with the parties themselves. In well conducted proceedings, parties participate personally as much as through their lawyers; it is they who will decide whether to reach settlement, or to take the case to court judgment and possibly to one or two appeals.

At the outset of the hearing the judge will try to put the participants at ease. The judge will move directly to the possibility of settlement. The judge will speak with the parties positively that the process gives them a great chance, with the help of the court and each other, to put an end to the dispute in short order. The judge will make clear at the beginning, however, that under some circumstances the process could drag out a long time.

After that introduction, the judge will summarize the facts and the dispute and in just a few words give the material positions, observations and arguments of the parties to the lawsuit, which the parties already know from their respective filings. In *Roh v. Doh* the hearing would proceed along the following lines to say:

“It is the position of the plaintiff, Mary Roh, that she demands repayment of a loan in the amount of €60,000, while it is the position of the defendant, John Doh, Jr., that the plaintiff gave him the money as a gift.”

The judge will then point out, that the process is concerned with clearing up the question: “gift or loan,” and possibly, if a gift is found, whether plaintiff has effectively revoked the gift. Since only one of the different versions can be correct, in the end, the judge will counsel, the decision comes down to which of the parties better convinces the court of its version by producing evidence that court sees as plausible and trustworthy.

The judge might at this point give formal guidance to the parties and protocol it in the record. Possibly, the judge might have given guidance already before the hearing, in which case it would look as follows and would be included in the record

In the Matter of Roh v. Doh

Memorandum pursuant to § 273(1) Code of Civil Procedure

In preparation for the hearing to be held 2011, the Court pursuant to § 273(1) Code of Civil Procedure advises:

1. The plaintiff has the burden of proving that the allocation of funds was a loan under § 488 of the Civil Code; the defendant does not have to prove that its legal basis was that of a gift under §§ 516 ff. of the Civil Code.
2. Should the Court not find the plaintiff's evidence to be fully convincing does not mean that the plaintiff must lose the case. In that event the Court, accepting defendant's position that the payment was a gift, must review whether the plaintiff is allowed under § 530(1) of the Civil Code to revoke the gift on the ground of gross ingratitude.

Signed

Jakob Jung
Judge of the *Landgericht*

The judge would then, if necessary, ask the parties and their lawyers, whether they want to add anything to the facts as they have stated them. The judge will note in the record any additions.

The judge will remind Roh and Doh that a judicial decision of their case must be completely for one of them and completely against the other. Either the transaction was a loan, or it was not; either it was a gift that was conditioned, or it was a gift that was not conditioned. The judge will tell Roh and Doh that they can avoid the risk of a total loss by reaching an amicable settlement.

The judge will ask them, first plaintiff Roh, then defendant Doh, whether each in principle could imagine an amicable settlement. If one of them is open to settlement, the judge will welcome that and note it in the record of the proceedings; if either rejects the idea of a settlement at this early stage, the judge will ask why.

The judge has great freedom in carrying through the hearing. An experienced judge will allow the course of settlement talks to be determined by what Roh and Doh say, what they wish, which reservations and what criticisms they have. At this stage the judge has many opportunities to keep the conversation with the parties and their lawyers on track toward settlement, to overcome difficulties and to encourage them bring make their own proposals for settlement. If neither party puts forward a proposal, the judge might formally make one. That judge will include that proposal as further formal guidance that would accent the all-or-nothing nature that the judge's legal decision necessarily would have.

At this point, the judge might remind Roh and Doh of personal matters not material to legal issues, e.g., their families' long and still continuing

relationship through sickness, injuries, set-backs and successes. Even if the judge is unable to reach settlement in these discussions, the judge will gain a information that helps evaluate the parties and judge the entire dispute. If the settlement talk fails, because Roh and Doh are too far from each other in their ideas of settlement, the judge must note that in the record of the case.

As part of structuring the case for decision or settlement, the judge may focus the attention of the parties on the contract claim for repayment of loan rather than the claim for restitution of a gift. As the judge clarifies the legal and factual situation, which material facts are in dispute—legal or factual—will become clearer. As which material facts are in dispute become clearer, settlement may be facilitated, for the criteria that determine the outcome will become more apparent.

Hearing and Evidence Taking When Settlement Fails

This is one case where the parties almost surely will be witnesses despite the usual reticence to rely on party testimony. In *Roh v. Doh* either party might call the other as witness. If they do not, this is the exceptional case where the judge can himself call a witness not nominated by the parties. It is available only to call parties and only if necessary to convince the judge of the truth or falsity of a material disputed fact.⁴⁹²

The judge will make a formal evidentiary decision (*Beweisbeschluss*) *ex officio* to take the testimony of parties under the special authority provided in order to be able to reach a conviction of the truth or falsity of the fact to be proven (loan or gift, possibly also, whether gross ingratitude of the defendant justifies revocation of a gift).

Before taking testimony party testimony, the judge will admonish each party to tell the truth and instruct the party that in his or her testimony he or she, like a witness, is under obligation to tell the truth, that he or she can be required to give an oath, and that he or she is subject to punishment if he or she intentionally or even negligently tells an untruth.

Experience teaches that every party, when formally testifying, at first does not deviate from his or her own position (stated in the pleadings and other filings). That makes it is the task of the judge to address peculiarities of facts and ask parties about them. Here, for example, why should the asserted conversation have taken place at the holiday party of the Honda dealers, why were there no witnesses to the conversation, why was there no receipt, why was there nothing in writing and no agreement about interest, why did Roh demand repayment only after her daughter broke off the engagement with Doh, what concrete use was Doh to make of the €60,000, and what use did he actually make of the money? The parties' lawyers are permitted to ask follow-up questions.

⁴⁹² § 448 ZPO.

The judge is required to note the substance of the testimony of the parties in the record of the proceedings. Unlike in American proceeding, there is no verbatim transcript made.

The judge must also decide in a formal decision whether the testifying party is to be sworn or be unsworn.

After taking the evidence, the lawyers must be given opportunity to take a position on the testimony. They can give their views, which witness on the basis of which circumstances the court should believe.

At this point the judge might, even if the judge has formed an opinion of the truth, again attempt to reach settlement. Then Roh and Doh will still not know and will be able only to guess how the judge would decide the case. At every stage of the proceeding the judge is require to work toward an amicable settlement.⁴⁹³ The judge will again remind them, that since for each party the dispute can end only in victory or defeat, they should think again about settlement while they still control the case.

The judge will tell Roh and Doh that if the case does end in judgment, it will not necessarily be over. They should think about what the future of the case is likely to be. The loser in the first instance will probably—in view of the large amount of money in dispute—seek a review of the case through appeal on law and facts (*Berufung*) to the Court of Appeals (*Oberlandesgericht*). The loser in that appeal might take a further appeal on legal grounds (*Revision*) to the Federal Supreme Court. That means that the dispute could still continue long into the future, the process through the different levels of appeal would on account of the high amount in dispute create significant costs, which the loser in the last appeal would have to pay for the consideration of the case by all of the courts.⁴⁹⁴ The final resolution of the dispute would thus remain for the moment uncertain. Notwithstanding Roh's daughter breaking off her engagement with the younger Doh—the background of the dispute—Roh and Doh well remain tied together until the lawsuit is finally concluded. This certainly is not a satisfactory solution for them.

Should there still be no settlement with mutual concessions to end the dispute, the judge would ask the lawyers for their requests. If they request no further taking of evidence, the judge would adjourn the hearing briefly, to think about the judgment and its formal justification, reconvene the hearing, and announce the judgment. The judge would have five weeks to write the formal judgment and justification and serve it on the lawyers.

C. Korea

⁴⁹³ § 278(1) ZPO.

⁴⁹⁴ §§ 91, 97 ZPO.

However just and impartial decisions judges delivers, Korean public does not shed suspicions, if the decision making process takes place from the place where their observation cannot reach: the office of judges. Seeing is believing. They want to see the whole process of decision making without any obstacles. That place is courtrooms.

Judge Tae-hoon Kang *et al.* (2008)⁴⁹⁵

1. The Nature of Korean Civil Process

Korean civil procedure is an indirect transplant of the German Code of Civil Procedure of 1877 and is typical of civil law systems generally: it has nothing that common lawyers think of as a trial.⁴⁹⁶ There is no single event where lawyers for parties present to the court their theory of the case. Instead, there are structured proceedings within which a court determines whether plaintiffs' assertions of fact satisfy requirements of a legal rule. Over time and place the exact form of proceedings varies: contemporary Korean proceedings are identical neither to their German relatives nor to their Korean antecedents..

In the first decade of the twenty-first century Korea amended its civil procedure. The differences were dramatic enough that Korean judges speak of the "New Model" and contrast it with the "Old Model." Changes needed in existing law were sufficiently substantial to make adoption of the New Model by no means certain. To overcome any conflict issue of New and Old, the Korean National Assembly amended the Korean Civil Procedure Act. The principal goal of the New Model is enhancement of public faith in the judiciary and in court proceedings and increased transparency in decisionmaking. Development of the New Model began at the instigation of the Supreme Court of Korea already in 1995; its implementation was not completed until 2006. The New Model does not adopt American-style discovery or otherwise follow American procedure. In direction it follows contemporary German civil procedure.

Earlier reforms of the Old Model. Earlier attempts at reform of the Old Model focused on delay rather than on decision making. Much as recent American attempts at reform did, the earlier Korean attempt fought delay through use of deadlines without working to improve decision making. Today the deficiency of the Old Model is seen to have been less delay and more excessive division of proceedings into endless separate, short,

⁴⁹⁵ Judges Tae-hoon Kang, Seong-soo Kim, Yoon-sun Chang, Dong-jin Song, Yon-kyung Lee and Eun-kyung Cho, *Future of Civil Procedure, The First Judicial Symposium in English*, 1 J. KOREAN JUDICATURE 732, 739 (Supreme Court of Korea, 2008).

⁴⁹⁶ See Tae-hoon Kang *et al.*, *Future of Civil Procedure, The First Judicial Symposium in English*, 1 J. KOREAN JUDICATURE 732, 736 (Supreme Court of Korea, 2008).

repetitive sessions. This splintering of proceedings produced delay and, worse, made decision making inaccurate and opaque.⁴⁹⁷ Proceedings piled on proceedings with little indication of their direction, until at the end of all proceedings, the presiding judge might say: “We will review the whole document without any omission, then decide this case with care.” This delay in consideration raised suspicion of improper evaluation. It made judging into a black box, out of which came an unpredictable outcome.⁴⁹⁸

The New Model. The solution of the New Model is “concentration” of proceedings. By concentrating proceedings, not into one single event as in an American trial, but into fewer, more focused sessions, parties can participate better in proceedings and follow better the course of the courts’ decisionmaking. The Korean reform parallels the important 1976 reform in German civil procedure.⁴⁹⁹ While the New Model may not have been based directly on the 1976 German reform, its implementation looked to practices in Germany.⁵⁰⁰ From the standpoint of this book, the reforms of the New Model of Korean procedure in the twenty-first century parallel reforms of German civil procedure in the twentieth.

Two key features of the New Model in addition to concentration are:

- Greater use of oral proceedings and less reliance on written proceedings;
- Greater party participation through increased interaction directly between court and parties and among the parties themselves.

Oral Proceedings in the New Model. The New Model is to increase transparency of decisionmaking. The new model promotes transparency by permitting parties to see where proceedings are going and to predict their outcome. The idea behind the New Model is: “Seeing is believing. [The public wants] to see the whole process of decision making without any obstacles. That place is [the] courtroom.”⁵⁰¹ Its motto is “the enhancement of public faith in the judiciary through substantial court proceedings.”⁵⁰²

Judge Hyun Seok Kim, Presiding Judge of the District Court of Busan, has well made the case for the New Model. His explanation is a sound platform for renewal and reform of civil procedure the world over. He states the benefits of oral proceedings:

⁴⁹⁷ See Moon-Hyuck Ho, *Zur Reform des koreanischen Zivilprozessrechts im Jahr 2002*, in RECHTSREFORM IN DEUTSCHLAND UND KOREA IM VERGLEICH 87, 89 (Thomas Würtenberger, ed., 2006). On the reliance of the previous reform on deadlines, see Woo Yea Hwang, *Efforts to Expedite Judicial Process in Korea*, 18 KOREAN J. COMP. L. 174 m 175-176 (1990).

⁴⁹⁸ Judges Tae-hoon Kang *et al.*, *Future of Civil Procedure, The First Judicial Symposium in English*, 1 J. KOREAN JUDICATURE 732, 737 (Supreme Court of Korea, 2008).

⁴⁹⁹ Moon, *Zur Reform*, *supra* note 497, at 87.

⁵⁰⁰ Kim, *Oral Proceedings*, *supra* note 290, 7 J. KOREAN L. at 60 n. 17, reprint at 38 n. 17 (citing works in Korean on German oral proceedings).

⁵⁰¹ Kang *et al.*, *supra* note 498, at 739.

⁵⁰² Kim, *Oral Proceedings*, *supra* note 290, 7 J. KOREAN L. at 58, reprint at 37.

[1] **Maximizing court communication.** ... the proceedings give the judges and the parties (attorneys) a chance to cast direct questions about ambiguous or doubtful assertions and testimonies on the spot, so that they can even unearth the underlying causes, motives or other unrevealed circumstances of dispute.

[2] **Accurate understanding of complex litigation.** Through oral proceedings, a judge or panel can comprehend even the most complex litigation which involves too many technical terminologies that would otherwise be incomprehensible (just by reading the brief, for example), but by oral explanation from parties and other people concerned it is understandable.

[3] **Helping the judge to make the correct decision.** ... Because the judge is able to figure out the overall intentions of the parties, he or she can appropriately evaluate the witnesses' testimonies and appreciate the parties' and witnesses' manners through the oral proceedings.

[4] **Providing sufficient chances to making statements—the Court as a listener.** ... [T]he parties can persuade the judges by making persuasive arguments and presenting compelling evidence; ... the parties can reveal their real intentions and situations. A judge should create an atmosphere where active communications and arguments, rather than plain statements, can be made. A judge should be a serious listener also.

[5] **Helping parties to understand court procedure—the Court as explainer.** [T]he court can present and explain its opinion and reasoning to the parties so that the parties can directly figure out towards which direction the court procedure is going. "Court as an explainer," which is one of the core aspects of oral proceedings, can enhance public trust in the judiciary.

[6] **Fostering parties' alternative dispute resolution.** ... oral proceedings itself can be the most effective tool to find a way to resolve disputes in ways that the parties exactly want, since a reasonable alternative dispute resolution can be reached not by just waiting for the parties' reconciliation, but also by exploring common understandings through oral exchanges.

[7] **Improving foreseeability of case-outcome.** [J]udges would make their decisions relying on the finding from oral proceedings and the parties would be able to predict what the results of trial will be like. This means that the distrust on the court's decision could be minimized, since the parties will not argue that they were not given enough chances for contentions or that they were unable to foresee the reasons, when they lose their cases.

[8] **Enhancing effectiveness of case management.** Oral proceedings help the judge to do his or her work more easily and effectively, since they can remove meritless contentions from

considerations and have the judge to concentrate on the remaining substantial factors when making decision. So, it becomes much easier to comprehend the case in detail and to set up a reasoning to make a decision. ...

[9] **Implementing public disclosure.** Oral proceedings is the only way to accomplish public disclosure.⁵⁰³

Party Participation in the New Model. Because of the heavy incidence of *pro se* representation, party participation was never a stranger to Korean civil procedure, but it was not an especially welcomed guest. The Old Model discouraged judges from interacting directly with parties, for fear that interaction might produce or suggest prejudice. The New Model, on the other hand, encourages interaction between judges and parties and among parties, even when those parties are represented by lawyers. Professor Moon observes the expected benefits of increased party participation:

(1) The clarification of the factual situation goes more quickly through discussions with the parties than with the lawyers, since the parties know the factual situation better.

(2) The case can be more quickly and effectively settled with the parties. The fact that the judge has immediately heard the parties, diminishes the hostility of the parties.

(3) After having been heard immediately by the judge, the parties usually satisfied with the resolution of the dispute, and indeed, independent of whether they have won.⁵⁰⁴

We turn now to details of how the New Model works.

2. The Process in Outline

Even before the New Model process in Korea was similar to process in Germany and particularly similar to older German process. Now it is closer still, particularly to contemporary German process. After reviewing the plaintiff's complaint, the court serves it on the defendant. At that time the court directs the parties either to appear for a preliminary hearing,⁵⁰⁵ or to engage in further written preliminary proceedings.⁵⁰⁶ While the New Model does not require parties to substantiate their pleadings, as the German code does, in preparation for the preliminary hearing, it requires defendants to answer plaintiffs' complaints with particularity. The Old Model had permitted them to reply with a simple general denial.⁵⁰⁷

⁵⁰³ Kim, *Oral Proceedings*, *supra* note 290, 7 J. KOREAN L. at 75-77, reprint at 45-46 [emphasis in original].

⁵⁰⁴ Moon, *Zur Reform*, *supra* note 497, at 90.

⁵⁰⁵ § 282 KCPA.

⁵⁰⁶ § 281 KCPA.

⁵⁰⁷ Moon, *Zur Reform*, *supra* note 497, at 89.

Preliminary Hearing

Until the New Model was implemented in 2006, the preliminary hearing was neglected in practice.⁵⁰⁸ Now it is preferred in principle.⁵⁰⁹ At this preliminary hearing, as in its German counterpart, the judge discusses the case with the parties and with their lawyers, if represented, to simplify and sharpen issues. The New Model looks to the presiding judge to make the proceedings effective.⁵¹⁰

The goal of the preliminary hearing—or of the written preliminary proceedings—is to identify applicable legal rules, their constituent elements, and which facts material to their application are in dispute. The determination of which rules might be applicable is tentative. While the court is to direct attention of parties first to factual elements of rules most likely applicable, the parties are not precluded from returning to those rules should it appear later that they are relevant.

In the preliminary hearing the court calls attention of the parties to material facts on which the parties do not agree. The court asks the party bearing the burden of proof for that element to present necessary proof. The court may also alert the other side that at some point, that if the proposing party presents what it needs to, the burden of proof may shift to it. No longer will it be sufficient to challenge the proponent's proof, but it will be essential to bring forth its own affirmative evidence.

Main Hearing (변론절차)

In the ideal case, following a preliminary hearing, the court determines the case in a single, comprehensive, concentrated main hearing. Insofar as this occurs, it assumes that the parties have been able to develop all the necessary factual information beforehand. In practice, however, the court does not always hold a preliminary hearing to get the whole picture of the case. Moreover, in the event that the court conducts a preliminary hearing, it is not required to hold a subsequent main hearing, but may accomplish the two together.

In the moments immediately preceding the main hearing, or immediately preceding the preliminary hearing if the court holds one, the court ordinarily confers with the parties on a possible settlement of the case.⁵¹¹ If settlement discussions fail, the court proceeds to the main or preliminary hearing as the case may be.

In the main hearing the judge introduces the matter in dispute and the lawyers for the parties, or the parties themselves if proceeding *pro se*, state

⁵⁰⁸ Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 128, reprint at 17.

⁵⁰⁹ Kim, *Oral Proceedings*, *supra* note 290, 7 J. KOREAN L. at 61, reprint at 39.

⁵¹⁰ Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 129, reprint at 19.

⁵¹¹ See Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 128, reprint at 19.

what they are seeking in the proceedings. Usually plaintiff's lawyer refers to his or her complaint and reiterates the specific relief requested there. Typically defendant's lawyer refers to the answer and requests dismissal of the complaint. The court then discusses the case generally with the lawyers and hears the parties themselves. There is no prescribed order to these proceedings. Following these discussions, ideally the court proceeds in that same hearing to take evidence as may be necessary to establish or defeat the requests of the parties. Often evidence taking is deferred to subsequent hearings.

Duty to Cooperate in Good Faith

From the preliminary hearing on through the lawsuit process is intended to be cooperative rather than combative. Process is designed so that the court, with cooperation of the parties, first frames the issues in dispute by finding points of common ground on which the parties agree and by identifying those points on which they disagree, and then proceeds to hear the parties and take evidence on those material facts in dispute.⁵¹² Section 1 of the Code of Civil Procedure imposes on the parties a duty to cooperate in good faith.

Duty to Elucidate (석명 의무) (§§ 136, 137, 140 KCPA)

In the legal process plaintiffs bear the burden of proof. That means, if plaintiffs fail to prove facts that fulfill the legal rules on which they rely, they lose. Defendants are not allowed, however, to lie back and say, "so prove it." They are subject to a duty of elucidation. They may be required by the presiding judge, acting on his or her own motion, or at the request of another party, to clarify the case.⁵¹³

The duty of elucidation also serves to eliminate surprise decisions. If the presiding judge believes that a party has overlooked a legal matter, the judge is required to give that party an opportunity to state an opinion on it.

The duty of elucidation also serves purposes similar to American discovery to deal with situations in which evidence is, in large part, in the hands of a party to an action. Its application is not limited to such cases as environmental cases, product liability cases, and medical malpractice cases, which may be generated in industrialized modern societies. The scope of its application is wider than the area where "zone of risk" theory, "probability" theory, and "prima facie evidence" theory are applicable.

The duty to elucidate may be imposed on the party who does not bear the burden of proof after its prerequisites are found in the following order: (1) The party who bears the burden of proof can explain the existence of

⁵¹² Cf. Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 128, reprint at 19.

⁵¹³ § 136(1) and (3) KCPA.

reasonable foundation of his or her allegation. (2) Without that party's fault, he or she cannot prove the existence and scope of his legal right from the viewpoint of an average person. (3) The opposing party is expected or is able easily to provide information about them for the party who bears the burden of proof. (4) If the three foregoing requirements are met, the party bearing the burden of proof has a right to demand information from the opposing party. The right is derived from section 1(2) Code of Civil Procedure which prescribes that "The concerned parties and participants of litigation shall perform the litigation sincerely and faithfully." Should the opposing party refuse to give the information to the party who bears the burden to prove it despite the latter's demand for it, the court determines whether it considers the latter's allegation to be true, depending on several factors such as the former's blameworthiness and importance of the information.⁵¹⁴

Taking of Proof

The oral hearing of the parties—and not witness testimony—is at the heart of the New Model of Korean civil process just as it is in German process. It is to be to the parties, above all when proceedings are *pro se*, to whom the court is to direct its first attention. Only when facts are found to be material and in dispute does the court—on party application—order the taking of evidence, including the testimony of witnesses.

With the move to the New Model, the significance of evidence taking has diminished in practice.⁵¹⁵ Only when facts are found to be material and in dispute does the court—on party application—order the taking of evidence, including the testimony of witnesses. The application is to state the facts that the evidence is to prove.⁵¹⁶

In principle the lawyer for the party calling a witness is the first to examine the witness. Then follows the lawyer of the other party.⁵¹⁷ After conclusion of examination by the parties' lawyers, it is the turn of the court.⁵¹⁸ This reverses the order of German process. This general rule notwithstanding, the presiding judge has latitude to structure the examination differently: at any time the presiding judge may examine the witness;⁵¹⁹ may restrict questioning which is redundant or irrelevant;⁵²⁰ and, after consulting with the parties, may alter the order of examination.⁵²¹

That parties and not the court have first responsibility for questioning witnesses follows American practice and departs from the German. It is the

⁵¹⁴ See LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM, *supra* note 99, 173-174.

⁵¹⁵ Cf., Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 130-131, reprint at 20.

⁵¹⁶ § 289 KCPA.

⁵¹⁷ § 327(1) KCPA.

⁵¹⁸ § 327(2) KCPA.

⁵¹⁹ § 327(3) KCPA.

⁵²⁰ § 327(5) KCPA.

⁵²¹ § 327(4) KCPA.

single most important continuing consequence of American influence on Korean civil procedure. Yet with all the latitude allowed judges under the law,⁵²² and in view of the high incidence of per se representation, party examination of witnesses in Korean civil procedure is distant from American procedure; in cases where judges make full use of their opportunities for intervention, questioning of witnesses lies closer to German practice.

In *Roh v. Doh*, the case is likely to proceed rather in the way described in Germany. After hearing both parties, the court should be in a position to make a judgment. The court will announce the judgment. It will be required to provide the judgment in writing within several weeks time. We discuss judgments in Chapter 7.

⁵²² § 289 KCPA.

CHAPTER 7

JUDGMENTS, APPEALS AND OUTCOMES:
DECISIONS ACCORDING TO LAW

Payment of Compensation
13th Century German Codex⁵²³

Mary Roh has reached the end of the process. She and John Doh, Jr. are in the courtroom for the last session. They hope that this will be their last day in court together. They can and should expect a decision that day. The case was not difficult. The judge has no special ground to delay decision; a jury, if there is one, should not take much time to decide their case.

If it is in the United States, and if there is a jury, Roh and Doh will fidget as the judge instructs jurors in their duties. The jurors will retire; Roh and Doh will perspire. They will pace about the courthouse until the jurors return. That is not likely to be in much less than an hour. Even jurors that have made up their minds before leaving the courtroom, do not want to return too soon. They want to show that they have deliberated carefully. Since there is no way to demonstrate that in writing, they allow time for deliberation to suggest it.

⁵²³ HEIDELBERGER SACHSENSPIEGEL (13th c.) reprinted in FRANZ HEINEMANN, DIE RICHTER UND DIE RECHTSGELEHRTEN: JUSTIZ IN FRÜHEREN ZEITEN, Illustration 36 („Überreichung des Sühnegeldes an den mit einer Herrenkrone geschmückten schöffensbarfreien Mann“) (1900).

If it is in Germany or in Korea, the judge should announce the decision from the bench that day. German and Korean judges may have ready a draft of the reasons that they will give; if they do, they may read from it. If they are not ready with written reasons, they are required to summarize the basis for their decisions orally and provide written reasons later. § 311(3) ZPO (within three weeks); § 207(1) KCPA (within two or four weeks according to case complexity).

Depending upon which facts the court finds, which law it determines governs, and how it applies that law to those facts, the court's judgment will either acknowledge Roh's rights or deny Doh's liability. If the judgment acknowledges Roh's rights, it will order a remedy, *e.g.*, Doh must pay Roh a certain amount of money. The judgment is to be, in words of the Maryland Declaration of Rights, "according to the law of the Land." If the judgment is not according to law, Roh and Doh do not have to accept it. They may take the court's decision to a higher court for review and revision, that is, they may take an *appeal* to an appellate court.

A. Judgments and Appeals Generally

When we speak of a decision *according to law*, we mean a judgment that applies law to facts correctly. A judgment reached by tossing a coin, if provided for by law, would be a decision made by legal process, but it would not be a decision *according to law*.

The law referred to, the "law of the land," is the state's substantive law, *i.e.*, the general laws that bind all members of the community equally. A decision *according to law* is *correct* when it correctly determines applicable law, correctly finds material facts, and correctly applies that law to those facts.

Correct application of law to facts is what Roh and Doh, Jr. are told to expect. It is what rational members of the public want from their civil justice system. It is not peculiar to particular systems of civil justice. Even jurists who see civil procedure as controlled by culture grant that. For example, Professor Oscar G. Chase observes: "[a]ll modern systems of adjudication depend on the application of a legal rule to a set of facts." Professor Chase explains: it is the "model that we present to the public [of] our legal system. We tell them that the results of court proceedings are dictated by the application of law to facts"⁵²⁴ Belief in that model impels people to abide by law.

In this chapter we examine how courts of first instance in our three systems apply law to facts in judgments and how appellate courts review the work of courts of first instance both for accuracy in judgment and for

⁵²⁴ Oscar G. Chase, *Reflections on Civil Procedure Reform in the United States: What has been Learned? What has been Accomplished?*, in *THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE*, 163, 165 (Nicolò Trockner & Vincenzo Varano, eds., 2005).

fairness in process. Our consideration of appeal is concise and directed to our hypothetical case.⁵²⁵

We begin by addressing general issues of judgments and appeals. We then examine each system *seriatim* to consider how that system treats both judgments and appeals in order to reach decisions according to law.

1. Judgments

- 23. Decision and Reasoned Explanation
 - 23.1 Upon completion of the parties' presentations the court should promptly give judgment set forth or recorded in writing. The judgment should specify the remedy awarded and, if a monetary award, its amount.
 - 23.2 The judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision.

Principle 23, ALI/UNIDROIT
PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE,
AMERICAN LAW INSTITUTE AND UNIDROIT(2004)

Giving Reasons ("Justifications")

A judgment is a determination by a court of a dispute between two parties. A few words suffice to resolve the dispute: "the Court finds that Roh recover from Doh a stated sum of money" or "the Court finds Doh owes Roh nothing." Dispute resolution does not require that courts give reasons for their decisions. We refer to giving reasons as providing a *justification*. Giving reasons has many benefits for a legal system; not giving reasons has many detriments. Above all, a justification provides legal process with transparency and makes decisions predictable.

Justifications have three main audiences: the judges who write them, the parties who are subject to them, and the appellate judges who review them.

Justifications work to assure that decisions are based on objective application of law to facts. Judges who write justifications are forced to provide coherent arguments for their decisions. Parties subject to justified judgments are given reasons why decisions are reached and a basis to challenge those decisions. Appellate judges are given grounds to review

⁵²⁵ We consider only appeals of final judgments after trial and not other appeals, *e.g.*, American interlocutory appeals, American appeals after decision of terminal motions, German *Beschwerde*.

decisions of lower courts for determinations of law, findings of fact and applications of law to facts.

All three of our systems require that judges give reasons for their decisions. German and Korean judges must state the “grounds” of their decisions. American judges must “find facts specially” and state conclusions of law separately, which in effect is much the same.⁵²⁶

When American courts decide cases with jurors, they are not required to justify their judgments. Jury decisions are among the most prominent decisions rendered without giving reasons. In *Taxquet v. Belgium*, no. 926/05, of January 13, 2009, a panel of the European Court of Human Rights held that lack of a written justification in a Belgian criminal case violated the right of an accused to a fair trial guaranteed by Article 6 of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms. The Court held that a criminal verdict was not sufficiently justified when the jurors did not explain their decision in detail but only responded to yes/no questions posed by the judge.

In German and Korean civil justice systems justification is an essential element of the right to be heard. In the American system it is not an essential part of a day-in-court. American scholars accept without criticism absence of such a requirement. They assert that in some cases justifications make decisions worse. They conduct cost-benefit analyses to determine when justifications are desirable and when not.⁵²⁷ To jurists familiar with justifications, such arguments ring of rationalization. They conveniently leave current jury practice undisturbed.

Predictability of Civil Justice

Justifications make process and results of process predictable. Justified judgments validate their predictability.

As we discussed in Chapter 1, civil justice systems implement substantive law. Certainty of application of law affects whether and how people follow law. If application of law is uncertain, some people may choose not to follow law, because they doubt that it will apply to them. Others may be unable to follow law, because of they are not sure what it requires.⁵²⁸ Civil justice systems are certain when they predictably and correctly apply law to facts.

Why Predictability Matters

⁵²⁶ See FED. R. CIV. P. 52(a)(1).

⁵²⁷ See generally Chad M. Oldfather, *Writing, Cognition and the Nature of the Judicial Function*, 96 GEORGETOWN L.J. 1283, 1285 (2008).

⁵²⁸ See generally Maxeiner, *Legal Indeterminacy*, *supra* note 44.

Predictability matters because modern civil justice systems affect civil society more through cases that they do not decide than they do through cases that they do decide. Predictability of civil lawsuits is particularly important for civil law, because parties choose to sue. For every case that is brought, many more potential cases are not brought. Cases are not brought because potential plaintiffs, based on predictions of what would happen were the cases brought, decide to abandon their claims or to find other ways to pursue their goals (e.g., self-help, informal complaint and agreement). Potential defendants, when confronted with claims from potential plaintiffs, based on their predictions of process, choose to settle rather than to contest those claims. Even when parties do begin process, predictability remains important. Many cases brought are settled after they are brought but before process is concluded in final judgments. They too are settled or abandoned based on parties' expectations of how they would be decided were they to go to judgment.

In all three of our systems, most disputes are resolved without lawsuits and most lawsuits are concluded without judgments. Parties in all three decide whether to begin lawsuits based on their assessments of how courts are likely to handle their disputes. What this means is that in practice, in most cases, application of law to facts takes place before lawyers are consulted or in lawyers' offices in discussions between lawyers and their clients before lawsuits are brought.

The Calculus of Practical Predictability

Parties contemplating lawsuits have their own calculus of practical predictability. While the aspiration of all of our legal systems is decisions of lawsuits on their merits, decisions whether to sue are not determined by merits alone. Parties care how decisions affect them practically. Their calculus of practical predictability is pinned to how decisions affect their individual situations and is colored by considerations besides merits alone.

A settlement takes two parties. In an ideal world, the applicable law, the true facts and the correct application of law to facts are all clear. In that world, the parties are under no external constraints and apply the law to themselves without court intervention. Of course, we do not live in a perfect world. Even when all elements of applying law to facts are clear and undisputed, one party may be unwilling or unable to comply with law. Such a party may choose not to comply until faced with imminent compulsory application of law, or until given a discount on paying the claim, or until faced with new expenses. That delay in satisfying a claim may harm the party in right.

We discuss three aspects of practical predictability: predictability of outcome, predictability of grounds for decision and predictability of process costs.

Outcomes. When one thinks of lawsuit predictability, one thinks of liability. Was it predictable which party would win and which would lose? Could one have foreseen that the court would decide that plaintiff had legal right? Quickly, one realizes, however, that liability is only part of the calculus of prediction of practical outcome. What does it mean to win? Did the court, in holding for plaintiff, award plaintiff a few cents or a great deal of money? Which outcomes should one have foreseen? What are the collateral consequences of the court's holding, for example, good or bad publicity, adverse impact on future dealings with this customer or with customers in general?

Reasons. Predicting outcomes is not all that there is to lawsuit predictability. Why did the court decide as it did? One needs to know that, if one is to take an appeal. One needs to know that, if one is to adjust one's conduct in the future to comport with the decision. For outside observers, the reasons for decisions often are the most important part of predictability. Outsiders want to know what they should do in conducting their affairs.

Process costs. Outcome and reasons leave uncounted the transaction costs of lawsuits. Lawyers must be paid; courts require their costs. Who bears these expenses materially affects process risks. Besides immediate expenses lawsuits involve other costs for parties. Resources and energy committed to lawsuits cannot be used elsewhere. While lawsuits are pending, credit may be impaired and other matters delayed. Process costs and risks often determine whether lawsuits are brought without regard to the underlying merits of the claims.

Practical Predictability and Settlements

Although issues of predictability are similar in our three systems, they play out differently in how cases are settled. Exactly how differently is not known. Information about resolutions of disputes, both before lawsuits are brought and after cases are commenced, is not available.⁵²⁹ What we do know about all three of our systems is that once cases are commenced, far fewer American cases conclude in judgments than do German or Korean cases. In the American federal system, the number of cases concluding in judgments is a little above 1% (about 3300 out of 267,000 cases). In the Bavarian system, it is about 28% (about 14,000 out of 50,000). Appreciating and explaining these disparate numbers could fill volumes. In an introductory book, we could not possibly do the topic justice. Yet, in a book designed to give practical knowledge of the realities of litigation, we cannot ignore it. In a discussion of the promises of the open courts clause, we need pay it mind. We offer here three observations that may help appreciate and explain this phenomenon, but for which we make no claim of accuracy.

⁵²⁹ See Clermont, *Litigation Realities*, *supra* note 529, at 1953.

Expenses of litigation. The expenses of litigation are much higher in the United States than they are in Germany or Korea. In America they may equal or exceed amounts in dispute; in Germany and in Korea they are usually kept proportionate to the matter in controversy. As we saw in Chapter 3, expenses in the United States are borne separately by each party; in Germany and Korea almost all are paid by losers. The American practice means that “as soon as disputants enter the litigation process, they are clear losers. ... [B]y bringing lawyers into the mix ... the parties consign themselves to being worse off.” Under such a regime, the question is not, why do cases settle?, but why do they get litigated?⁵³⁰ In Germany and Korea, where losers pay, parties dispute so long as their belief in a favorable judgment exceed their aversion to risk of loss.

Risks of litigation. The risks of exorbitant judgments are higher in the United States than in Germany or in Korea. American substantive law frequently permits higher awards. American procedure entrusts those awards to lay jurors, who may in effect make new law that is unavailable to professional judges, or who may be more generous than professional judges charged with maintaining equal justice under law. The American practice of no indemnity for lawyers’ fees promotes making exorbitant demands to fund expensive litigation while imposing no penalty (in greater risk of loss) for asserting them. Since litigation is voluntary, even a slight risk of an exorbitant judgment is enough to brow-beat risk averse parties into settlement. The risk of exorbitant awards in the United States is sufficiently serious to have spawned a new type of legal professional, the trial consultant, a new organization for trial consultants, the American Society of Trial Consultants, a new journal, *The Jury Expert*, and new work products, e.g., focus groups, mock trials and valuation studies.⁵³¹

Settlement as norm. Settlement has dominated American civil justice for so long that it is now dubbed the “modal civil case outcome.” “[I]n the usual course, settlement is our system of justice.”⁵³² The system depends on “parties finding alternatives to using the system.”⁵³³ In this world “reformers are constantly seeking ways,” Professor Clermont writes, to get cases to leave the system by “abandonment, concession or privately negotiated settlement or by ... arbitration, mediation [or] conciliation.”⁵³⁴ Adding more judges to decide more cases is thought would only encourage more litigation.⁵³⁵ The equivalent for health care reform would be to hope more

⁵³⁰ Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1265-1266 (2002).

⁵³¹ See AMY J. POSEY & LAWRENCE S. WRIGHTSMAN, TRIAL CONSULTING (2005).

⁵³² Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, J. EMPIRICAL LEGAL STUDIES 111, 112 (2009).

⁵³³ Clermont, *Litigation Realities*, *supra* note 529, at 1952 [emphasis in original].

⁵³⁴ *Id.*

⁵³⁵ *Id.* at 1947.

people die or at least treat themselves at home without ever going to a physician or entering a hospital.

Today's reality of settlement instead of trial demands new measures. American lawyers, in a way typical of their admired flexibility, are responding with a new form of professional firm: the "settlement mill." These are "high-volume personal injury law practices that aggressively advertise and mass produce the resolution of claims, typically with little client interaction and without initiating lawsuits, much less taking claims to trial."⁵³⁶ The world looks to the United States as leader in what is called alternative dispute resolution. One day the world will realize the United States has more need for alternatives because its judicial system works poorly for many cases.

Readers may find pressing people to private dispute resolution a repugnant step backward in time. Should society not just as well renounce public schooling and public transit? Were not schooling and transit once limited to the wealthy? Readers may ask, what are the consequences of dispensing with public dispute resolution? If there is no longer a viable public option providing neutral application of law to facts, what is left of the rule of law? Will there be a return to a state of "liberty without law," where, as a popular nineteenth century American secondary school text book described it, "a strong man might use a weak one as he pleased, or the cunning man might cheat or circumvent another, and thus take away his life or property, or make him the slave of his pleasures."⁵³⁷ Pressing people to private dispute resolution is renunciation of the open courts promises of decisions according to law. It is a poor apology for a dysfunctional civil justice system. Yet it is one that has been made in the past. Indeed, it is asserted that throughout much of American history potential suitors were told that "litigation is something pernicious that ought to be discouraged."⁵³⁸

In this world readers may wonder, what is the purpose of courts? It is not to apply existing law to facts to decide cases, but to create law so that parties can apply the newly found or created law to themselves. A 100% settlement rate would not work: "the system must adjudicate some cases in order to pronounce the law."⁵³⁹ According to a model originating in what is called the law-and-economics school, the American civil justice system gives parties an opportunity to test the law (motion to dismiss for failure to state a claim) and an opportunity to test the facts (discovery). After that testing, parties should resolve their issues themselves. They will go to trial only if they are mistaken in their evaluations of the tests or their claims are not governed by existing law. Americans, in this view, have "designed a

⁵³⁶ Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009).

⁵³⁷ S.G. GOODRICH, *THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE AND NECESSITY. FOR THE USE OF SCHOOLS* 26 (4th ed., 1844).

⁵³⁸ Stephen B. Presser, *A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective*, Paper presented to the U.S. Chamber of Commerce, October 2009, at 1.

⁵³⁹ Clermont, *Litigation Realities*, *supra* note 529, at 1952.

pretty good system for letting all but the foolish and the trailblazers resolve their disputes prior to trial.”⁵⁴⁰

2. Appeals Generally

Losing parties in lawsuits are not a happy lot. Most feel that the court of first instance got it wrong: it found facts falsely, determined law incorrectly or applied law to facts erroneously. Appeals permit losing parties to ask another court to take a second look at the case and to get right what the first court—in the losing party’s view—got wrong.

While appeals are of intense interest to losing parties, they are not essential to dispute resolution. Indeed, were dispute resolution the only goal of civil justice systems, appeals might be dispensed with. Necessarily they increase costs and, at least in short run, undermine efficiency. Yet appeals are normal features of civil justice systems because, in the long run, they contribute to making legal systems work better. System benefits of appeals include:

- *Encouraging voluntary participation of parties in lawsuits.*
Parties know that courts make mistakes; they more readily participate in first instance proceedings and accept results of those proceedings when they know that mistakes can be corrected.
- *Encouraging self-directed judicial quality control.*
Judges know that they make mistakes; they more fully and fairly hear all parties and more carefully craft their decisions when they know that their actions are subject to criticism and correction.
- *Fostering consistent implementation of procedural rules and consistent interpretation of substantive rules among all courts.*
Rules, both procedural and substantive, sometimes require interpretation for application. When all first instance courts are subject to supervision by one higher court, their actions are more easily kept consistent, thus promoting both predictability and equal protection under law.
- *Filling gaps in law through occasional judicial lawmaking.*
Disputes occasionally raise issues not governed by existing law that require finding new law in the course of law applying. When one appellate court has responsibility for that law

⁵⁴⁰ See Issacharoff, *supra* note 530, at 1274-1275.

finding, all lower courts can more easily conform their decisions to that one court's law, thus promoting predictability, equal protection and legitimacy of decisions.

- *Encouraging voluntary compliance with law generally.*
People abide by law, in part, because they believe that law will be applied to all correctly and equally. They more readily abide by law when appellate courts oversee correct and equal law application.

The first two of these benefits are individual case-oriented; the last three are system-directed.⁵⁴¹ Appeals contribute mightily to legal certainty and realization of the rule of law.

While appeals are common, they are not all of the same type. Some appeals review entire cases; others consider only specific mistakes. The former address all aspects of decisions below and ask, was that decision right. The latter review only whether the court below made specific errors; did the court make a mistake. Some appeals consider whether lower courts correctly found facts; other appeals review only whether lower courts properly followed all legal rules. Typically courts that review findings of fact may themselves take proof, while those that only correct errors in following legal rules do not.

Appeals thus differ in the attention that they give to individual-case and system values. While this different emphasis is not necessarily a feature of judicial hierarchy, it is easily observed there. Commonly systems of civil justice have three levels of courts: courts of first instance, intermediate courts of appeal, and courts of final appeal. All three of our systems do. As one moves up the hierarchy of courts, the main mission of the court shifts from the case before it to system values.

In courts of first instance in all three of our systems, the main mission is decision of the case before it correctly. Courts of first instance take rules of law governing the case as givens. Their job is to find facts, determine which law is applicable and apply that law to the facts correctly. To find those facts, they may take proof offered by the parties. The courts have responsibility for the whole case. Their proceedings address all possibly applicable legal rules and take account of all elements of those rules.

In courts of final appeal in all three of our systems, the main mission is not decision of the individual case, but determination of legal system issues. Courts of final appeal usually take as givens facts of the instant case as found by lower courts. Their job is to decide specific issues of rule application and interpretation that the case has raised and to evaluate the probable impact of decision of those issues for the legal system as whole. Ordinarily courts of final appeal do not, indeed sometimes may not, take further proof. The

⁵⁴¹ See generally ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 3-4 (1941).

courts do not have responsibility for the whole case, but only for decision of those specific issues.

In intermediate appellate courts, the main mission varies among our three systems. Here the feature common to all is exposure to pressures of these competing missions. Are the intermediate appellate courts to function more like courts of first instance or more like courts of final appeal? Are they to review the whole case below and worry about its outcome, or are they to limit review to correction of errors made below? Are they to review findings of fact and possibly revise them, even by taking new proof, or are they to limit their examination to issues of law? While there are few absolutes, as a general matter, intermediate American appellate courts, especially those of the federal system, lean in the direction of the system-focus of courts of final appeal, while German and Korean intermediate appellate courts tend toward the individual-case focus of courts of first instance.

It is important to keep the different missions of the different courts distinct. Critics of judicial styles commonly confuse civil law decisions of courts of first instance with opinions of common law courts of final appeal. Such comparisons are misleading. Courts of final appeals consider only specific legal issues and the effect on the legal system of the resolutions they adopt. Courts of first instance find all facts necessary to fulfill all elements of all legal norms in the cases before them.⁵⁴²

B. United States

We discuss in this section judgments after trials and then appeals from those judgments.

The United States has two principal forms of judgment. The one that follows a bench trial mirrors German and Korean judgments. The other, which follows a jury trial, is completely different from German and Korean judgments. All forms of judgment, at least in conventional wisdom, pursue the same goals of the open courts clause: accurate finding of facts and application of law to reach decisions according to law.

We saw in Chapter 6 that summary judgment is a kind of American judgment. It occurs without trial, that is, without court findings of fact. Summary judgments are used most when facts are no longer in dispute. They can also be used where one party asserts that there is no material issue of fact in genuine dispute; use in such cases can be controversial. Ordinarily summary judgments do not require justifications.⁵⁴³ We do not consider them further here.

⁵⁴² See "Table Comparison of the Formal Elements of a Decision and an Opinion," in JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 37 (5th ed. 2007).

⁵⁴³ FED. R. CIV. P. 52(a)(3).

Appeals occur in more cases than in the few cases that go to trial. Some appeals review summary judgment decisions. Others reexamine decisions of preliminary motions that result in ending the litigation, such as dismissals for lack of jurisdiction or for failure to state a legal claim for relief. Others review decisions granting or denying interim relief before trial, i.e., granting or denying temporary restraining orders or preliminary injunctions.

We begin with judgments of American courts of first instance after bench trials, continue with judgments after jury trials, and conclude with appeals of both types of judgments.

1. Judgments

An American judgment is an official recording of a court's decision. It determines rights of parties in a lawsuit. It consists of a caption that identifies the parties and the lawsuit and a statement of the decision made and the relief ordered.⁵⁴⁴ Unlike German and Korean judgments, an American judgment does not include reasoning of the court. It thus corresponds to the *Rubrum* and the *Tenor* of German and Korean judgments. The judgment is where American courts of first instance apply law to facts of the case.

While an American judgment, formally defined, does not include reasoning of the court, in the case of a judgment after bench trial, the judgment is accompanied by a separate statement of reasons ("findings of fact" and "conclusions of law"). In the case of a judgment following a jury trial, there is no additional statement. For convenience, we refer to an American judgment accompanied by a decision as a "justified judgment." In contrast, we refer to a judgment unaccompanied by a decision, i.e., a judgment on a jury verdict, as an "unjustified judgment."

Since parties themselves determine which kind of trial they have, they also control which kind of judgment they receive. The rule is that a party who has a right to jury trial, is entitled to and will receive one, provided that the party acts timely. The right is absolute: the judge must direct a jury trial. If, however, neither party timely requests a jury trial, trial is by judge alone. In most private law matters seeking money damages parties have a right to jury trial. The demand must be made at the very outset of the lawsuit. Even if both parties do not have a right to jury trial, the judge may order one if both parties agree.⁵⁴⁵

Justified Judgments (Judgments after Bench Trials)

⁵⁴⁴ See GEORGE, *supra* note 542, at 39-44.

⁵⁴⁵ See FED. R. CIV. P. 38, 39.

In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.

FED. R. CIV. P. 52(a)(1)

Following bench trials judges are required to make findings of fact and conclusions of law.⁵⁴⁶ These findings of fact and conclusions of law together constitute the decision of the court. The decision of the court justifies the legal correctness of the court's judgment. The decision determines law, finds facts and applies law to facts. The judgment, together with the decision, corresponds to what in German and Korean civil procedure is simply called a judgment.

The ideal type of an American justified judgment is similar to the ideal types of its German and Korean counterparts. The American decision is to include five parts: (1) the nature of the action; (2) the facts; (3) the issues; (4) the law and reasoning; and (5) the disposition. It is to be written in plain language and should be the most condensed version of the relevant facts and law possible. It should decide no more than is necessary to dispose of the case. It should set forth only material facts. It should state facts in the past tense and law in the present.⁵⁴⁷

Findings of fact. A finding of fact is a declaration of an ultimate or material fact that determines rights of the parties. If there is a stipulation or admission of facts, no finding is necessary. A finding of fact should be made on each material issue of the legal claim, since each is necessary to determination of the rights of the parties. A finding of fact is drawn or inferred from the evidence presented, including agreed, stipulated and admitted facts, and is deemed essential to an understanding of the case or to a determination of the rights of the parties. A finding of fact made from disputed evidence requires evaluation of competing versions of fact.⁵⁴⁸

Conclusions of law. Conclusions of law are reached by judges using deductive reasoning that subjects material facts found to applicable law. A conclusion of law is a statement of the law to be applied to the specific facts in the specific case; it carries with it some form of legal consequence. Conclusions of law taken together determine rights and duties of parties.

An American justified judgment, like its German and Korean counterparts, carries through the syllogistic application of law to facts. The process, contrary to widely held misconceptions, is not easy. Judge Joyce J. George, well describes what it requires:

⁵⁴⁶ FED. R. CIV. P. 52(a)(1)

⁵⁴⁷ See GEORGE, *supra* note 542, at 161-184.

⁵⁴⁸ GEORGE, *supra* note 542, at 209-220.

Using this method the judge is forced to reason a step at a time and to support each finding. This must be done before moving on to the next step. Such an approach disposes of all immaterial and insignificant matters that can clutter judicial [reasoning]. Not all the facts involved in a case are necessary either to a decision or to the law. Only those facts that could be applied to the law are necessary. The step-by-step approach compels a straight-line thought to a single acceptable decision
....

This step-by-step process is tedious. It requires the author to select pertinent facts and to discard unimportant facts. Then he must select the law to be applied to the chosen facts. The labor, however, is well worth the time. After this process, the judicial writing can be made to ring with clarity. Then no one will be able to misunderstand the author's thought process; it will be apparent.⁵⁴⁹

American justified judgments among themselves are less consistent in form and style than are their German and Korean counterparts. That is not surprising: they are rare rather than routine. Writing judicial decisions is not an everyday task for American judges the way it is for German and Korean judges. While all German and Korean judges receive extensive training in writing judgments, few American judges do. While German and Korean judges write a dozen or more judgments in a year, American judges may write only one or two.

Unjustified Judgments (Judgments After Jury Trials)

... the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(A) the jury returns a general verdict;

FED. R. CIV. P. 58(b)(1)

Judgment after jury trial is different from judgment after bench trial. The jurors' verdict tells no story. It does not state the facts the jurors found, the law they applied or the legal reasoning they relied on. It is, as both Judge Jerome Frank and Professor Sunderland said, "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."⁵⁵⁰ The judgment after jury trial states names of parties and jurors'

⁵⁴⁹ GEORGE, *supra* note 542, at 25-26 [emphasis added].

⁵⁵⁰ Skidmore v. Baltimore & Ohio Railroad Co., 167 F.2d 54, 60 (2nd Cir. 1948). See Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920)

determination of parties' rights (*e.g.*, we find for the plaintiff in the amount of \$75,000) and no more. The clerk of the court, without the judge's review, enters the verdict as the judgment of the court.

2. *Judgment in Roh v. Doh*

A judgment on a general verdict in *Roh v. Doh* might look as follows:

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND	
Mary Roh,	
Plaintiff	
v.	No. _____
John Doh, Jr.	Civil Action
Defendant	
JUDGMENT ON A JURY VERDICT	
This action was tried by a jury with Judge Jung presiding, and the jury has rendered a verdict.	
It is ordered that the plaintiff Mary Roh recover from the defendant John Doh, Jr. the amount of \$75,000, with prejudgment interest at the rate of __ %, post-judgment interest at the rate of __ %, along with costs.	
Date: September 15, 2013	
	_____ Clerk of Court

There is no formal mechanism for jurors to disclose or for parties to learn the reasons why jurors decided as they did. While judges may and, at the request of a party must, ask jurors individually whether they join in the verdict ("poll" the jury), there is no provision, let alone requirement, that jurors reveal their reasons.⁵⁵¹ That there is great interest in those reasons is shown by multiple media interviews and juror-written books that follow jury verdicts in high-profile cases.⁵⁵² Talking informally with individual jurors after the judge has formally dismissed them is the only way to learn their reasons.

⁵⁵¹ See FED. R. CRIM. P. 31(d) (providing for polling in criminal cases).

⁵⁵² See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465 (1997).

3. *Jury Decisions According to Law*

Although jurors do not give reasons for their decisions, jurors are expected to decide objectively and according to law. Judges instruct them that “[i]t is your duty to accept these instructions of law and apply them to the facts as you determine them”⁵⁵³ Jurors are to find all facts necessary to fulfill all elements of applicable legal rules.

Jurors are not required to give reasons for their decisions because they are thought not capable of doing so. In colonial times, many jurors were not literate. Even today, many are not well educated. They are not selected for their skills, as their German lay counterparts are, but as representatives of all of society including the less well-educated. Even jurors that are well-educated are rarely trained in law. To expect lay jurors, without help to apply law, to facts as experts would, is unrealistic. Yet we are aware of no extended discussion of providing jurors with legal assistants such as Swiss courts provide legally-untrained judges with “court-writers” (*Gerichtsschreiber*).

Judges are conscious of the duty of jurors to decide according to law. They want jurors to decide according to law. Once jurors return a verdict, there is not much that judges can do to change it. Their authority is limited by the seventh amendment of the federal constitution and by similar guarantees in state constitutions. The former mandates that “no fact tried by jury shall be otherwise reexamined . . . than according to the rules of the common law.” Consistent with that mandate, judges have developed ways to promote decisions according to law in compliance with the open courts’ clauses. We discuss four:

- (a) instructing jurors in finding facts and applying law (jury instructions);
- (a) focusing jurors on fact findings (special verdicts, jury interrogatories, separate trials);
- (a) restraining jurors from verdicts against law (judgments as of law and new trials); and
- (a) telling jurors what judges think of evidence presented (commenting on evidence).

(a) Instructing jurors in finding facts and applying law (“jury instructions”)

Jury instructions are a tribute to Americans’ devotion to the open courts’ promise of decisions according to law as well as a demonstration of their

⁵⁵³ Instruction 71-2 Role of the Court, 4-71 MODERN FEDERAL JURY INSTRUCTIONS 71.01 (2009).

boundless faith in the potential of their fellow men. What could be more noble than to hope that common men could learn to decide like lawyers after a few minutes of instruction when potential lawyers are required to study for three years before they are even allowed to take the examination to permit them to practice as lawyers?

Judges are to give jurors formal instructions in every case. Toward the close of the taking of proof parties propose instructions that they want the judge to give. The judge decides which instructions to use, informs parties of that choice and gives them opportunity to object.⁵⁵⁴

At the end of the parties' presentations and just before jurors exit the courtroom to deliberate, judges read formal written instructions lecture-style. There is no interaction: judges do not probe jurors for understanding of instructions and jurors are not invited to ask questions. Judges take from a few minutes to a few hours to read the instructions. Jurors, who had been sitting passively listening to court proceedings for hours or days, sit passively to take in all that the judge reads to them. The result is what one might expect: jurors nod off into sleep as judges "drone on."⁵⁵⁵

Judges typically begin their instructions telling jurors of their duties and advising them how to conduct deliberations, continue on to general legal issues of method such as burden of proof, and drill down to elements of claims made in the case. Judges tell jurors that they must find all elements of a claim in order to decide for plaintiff. While practices vary, judges usually give instructions orally. Some also give jurors written copies of instructions.

Jury instructions did not spring from some reform commission. They grew out of the practice of judges commenting on evidence and telling jurors which facts they had to find in order to hold for plaintiffs (see b below). While judicial comments on evidence focus on facts, jury instructions are directed to law and its application. They were unnecessary so long as jurors only found facts and did not apply law to facts. The first major work devoted to jury instructions was not published until 1881, that is, after the reforms of mid-century had increased jury involvement in law applying.⁵⁵⁶

Although judges introduced jury instructions to help untrained laymen apply law, today "jury instructions are written and presented in a manner that defy comprehension to those untrained in the law."⁵⁵⁷ This happened because jury instructions became subjects for appeals. Appellate judges parsed instructions to jurors to determine whether the judge accurately stated the law. Trial court judges responded by using the very language of the law—whether the text of statutes or words of the appellate court—to instruct jurors. That placated appellate judges, but perplexed lay jurors. At this point,

⁵⁵⁴ See FED. R. CIV. P. 51.

⁵⁵⁵ See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 496-497 (2006)(citing examples).

⁵⁵⁶ See FREDERICK SACKETT, INSTRUCTIONS AND REQUESTS FOR INSTRUCTIONS FROM THE COURT TO THE JURY IN JURY TRIALS (1881).

⁵⁵⁷ Marder, *supra* note 555 at 451.

however, appellate judges lost site that the goal of jury instructions is to help jurors apply law to facts. Today they acknowledge that instructions to jurors may be “polysyllabic mystification,” but conclusively presume that jurors understand the mysteries.⁵⁵⁸

The American approach to helping jurors apply law is not the only possible one or even the one that comes first to mind. There are other ways that judges might help jurors find facts and apply law. Courts might train jurors to act as judges on a regular basis. Judges might sit with jurors as consultants and facilitators when jurors decide; when jurors have questions, judges could answer them. The present American approach is a one shot lecture on law just before jurors decide. It’s the legal process equivalent of an air traffic controller talking down a passenger in charge of a pilotless plane: “here’s what you need to know about aerodynamics, here’s how the controls of your plane work, we wish you good luck and please report back once you’ve landed with the results—over-and-out!” Why do Americans do it this way? We suspect because the present way required no formal institutional change; individual judges acting alone has only to modify instructions that they were already giving.

(b) Focusing jurors on finding facts

If jurors only find facts, they need not be skilled at or instructed in applying law. Special pleading at common law kept jurors focused on fact finding and distant from determining law applying. There are several different approaches available to judges today that work in much the same way as did special pleading.

Special verdicts. In special verdicts judges instruct jurors to make a “special written finding upon each issue of fact.”⁵⁵⁹ Judges take the facts as found by jurors, apply law to those facts and enter judgment. The drafters of the Field Code recognized that their new approach had jurors applying law more often than under common special pleading. They recommended that judges use special verdicts.⁵⁶⁰ Today law reformers again recommend greater use of special verdicts in order to improve rationality of jury trials and to restore law-applying to judges as much as possible.⁵⁶¹

Special verdicts on written questions (jury interrogatories). Closely related to special verdicts are jury verdicts on written questions, also called jury interrogatories. Here, judges submit to jurors, along with forms for a general verdict, “written interrogatories upon one or more issues of fact the

⁵⁵⁸ Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993).

⁵⁵⁹ FED. R. CIV. P. 49(a).

⁵⁶⁰ NEW YORK REPORT, FIRST REPORT OF THE PRACTICE COMMISSION (Feb. 29, 1848) at 273-274, *extensively excerpted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (A.P. Sprague ed., 1884).

⁵⁶¹ See Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 58 (1990).

decision of which is necessary to a verdict.”⁵⁶² If jurors return answers to the interrogatories that are consistent with each other, and with the general verdict, the judge enters judgment on that verdict. If, however, jurors return answers that are inconsistent with the general verdict, the judge may enter judgment consistent with the answers, may return the case for further consideration by the jurors, or may order a new trial. If the answers are inconsistent with each other, the judge may not enter a judgment, but must either return the case to the jury for further deliberation or order a new trial. In effect, the written answers serve as a rudimentary justification of the jury verdict.

Separate trials of issues. Judges are not required to consider all issues that a case raises in a single trial before a single jury. “For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, cross claims, counterclaims, or third party claims.”⁵⁶³ This rule permits judges to separate out one issue from another to avoid making one finding dependent on the other. It finds greatest use in separating out issues of liability from damages, but could be used elsewhere as well. It has, however, found little application in such other uses.⁵⁶⁴ Because special verdicts take law-applying away from juries, they are anathema to proponents of an extra-legal function for juries.

Despite their promises of improved accuracy, special verdicts, written jury interrogatories and separate trials are little used tools. There is no requirement that courts use any of them routinely or at all. Most judges use them infrequently. Neither lawyers nor judges like them much. Lawyers would rather that juries be freed to “do justice” than be constrained or guided by law. Judges fear complexity from creating special verdicts and complications in dealing with them when rendered.⁵⁶⁵

Restraining jurors from deciding contrary to law

American judges have no general authority to revise erroneous decisions of jurors. Judges may think jurors have decided in error, but in the usual case, they are not free to override the jurors’ verdict and hold what they consider correct. Nevertheless, judges have asserted in civil cases authority to overrule verdicts that are completely unfounded in law or evidence. This is less a measure to maintain accuracy than a “a safeguard against irrational behavior” on the part of jurors. It only “patrols the extreme outer limits of rationality on the [jurors’] dominion.”⁵⁶⁶

⁵⁶² FED. R. CIV. P. 49(b).

⁵⁶³ FED. R. CIV. P. 42(b).

⁵⁶⁴ See Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000).

⁵⁶⁵ See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE at § 7.23 at 457 (5th ed. 2000); CLERMONT, CIVIL PROCEDURE *supra* note 565, at 99.

⁵⁶⁶ CLERMONT, CIVIL PROCEDURE, *supra* note 565, at 98, 96.

This irrationality control exists in three forms: (1) motion for judgment as a matter of law (made *before* jurors decide and formerly called a motion for directed verdict); (2) renewed motion for judgment as a matter of law (made *after* jurors have decided and formerly called a motion notwithstanding the verdict); and (3) motion for a new trial.

Judgment as a matter of law. Rule 51(a) allows a court, once a party has been fully heard on an issue during a jury trial, to grant a motion for judgment on a claim or defense “if the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” The standard for granting the motion is high. The court must view the evidence in the light most favorable to the opposing party. Unlike in state courts, the court is to give the non-moving party an opportunity to cure the defect. While the text of the Rule does not require a motion, practice usually does. The Rule allows the court without motion to “resolve the issue.”

Renewed motion for judgment as a matter of law. Rule 51(b) permits a party to renew a Rule 51(a) motion up to ten days after trial if the court denied the first motion. The standard for granting a Rule 51(b) motion is the same as for Rule 51(a). Judges often prefer to delay decision of a Rule 51(a) motion and decide the issue as a Rule 51(b) motion. This way, if jurors decide the way the judge thinks they should, the judge will not have to decide at all, both sparing judges’ time and preserving citizen involvement in the case.

Motion for New Trial. Rule 59(a) permits a court to grant a motion for new trial on some or all issues “for any reason for which a new trial has heretofore been granted ...”. This rule that incorporates common law practice without naming the reasons is used mostly in the following situations: verdict against the weight of the evidence, verdict in amount awarded is excessive or inadequate, newly discovered evidence and improper conduct affecting counsel, court or jury. The standard for granting a new trial is lower than for granting judgment as a matter of law. It should be granted if the verdict is against the weight of the evidence. While the judge should not substitute the judge’s view of the case for the jury, but only if the judge is clearly convinced that the jurors were in error. The judge need not, however, find the jurors’ verdict to have been irrational.⁵⁶⁷ Granting a new trial is, however, extremely costly. It requires redoing the whole proceedings.

(d) Telling jurors what judges think of evidence (commenting on evidence.)

In the nineteenth century American judges routinely commented on the evidence offered by both parties before submitting cases to jurors.

⁵⁶⁷ See CLERMONT, CIVIL PROCEDURE, *supra* note 565, at 101.

Sometimes judges stated how they thought jurors should find facts based on that evidence. The practice was and still is common in England, but is rare in the United States today.⁵⁶⁸ Professor John Henry Wigmore, the icon of evidence law, wrote that abandoning the common law practice of commenting did “more than any other one thing to impair the general efficiency of jury trial as an instrument of justice.”⁵⁶⁹ Professor Sunderland thought that “no single reform would have so wide-reaching and wholesome effect in promoting the efficiency of courts and improving the quality of justice.”⁵⁷⁰ The practice is little used today because in the nineteenth century American lawyers successfully fought it as an unwanted interference with their efforts to persuade jurors.⁵⁷¹

4. Neglect of Syllogisms in American Law

Legal syllogisms make civil justice possible. They enable bringing objective law and subjective fact together to determine parties’ rights and resolve their disputes according to law in particular cases. Consistently applied syllogisms promote equal protection under law. They provide guidance to subjects of the rules. Syllogisms contribute to constraining decision makers, parties and third parties. They make the rule of law possible.

Syllogisms are the basis of applying rules in Germany, Korea and the United States. But American jurists are ambivalent toward this centerpiece of legal systems.

Academics, judges and practitioners do not like syllogisms because syllogisms control legal decisions. Syllogisms limit the power of courts—judges or jurors, often at the urging of practitioners or academics—to decide cases the way they would like to decide them. If they could, a good number of them would vote syllogisms out of the system.

Oponents of syllogisms rarely challenge syllogisms’ place in law directly. Almost none criticize syllogisms as constraints on their own freedom of action. Instead they offer up competing values which they contend should routinely override syllogisms: doing justice in individual cases, controlling government, and fostering democratic participation in government. That these values are important, no reasonable proponent of syllogisms would deny. That these values require routine rejection of

⁵⁶⁸ See LANGBEIN ET AL., HISTORY *supra* note 430, at 431-433.

⁵⁶⁹ 9 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2551, at 504-505 (3rd ed., 1940), cited after LANGBEIN ET AL., HISTORY, *supra* note 430 at 433.

⁵⁷⁰ Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 316 (1914).

⁵⁷¹ See Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 233-239 (2000).

sylogisms or that they cannot be achieved with syllogisms—indeed better achieved with syllogisms—are other issues.

Few opponents of syllogisms appreciate fully and act consistently upon the consequences of their opposition. If society eschews general laws syllogistically applied, but relies for dispute resolution on sensibilities of individual decision makers, then it is imperative that society give citizens adequate opportunities for such individualization. The American jury is hailed for the opportunities that it provides for individualization of justice, control of authority, and participation of citizens in government. These values are ill-achieved in abstract generality; they find realization in specific application in particular cases. Yet the American civil justice system provides a forum for only a small percentage of all disputes and gives only one-in-a-hundred of those actually brought a jury trial.

Syllogisms will not disappear in the United States. Litigating lawyers may wish to disavow them, but the public will not. Without syllogisms the public and their counseling lawyers could not apply rules to themselves. The public rightly expects judges to apply law and not to make law; it rightly rejects runaway verdicts.

Proponents of syllogisms, on the other hand, also should appreciate the consequences of their proposition. If society is to rely on general laws syllogistically applied, those laws had better be good ones. Syllogisms are formulated abstractly to apply generally. Their general application makes imperative technical simplicity in application and substantive justice in results. They should be sufficiently sophisticated to allow for exceptions. That American statutes often fall short of these goals is not reasonably deniable.

Attitudes toward syllogisms crystallize in views of the role of judges and, especially, in the role of the jury: is the jury a fact-finding body that is to follow the law or is it an institution that is to serve broader social purposes that is authorized to depart from law? We address here four persistent points of American process that we believe would be better considered were syllogisms not neglected, but respected.

“Are juries really that bad?”

That is the question that Professor Clermont deftly uses to summarize one long-standing debate that contrasts jury decisions with judges’ decisions.⁵⁷² The stereotypical view of a “biased and incompetent jury system” is, Professor Clermont says, “elitist.”⁵⁷³ He, and many others, conclude that juries really are not that bad. They rely on empirical studies first done in the 1950s and since reproduced, that in samples measured, in

⁵⁷² CLERMONT, CIVIL PROCEDURE, *supra* note 565, at 89 (2nd ed. 2009).

⁵⁷³ Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L REV. 1919, 1964.(2009).

about four-out-of-five cases, lay jurors reach the same decision on liability as would professional judges.

We have trouble with the characterization of 80% agreement as felicitous. That might be tolerable in criminal cases where participation is involuntary and where the consequence of disagreement is leniency, but we think that it is inadequate in civil matters, where participation is voluntary and where parties are as interested in the extent of liability as in the fact of it. We also have trouble with using agreement between judges and jurors as the measure of quality. What matters is whether judges' or jurors' decisions are according to law. It is no comfort to the public or to the righteous litigant if judge and jury agree on the wrong decision or never decide at all.

Even if jurors' verdicts matched judges' judgments one hundred percent of the time on liability and one hundred percent of the time on the principal amount awarded, they still would be deficient compared to the latter. Jury verdicts would still be unjustified. They would not demonstrate that jurors systematically found facts and accurately applied law. Verdicts would not tell parties why they were wrong to litigate and not to settle. They would not inform parties, or interested other persons, how to comport their conduct with the law's requirements. They would not permit appellate review for accuracy. In short, so long as jury verdicts are unjustified, they are inadequate.

Syllogisms are not simple. It is not elitist to think that jurors need help in applying law to facts. Today, it is no longer out of contemplation that jurors might give reasons.⁵⁷⁴ It is misguided, on the other hand, to believe that jurors should rely on receiving that help from lawyers for the parties rather than from judges inclined to help jurors carry through subsumption of facts under law.

“Theory of the Case—Wrecker of Law.”

That is how, one century ago, one perceptive lawyer characterized the theory of the case, the salvation for subsumption then being newly offered by trial lawyers. Today, theory of the case is ubiquitous. It is the way that is supposed to help jurors—and judges—understand lawsuits. A guide published by the American Bar Association for lay readers states: “The trial is a formal hearing at which both sides present their theory of the case”⁵⁷⁵ A guide published by the National Institute of Trial Advocacy for professional readers captures the concept well in its first sentence: “At its

⁵⁷⁴ See, e.g., See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 527-537 (1997).

⁵⁷⁵ AMERICAN BAR ASSOCIATION, GUIDE TO RESOLVING LEGAL DISPUTE INSIDE AND OUTSIDE THE COURTROOM 139 (2007).

most basic form, a trial is nothing more than the presentation of each side's version of a dispute."⁵⁷⁶

What is so bad about the theory of the case? It denies the syllogism. Edward D'Arcy criticized the theory of the case for allowing "parties to become involved in controversies not embraced within the issue."⁵⁷⁷ We add that it forces passive decision makers, be they judges or jurors, to choose between competing presentations. It makes judgments, which should be objective applications of law to facts, into awards for the better story. The American poet laureate Robert Frost is said to have cracked: "A jury consists of twelve persons chosen to decide who has the better lawyer." The ABA Guide maintains that syllogisms remain: "The plaintiff will have to prove each necessary element of his or her cause of action"). The reality, however, is often they disappear.

"Jury Nullification—Law versus Anarchy"

Nowhere is rejection of syllogisms clearer than in the practice of jury nullification. Jury nullification claims for lay jurors authority to decide against law. In a democratic state such uncontrolled power to decide against law contravenes the rule of law. That jurors have that power in criminal cases has long been conceded; verdicts of acquittal are not reviewable. Verdicts in civil cases are, however, reviewable to the limited extent that they are manifestly against law. That jurors do not and should not have that authority to decide against law has been consistently maintained. Judge Lawrence W. Crispo stated the question succinctly: "Law versus Anarchy."⁵⁷⁸ In a democratic state such uncontrolled power to decide against law contravenes the rule of law.

The power of juries to decide against law is said to be one of the greatest benefits of juries. Juries are said to be the citizen's protection against arbitrary government power. The argument, based on America's colonial heritage of juries protecting colonists against the English crown, is anachronistic. Professor Sunderland countered it already in 1914:

[T]imes have changed and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily

⁵⁷⁶ D. SHANE READ, WINNING AT TRIAL 1 (2007).

⁵⁷⁷ Edward D'Arcy, "Theory of the Case"—*Wrecker of Law*, 70 CENTRAL L.J. 294, 311, 402 and 455, at 295 (1910).

⁵⁷⁸ Lawrence W. Crispo *et al.*, *Jury Nullification—Law Versus Anarchy*, 31 LOY. LA L. REV. 1 (1997).

diminishing for a hundred years, until now [1914] the jury must find some other justification for its continuance.⁵⁷⁹

Sunderland's argument is all the more persuasive when addressed to court resolution of private disputes where dangers of arbitrary uses of government power are minimal. Yet jury nullification is resilient; it has outlived Professor Sunderland. It remains an ever present issue in discussion of the role of the jury.⁵⁸⁰

Managerial Judging: "Are We Getting Civil-ized?"

The historic role of the American judge is passive; lawyers lead process. Reform proposals in recent decades call upon judges to be active. The report of the American College of Trial Lawyers Report, for example, urges judges to "have a more active role at the beginning of the case in designing the scope of discovery and the timing and direction of the case all the way to trial."⁵⁸¹ Active involvement is dubbed "managerial judging." It has had only limited success.

Critics worry that managerial judging puts clearing dockets ahead of declaring rights. They see it threatening the impartiality of judges by involving them directly in case settlement. Many discern in it "some version of the continental or inquisitorial model."⁵⁸² Professor Thomas T. Rowe, Jr. asks: "*Are We Getting Civil-ized?*" He keenly concludes that American judges, when it comes to dealing with facts, are not moving in the direction of what he calls "inquisitorial fact-finding."⁵⁸³

Managerial judging is not a step toward German syllogistic law applying. It is a giant leap in the opposite direction. Managerial judging is about "litigation control," "case management," and "docket control."⁵⁸⁴ It is

⁵⁷⁹ Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 305 (1914). It is also an argument against a professional career judiciary. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (Scalia, J., for the Court: "Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.")

⁵⁸⁰ See generally, CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* (1998).

⁵⁸¹ AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note 42, at 2.

⁵⁸² E.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982).

⁵⁸³ Thomas T. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 203, 210 (2007).

⁵⁸⁴ See, e.g., COURT DELAY REDUCTION COMMITTEE, NATIONAL CONFERENCE OF STATE TRIAL JUDGES, *LITIGATION CONTROL: THE TRIAL JUDGE'S KEY TO AVOIDING DELAY* (American Bar Association, 1995).

not about clarifying what are the material issues in dispute between the parties, deciding those issues under law and justifying decisions in judgments. Professor Rowe, without referring to subsumption, links the decisive change to the 1983 revision of Rule 12 providing for pretrial conferences. The title changed. Before 1983 Rule 16 was headed, "Pre-Trial Procedure: Formulating Issues." Now the title is different: "Pretrial Conferences; Scheduling, Management."⁵⁸⁵

German judges, too, are under pressure to clear dockets. Statutes, justification and appeals, as we shall see, protect judges, to some extent against those pressures. German judges put applying law ahead of docket clearing. When involvement of judges in settlement discussions became substantial, the Bavarian Ministry of Justice created a new institution: the settlement judge. The settlement judge heads off the possibility of partiality that troubles critics of managerial justice.⁵⁸⁶

3. Appeals

In the United States the first appeal is of right. That means that a party disappointed by a decision of the court of first instance need not make any special showing to obtain review by the next level court. Free review from the first instance decision is offered, because the purpose of the review is to correct mistakes of the court of first instance. In a few less populous states, that first review is the last possible, since those states have no intermediate appellate court, but only one appellate court of last resort. In most states, however, and in the federal system, a further review to a court of last resort is possible when certain conditions are met. The purpose of that final review is not the correction of error in the case at hand, but safeguarding the integrity of the legal system as whole. That review usually requires permission of one or the other of the courts to determine whether the case presents an issue requiring appellate supervision, such as the court below decided contrary to law or in conflict with other courts.

Filing fees for appeals from the United States District Court to the Court of Appeals are modest: in 2010 the charge was \$450 without regard to the amount in controversy. Additional costs, however, can be substantial. These might be printing the record or obtaining a bond to protect the interests of the party opposing the appeal during the course of the appeal. The costs of legal representation on appeal are borne by each party without regard to whether the party who appeals is successful. An important question for every appeal is whether it suspends the implementation of the first instance decision.

⁵⁸⁵ *Id.* at 195.

⁵⁸⁶ *See, e.g.*, Harriett Weber, Referat: für die gemeinsame Tagung für Richterinnen und Richter sowie Staatsanwältinnen und Staatsanwälte aus Österreich, Bayern und der Schweiz, November 2009.

Nature of Appellate Reviews

In American systems appellate review—both first and second—rests on appealing parties identifying specific errors of law made by lower courts and asking appellate courts to correct those errors. Appellate courts in the United States do not review cases in their entirety to determine that they were as whole correctly decided and reached correct decisions, *i.e.*, that the court of first instance correctly found facts, properly determined law, and correctly applied law to facts.

Legal and practical obstacles stand in the way of full review. In American systems, fact finding is reserved to jurors. The Seventh Amendment of the Constitution limits appellate review of facts found to reviews allowed by the eighteenth century common law. In effect all that appellate courts are allowed to do is to examine the record to see whether there is some evidence from which jurors might have concluded that a material fact had been proven.

The form of jury verdicts is a practical obstacle to review of the fact findings of jurors. Since general verdicts state only a result, but no findings of fact or conclusions of law, and give no reasoning, appellate courts cannot review decisions closely. The higher court cannot know which facts the jurors found to be true, how jurors understood law, or how jurors applied law to facts found. All that appellate courts can do is to read laboriously through trial records (recorded verbatim) to see whether there were at least arguable bases for the verdicts challenged.

While these limitations need not apply to reviews of judgments from bench trials, appellate practice is based on expectation of review of jury verdicts. Appellate courts do not, for example, themselves hear witnesses or otherwise take evidence; they only review records of trials below. Consequently practice in review of bench judgments is not as different from review of jury verdicts as law would permit.

As result, even in the first review, appellate courts confine their review to issues of law and do not revise findings of fact. They determine issues such as whether courts below properly conducted proceedings, properly instructed juries or correctly decided motions that disposed of or could have disposed of cases based on undisputed facts. They review records to see if there was some evidence on which jurors might have based their decision, but do not inquire whether lower court decided cases correctly.⁵⁸⁷

American lawyers rarely recognize the high costs that this restricted review imposes. In the days before computers and photocopiers, parties would expensively have the entire trial transcript set in type and printed. To this day, they still provide to the court copies of any part of the verbatim record potentially applicable for appellate judges painstakingly to read

⁵⁸⁷ See Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 515 (1975).

through. Yet restricted review means that appellate courts usually cannot themselves correct errors, but must return cases to lower courts for further proceedings, including sometimes completely new trials.

Courts of Law Resort and Redundancy of American Appeals

In most American states and in the federal system, although parties are denied even one review of factual findings, they get two reviews of legal determinations. American lawyers rarely ask why there are two levels of appellate review on law, since neither instance can correct factual findings of the court of first instance or review a case as a whole. The unintended consequence of a system of intermediate appellate courts is the phenomenon of double appeals. Two level of appellate courts for law leads to two appeals. If at first you lose your appeal, appeal again! It is a system from which only lawyers profit.

The possibility of a second appeal in *Roh v. Doh* is low because the case is in the federal system. In the federal system, a second appeal to the United States Supreme Court is theoretically possible for questions of federal law, including of federal constitutional law, but practically extraordinary. Since *Roh v. Doh* is based on state law, no further appeal would be possible.

C. Germany

The judgment shall include: ... 6. The grounds for decision. ... The grounds for decision shall contain a short summary of the bases on which the decision in factual and legal respects rests.

§ 313 Code of Civil Procedure

1. Judgments

“A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than personalized opinions of the individual deciding justices. . . . The typical German judgment . . . strives after the ideal of deductive reasoning.”⁵⁸⁸ It is designed to assure that the parties understand the grounds for the court’s decision. Ideally the judgment will convince the party who loses the lawsuit that that loss is the correct outcome. At a minimum, the judgment should persuade the loser that the process was rational. Parties affected by the judgment should be enabled to reproduce the grounds for the decision. They should recognize that rational argumentation,

⁵⁸⁸ Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, in INTRODUCTION TO GERMAN LAW 1, 26-27 (Mathias Reimann & Joachim Zekoll eds., 2nd ed., 2005).

not arbitrariness, determined the judgment. In this way, the parties are fundamental rights under the German constitution (Basic Law, *Grundgesetz*) are fulfilled: the right under Article 3 to equal treatment under law and the right under Article 103(1) to be heard.⁵⁸⁹

Not only do judgments inform parties, they control judges. Judges who subsume facts of cases under applicable rules incorrectly are subject to being corrected on appeal. They demonstrate through their judgments their understanding—or lack of understanding—of the contentions of losing parties. They display, through the impersonal, even colorless, style of their judgments, their neutrality. In theory judges should be fungible.⁵⁹⁰

Elements of a Judgment

A judgment consists of a caption (*Rubrum*) that identifies the parties and the lawsuit; a statement of the decision made and the relief ordered (*Tenor* or *Urteilsformel*), which should be a sufficient direction to court personnel for enforcement of the judgment; the findings of fact (*Tatbestand*); and the grounds for the decision (*Entscheidungsgründe*), referred to here as the *justification*.

The *Tatbestand*, as it appears in a judgment, is a short statement of the parties' legal claims and assertions of fact. The Code of Civil Procedure provides: "In the *Tatbestand* the asserted claims and the supporting and defending materials should be concisely presented only in their material content with particular reference to the subject applications. For details of the subject and of the matters in dispute, reference should be made to pleadings, minutes and other documents."⁵⁹¹ From the *Tatbestand* it should be possible to discern quickly who is seeking what, from whom, on what ground, and to determine which matters are in dispute and which are not. The *Tatbestand* serves as a public record of the oral hearings. It should include: the subject matter of the lawsuit, a sketch of the facts detailed only insofar as necessary to establish clearly the subject of the lawsuit, the

⁵⁸⁹ See generally, James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 114 PENN STATE L. REV. 469 (2009).

⁵⁹⁰ The judgment is central to German civil justice. It contributes both to accuracy of judgments and to fairness of process. It is a rule of law control of judges' actions and a quality control of their decisions. German legal science gives the duty of justification and judgments close attention. See, e.g., JÜRGEN BRÜGGEMANN, *DIE RICHTERLICHE BEGRÜNDUNGSPFLICHT: VERFASSUNGSRECHTLICHE MINDESTANFORDERUNGEN AN DIE BEGRÜNDUNG GERICHTLICHER ENTSCHEIDUNGEN* (1971); DELF BUCHWALD, *DER BEGRIFF DER RATIONALEN JURISTISCHEN BEGRÜNDUNG: ZUR THEORIE DER JURIDISCHEN VERNUNFT* (1990); ANUSHEH RAFI, *KRITERIEN FÜR EIN GUTES URTEIL* (2004). German legal education gives the skill of writing judgments center stage in the first of the two year mandatory internship that follows university legal education. Highly trained judges teach all prospective lawyers how to write judgments. See, e.g., WINFRIED SCHUSCHKE, *BERICHT, GUTACHETEN UND URTEIL* 34th ed. (2008) (1st ed. by Hermann Daubenspeck, 1884); CHRISTIAN BALZER, *DAS URTEIL IM ZIVILPROZESS: URTEILSFINDUNG UND URTEILSABFASSUNG IN DER TATSACHENINSTANZ* (2nd ed., 2007).

⁵⁹¹ § 313(II) ZPO.

evidence offered by the parties, the applications of the parties, relevant history of the lawsuit, and specific references to the file. It should not include: facts not necessary to the decision of the case, party statements made in the proceedings that are no longer relevant, legal arguments of the parties, statements of the law, nor normative evaluations of the facts. Silence in the *Tatbestand* is understood to prove that no position was taken on the point.

The justification furnishes the legal basis for the relief ordered or other resolution of the case. Matters not relevant to the decision made or the relief ordered do not belong in the justification. The justification is to evaluate and subsume the concrete facts of the *Tatbestand* under the abstract elements of the applicable rule. The Code of Civil Procedure provides: “The justification contains a short summary of the consideration on which the decision in factual and legal respects rests.”⁵⁹² In the normal case it should include the following:

A statement of the result and the claims for relief;

A statement that the complaint states a cause of action (is *schlüssig*);

A statement that the claim is permissible, i.e., satisfies the prerequisites for a lawsuit (*e.g.*, the court has subject matter and personal jurisdiction) (is *zulässig*);

A statement of the facts that satisfy the abstract elements of the applicable rule;

A statement justifying the factual findings necessary for application of the law; and

A statement of which facts are undisputed and which are disputed and an evaluation of the evidence and resolution of the issue with respect to disputed facts relevant to the decision.

2. Justification: Applying Law to Facts

The justification applies law to facts. It determines the facts of the *Tatbestand* and subsumes them under the abstract elements of the applicable rules. The process of applying law to 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

⁵⁹² § 313(III) ZPO.

arising from the loan agreement of April 15, 2011 to repayment of the loan of €60,000.”

The justification then proceeds to address systematically the applicable rule, its elements and, if the judgment denies plaintiff’s claims, all rules that might support any of the claims. For each element of the rule, insofar as necessary, 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 directly relevant to determining whether the facts in the present case fulfill 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 those facts material to decision of the case. Immaterial facts have no place in the justification except as is necessary to understand the court’s decision. The justification starts from 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 burden of proof other than with respect to material facts in dispute. Once the justification has clarified material and disputed facts, it subsumes those facts under the identified and clarified rule.

Duty of Justification Fulfilled in the Judgment

The German judgment fulfills the duty of the German judge to justify the judge’s judgment. The general requirement of German law that a decision to apply government power must be individually justified is especially pronounced in judicial proceedings. Unjustified judgments threaten the rule-of-law state; justified judgments tie the implementation of the law in the individual case to the statute. They establish that application of the law is an impartial application of the general rule to the specific case. A deductive justification is thought essential to fulfillment of legal certainty.

The duty of justification is intended to enhance the quality of legal decisions. In the first instance, it provides a foundation to review the decision made. Just the knowledge that such a review is possible impels decision makers to self-control. It requires them to base their decisions, or at least the justifications for their decisions, on approved reasons (*e.g.*, statutory requirements) and not on unapproved ones (*e.g.*, bias or prejudice). It pushes them toward more careful handling of materials of decision, of fact finding and of law determining and applying. Particularly compared to American judges, who oversees proceedings as much as reach decisions, the duty of justification imposes on decision makers the responsibility for outcomes of procedure. Justification is not required, however, if both parties relinquish their rights to appeal or if an appeal would not be permitted.⁵⁹³

3. Judgment in Roh v. Doh and Assuring Open Courts Accuracy

⁵⁹³ § 313a(1) ZPO.

Below we provide a judgment such as might be entered in Roh v. Doh. Notice in particular how it provides transparency to decision thus promoting decision accuracy.

Mary Roh v. John Doh, Jr.

File No.:

Entered May 10, 2012

IN THE NAME OF THE PEOPLE

JUDGMENT

In the lawsuit

Mary Roh, Bismarkstraße 11, 10400 Berlin

Represented by Harry Hahn, Esq.

-against-

John Doh, Jr., Kaiserplatz 11, 84471 Munich

Represented by Betty Bahn, Esq.

For Repayment of a Loan

The 22nd Civil Chamber of the District Court Munich I, by District Judge Jung as single judge, based on the oral hearing held April 30, 2012 issues the following:

Final Judgment:

- I. The Defendant is ordered to pay the Plaintiff € 60.000 and interest of 5 % above Prime Rate from August 16, 2011.**
- II. The Defendant bears the costs of the action.**
- III. The judgment is provisionally enforceable upon posting of a bond of 120 % of the amount enforced.**

Tatbestand

The parties dispute the repayment of money in the amount of € 60.000.

Plaintiff and Defendant are independent merchants in the automotive section. Each of them is a franchised Honda automobile dealer. Defendant's father has been a close friend of Plaintiff since they went to college together, and is the regional distributor for Honda, who supplies the dealerships of both Defendant and Plaintiff. Defendant had

been engaged to marry the Plaintiff's daughter, but they broke up last summer.

On April 16, 2011 Plaintiff transferred €60,000 to Defendant's company's account with the Deutsche Bank, Munich. This amount has not been repaid to Plaintiff.

Plaintiff's position is that she transferred the money to Defendant as a loan. Defendant has not complied with his obligation under the loan agreement to repay the money no later than August 16, 2011. Defendant's position to the contrary is that the disputed amount was a gift of Plaintiff. Repayment by Defendant, let alone at a specific time, was not agreed.

Plaintiff moves the Court,

to order Defendant to pay €60,000 and interest since August 16, 2011, in the amount of 5 % above Prime rate.

Defendant moves the Court,

to dismiss the Complaint with prejudice.

Defendant contests having made a loan agreement with Plaintiff. Rather it is that Plaintiff rather gave him a gift. Presumably with her transfer of money Plaintiff wanted to contribute to strengthening the relationship between Defendant and her daughter and thereby further an eventual union of the families of two friends. A common future of her daughter with Defendant, however, is now out of the question, since the daughter has ended the relationship with Plaintiff. He was not at fault and therefore is in no way obligated to pay the money back.

The Court took proof on the basis of its decision of August 15, 2011 by taking unsworn testimony of both Defendant and Plaintiff as witnesses. Reference will be made to the conclusions of the evidence-taking.

For further supplementation of the facts and of the dispute, reference is made to the pleadings and their exhibits.

Grounds for Decision

The complaint is permissible and is in all respects justified. Under § 488(1) second sentence of the Civil Code [BGB] Plaintiff has a claim against Defendant for repayment of the loan in the amount of €60,000 pursuant to the loan agreement of April 15, 2011. It is not disputed between the parties that Plaintiff transferred this amount to Defendant's company on April 16, 2011 and that the Defendant has not paid this amount back to Plaintiff.

1.

On April 15, 2011 at the traditional spring party of the regional Honda distributor the parties orally concluded a loan agreement on the basis of which Plaintiff was obligated to place at Defendant's disposal €60,000 as loan and Defendant was obligated on his part to pay the loan back to Plaintiff no later than August 15, 2011.

Based on the oral hearing the Court is convinced that Plaintiff placed this money at the disposal of Defendant only on the basis of the loan agreement.

The Court heard and examined Defendant and Plaintiff each formally as parties regarding the controverted conversation at the referenced spring party. The Court saw itself as bound to do so, because Plaintiff, who bears both the burden of presentation

and the burden of proof of the asserted claim for loan repayment, under applicable rules of proof, could meet that burden only through examination of the party opponent, the Defendant (§ 445(1) Code of Civil Procedure). Defendant did not consent to Plaintiff's application to her examination as the party bearing the burden of proof (§ 447 Code of Civil Procedure).

The Supreme Court has repeatedly emphasized (e.g., its decision reported at NJW-RR 2006, 61ff. with further citations), that in such situations where a party to a confidential conversation has no witnesses, the party must be given opportunity to introduce into the proceedings her personal view of the conversation.

The parties in their examinations in the oral hearing orally confirmed their previously stated positions. The evaluation of the proof of the party examinations (§ 453(1) 1 Code of Civil Procedure) persuaded the Court that Plaintiff made her payment of €60,000 to Defendant exclusively on the basis of the loan agreement with Defendant.

Under § 286 Code of Civil Procedure, which governs judicial free evaluation of evidence, an assertion is proven, if the court is convinced of its truth, without thereby setting requirements that can not be met. The basis of the evaluation is the entire content of the hearing, all submissions, conduct, omissions, and personal impressions of the participants in the process of taking proof.

It was plain to the Court that Defendant could not give a sound ground to explain why Plaintiff would have given him a gift of such a large amount. It is undisputed that the transfer of the money was to the corporate account of Defendant's company. This circumstance appears at least—in the absence of an further explanation, as is here the case—to speak directly against the assumption of a gift. It must mean that the money was also to benefit the business of Defendant's company. The debits and credits of a company's bank account have special meaning for the company, above all under accounting standards and in tax law. It would not be understandable, if a purely private gift to the owner of a company would land in its corporate account, with all of the substantial commercial and tax consequences that would have. The way the matter was carried out, *i.e.*, by transfer to the company account, speaks forcefully for characterizing the payment as a loan.

What is more is that Defendant could not give a plausible ground for a gift. This is a matter of a substantial amount of money. If Plaintiff really had in mind doing something for the common future of Defendant and her daughter, obviously she would have told her daughter Rosa about it, which undisputedly did not happen. If one assumes a gift, it is not apparent why Plaintiff would wanted to support only Defendant unilaterally and not also her daughter.

It was plain to the Court that Defendant, both in the hearing and in his testimony, was unable to give precise details, but was able only to speak in general and conclusory terms. In his statements he often failed to distinguish between descriptions of fact and his evaluation of them. In sum, Defendant could not convince the Court that the disputed amount was a gift of Plaintiff.

Plaintiff, on the other hand, both in her statements and in the personal impression she presented, convinced the Court that the complaint's version of the case corresponds to truth. Plaintiff testified that at the relevant time there was not the slightest ground for her to give Defendant such a large amount of money. It was substantial to her. Rather, at the spring party Defendant told her of his unexpected financial difficulty, that it arose from the failure of an important customer to pay, and that it was completely unexpected. Defendant implored her emphatically to loan him the money. Sure he could have asked his father for the money at any time. Sure he could get short-term

money in a number of other ways. But he wanted absolutely wanted to avoid, that this sudden, but transitory financial difficulty, might disturb his father, who had placed great trust in him. The money (€60,000) he would pay back as quickly as possible, and at the latest, August 15, 2011. Defendant further said that he was asking her—the Plaintiff—above all, because she had great trust in him.

In her declarations Plaintiff was clear and open. She freely acknowledged that she was angry with Defendant, because he presented the matter otherwise and because he had broken his promise to pay the money back. She was, however, able to detail the entire course of events and to present them understandably. Her entire presentation of the matter was believable and she herself was credible in her testimony. Based on the personal impression of the Plaintiff, the Court cannot conceive that Plaintiff, either out of disappointment with Defendant or out of her disappointed expectations, could have testified to untruths.

Defendant is therefore adjudged to pay back to Plaintiff the amount of the loan.

2.

The promised amount is, as sought, to bear interest. The Defendant has been in default in repayment since August 16, 2011 (§ 286 (1) 2 Civil Code). The amount of interest follows from § 288 (1) 1 Civil Code.

3.

The decision on costs is based on § 91(1) Code of Civil Procedure.

4.

The claim for provisional enforcement is based on § 709 first sentence Code of Civil Procedure.

Jakob Jung
Judge *Landgericht*

At about 1500 words (one word for every forty Euros in dispute) the justification is neither long nor short for cases of this magnitude. We have tried to create in this translation the style of a typical German judgment.

This judgment is an example of how German judgments are crafted to use clear, declarative sentences to explain why judges decide as they do. The judgment states first the differing contentions of the parties. It identifies the applicable law. It considers the proof to see whether it fulfills the elements of the applicable rules. It explains why the judge chose to believe one witness and not another.

Such a judgment may not be literature, but it is a clear statement showing the path that the court followed to reach the decision that it did. Should one or the other parties challenge the outcome, they will not be reduced to arguing generalities. While they may argue that the court made particular procedural errors (most commonly, failure to fulfill a duty of elucidation), they will be able—indeed, they may be required—to point to how those errors adversely affected the court’s substantive adjudication.

Such judgments are given in the majority of concluded cases. German judges write dozens of such judgments each year. They can do that because, as we saw in Chapter 3, they are trained to do it.

Writing good prose is not enough. While it is hard to imagine an untrained American juror writing such a judgment, it is not easy to imagine a well-trained American professional writing one either. American lawyers focus on case theory rather than on thought process. A judgment states the thought process used by the judge in the case. The judgment details the judge's route to decision; it states why at each point along the way, the judge went down one path rather than another. An American theory of the case presentation does not ordinarily permit departures from presented paths. Yet, that is exactly what the law may sometimes require.

Living with the case and doing it justice: the judge as facilitator and guide, not as manager or inquisitor.

A German judgment is possible because the judge who decides the case has lived with it from its filing. Living with the case is an explicit requirement of the Code of Civil Procedure.⁵⁹⁴ The judge writing the opinion must have participated in the hearings, i.e. *beigewohnt haben*, which translates literally as “have lived with” the hearings.

As Americans ponder how more active judges might function without undermining their system's commitment to party presentation and judicial neutrality, they should consider how German judges live with their cases and do them justice: they guide cases toward resolution according to law. Let us recall our discussion throughout this book of how German judges decide cases.

German judges are not the inquisitors that Americans, unfamiliar with German practices, believe them to be. German judges have no personal or governmental interest in how they decide cases before them. Their interest is that they decide according to right and statute to further the overall societal interest in the rule of law and peace. Recall our discussion in Chapter 6 above.

Nor are German judges the managers that critics of American managerial litigation fear their judges may become. They are not driven single-mindedly, as legal ethics expert Professor Stephen Gillers said of American judges, to “Wind up this dispute, let's go on to the next dispute.”⁵⁹⁵ German judges do not rely on deadlines divorced from case issues to expedite resolution of disputes; they do not demand that parties complete preparation or presentation of case theories within artificially set

⁵⁹⁴ § 309 ZPO.

⁵⁹⁵ TRUTH ON TRIAL, 8 ANNENBERG ETHICS IN AMERICA at 55th minute (Columbia University Seminars on Media and Society, 1989, ISBN 0-89776-526-5)
<http://www.learner.org/resources/series81.html?pop=yes&pid=198>.

timelines. What they do is insist on is that parties substantiate assertions that particular facts do or do not fulfill elements of legal claims.

German judges could not be the managerial judges that American jurists rightly fear. The twin duties under which they work—of justifying their decisions after elucidating their cases—do not permit it. While German judges are under pressure to decide cases, they cannot decide and bury old cases. They must find facts that establish legal bases for their decisions. If they do not put those facts down in their judgments, appellate courts will reverse them. If they decide without hearing all sides adequately on a material point in dispute, appellate courts will themselves review that element or return the case to them.

German judges function not as inquisitors or managers, but as guides and facilitators of decisions according to law. Statutory law tells them where they must guide their cases, while the duty of justification tells them how to facilitate the trip and demands that they document that they have properly completed it.

Look back on our discussions of pleading and process. Recall how German judges act:

Pleadings: German judges review every case filed for compliance with procedural and substantive prerequisites. They review all cases, not just those parties object to, *before* they serve complaints. They determine affirmatively, albeit preliminarily, that jurisdiction exists and that actions are timely brought. If lacking, they give guidance. Jurisdictional rules are straight-forward and permit expeditious application. They are not complex and convoluted the way many corresponding American rules are. German judges, before serving complaints, determine that complaints state plausible grounds for relief. That is also not time consuming, because rules of substantive law are codified: recognizing possible legal grounds for relief is easy in most cases. Moreover, rules of procedure require that plaintiffs substantiate claims for relief, not just with wishful assertions of facts, but with offers of proof.

To American plaintiffs' lawyers the world of German pleading universe might sound a hell and to defense lawyers a heaven (or at least a safe haven), but that is not so. Plaintiffs whose pleadings fail one or the other test are not summarily dispatched from the courthouse; judges may ask them to make up deficiencies. In other words, judges guide plaintiffs to right paths. Only if plaintiffs are then unable to make necessary claims, do judges dismiss complaints. Such dismissals are in everyone's interest. They avoid squandering court and plaintiffs' time in useless litigation. They protect privacy of potential defendants who are never served. They may spare plaintiffs, who would most surely wind up on the losing side, the obligation of reimbursing the side-not-served for its lawyers' fees.

Preliminary hearings. Beginning with review of complaints, German judges work to facilitate conclusion of the cases according to law. It is their responsibility, as participants knowledgeable in law, to identify possibly

applicable legal rules. As facilitators they discuss cases directly with parties and not just with lawyers of the parties. In these hearings judges seek, as they did with pleadings, not to evict parties with weak cases from the courthouse, but to facilitate court resolutions of cases on the merits. Judges are looking for the material issues in dispute, for these are the only issues that they need consider.

Proof taking. Only after they have identified conceivably applicable legal rules and determined which elements of those rules are material and in dispute between the parties, do German judges turn to proof taking. Parties are responsible for identifying proof. The parties are not, however, allowed to impose on the other side the burdens of American-style discovery. They cannot force participation. German judges facilitate taking proof of facts that are material elements in dispute. They do not, however, allow parties to inquire into matters not relevant to material elements in dispute. Again German judges are guides and facilitators, for they help identify what parties must prove. Where a party's proof proves infirm, they do not exclude the party or the parties' claims from proceedings. What they do do is to postpone further consideration pending production of necessary proof. Should a party uncover the proof, if the judge has not decided that case already, the party can return to court.

No surprises. German judges guide process to facilitate cooperation of judges and all parties in determining whether facts exist that establish or deny application of applicable legal rules. When courts and parties cooperate in determining whether elements of legal claims are fulfilled, there are few surprises. Decisions according to law require that judges give all parties opportunity to be heard on all material issues in dispute.

5. Appeals

In Germany, as in the United States and in Korea, the first appeal, is as of right. For very small matters (below €500), appeal requires approval of the court.⁵⁹⁶

The 2002 reform of German civil procedure introduced a completely "new conception" of the first appeal. Previously, the first appeal anticipated a trial *de novo*; virtually everything was done anew. Appeals were very common. The formal parliamentary explanation for the reform bill rejected this long-used approach both as uneconomical and as not required by the rule of law. According to the explanation, the function of review now is "to review the judgment of the first instance for its application of the substantive law as well as the correctness and completeness of the determinations reached and to correct any mistakes." Under the new law, the appellate court is required to accept factual findings of the court of first instance "insofar as there is no clear indication of doubt of the correctness or completeness of the

⁵⁹⁶ § 511 ZPO.

fact determinations material to the decision and therefore indication for a new fact determination.” If there is such doubt, however, the court, as before, may take new testimony and find new facts.

Whether the reform will change the scope of review materially remains to be seen, but most commentators think that it will not. What remains the same after the reform is the appellate court’s responsibility for the material correctness of final judgments. The appellate court is not to search for errors by courts below, but is to insure that judgments in their entireties are correct and, when they are not, to correct the judgments. Now, rather than conduct the proceedings of the case itself anew as the previously did, appellate courts are to review trial court’ factual findings for correctness and to apply the law to the facts as found. By focusing on how the trial court applied the law, reforms are intended to enhance legal certainty. In any case, other aspects of the reform seek to enhance legal certainty by helping cases conclude sooner. Appellate courts are required to review all appeals when initially filed. They are to dismiss, *ex officio*, appeals that appear to have no chance of success or raise no legal issue of fundamental importance.

Although the 2002 reform sought to diminish the incidence of appeals, the percentage of cases appealed remains high. Fees for appeals are based on the amount in dispute. As with court costs generally, they are taxed to the losing party.

D. Korea

A written judgment shall contain ... 4. the grounds for decision.

Art. 208(1) Civil Practice Act⁵⁹⁷

1. Judgments

In form Korean judgments parallel their German counterparts. They begin with identification of the parties and the lawsuit and with a statement of the decision and of the relief ordered. They then give a short statement of the parties’ legal claims and of their assertions of fact. Finally, they conclude with a justification of the decision which applies the law to the facts.⁵⁹⁸

The justification of Korean law is in essence similar to its German counterpart. One substantial difference is that Korean court judgments are restricted to giving judgment on the legal claims that the parties asserted.⁵⁹⁹

⁵⁹⁷ The language is the same as in the original 1877 German Code of Civil Procedure, = § 274(1) CPO (1877).

⁵⁹⁸ § 208(1) KCPA. See Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 134-135, reprint at 22-24.

⁵⁹⁹ *Id.*

Korean Judgment in *Roh v. Doh*

Mary Roh against John Doh, Jr.

Judgment Announced by Seoul Central District Court May 10, 2012

Case Number:

Plaintiff Mary Roh
100 Heukseok Street, Dongjak-Gu, Seoul

Plaintiff's Procedural Representative Lawyer Harry Hahn
111 Heukseok Street, Dongjak-Gu, Seoul

Defendant John Doh, Jr.
300 Haewoondae Street, Haewoondae-Gu, Pusan

Defendant's Procedural Representative Lawyer Betty Bahn
313 Haewoondae Street, Haewoondae-Gu, Pusan

Date of Final Hearing April 30, 2012

[Main Text of Final judgment]

I order that:

- I. The Defendant pay to the Plaintiff ₩75 million plus 5% annual interest rate of the said amount since August 15, 2011 until May 10, 2012 [date of formal entry of judgment], and 20% annual rate of the said amount from the next day of the date when the decision was rendered until the day when Defendant fully pays back to Plaintiff the amount awarded.
- II. Defendant bears the costs of the dispute.
- III. The above is subject to provisional execution.

[Gist of Plaintiff's Claim]

Identical to the main text of final judgment

[Grounds]

1. **Basic Facts**

The plaintiff and the defendant are each working as independent merchants in the automotive industry. Each of them are Honda dealers. The father of Defendant is a longtime and close friend of Plaintiff. Defendant's father is regional distributor for Honda automobiles. Defendant was engaged to be married this upcoming June to the daughter of Plaintiff; she unilaterally broke of the engagement in June of last year.

At the traditional spring party of Honda dealers held last year Plaintiff and

Defendant met. The parties disagreed about what was said between them at the party, but they agree that the next day Defendant transferred ₩75 million to the account of DohSon Honda LLC, in which Defendant was the manager-owner. On April 16, 2011 the amount mentioned above was transferred from the plaintiff to DohSon Honda LLC's bank account at Pusan Bank in Pusan.

September 7, 2011 Plaintiff asked Defendant to repay the loan which had been due at the latest, August 15, 2011. However, Defendant refused to repay the money, contending that he did not enter into a loan agreement with Plaintiff and it was a gift to him. As a result, Plaintiff instituted the instant suit against Defendant before the court.

On basis of Proofs No. 1 to 3, I found that there was a loan agreement between Plaintiff and Defendant on April 15, 2011.

[Proof] Proofs No. 1, No. 2. And No. 3 Attached.

2. Parties' Arguments and Court's Holdings

(1) Parties' Arguments

1) Plaintiff's Argument

Plaintiff is of the opinion that she transferred ₩75 million to Defendant as a loan. Plaintiff argues that Defendant was obligated to repay the loan by August 15, 2011 and failed to do so. Hence, Plaintiff claims Defendant should pay to Plaintiff ₩75 million plus 5% annual interest rate of the said amount since August 16, 2011, until May 10, 2012 and 20% annual rate of said amount from the next day of the date when the decision was formally entered to the day when Defendant has fully paid this judgment.

2) Defendant's Arguments

Defendant argues that the amount mentioned above was a gift for him and does not need to be paid back to Plaintiff. Thus Defendant contends that the instant lawsuit should be dismissed.

(2) Court's Holding

It is not disputed that the plaintiff paid ₩75 million on April 16, 2011 to the company owned by Defendant and that Defendant has not paid the money back to Plaintiff within its due date.

The parties entered into an oral loan agreement on April 15, 2011 at the annual spring party of the regional Honda Automobile dealers' association, under which Plaintiff was obliged to lend ₩75 million to Defendant and, in turn, Defendant was obliged to pay the money back to the plaintiff no later than August 15, 2011.

At the hearing, the Court was convinced that Plaintiff transferred the money to Defendant's company only on the basis of the loan agreement between the parties.

The Court has examined both parties as witnesses in accordance with Article 293 of Korean Civil Procedure Act [KCPA].

In addition, the court noticed that the defendant could not name a really good reason as to why the plaintiff gave that amount of money to the defendant for a gift. It is undisputed that the transfer of payment to the DohSon Honda LLC's business account was made by Plaintiff. This situation seems to mean that the money should benefit the operation of DohSon Honda LLC. Hence, the money cannot be a purely private gift for Defendant only on the basis of the fact that he is the owner of the company.

Another factor is that the defendant could not present the Court a really plausible reason for a gift. The amount the plaintiff transfer to the defendant's company is significant and high. Overall, the defendant fails to prove that the disputed amount was a gift for the defendant. Thus, the court believes the plaintiff's version of the truth.

3. Conclusion

Thus, the defendant has obligation to pay to the plaintiff ₩75 million plus 5% annual interest rate 600 of the said amount pursuant to the Korean Civil Code since August 16, 2011, until May 10, 2012, and 20% annual rate of the said amount pursuant to the Act on Special Cases Concerning Expedition, etc. of Legal Proceedings (*sosong chokjin deong e kwanhan teokre beop*), from the next day of the date when the decision was rendered to the date when the Defendant has fully paid this judgment.

Thus, by affirming the plaintiff's claim, the court holds the judgment mentioned on the main text of the final judgment.

Jacob Jung
Court Judge

3. Appeals (상소)

In Korea, as in the United States and in Germany, the first appeal (항소) is of right.

In Korea, as in Germany but contrary to the United States, the second instance courts review not only issues of law but also factual issues. Hence, appellants can submit additional evidence before the second instance courts. This arrangement encourages plaintiffs and defendants alike to forego lawyers in the first instance proceedings and appear *pro se*. They figure that if they lose in the first instance, they can appeal to the second and, in effect, have a new proceeding. They anticipate, what usually is the case, that they will invest more resources in the second instance than they did in the first.

The fee schedule discourages appeals, even though the costs imposed are eventually taxed to the losing party. The fees through the courts increase regularly. As we saw in Chapter 5, the fee in the court of first instance in 0.5 % of the amount in controversy. In the second instance, it rises to 1%, and in the third and final instance, to 1 ½ % of the amount in controversy.

⁶⁰⁰ Article 379 of Korean Civil Code.

E. *Roh v. Doh*: Comparative Outcomes

We do not want to make the mistake that many make and confuse legal decisions for actual outcomes. Different systems may reach the same legal conclusion, yet from the perspective of the parties, produce very different outcomes. That is the case in *Roh v. Doh*.

Deciders in all three systems—be they judges or jurors—are likely to reach the same decision in our hypothetical case based on how they assess the parties' credibility. The outcomes in the three systems, however, will be different even if the legal conclusions are the same.

1. Can Roh lose while winning?

If the case goes to final judgment, if Roh wins, in the United States, she will be lucky to recover one-half of her claim; in Germany or Korea, she will recover nearly all of her money. If Doh wins, in the United States, he will be lucky to have spent less than one third the value of his legal right for his victory; in Germany or in Korea, he will have lost little of it. The following tables show that:

Roh Wins

If plaintiff Roh wins, she recovers:

	U.S. Contingent	U.S. Hourly	Germany	Korea
Award	\$ 75,000	\$ 75,000	€ 60,000	₩ 5,000,000
Less lawyer's initiation fee	free	free	[729] ⁶⁰¹	4,250,000
Less lawyer's process fee	25,000	30,000	loser pays	1,050,000
Less lawyer's expenses	ca. 5,000	ca. 5,000	included	included
Less court costs	loser pays	loser pays	loser pays	loser pays
Less fast payment discount	ca. 5,000	ca. 5,000	none	none
Outcome-Roh recovers	\$ 40,000	\$ 35,000	€ 60,000	₩ 0,700,000
NET RECOVERY % of claim	53.3 %	46.7 %	100.0%	94.3%

While defendant Doh pays:

	U.S.	Germany	Korea
Award	\$ 75,000	€ 60,000	₩ 75,000,000
Plus lawyers' initiation fees	free	[729] ⁶⁰²	4,250,000
Plus lawyers' process fees	30,000	5,614	9,300,000
Plus lawyer's expenses	ca. 5,000	no charge	no charge
Plus court costs	ca. 2,500	1,668	342,500
Less fast payment discount	ca. 5,000	none	none
Outcome-Doh pays	\$ 107,500	€ 67,272	₩ 88,892,500
NET PAYMENT % of claim	143 %	112 %	119 %

For these tables, we assume: (1) for the United States, a contingent fee of 33⅓ % or an hourly fee of \$30,000 (100 hours @ \$300 or a mix with more hours, some at a lower charge), with Doh's lawyer charging the same amount as Roh's lawyer; (2) for Korea, Doh's lawyer charges the same Roh as set out in Chapter 3. The hour calculation for the United States is artificial and includes trial time. Just how many hours will be required lies in the hands of the lawyers for the parties. Depending upon how they choose to conduct the case, they can raise or lower the estimate dramatically.

If Roh wins, in the American system, she will be lucky to recover half of her claim. Because the German and Korean systems have variations of loser-pays for costs, a winning Roh in those systems gets back most of her money. In Germany, she gets back all of it. She is held harmless. In Korea, however, Roh will not be held completely harmless. The lawsuit will cost her a little more than 5%.

⁶⁰¹ Advance payment on process fee credited to process fee.

⁶⁰² Advance payment on process fee credited to process fee.

The absence of a loser-pay system in the United States and the significance for plaintiff of contingent fee representation are especially plain when plaintiff Roh loses and defendant Doh wins. Then there is no recovered principal to fund legal fees:

Doh Wins.				
If plaintiff Roh loses, she pays out (not necessarily to Doh):				
	U.S. if contingent	U.S. if hourly	Germany	Korea
Award	\$ 0	\$ 0	€ 0	₩0
Plus lawyer's initiation fee	free	free	[729] ⁶⁰³	4,250,000
Plus lawyers' process fees	free	30,000	5,614	9,300,000
Plus lawyer's expenses	ca. 5,000	ca. 5,000	included	included
Plus court costs	ca. 2,500	ca. 2,500	1,668	342,500
Less fast payment discount	none	none	none	none
Outcome-Roh pays out	\$ 7,500	\$ 37,500	€7,272	₩13,892,500
NET PAY OUT % claim	10 %	50 %	12.1 %	18.5 %
While defendant Doh, the putative winner, pays:				
	U.S.	Germany	Korea	
Award	\$ 0	€ 0	₩ 0	
Plus lawyers' initiation fees	free	[729] ⁶⁰⁴	4,250,000	
Plus lawyers' process fees	30,000	loser pays	1,150,000	
Plus lawyer's expenses	ca. 5,000	included	included	
Plus court costs	loser pays	loser pays	loser pays	
Less fast payment discount	none	none	none	
Outcome-Doh pays	\$ 35,000	€ 0	₩ 5,400,000	
NET PAY OUT % claim	46.67 %	0 %	7.2 %	

When Doh “wins,” he still loses in the American system: his legal fees likely will be one-third—possibly even more—of the total value of his legal right. In the German system, on the other hand, he emerges from litigation unscathed. He does not do quite as well in the Korean system, where he still has to pay around 7% of the value of his claim.

Plaintiff Roh, on the other hand, is a big loser in the American system, but only if she pays the hourly rate. She comes off relatively well if she is

⁶⁰³ Advance payment on process fee credited to process fee.

⁶⁰⁴ Advance payment on process fee credited to process fee.

represented on a contingent fee basis. Then her lawyer loses; Hahn gets no fee. She pays around \$7000.

That the winner loses in the United States in a case like *Roh v. Doh* is explained, but only in part, by absence of a loser fee system. The absence does not, however, explain all of the pain that parties in American litigation suffer. The *loser* in *Roh v. Doh* in Germany or in Korea, pays *less* in process costs—which are for two parties—than the *winner* in the American case pays for his or her own lawyer. In the United States, in our case, process costs eat up half or more of the value of the right in dispute. The only winner is the legal system itself. It takes the lion's share of the right in dispute. Total legal fees and process costs in the United States are several times what they are in Germany or Korea. Combining the tables above demonstrates that:

The Claim of the System of Civil Justice				
If plaintiff Roh wins, the civil justice system takes in total:				
Roh Wins	U.S. if contingent	U.S. if hourly	Germany	Korea
Roh wins less than claim	\$ 35,000	\$ 40,000	€ 0	₩ 4,300,000
Doh pays more than claim	37,500	37,500	7,272	13,892,500
Total legal system charges	72,500	77,500	7,272	18,192,500
Charges as % claim	96.7 %	103 %	12.1 %	24.3 %
If defendant Doh wins, the civil justice system takes in total:				
Doh Wins	U.S. if contingent	U.S. if hourly	Germany	Korea
Roh pays	\$ 7,500	\$ 37,500	€ 7,272	₩ 13,892,500
Doh pays	35,000	35,000	0	5,400,000
Total legal system charges	42,500	72,500	7,272	19,292,500
Charges as % claim	56.7%	96.7 %	12.1 %	25.7%

Avoiding Legal Fees

In the United States parties can avoid painful legal fees if they agree, formally or informally, to do so. Legal fees in the United States are usually a product of how much time lawyers spend on cases. Lawsuit filings do not automatically create legal fees as they do in Germany and in Korea. There, once lawsuits are commenced, fee tables determine charges. There are only limited opportunities to avoid legal fees. This fee phenomenon makes for greater caution in commencing actions in Germany and Korea and for

greater propensity in the United States to file just to see how the other side will react.

We saw already in Chapter 3 that Roh's lawyer Hahn hoped to keep fees low by not bringing in additional parties, such as DohSon Honda, LL.C. or John Doh, Sr. Other ways that Roh and Doh could manage to minimize fees include: (a) agreeing to arbitration, possibly with a loser pays feature, or agreeing to mediation; (b) going to trial without discovery; and (c) settling the case, with or without discovery, but without trial. For obvious didactic purposes, we did not have our parties do that.

Post-Filing Arbitration

Post filing mediation or arbitration are possibilities in all three of our systems. Sometimes they are court sponsored. The *Landgericht* in Munich has developed a program to encourage court-conducted mediation. Mediation is a non-binding form of arbitration. The Munich program creates special mediation judges, who mediate cases that are transferred to them by the ordinary judges otherwise deciding the cases. The program uses special mediation judges to avoid having mediation interfere with the functioning of adjudication. This avoids the criticism voiced in the United States of "managerial judging" (see Chapter 6, above), that judicial involvement in mediation compromises judicial neutrality and the main proceedings' adversarial nature.⁶⁰⁵

No or Limited Discovery

Many American lawsuits involve little or no discovery. How much discovery there is in any case, however, is determined by each party individually. There is no formal provision for parties to agree not to conduct discovery. That means that even if one party conducts no discovery, the other may.

The hope of originators of pretrial discovery was that parties would use it in moderation to focus trial on those issues that are material and that are in dispute. That hope is realized in some cases. For pretrial discovery to work well in this way, however, it should not itself create costs disproportionate to the amount in dispute.

Once discovery gets going, it can be hard to limit it. If parties are minded to go to trial, they want full discovery beforehand. Since few cases ever to trial, it is a fairly sure bet that a case without discovery will be a case without trial.

⁶⁰⁵ See generally, HARRIET WEBER, THESEN ZUM ZUSAMMENSPIEL VON RECHT, JUSTIZ UND MEDIATION http://www.in-mediation.eu/wp-content/uploads/file/top-secret/2008_kongress_Weber.pdf.

In Germany and in Korea there is likewise no opportunity for the parties to forgo evidence taking. In those systems, however, judges already focus on material issues in dispute. For lawyers to avoid taking evidence on those issues requires that they concede them.

2. Unsettling Settlements

While in all of our systems, the majority of cases filed are concluded without formal judgments, that does not mean that settled cases have substantially similar outcomes in our three systems. We have not conducted studies comparing settlements, but we doubt the proposition that they are similar. Cases settle in the shadow of likely outcomes in litigation. Different expected outcomes deliver different settlements.

United States. Process costs are powerful drivers to settlement in the United States. Parties who do not want to sacrifice their resources to their lawyers, should settle immediately, before spending money on lawyers' fees. Many economically-minded parties, if they fear no collateral consequences, if they have no emotional entanglements in a case, and if they are not subject to financial constraints, do just that. Many plaintiffs with strong claims hope that their lawsuits will bring recalcitrant defendants to their senses without need for proceedings beyond their formal complaints. That may have been Mary Roh's hope in this case.

Immediate settlement comes to mind in the reverse case as well: when plaintiff's claim is so weak that it is unlikely to be successful. It may be nothing more than what is called a "nuisance claim." Here, too, American parties may settle. A dollar offered early in settlement is worth five dollars offered later. If one can, one settles immediately, even if the case has little substance. While it is distasteful to pay tribute when one is in the right, it is practical. Unless a case is completely unfounded, thought should always be given to a nuisance value offer. Sometimes, one can settle a case for no more, or only a little more, than what it would cost to hire a lawyer to put in an answer. Here Doh might have offered Roh \$5,000. That would give both plaintiff and plaintiff's lawyer some money for little work.

A nuisance value offer would not likely work in *Roh v. Doh*. Plaintiff has appealing facts; if she presents a reasonable witness, then chances of her winning were a trial to happen, are good. Doh, Jr. and his lawyer know that. If they are serious about settlement, their strategy might be to put in an answer—to demonstrate willingness to contest the claim—then make a non-trivial settlement offer of say \$10,000. An offer then of \$10,000 would signal willingness to engage in substantive negotiations. It could get negotiations going to reach a settlement of \$20,000, \$30,000 or \$40,000. Roh would be hard-pressed to refuse an offer of \$40,000. After paying her lawyer and covering filing fees, on an hourly basis, she might have close to half her \$75,000 back. Since her lawyer would have done so little work, a typical contingent fee agreement, might leave her with close to that much.

Parties do not always look at lawsuits as cold economic propositions. In our case we have suggested facts that might keep Doh, Jr. from seeking settlement. Financially, he may not be able to pay. Emotionally, he is the jilted lover who hates the plaintiff's daughter. Practically, he has a friend prepared to litigate below cost. These considerations are independent of the parties' respective claims of right and of the facts and law that undergird them.

Once parties get going with discovery, settlement becomes more difficult. While parties will then know more, they will have spent more money. They will have invested in the lawsuit.

In *Roh v. Doh* discovery is unlikely to focus the parties. The case is already straight-forward. Equally or more likely, either party might choose to use discovery to create expenses for the other. Either might search for the elusive admission of the other that the money was a gift or a loan. To that end they might demand documents of each other and notice depositions not only of each other, but of third parties as well. Either might use discovery to develop an innovative "theory of the case" (e.g., DohSon Honda, LL.C., is the appropriate defendant). Little stands in the way of a party who wants to use discovery to increase costs of the other.

Germany. Settlement is less likely in Germany than in the United States. Once the lawsuit is underway, there are few process cost incentives to cut a deal. In fact, there is a special settlement fee that discourages settlement. So long as a party is convinced that he or she will win, there are few attractions to taking the case from the judge. Only if the process creates external costs or if both parties fear that the judge may decide against them, does settlement come onto the table.

Korea. In Korea, owing to the high incidence of *pro se* representation, settlement may be less likely than in Germany. Costs are less a consideration and emotions more. The moderating influence of external counsel is often present only on one side or not at all.

CHAPTER 8

CONCLUSION

**TEN POINTS FOR CIVIL PROCEDURE REFORM
THAT PROMOTE JUSTICE THAT IS CIVILIZED****Justice according to law**

[I]t is by comparison of our rules and practice with those of foreigners, that we become fully sensible of what is defective or excellent, and therefore of what is to be cherished and upheld, or to be disapproved and abolished in our institutions.

Caleb Cushing (1820)

Later United States Attorney General, declined nomination to be Chief Justice of the United States⁶⁰⁶

There is no country on earth, which has more to gain than ours by the thorough study of foreign jurisprudence. ... Let us not vainly imagine that we have unlocked and exhausted all the stores of juridical wisdom and policy.

Joseph Story

Justice of the United States Supreme Court
Dane Professor of Law, Harvard Law School
Founder of American Law (1821)⁶⁰⁷

⁶⁰⁶ *The Study of the Civil Law*, 11 NORTH AMERICAN REVIEW. 407, 408 (1820).

Civil justice comes from the heart of mankind. It can fulfill expectations and it can disappoint them. It can justify hopes and—in the best of cases—it can resolve disputes for once and for all. Often it is the last place to which people can turn for clarity about what is right.

Although civil justice is principally concerned with parties' private interests—seen as whole—it has an important social role. That role requires that all people, without regard to their individual financial circumstances, have access to courts. Civil procedure needs laws that people can understand, can follow and can accept. It requires rules that are fair and just, and thus are suited to bringing peace among adversaries. All parties, without exception, must be able personally to present how matters in dispute affect them individually.

Realizing the right to be heard is the central point of almost every lawsuit: realization of the right determines when a case can be quickly, fairly and justly resolved. The parties' true concerns must not be allowed to disappear in the fog of courtroom battle or in a haze of legal analysis. Lawsuits must be structured for modern, effective dispute resolution, or else they will not keep pace with a rapidly changing world. Constant improvement is necessary lest civil procedure lose its stabilizing function and the trust of those that rely on it.

* * *

By comparing legal systems among each other, one broadens one's perspective. One can consider what works elsewhere better and why. What do I not like there? What am I trying to achieve here and what would I need to do to achieve it? What would it cost in resources? While tradition is important, willingness to consider new approaches is essential. That is life. From new experiences come new insights. New knowledge challenges not only legislators, but litigants, lawyers and judges.

It is a public responsibility of legal professionals to maintain minds open to other ways. They should not be nationalists defending one nation's practices for no reason other than they are that nation's practices. We compare legal systems not as international pageants to find the most beautiful, but to better our own legal systems. Whether this system or that system is more elegant, or even whether it more accurate, more fair, more efficient, less expensive or more accessible, are secondary to whether we can find in the comparison better ways for particular legal systems.

⁶⁰⁷ Joseph Story, *Address Delivered Before the Members of the Suffolk Bar, at Their Anniversary, on the 4th September 1821*, 1 AM. JUR. 1, 29 (1829), reprinted in JOSEPH STORY, *THE MISCELLANEOUS WRITINGS: LITERARY, CRITICAL, JURIDICAL AND POLITICAL OF JOSEPH STORY, NOW FIRST COLLECTED* 405, 434-435 (1835) and in 1 JOSEPH STORY, *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 198, 235 (1852).

Lawyers, judges and legal academics have a special responsibility to mind foreign legal developments. They exercise choice for the true consumers of law, the public. They decide for others just what kind of legal system a country has. The public has limited opportunity to change law and legal institutions.

In almost every other field of organized human activity, failure to mind foreign practices can lead to legal liability or lost market share. When a test for AIDS was found in France, public health personnel throughout the world rushed to implement it. Those who were slow to do so committed malpractice. When Japanese manufacturers developed “just in time” processes, businesses all over the planet copied the foreign techniques. Those who were slow to do so were punished by the market.

Responsible lawyers, judges and legal academics should pay attention to foreign law just as responsible physicians consider cures developed abroad or successful businessmen mind foreign products and techniques. Perhaps the day will come in America when those who look abroad for legal solutions are not shunned, but are celebrated, as they are in Germany and Korea. That will happen only when knowledge of foreign law is not thought exotic, but essential to understanding America’s own legal system.

We began this book with the observation that our three systems of civil justice have a common moral framework. They share the same goals and values for civil justice: just decisions, accurate according to law, reached speedily by fair and efficient process, with access for all. We noted however, that many Americans have lost faith that their civil justice system can ever achieve those goals, while most Germans and Koreans have not. The latter strive to achieve their goals.

We have now seen, however, that American methods, the legal framework, also are not so distant from German and Korean methods as many Americans suppose. Our three systems share similar tasks and similar approaches to dealing with those tasks of civil justice. While the means to achieve those tasks vary, they have more in common than at variance. Variations are more in degree than in kind. Civilized justice is justice according to law. In all three systems, civil justice requires bringing law and facts together. In all three, law and facts are starting points; in all three applying law to facts to decide a case is the ending point.

Look at the mechanics. Before a court can decide a case, the court must know which issues it has to decide. In all three systems the general course is similar. Plaintiffs commence actions with complaints, which courts may review—in Germany and Korea, which courts must review—for sufficiency. Parties, with guidance of the court—with considerably more guidance in Germany and Korea than in the United States—determine the issues for decision. Before the court decides, it should give all parties opportunity to be

heard on all material issues in disputes. Courts are expected to base their decisions on syllogistic application of law to facts. Except when juries decide with general verdicts, courts are to justify in writing their findings of fact, conclusions of law and application of law to fact. When juries decide, courts are to provide detailed written instructions, which juries are carefully to consider. In all three systems, parties may appeal to have one or more higher courts review the decision of first instance for the conformity of the decision with law and the consistency of procedures used with normal expectations safeguarding the right to be heard.

Principal differences in the ways of our respective systems lie largely in how they share responsibilities for the tasks they undertake. The American system entrusts case resolution principally to the unguided cooperation of the parties and of the parties' lawyers; judges keep their distance and are called in only at the last moment to decide matters lawyers cannot resolve. The German and Korean systems leave the parties in charge of definition and disposition of disputes, but provide judges to facilitate the process of resolution. German and Korean judges help parties identify material issues and present disputed issues for court determination. That guiding function does not transform German and Korean judges into the inquisitors that common law mythology suggests. German and Korean judges help and not hinder hearing of the parties. They do not act in ways inconsistent with American process values. What they do from the start is to guide proceedings toward reaching decisions according to law.

In our comparative presentation of the American, German and Korean systems we looked at the different ways that each system seeks the best possible outcome. We saw similarities and we saw differences in execution, but the ways were mostly similar. Often the differences were more in emphasis than in substance. From the many ways we have chosen ten to highlight where we believe the German and Korean systems have advantages. They are not distant from American experiences. Many are already practiced in the United States. Some are conventional wisdom, some are aspirational, and some are controversial. None is new. Americans can emulate these practices without fear of introducing elements foreign to their legal traditions. These insights are not exotic.

We offer these insights as ways for consideration in reform of American civil justice. These are insights and not blueprints. We do not believe that transplanting is likely or possible even were it desirable. We leave to another day and to other proponents specific proposals that might incorporate these insights in concrete proposals capable of political adoption.

1) Legal rules seek justice through statutes.

☞ Chapter 2. Thinking Like a Lawyer.

Civil procedure is about applying rules. A system of civil justice can be no better than the rules that it applies. Those rules should be just and democratically adopted to assure legitimacy. They should be stated beforehand in technically well-crafted syllogisms so that they are consistent with each other and may be applied by the public to themselves.

German rules in substance are guided by a social market economy. In form they are authoritative statute-based syllogisms. In application they coordinate with other rules. Korean rules share many of these advantages, although they are newer and Korean legislative techniques remain under development. American rules often do not share these benefits. In substance they may reflect special interests as much as public interest. In form they may fail to be self-applicable. The existence of numerous law-making bodies that do not coordinate with each other is productive of inconsistent commands.

Americans know that laws should seek justice. That statutes predominate and should predominate is not exotic. Already in 1886 the American Bar Association resolved: "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."⁶⁰⁸ Today Americans live in an age of statutes. They are learning to deal with statutes.

2) Civil justice is accessible independent of wealth.

☞ *Chapter 3. Lawyers & Legal Systems: Access to Justice*

Civil justice is not theoretical, but practical. A system of civil justice that is unavailable to many people is a failure. In Germany and in Korea access to justice is largely assured. In Germany legal aid is granted as of right; in Korea, *pro se* representation is routine. In the United States there is no right to civil legal aid; only a small percentage of those in need receive it. *Pro se* representation is more theoretical than routine.

Americans are now acting on what they have long known: equal justice under law requires equal access to justice. Equal access is not exotic. In 2006, and again in 2010, the American Bar Association, following the words of Justice Lewis Powell, Jr., the Association's President and late Supreme Court justice and resolved: "Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status."⁶⁰⁹

⁶⁰⁸ REPORT OF THE NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 74 (1886).

⁶⁰⁹ Resolution 104 (Revised), *supra* note 139, at 1.

3) Those in right are not burdened with high litigation expenses.

☞ Chapter 3. Lawyers & Legal Systems: Access to Justice

To resolve disputes process determines rights. If process is to make those in the right whole, it should assess the costs of process to the losers found to be in the wrong (“loser pays”). To keep process fair, reimbursable costs must be limited and reasonable. In Germany and in Korea, losers pay most of the costs of proceedings. Process costs are low and are proportionate to amounts in dispute. Frivolous lawsuits are discouraged and uncommon. In the United States, winners in routine cases, i.e., those in the right, must bear their own costs. Process costs are high and may exceed amounts in dispute. Frivolous lawsuits are a significant problem.

Americans know this logic of right. It is not exotic. That losers should and do pay court costs is unquestioned in the United States. Controversial is when losers should pay attorneys’ fees. Sometimes they do. Routinely, they used to in some states. As Theodore Sedgwick, the founder of the American law of damages wrote: “the losing party should pay all the expenses of the litigation; this is a rule of inherent justice.”⁶¹⁰

4) Judges are professionals.

☞ Chapter 3. Lawyers & Legal Systems: Access to Justice

Judges should be neutral and responsible to law and justice. Judging is not for amateurs. It requires specific skills. Judging should be no more left to those not trained for it than surgery should be left to barbers. In Germany and in Korea judges are selected on merit and are trained as judges. In the United States, on the other hand, judges are selected politically. They are not trained as judges before assuming office.

Americans know about merit selection and about judicial education. There is nothing exotic in either. For centuries they have debated the latter and in recent years have promoted the former. They know that the taint of campaign contributions calls into question whether judges are fair, independent and impartial.⁶¹¹

5) Trusted institutions coordinate civil justice.

☞ Chapter 3. Lawyers & Legal Systems: Access to Justice

⁶¹⁰ THEODORE SEDGWICK, HOW SHALL THE LAWYERS BE PAID? OR SOME REMARKS UPON TWO ACTS RECENTLY PASSED ON THE SUBJECT OF THE COSTS OF LEGAL PROCEEDINGS, IN A LETTER TO JOHN ANTHON, ESQ. 10 (1840).

⁶¹¹ Caperton v. A.T. Massey Coal Co., -- U.S. --, 129 S. Ct. 2252 (2009).

Civil justice is a public good just as are public health and public education. It is too precious a commodity to leave in private hands unguided by public accountability. Modern society demands of civil justice a quality and quantity of systemic performance unattainable without public responsibility. Just as public health systems should leave no patient untreated and public education systems should leave no child behind uneducated, civil justice systems should leave no gaps in law or practice that cause injustice. In Germany ministries of justice are responsible for the just administration of law. In Korea the Supreme Court is. In the United States, on the other hand, no public authority has responsibility for administration of civil justice. Government lawyers are lawyers for the government and not trustees of the public good. Courts and court administrators are responsible for the functioning of their courts but have few responsibilities or capabilities beyond those functions. Lawyers and their bar associations focus on their interests and those of their clients. They have neither authority nor resources to provide for the public interest in civil justice.

Americans have long sought institutions to guide civil justice. Creation of the United States Department of Justice coincided with creation of the German Imperial Ministry of Justice in the 1870s.⁶¹² The founding of the American Law Institute in 1923 is sometimes attributed to a contemporaneous article by Justice Cardozo praising European ministries of justice.⁶¹³ The Administrative Office of United States Courts followed in 1939. In 2007 that bastion of the Common Law, the United Kingdom, established a ministry of justice.⁶¹⁴ There is nothing exotic in the idea of an American office for justice.

6) Jurisdiction is determined without litigation.

☞ *Chapter 4. The Court: Jurisdiction and Applicable Law*

⁶¹² Compare *** and ***. At about the same time Britain adopted the institution of the professional parliamentary draftsman, whose function the German ministry has. American jurists were quick to take note and urged comparable practices. *See, e.g.*, Simon Stern, *The English Methods of Legislation Compared with the American*, PENN MONTHLY, May 1879, at 336; FRANCIS WAYLAND, OPENING ADDRESS ON CERTAIN DEFECTS IN OUR METHODS OF MAKING LAWS BEFORE THE AMERICAN SOCIAL SCIENCE ASSOCIATION AT ITS ANNUAL MEETING, SARATOGA SPRINGS 13, 21, 27 (Sept. 5, 1881) (reported at length in N.Y. TIMES, Sept. 6, 1881, at 5).

⁶¹³ *See* Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921) (citing two contemporary works by Roscoe Pound); ROSCOE POUND, 3 JURISPRUDENCE 736-37 (1959). The creation of the American Law Institute is sometimes attributed to Cardozo's call. *See* Kirsten David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 SO. ILL. L.J. 173 (2007).

⁶¹⁴ In the twentieth century, leaders of the bar observed the benefits of European-style ministries of justice. In this millennium the United Kingdom has established its own Ministry of Justice. *See* BRYAN GIBSON, THE NEW MINISTRY OF JUSTICE (2nd ed., 2008).

Civil justice, like any public or private service, should be organized to facilitate its distribution. Dispute resolution requires designation of which court is competent to decide which disputes. Korea, as a unitary country, has it easy. Germany and the United States, as federal systems, have it harder. Germany, as part of the European Union, has it harder still. In Germany, statutes answer questions of jurisdiction and applicable law clearly and easily in routine cases. In the United States, it is otherwise. Resources and time are squandered in predicting and determining which American court should resolve purely American disputes.

Simple determination of jurisdiction is not exotic. It is not beyond reach. America's founding fathers provided the means to minimize jurisdictional litigation: the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution. Justice Robert H. Jackson proclaimed that it is "the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have."⁶¹⁵

7) Parties tell courts about their disputes.

☞ *Chapter 5. Pleading: Structuring the Matter in Controversy*

Courts need to be told what parties want them to decide. In Germany and in Korea the parties in their pleadings guide courts to material matters in dispute by setting out the facts that they wish the court to consider. By law in Germany and by practice in Korea they identify evidence to be relied upon and by otherwise substantiating claims made. Courts review pleadings for sufficiency of the case claimed at the outset of the proceedings. In the United States parties in their pleadings give notice of their claims but provide little information about the underlying matters and what about those matter is in dispute. They do not identify evidence and usually do little to direct courts to material matters in dispute. Courts review pleadings only on party request.

Americans know that courts can not decide if they do not know what to decide. That is not exotic. While the Federal Rules of Civil Procedure require only notice pleading, other American systems have required parties to tell about the facts. That is not exotic or threatening. The Field Code of 1848 required that the complaint give "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."⁶¹⁶ It is what they propose today: "a process that begins to

⁶¹⁵ Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 34 (1945).

⁶¹⁶ An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, 1848 N.Y. Laws 497, § 120(2).

narrow and focus as soon as a legitimate claim is filed.”⁶¹⁷ They are returning to the first lesson lawyers learned in the nineteenth century: “In the course of administering justice between litigating parties, there are two successive objects,—to ascertain the subject for decision, and to decide.”⁶¹⁸

8) Judges work with parties to prepare cases for decisions according to law.

☞ Chapter 6. Process: The Right to Be Heard

Civil justice determines rights; civil procedure should not be contest. There should be no surprises. To assure that there are no surprises, civil process should let parties know what courts will decide. Courts should tell parties which elements of their claims are present, which are missing and which are disputed. They should give parties opportunity to be heard on all disputed issues. In Germany and in Korea judges have affirmative duties to assure that parties are heard. Judges speak with parties early in litigation. In the United States, where judges have no comparable duties, parties are not always heard on material matters. Judges remain passive. Often they never speak with parties. Trials are vanishing.

For courts to cooperate with parties to frame issues has long been a hope of American procedure. As we saw above, the drafters of the federal rules had in mind cooperation in issue framing as subject for pretrial conferences and not scheduling of discovery. Professor Sunderland wrote that the court should take a hand “supplementing the proceedings and the discovery which the parties have obtained, by direct interrogation of counsel or parties in the presence of each other, with a view to eliminating issues through admissions or through the withdrawal of allegations or denials, or by obtaining the consent of the parties to the limitation or simplification of proof.”⁶¹⁹

9) Judges oversee taking evidence.

☞ Chapter 6. Process: The Right to Be Heard

In Germany and in Korea, courts conduct cases. Judges take evidence when needed for decision of disputed matters material to claims of right, but only then. Judicial oversight assures that evidence taking is within bounds. In the United States, lawyers are in charge of process of pre-trial. There is little judicial oversight of what lawyers do with the power and under the

⁶¹⁷ Kourlis *et al*, *supra* note 247, at 246.

⁶¹⁸ HENRY STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 1 (1824).

⁶¹⁹ Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 218-219 (1937).

authority of courts. Lawyers are guided by their interest and by client interest and not by justice or law.

Judicial supervision of evidence taking was not exotic in American history. It was called trial. Presence of the judge was, Justice Scalia reminds us, what made American justice adversarial and not inquisitorial.⁶²⁰ Until the Federal Rules of Civil Procedure took effect in 1938, judicial supervision of evidence taking was the rule of civil justice. The Supreme Court stated it succinctly: “the judge is always present at the time of the evidence given in it. ... This direction and superintendence [is] an essential part of the trial.”⁶²¹

10) Courts base their judgments on law and explain them.

☞ Chapter 7. Judgments, Appeals & Outcomes: Decisions According to Law

Courts should decide disputes according to law. Even children want to know why parents decide as they do. Written justifications validate correct decisions. They facilitate appellate review of the accuracy of those decisions. In Germany and in Korea judges tell parties why they decided as they did. Parties know which facts judges found and why. They know which law governed and why judges applied it as they did. If parties find fault with how judges decided, the justification is the basis for review by a higher court. In Germany and Korea that court can supplement or determine anew the first court's decision. In the United States justifications are exceptional. Rarely do cases go through trial. Of those that do, jurors' verdicts have no written justifications. Parties are left to guess why jurors decided as they did. They cannot know which facts the jurors found nor how jurors applied law to those facts. Appellate courts can only review the record for whether the rules of procedure were followed and whether the evidence produced created a possible basis for jurors' decisions.

Justifications are not exotic in American law. When courts decide cases after trials without jurors, Federal Rule of Civil Procedure 52 requires that judges provide what amount to in law and practice justified judgments.

* * *

⁶²⁰ McNeil v. Wisconsin, 501 U.S. at 181 n.2, quoted note 314.

⁶²¹ Capital Traction Co. v. Hof, 174 U.S. 1, 14, 16-17 (1899)(quoting respectively Lord Hale, *History of the Common Law*, chapter 12 (5th ed.) and Judge Sprague in *United States v. Bags of Merchandise* 2 Spr. 85, 88 (1863)).

APPENDIX

NOTES ON LEGAL AND POLITICAL UNITY

Almost everyone takes the political history of his or her own country for granted. We are taught it by our parents, we learn it in school, and we experience it in our lives. The political history of other countries, we know less well, if at all. What we do know may be wrong or over-simplified.

Systems of civil justice do not live outside their own times. They are affected by historic changes. They have their own histories independent of political history. Because in this book we refer to these changes, we reference them here through a series of tables and notes. We know that the civil justice systems that we describe today will be different tomorrow.

A. United States

**Out of many, one
E pluribus unum
Great Seal of the United States (1782)**

United States Time Table

1776	Declaration of Independence; Maryland Declaration of Rights
1787-1791	United States Constitution & Bill of Rights
1848	Field Code of Civil Procedure in New York; merger of courts of law and equity in New York
1861-1865	National division, North and South: Civil War
1872	Federal Conformity Act: disunity in civil procedure
1938	Federal Rules of Civil Procedure; unity of civil procedure in all federal courts; merger of equity and law rules

In the United States, political unity was achieved earlier than in Germany and in Korea. Thirteen American colonies of Great Britain declared their independence on July 4, 1776. They fought a war of independence until the British withdrew in 1783. Governed at first under the Articles of Confederation, they replaced these with the Constitution of 1789 and the Bill of Rights of 1791 (*i.e.*, the first ten amendments to the Constitution of 1789).

Political unity came at a price: legal disunity. The Constitution of 1789 recognized and perpetuated a non-uniform law of slavery. To abolish that non-uniform law of slavery the country fought a bloody Civil War (1861-1865). While that war led to abolition of slavery, and implicitly to rejection of the idea that individual states might have fundamentally different social, economic, or political systems, it did not lead to legal unity.

To this day most American law is made by individual states and local governments. While Americans think of this as a necessary feature of federalism, Germans know that it is not, for in Germany's form of federalism, national laws govern in most basic areas of law. In the United States, national laws remain exceptional; states and local laws are the rule. In the United States, although state and local laws are very similar, they are not uniform.⁶²²

Civil procedure is no different from the rest of American law: mostly it is state law, but state rules of civil procedure which are very similar. Most state procedural rules are variations on the Federal Rules of Civil Procedure. Here we study the Federal Rules. That American rules vary from state-to-state, remarkable as it is, is less remarkable to Germans than the existence of completely separate systems of state and federal courts. We discuss this phenomenon in Chapter 4. In Germany, with one minor exception, courts of first instance and courts of first appeal are state courts. Federal courts exist only as courts of final appeal to make sure that state courts apply federal law correctly.

The Federal Rules of Civil Procedure apply only in federal courts. Until 1938 when the Federal Rules came into force, federal courts had separate federal rules to apply only for special forms of proceeding (*e.g.*, admiralty and equity cases). In most cases, federal courts used state procedural rules. Under the so-called Conformity Act of 1872 they applied the procedural rules of the states in which they were located. So a federal court sitting in Baltimore applied Maryland rules, while a federal court sitting in nearby Philadelphia applied Pennsylvania rules. This meant that lawyers in one city

⁶²² See James R. Maxeiner, *Uniform Law and its Impact on National Laws Limits and Possibilities*, *U.S. National Report*, in 2 MEMOIRS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW, GENERAL AND NATIONAL REPORTS OF THE 1ST INTERMEDIATE CONGRESS. THE IMPACT OF UNIFORM LAW ON NATIONAL LAW: LIMITS AND POSSIBILITIES (2010).

could—at least in theory—count on procedural rules being the same without regard to whether they went to the federal or to the state court in their city. On the other hand, it meant that lawyers who specialized in matters before federal courts had to familiarize themselves with different rules when they went to federal court in another state. The Federal Rules of 1938 made practice easier for those lawyers who practiced in different cities (mostly lawyers for larger interests), but more difficult for lawyers who practiced in both state and federal courts in one city (mostly lawyers for smaller interests).

The burden of legal disunity has increased over time. That increase is related to the growth of commerce in the nineteenth century. When the Constitution was adopted in 1789, coordination of laws of the several states was not a major issue. Long-distance travel in 1789 was rare; interstate commerce was minor. But within a century, all that had changed; merchants carried on trade in every state. Already by the 1830 and 1840s the growing economy demanded laws and procedures that were more rational and more predictable and more often uniform. With the end of slavery and of the Civil War, those issues acquired increased vigor and urgency.

Throughout the nineteenth century and into the beginning of the twentieth century American reformers sought to build a rational legal system of systematic statutes that judges might apply syllogistically. They championed “codification”—not the mere collection of statutes—but the systematic integration of bodies of substantive law. They sought to write procedural law that would facilitate rather than undermine application of substantive rules to fact. Their efforts, in the case of substantive law, mostly failed of adoption; their reforms in procedural law were adopted (the “Field Code” and “code pleading”), but did not work as hoped, and led to subsequent reforms, which likewise did not work as well as hoped (the Federal Rules of Civil Procedure and “notice pleading.”)⁶²³ We now discuss America’s three attempts at civil procedure that fell short of the goals of the open courts clause.

History of American Civil Procedure—Three Tries for Reform

While the American political system has been stable since the end of the Civil War era in 1876, the same is not true of American civil procedure. Throughout its more than two hundred year history American civil procedure has vacillated from one extreme to another—from formality to flexibility—in one attempt after another to create a system that might satisfy the promises of the open courts clause: accuracy, fairness, access to justice and efficiency. All attempts to fulfill those promises have fallen short of the goal. From the earliest days popular dissatisfaction with civil justice has been and

⁶²³ See Maxeiner, *Legal Indeterminacy*, *supra* note 44, at 530-534. See also Leubsdorf, *supra* note 57, at 53.

remains endemic. The classic critique is that of Roscoe Pound at the Annual Meeting of the American Bar Association in 1906, *The Causes of Popular Dissatisfaction with the Administration of Justice*.⁶²⁴ One hundred years later those days look to some Americans as the good old days.⁶²⁵ The history of American civil procedure is the story of three cycles of attempted reforms all of which fell short of hopes.⁶²⁶

Each cycle brought a new approach to civil procedure. The first try was that of “common law pleading.” It came to the United States from England in the late eighteenth century; it was brought by the generation that formed American law and which included Justice Joseph Story and Chancellor James Kent. The second try was “code pleading” of the mid-nineteenth century. It started life as the New York Code of Civil Procedure of 1848, which was drafted by the prominent practitioner, David Dudley Field, Jr. (the “Field Code”). The third try was “notice pleading” of the mid-twentieth century. Its source was the Federal Rules of Civil Procedure of 1938, which were drafted by two law professors, Charles E. Clark, then Dean of Yale Law School, and Edson R. Sunderland of the University of Michigan.

Three times the story is the same. Each cycle begins with belief that the new system of procedure can apply law to facts rationally: that it will produce decisions according to law. To be sure, there are pessimists, non-cooperators and even opponents of the new procedure. Soon, however, hopes are dashed. Flaws in the conception of the new system and failures of individuals to work together to overcome those flaws, result in unsatisfactory performance. Process is encumbered by delay, expense and uncertainty. The now less-than-new system produces decisions not in accord with either law or with justice. Minor fixes are attempted, but system still fails to work well. As collective memory of the last cycle fades, agitation for change gains strength. Finally, a new reform is adopted.

The first try in the early nineteenth century put in clear contention the issues of form versus flexibility and of decision according to law versus decisions ad hoc. It was what Professor Langbein calls a “Struggle for Learned Law.”⁶²⁷ Proponents of a formal system recognized that the complexity of modern society requires legal rules and legal procedures of comparable complexity. Unwritten folk law—common sense lacking legal

⁶²⁴ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REP. 395 (1906), which has been reprinted and commemorated many times. Pound’s critique is as compelling today as it was then. See James R. Maxeiner, *1992: High Time For American Lawyers to Learn From Europe, or Roscoe Pound’s 1906 Address Revisited*, 15 FORDHAM INT’L L.J. 1 (1991).

⁶²⁵ JOHN B. OAKLEY & VIKRAM D. AMAR: AMERICAN CIVIL PROCEDURE: A GUIDE TO CIVIL ADJUDICATION IN US COURTS 26 (2009) (“At the outset of the twenty-first century, the adversary system of adjudication is not as perfectly realized as it may have been a century before.”).

⁶²⁶ See the bibliographic notes in Appendix II, below.

⁶²⁷ John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993).

rules—is inadequate to govern the myriad of transactions among men; men need rational rules to guide them by stating rights and duties.

That first try was successful insofar as reformers did establish a learned American law. It fell short, however, in establishing a system that routinely fulfilled the promises of the open courts clause. Critics charged that the contrary occurred. According to one judge the forms of civil procedure became “the fruitful mother of the rankest injustice.”⁶²⁸

When the system faltered, instead of replacing it, the bar first made excuses for it. The public expected too much of civil justice. Better that people steer clear of lawsuits altogether. Professor Stephan B. Presser sees the idea that litigation is “something pernicious that ought to be discouraged” as a recurrent theme in American legal history.⁶²⁹

The United States may now be coming to the end of the third cycle. What is different at the end of this cycle, however, is that many American lawyers now openly question the values of the open courts clause or at least doubt the achievability of those goals. Some wonder whether decisions can ever be made accurately, fairly and promptly according to law *routinely*. The authors of the College of Trial Lawyers’ Report seem to be among them for they would be content were American procedure to produce “*reasonably prompt, reasonably efficient, reasonably affordable resolution*.”⁶³⁰

Other American legal scholars are still more skeptical. Some question whether determination of rights is the goal of civil justice and whether accuracy *should* be the appropriate measure of their legal system. These scholars emphasize process in civil lawsuits. They maintain that process, and participation in it, and not legally accurate determinations of right, is the better measure of civil procedure. Their view is tantamount to a return to primitive law.

Another group of scholars, who accept supremacy of determination of rights over process, nevertheless, are so disappointed by the performance of the public system of civil justice, that they see in the public system mostly an incentive to encourage parties to find better ways to resolve disputes privately, outside the system, through settlement or other extra-system

⁶²⁸ ROBERT WILLIAM WELLS, *Observations on the Pleadings and Practice of the Courts of Justice of Missouri: and, A Radical Change Therein Recommended*, in A LETTER ADDRESSED TO THE “METROPOLITAN” (1847), *substantially reprinted in Law Reform*, 21 U.S. MAG. & DEM. REV. 477, 482, 486 (1847).

⁶²⁹ Stephen B. Presser, *A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective*, Paper Presented to the 10th Summit on Legal Reform, at 1 (U.S. Chamber Institute for Legal Reform, October 28, 2009), available at Searle Center on Law, Regulation, and Economic Growth, http://www.law.northwestern.edu/searlecenter/uploads/Presser_A_Tale_of_Two_Models.pdf (quoting the open courts clause of the Massachusetts Declaration of Rights of 1780. *Id.* at 2 n. 4.).

⁶³⁰ AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT, *supra* note 42, at 4 [emphasis in original].

means, such as arbitration or mediation (“Alternative Dispute Resolution—ADR”).

“Trans-substantive” Civil Procedure

For much of American history American civil procedure has suffered from a lack of unity not only among the states, but within courts of individual states and within courts of the federal system as well. There were separate procedures for what had once been separate courts of “law” and of “equity.” The former, legal rules, differed markedly from the latter, equity rules.⁶³¹ Uncertainties in which procedural rules applied produced much injustice. Merger of law and equity was a central element in the reforms that culminated in the 1848 New York Civil Procedure Code and in the 1938 Federal Rules of Civil Procedure. The reformed rules applied to all cases whether previously characterized as legal or as equitable.

American civil procedure scholars characterize this single form of rules as “trans-substantive.” They mean that for all civil lawsuits, regardless of the substantive law underlying the claims (“case-type”) or the size of the case (“case-size”), the same procedural rules should apply. Today federal procedure and most state procedures are “trans-substantive.”⁶³² These trans-substantive rules infused equitable procedures into many matters formerly subject only to legal rules.

American Civil Justice and Public Law Litigation



Private actions to recover penalties for the government are known as *qui tam* actions or as “whistleblower” lawsuits

The use of equity procedures in the trans-substantive codes permitted accommodation of new types of litigation and of larger cases than had been previously possible under older legal procedures. Scholars point to antitrust, civil rights, consumer protection, products liability and class actions

⁶³¹ For example, a right to jury trial existed only in the former.

⁶³² Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An essay on Adjusting the “One Size fits All” Assumption*, 87 DENVER U.L. REV. 377, 378 (2010).

generally as litigation facilitated by the liberal pleading, joinder and discovery rules of the trans-substantive procedure.⁶³³

Some American civil procedure scholars suggest that this trans-substantive nature of American civil procedure limits the value of international insights for American law reform. They suggest that these newer uses of civil procedure make American civil procedure fundamentally different from foreign procedures. They suggest that incorporation of insights drawn from foreign systems difficult and, at best, benign and at worst destructive.

American civil procedure scholars see American courts making and enforcing public law norms as exceptional. They observe that American civil justice engages private parties to enforce and even to make public law norms through litigation before independent courts. For example, Professors Stephen N. Subrin and Margaret Y.K. Woo of Northeastern University School of Law, assert:

The role of civil litigation in America is somewhat different perhaps from its role in other countries, and it defines the character of our system. Rather than simply seeking courts to resolve private disputes (the conflict resolution model) Americans have relied on relatively open access to court and private civil litigation to be at the heart of a great deal of the enforcement of our public law (the behavior modification or social control model). With a mistrust of big government and intrusive states, the American public has (probably more than most other countries) relied on private litigation rather than solely on state-controlled litigation or state regulatory agencies to enforce our public values.⁶³⁴

Professor Paul D. Carrington observes similarly:

[D]iscovery is the American alternative to the administrative state. We have by means of Rules 26-37, and by their analogues in state law, privatized a great deal of our law enforcement, especially in fields such as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. Private litigants do in America much of what is done in

⁶³³ *Id.* at 387.

⁶³⁴ STEPHEN N. SUBRIN & MARGAET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 37 (2006).

other industrial states by public officers working within an administrative bureaucracy.⁶³⁵

Other scholars make a similar distinction in discussing litigation as a means of law reform.⁶³⁶ They usually point to the classic example of the famous 1954 Supreme Court case of *Brown v. Board of Education of Topeka*,⁶³⁷ which overturned the Supreme Court's earlier approval of racial segregation in the 1896 case of *Plessy v. Ferguson*.⁶³⁸ Since *Brown*, generations of students have gone to law school seeking reform through litigation. As amended in 1983 Federal Rule 11 approves law reform through litigation, when it excludes from sanctions for frivolous law suits, claims not based on existing law, so long as a claim is based on a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."⁶³⁹ Today, the American Bar Association in a layman's guide to dispute resolution touts changing the law as a benefit of America civil procedure.⁶⁴⁰

The suggestion is that foreign civil justice systems are not relevant to American civil justice reform because making and enforcing public law through private litigation requires American-style pleading, joinder and discovery. Deficiencies in trans-substantive civil procedure must be accepted if American civil justice is to fulfill its public law functions. These functions are, Professor Carrington says, a part of American culture hardly subject to change.⁶⁴¹ Changes now, Professor Subrin says, would be "too deep an assault on the historic role of civil litigation in our country."⁶⁴² They are believed absent in foreign systems.

We do not accept these arguments.

First, American scholars overstate the case for American exceptionalism. They state their conclusion that foreign systems do not use private litigation before independent courts to make and enforce public law norms as truisms

⁶³⁵ Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997). See also PAUL D. CARRINGTON, CIVIL PROCEDURE TO ENFORCE TRANSNATIONAL RIGHTS? (March 3, 2007). See also Richard L. Marcus, *Review Essay: Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005).

⁶³⁶ See Lawrence M. Friedman, *The Litigation Explosion*, in 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA at 189 (Michael Grossberg & Christopher Tomlins, ed., 2008).

⁶³⁷ 347 U.S. 483 (1954).

⁶³⁸ 163 U.S. 537 (1896). The NAACP's first major success was *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

⁶³⁹ FED. R. CIV. P. 11(b)(2).

⁶⁴⁰ THE AMERICAN BAR ASSOCIATION, GUIDE TO RESOLVING LEGAL DISPUTES INSIDE AND OUTSIDE THE COURTROOM 117 (2007) ("a lawsuit offers the litigants an opportunity to change the law, and to create legal precedents for similar cases that follow.")

⁶⁴¹ Cf., Paul D. Carrington, *Moths to the Light: The Dubious Attractions of American Law*, in Festschrift für Bernhard Grobfeld zum 65. Geburtstag 129, 141 (Ulrich Hübner & Werner Ebke, eds. 1999) ("It would require deep cultural change ...").

⁶⁴² Stephen N. Subrin, *The Limitations of Transsubstantive Civil Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENVER U.L. REV. 377, 397 (2010).

without grounding them in observations of specific legal systems. In fact, in Germany and in Korea, private litigants bring lawsuits before independent courts and play an important role in enforcing social norms such as antitrust, civil rights, consumer protection and product liability. American scholars may overlook this activity because most of it takes place before specialized courts.⁶⁴³

We noted in Chapter 3 that Germany,⁶⁴⁴ and to a lesser extent, Korea, have specialized courts. In Germany they include constitutional courts, administrative courts,⁶⁴⁵ social courts,⁶⁴⁶ labor courts,⁶⁴⁷ fiscal courts and a patent court. Korea has a constitutional court and administrative courts.⁶⁴⁸ Private litigants bring most of the cases before these independent courts.⁶⁴⁹ Collectively specialized courts in Germany handle more than 900,000 cases a year. That is about three-quarters as many civil cases as the ordinary German courts handle (about 1.2 million). It is more than three times as many civil cases as the American federal courts (about 275,000) handle.⁶⁵⁰

⁶⁴³ We note that American proponents of the public law argument err in comparing only that which goes by the same name. International experiences with treaties that apply to “civil and commercial matters” show that common countries tend to deem all that which is not criminal, civil, while civil law countries take a narrower view. See DAVID McCLEAN, INTERNATIONAL COOPERATION IN CIVIL AND CRIMINAL MATTERS 25-27, 108-111 (2002). Comparativists avoid this problem using what they term “functionalism,” i.e., they look at different institutions that carry out the same functions despite their different names. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 32-47 (3rd ed., Tony Weir transl., 1998); Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Matthias Reimann & Reinhard Zimmermann, eds., 2005).

⁶⁴⁴ For a clear and detailed statement of the different courts and jurisdictions in Germany, see WOLFGANG HEYDE, JUSTICE AND THE LAW IN THE FEDERAL REPUBLIC OF GERMANY 38-75 (1994).

⁶⁴⁵ See generally Künnecke, *supra* note 174; MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE (2nd ed., 2002); Michael Nierhaus, *Administrative Law*, in INTRODUCTION TO GERMAN LAW 87 (Matthias Reimann & Joachim Zekoll, eds., 2nd ed. 2005); Karl-Peter Sommermann, *Procedures of Administrative Courts in Germany*, in IMPLEMENTATION OF ADMINISTRATIVE LAW AND JUDICIAL CONTROL BY ADMINISTRATIVE COURTS 55 (Speyerer Forschungsberichte No. 180, Heinrich Siedentopf *et al*, eds. 1998).

⁶⁴⁶ See generally, ULRICH WENNER, FRANZ TERDENG & KAREN KRAUB, GRUNDZÜGE DER SOZIALGERICHTSSBARKEIT—STRUKTUREN—KOMPETENZEN—VERFAHREN (3rd ed., 2005).

⁶⁴⁷ See generally Manfred Weiss, *Labor Law*, in INTRODUCTION TO GERMAN LAW 87 (Matthias Reimann & Joachim Zekoll, eds., 2nd ed. 2005);

⁶⁴⁸ He-Jung Lee, *Administrative litigation in Korea: structures and role in judicial review*, in LITIGATION IN KOREA 175, 176-179 (Kuk Cho, ed., 2010). Korean administrative law has been much influenced by German administrative law. See generally JONG HYUN SEOK, DIE REZEPTION DES DEUTSCHEN VERWALTUNGSRECHTS IN KOREA (1991); RECHTSSCHUTZ GEGEN STAATLICHE HOHEITSAKTE IN DEUTSCHLAND UND KOREA: DEUTSCH-KOREANISCHES SYMPOSIUM (Wolf-Rüdiger Schenke und Jong Hyun Seok, eds., 2006).

⁶⁴⁹ These courts are comparable to the regular courts; they are not instruments of some bureaucratic state. Their judges are independent; their procedures do not vary widely from those of the ordinary courts. The same constitutional and statutory guarantees apply to regular and specialized courts. See WENNER *ET AL.*, *supra* note 646, at 21-22.

⁶⁵⁰ The German totals come from Bundesamt der Justiz, Geschäftsentwicklung bei Gerichten und Staatsanwaltschaften 1999-2008 available at

In the United States almost all of these cases would count as civil matters; many would be deemed within the class of private enforcement of social norms. In Korea, one argument against introduction private attorneys general is that presently private parties' cases before administrative courts challenging public decisions serve much the same function as direct actions against polluters.⁶⁵¹ Despite the small bar, Korea has a cadre of active public interest lawyers.⁶⁵²

Moreover, in Germany and Korea, the ordinary courts themselves have an important role in social rights enforcement. In Germany through private litigation they help enforce antitrust, competition and consumer protection law.⁶⁵³ In law reform and law making, in Germany and in Korea, they have a modest role in creating private law and a traffic-conducting role in creating public and international law. In the case of the latter, when issues of constitutional implicated, the ordinary courts refer questions to constitutional courts. There, private parties argue the legal issues before these independent courts, where they are resolved and the cases returned to the ordinary courts. In Germany, private courts act similarly in matters of European Union law.

If ever the United States was exceptional is using private litigants before independent courts to carry out public law tasks, a 2007 joint German-Korean symposium suggests a different future; the title says practically proclaims it: "Utilization of Private Parties in Fulfillment of Public Responsibilities."⁶⁵⁴ Differences that exist are not grounds for ignoring foreign experiences, but for studying them for insights into all worlds.⁶⁵⁵

Were it true that foreign civil justice systems had no role in public law making and enforcement that still would not be ground to ignore foreign

<http://www.bmj.de/files/02e1e8a90216d1f618642cb195ba1eef/4524/2008%20Gerichte%20und%20Staatsanwaltschaften%20ab%201999.pdf>.

⁶⁵¹ Hong Sik Cho, *Against the Viability of Private Enforcement: Focusing on Korean Environmental Law*, 7 J. KOREAN L. 81, 106-107 (2007).

⁶⁵² Patricia Goode, *From Dissidents to Institution Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 EAST ASIAN L. REV. 63 (2009); Kwon, Korea: *Bridging the gap*, *supra* note 73, at 171-172.

⁶⁵³ See, e.g., JAMES R. MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY* (1986), published in German as *RECHTSPOLITIK UND METHODEN IM DEUTSCHEN UND AMERIKANISCHEN KARTELLRECHT: EINE VERGLEICHENDE BETRACHTUNG* (1986); James R. Maxeiner, *Standard Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109 (2003); JAMES R. MAXEINER & PETER SCHOTTHÖFER, *ADVERTISING LAW IN EUROPE AND NORTH AMERICA* (2nd ed., 1999).

⁶⁵⁴ DIE EINBEZIEHUNG PRIVATER IN DIE ERFÜLLUNG ÖFFENTLICHER AUFGABEN. VORTRÄGE AUF DEM KOREANISCH-DEUTSCHEN SYMPOSIUM ZUM VERWALTUNGSRECHTSVERGLEICH VOM 13. BIS 15. SEPTEMBER 2007 AM DEUTSCHEN FORSCHUNGSINSTITUT FÜR ÖFFENTLICHE VERWALTUNG SPEYER (Jong Hyun Seok & Jan Ziekow, eds., 2008).

⁶⁵⁵ That French courts also use civil procedure to enforce public norms came strikingly home in the United States when the American firm Yahoo! Sought American court protection against a French civil decree ordering penalties for posting Nazi-related materials on Yahoo!'s internet sites. See *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme (LICRA)*, 433 F.3d 1199 (9th Cir. 2006).

civil justice. One should not assume that such uses are immutable in America or that such trans-substantive procedure will be forever present.

Whether public law uses of civil procedure are a good thing, is controversial in the United States. Some Americans object that they take the courts out of their accustomed role as applier of law to fact. Professor Carrington himself makes this objection.⁶⁵⁶ Other scholars object that private attorneys general are not an effective way to enforce public law.⁶⁵⁷ Still others doubt that litigation is effective in bringing about law reform and social change.⁶⁵⁸ So long as such public law use is controversial, foreign insights remain relevant.

Assuming that these uses of civil procedure are desirable does not require retention of the trans-substantive model. For three decades Professor Subrin himself has questioned whether one form of civil procedure should apply without regard to case-type or case-size. Moreover, historically seen, trans-substantive procedure has not always been the norm for private actions before independent courts to enforce public law. So-called *qui tam* actions, many private actions for a public penalty or forfeiture, were not subject to either legal or equity rules, but to rules formerly used by courts of admiralty and of the old English Court of the Exchequer.⁶⁵⁹ To this day, the federal rules include Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Should Americans chose to return to separate rules for public law actions, foreign experiences are particularly relevant.

⁶⁵⁶ Carrington, *A New Confederacy?*, *supra* note 57, at 938-944.

⁶⁵⁷ See, e.g., John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983); JAMES MAXEINER, *POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY* (1986) (attributing difficulties in American antitrust enforcement to failure to separate determination of policy issues for legal issues). Today's low level of antitrust enforcement may be attributed to the backlash engendered by ambitious, but ineffective, private enforcement of antitrust law.

⁶⁵⁸ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2nd ed. 2008). See also W.A. BOGART, *COURTS AND COUNTRY: THE LIMITS OF LITIGATION AND THE SOCIAL AND POLITICAL LIFE OF CANADA* (1994) (with extensive references to the United States); DAVID A. SCHULTZ & STEPHEN GOTTLIEB, *LEVERAGING THE LAW: USING THE COURTS TO EFFECT SOCIAL CHANGE* (1998).

⁶⁵⁹ See generally James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last?*, 62 CORNELL L. REV. 768 (1977); RUFUS WAPLES, *A TREATISE ON PROCEEDINGS IN REM* (1882). The hot issue of the day then was not whether civil procedure should apply, but how much of criminal procedure should. The most controversial use of such procedures was to punish treason in the Civil War. Procedure was anything but trans-substantive.

B. Germany



Unity and justice and freedom
For the German fatherland!
German National Anthem (1841/1952)⁶⁶⁰

Germany Time Table

1793-1794	Prussian codes
1805-1814	French occupation; end of Holy Roman Empire; French codes imposed in many German states
1864-1871	Wars of national unification
1871	National unification (without Austria); legal unity
1877	Code of Civil Procedure (CPO now ZPO)
1933-1945	Nazi dictatorship; rule of law abolished
1945-1955	Allied occupation
1949-1990	National division, East and West; legal disunity
1990	National re-unification; legal unity restored

In 1789 when the American Constitution entered into force and the French Revolution began, Germany consisted of hundreds of independent principalities associated in the Holy Roman Empire of the German Nation. Within those states there was a loose legal unity in both civil law and civil procedure under what was called “the common law” based on law of Roman origin. That legal unity was shaken already in 1793 and 1794 when one of the largest states, Prussia, adopted new and enlightened codes of civil procedure and of general law.

In 1805 France invaded Germany; in 1806 the Holy Roman Empire ended. France imposed on those German states that it controlled its own new and enlightened codes, including the Civil Code of 1804 (the “Code Napoleon” or Code Civil) and the Code of Civil Procedure of 1806 (Code de

⁶⁶⁰ “Einigkeit und Recht und Freiheit/Für das deutsche Vaterland!,” beginning of the third verse of August Heinrich Hoffmann von Fallersleben, *Lied der Deutschen* (1841).

Procédure Civil).⁶⁶¹ Legal disunity in Germany increased. The subsequent defeat of Napoleon in 1814 did not lead to unity; those states on which Napoleon had imposed the enlightened French codes did not abandon them. Legal disunity continued until political unity was achieved in 1871 and even, at first, thereafter. But in the following twenty-five years, the German legislature adopted codes that achieved legal unity: first the Code of Civil Procedure of 1877 (*Civilprozeßordnung* = CPO, in modern German, *Zivilprozessordnung* = ZPO) and in 1896 the national civil code (*Bürgerliches Gesetzbuch* = BGB), which entered into force on January 1, 1900.

In 1933 the National Socialist (Nazi) party gained power. Within in four months it established a dictatorship and abolished the rule of law.

In the Second World War (1939-1945) the Soviet Union, the British Empire and the United States defeated Nazi Germany. Together with France, they occupied Germany. In 1949 two German states were created in parts of the territory of defeated Germany, the Federal Republic of Germany (“West Germany”) and the so-called German Democratic Republic (“East Germany”). Pre-war Germany east of the Oder and Neisse Rivers (Silesia, East Prussia and Pomerania) was transferred to Poland or to the Soviet Union in perpetuity. The division continued until 1990, the year after the fall of the Berlin Wall, when the two German states united.

West Germany was and Germany today is a democratic, federal, rule-of-law state; West Germany restored the legal system that existed before the Nazi dictatorship. East Germany was an authoritarian, centralized Communist state subject to control of the Soviet Union. It kept its population from fleeing only by building the infamous Berlin Wall. Instead of the rule of law, East Germany had “socialist legality” on the Soviet model. In 1989 East Germany collapsed; in 1990 West Germany absorbed East Germany as five federal states in an enlarged Federal Republic of Germany. Legal unity was restored when West German laws were extended to former East Germany.

The Social Market Economy

While the new West German state restored the old legal system, it did not restore the old political and social order. West Germany adopted a more democratic and more social order. That social system was shaped by a group known as the neoliberal, Freiburg or ORDO school; it embraced a competitive economic system. The neoliberals considered a competitive economic system not only more efficient, but also more democratic. They emphasized the positive role of the state in maintaining an economy in which

⁶⁶¹ See Hanns Prütting, *International Sources of German Civil Procedure*, in *THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY* 245, 250 (Masahisa Deguchi & Marcel Storme, eds., 2008).

the competitive system is maintained by government measures (taxes, currency regulation, credit policy, etc.) while at the same time subjecting the state fully to rule of law safeguards.

The social market economy continues today not only as the hallmark of united Germany but as the core of a united Europe that largely espouses principles of a social market economy. The legal methods by which the German legal system has implemented this social market economy have renewed relevance. It is a political system that is—in contrast to the American—avowedly social. It is a system where all people have health insurance and few, at least compared to the United States, are incarcerated.

History of German Civil Procedure—Refining a Good Choice

In contrast to modern American civil procedure, German civil procedure has not swung wildly from one extreme to another. Today's Code of Civil Procedure is the direct descendent of the Code of 1877. The procedures of 1877 worked well. Amendments since 1877 have made process more flexible, more efficient and more just, but have not dramatically changed it. They reflect—especially since 1949 and the creation of the Federal Republic of Germany—a more democratic and more social state than in 1877.⁶⁶²

The Code of Civil Procedure of 1877 was the national consolidation and implementation of reforms that occurred in several German states, above all in Prussia and in Hannover, beginning in the eighteenth century. The Code of 1877 was a rejection for all of Germany of the procedure of the antiquated “common law.” Common law procedure had earned for German procedure the appellation “inquisitorial” in the Anglo-American world. German common law procedure was largely non-oral, non-immediate and secret. Oral statements had to be recorded in writing to count. Judges decided cases based on written records and without involvement in preparation of cases or in hearings. Non-immediacy was thought to safeguard impartiality, since it prevented parties from influencing judges improperly. Strict rules of evidence determined which evidence judges could consider and how they had to evaluate it.⁶⁶³ German civil procedure in the Code of 1877 is marked by opposites of common law procedure: it is oral, it is immediate, and it is public. It eschews formalism, such as strict rules governing evidence; instead it evaluates evidence “freely,” *i.e.*, it gives evidence weight appropriate to circumstances.

⁶⁶² See generally P. Oberhammer & T. Domej, [Civil Procedure in] *Germany, Switzerland, Austria (Ca. 1800-2005)*, in *EUROPEAN TRADITIONS IN CIVIL PROCEDURE* 103 (C.H. van Rhee, ed., 2005).

⁶⁶³ *Id.* at 108-109.

Nazi Takeover of German Civil Justice



Nazi Logo for Justice (1933-1945)

More than two generations after the end of the Nazi dictatorship, American comparativists, when they advocate learning from German civil procedure, hear the retort: “Before you go on telling me any more about the virtues of German civil procedure, please explain why they had Hitler and we did not.”⁶⁶⁴ To younger people, particularly those who know Germany today, such views are out-of-touch with reality. The crimes of the Nazis lie generations back in history. Still, today and for generations to come, those twelve dark years will haunt study of Germany and of German institutions. We cannot ignore the question.

Thoughtful people wonder whether the evils of Nazi Germany should disqualify the German legal system from consideration as model for other systems. They think as follows: however fine German civil justice may be today, it failed to foil Nazi crimes. They surmise that the German legal system was integral in bringing about Nazi crimes. They fear that whatever thinking animated the Nazi system, must have infected German civil justice, both before and after the Nazi regime. The argumentation is faulty, as we now explain.

The German legal system was not responsible for the Nazi take-over. While the Nazis took care to clothe their take-over in legal terms, might, not right, took over.⁶⁶⁵ Politics, not legality, triumphed. The system that failed was the political system; the Nazi party never received a majority in a free national election.

The Nazis took over the civil justice system as thoroughly as they took over the government. Immediately upon Adolf Hitler’s taking power January 30, 1933 the Nazi regime began to “coordinate” (*gleichschalten*) the German justice system just as it did all other aspects of public life. It dismissed large

⁶⁶⁴ John H. Langbein, *The Influence of Comparative Procedure in the U.S.*, 43 AM. J. COMP. L. 545, 554 (1995).

⁶⁶⁵ See IRENE STRENGEM, *MACHTÜBERNAHME 1933—ALLES AUF DEM LEGALEM WEG?* (2002).

numbers of politically unacceptable judges, prosecutors, professors and apprentice jurists from their positions. It suppressed or absorbed professional associations and professional publications. It subordinated the states, their courts and their ministries to central Nazi authority. It established special courts to try political prisoners and special prisons (the first concentration camps) to hold them. It demanded loyalty oaths from those judges, prosecutors, lawyers and professors that remained in their positions.

The Nazi “legal system” did not build on German legal traditions or grow out of it: the Nazi system rejected German legal traditions. Already in March 1934 Helmuth James Graf von Moltke, one of those later executed for the 1944 attempted overthrow of the Nazi regime, wrote in a private letter that the German jurisprudence that he had learned—founded on “a concept of abstract justice and humanity”—had less than fourteen months after the take-over only “historical interest;” its “legal methods, put to the test and strengthened over centuries,” would need decades to be pulled from the rubble.⁶⁶⁶ By 1939, Karl Loewenstein, a renowned German-American law professor, wrote from an American refuge in the United States in his book *Hitler's Germany*: “[i]n no other field of human activities” did the Nazis “more completely revolutionize” German traditions than in law.⁶⁶⁷

To speak of a Nazi “system of law” is misleading. Hitler governed according to the “leadership principle” (*Führerprinzip*) and not according to statute. If ever there was a government of men and not of laws, the Nazi regime was it. Not only did Nazis not build on past law, in the area of civil justice, they left no new law. Although they began preparation of a new civil code (styled a “People’s Code” *Volksgesetzbuch*),⁶⁶⁸ they did not have time to complete it. They made no substantial changes in the Code of Civil Procedure; changes that took place under their rule had been programmed before they came to power or were temporary measures to deal with wartime conditions. Rather than change civil justice laws, they relied on convinced Nazi judges⁶⁶⁹ and on formal letters to those less convinced.⁶⁷⁰

⁶⁶⁶ Letter of 7 March 1934, in GÜNTER BRAKELMANN, HELMUTH JAMES VON MOLTKE 1907-1945. EINE BIOGRAPHIE 71 (2007), cited following Joachim Rückert, *Die NS-Zeit und wir—am Beispiel Kreisauer Kreis*, in KONTINUITÄTEN UND ZÄSUREN, RECHTSWISSENSCHAFTEN UND JUSTIZ IM „DRITTEN REICH“ UND IN DER NACHKRIEGSZEIT, 11, 17 (Eva Schumann, ed., 2008).

⁶⁶⁷ HITLER'S GERMANY. THE NAZI BACKGROUND TO WAR 92 (1939). Loewenstein was one of a number of German refugee jurists who enriched American law. See DER EINFLUß DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN DEN USA UND IN DEUTSCHLAND (Marcus Lutter, Ernst C. Stiefel & Michael H. Hoeflich, eds., 1993) (with numerous contributions in English, including, John H. Langbein, *The Influence of the German Emigrés on American Law: The Curious Case of Civil and Criminal Procedure*, at 321).

⁶⁶⁸ JUSTUS WILHELM HEDEMANN, HEINRICH LEHMANN & WOLFGANG SIEBEERT, VOLKSGESETZBUCH: GRUNDREGELN UND ERLÄUTERUNGEN (1942).

⁶⁶⁹ See, e.g., CURT ROTHENBERGER, DER DEUTSCHE RICHTER (1943).

⁶⁷⁰ RICHTERBRIEFE: DOKUMENTE ZUR BEEINFLUSSUNG DER DEUTSCHEN RECHTSPRECHUNG 1942-1944 (Heinz Boberach, ed., 1975).

For the Nazi regime, the civil justice system was largely irrelevant.⁶⁷¹ The regime did not trust even the eviscerated rump of the former system that remained.⁶⁷² To implement its terror, it largely looked elsewhere for more trustworthy servants, to the police, to the army, and above all, to its own forces, the secret state-police (*Gestapo*) and the S.S. It carried out its most heinous crimes in extermination camps distant outside Germany against people it had first rendered stateless.⁶⁷³

Still, there was no shortage of academics—many newly appointed—willing to clothe the new regime with “legal theory” and able to fill the new legal journals with “a colorful mix of irrational fantasies, self-debasing declarations of submission, and traditional dogmatic jurisprudence with a ready (positivist) acceptance of the new order.”⁶⁷⁴ Their work testifies to the irrelevance of the legal system in those terrible times.

When the Allies occupied Germany they immediately repealed many Nazi laws. Above all they put out of force public laws: criminal law and racial laws. They had no need to change substantially the Code of Civil Procedure or most other laws addressing civil justice.

Since the capitulation of the Nazi regime in 1945 Germans have sought to make up for the crimes of the German state (*Wiedergutmachung*) and to come to grips with the nation’s Nazi past (*Vergangenheitsbewältigung*). With respect to the latter attempt to understand the past, Germans asked the questions that Americans wonder about today: did German legal methods contribute to the Nazi takeover?

⁶⁷¹ Professor Vivian Curran points out that the Nazi and Vichy regimes nonetheless “maintained a mimicry of law, such that Fascist terror was visited upon people in the name of law, pursuant to apparently legal mechanisms, channels and structures, and not in an overt shunning or repudiation of law.” Vivian Curran, *Politicizing the Crime against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677, 688 (2003).

⁶⁷² Even while in power, some areas of civil justice remained “virtually untouched.” “[A]dherence to the rules could certainly be demanded and implemented, violations of the law could be reprimanded, and even a certain measure of legal protection could be preserved.” MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA, STUDIES ON LEGAL HISTORY IN NAZI GERMANY*, 98 (Thomas Dunlap, transl., 1998)(addressing specifically administrative and commercial law).

⁶⁷³ While the justice system was not central in the most abominable crimes, it was complicit in others, including in murder of its own members and their families. See, e.g., Ray Brandon, „*Politische Einstellung: Jude*“, *Wolfgang Johannes Leppmann*, OSTEUROPA, Dec. 2005, 87. Wolfgang Leppmann was a legal scholar at the Institut für Ostrecht in Berlin. His father, Dr. Friedrich Leppmann, had been psychiatrist for the Moabit investigative prison. His father and his uncle, Arthur Leppmann, were leading penologists before the First World War. The regular justice system arrested young Wolfgang Leppmann and imprisoned him first, apparently, in the very prison where his father had worked before fleeing the country. The justice system charged and convicted him of a Nazi-racial crime. It placed him in an ordinary prison. Subsequently the prison’s warden learned Leppman was a “full-Jew” and not a “half-Jew” and turned him over to the Gestapo, which deported him to Auschwitz in occupied Poland and murdered him there. *Id.* at 97.

⁶⁷⁴ STOLLEIS, *supra* note 672, at 97, 98-99. See also INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider, transl. 1991); BERND RÜTHERS, *ENTARTETES RECHT. RECHTSLEHREN UND KRONJURISTEN IM DRITTEN REICH* (1989).

In the immediate post-war years the German legal philosopher, Gustav Radbruch, asked whether German legal theory prevailing before 1933 (i.e., positivism and giving first attention to statutory law) had facilitated the Nazi takeover of the legal system.⁶⁷⁵ While Radbruch had not been compromised, those who had been were quick to assert that their acts were justified by positivist theory of following Nazi laws. The fault lay with the Nazi lawgivers and not with the compromised judges.⁶⁷⁶ Today, the thesis that German positivism led to Nazism is rejected. Fault is found not with the legal methodology, but with the ideological beliefs of the jurists who remained in office.⁶⁷⁷

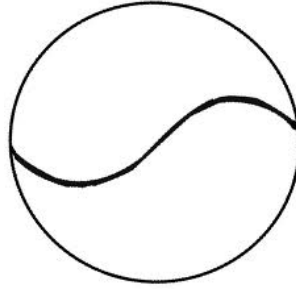
We do not believe there is reasonable ground not to find insights in German law.

⁶⁷⁵ Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* ["Legal Injustice and Statute-Superseding Justice," author's translation], 1946 SJZ [SÜDDEUTSCHE JURISTENZEITUNG] 105, reprinted in 3 GUSTAV RADBRUCH, GESAMTAUSGABE 81 (Arthur Kaufmann, ed., 1993), translated in Gustav Radbruch and the "Positivist Theses," in 13 LAW AND PHILOSOPHY 313 (1994). See Stanley Paulsen, *Radbruch on Unjust Laws: Competing Earlier and Later Views*, 15 OXFORD J. LEGAL STUD. 489 (1995).

⁶⁷⁶ Muller, *supra* note 674, at 219-231.

⁶⁷⁷ Matthias Mahlmann, *Judicial Methodology and Fascist and Nazi Law*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 229-234 (Christian Joeges & Navraj Singh Ghaleigh, eds., 2003), citing Vivian Grosswald Curran, *Formalism and Anti-Formalism in French and German Judicial Methodology*, in THE DARKER LEGACIES, at 205, 221-224. See also MICHAEL STOLLEIS, RELUCTANCE TO GLANCE IN THE MIRROR: THE CHANGING FACE OF GERMAN JURISPRUDENCE AFTER 1933 AND POST-1945 (2002), reprinted in THE DARKER LEGACIES at 1.

C. Korea



Taegeuk (태극)
Symbolic depiction of Yin and Yang
used on Korean National Flag (1882)

Korea Time Table

Before 1876	Kingdom of Jos ŏn (“Land of Morning Calm”)
1876	Opening of Korea to Japan and the West
1904-1905	Russo-Japanese War over Korea
1905-1945	Japanese protectorate, then occupation
1912	Japanese Code of Civil Procedure, based on German Code of Civil Procedure
1945-1948	Allied occupation
1948- present	National division, North and South, legal disunity
1950-1953	Civil War (Korean War)
1960	Civil Procedure Act, based on Japanese Code of Civil Procedure
1987	Constitutional revolution
2002	Korean Civil Procedure Act Amendment
2008	Korean Civil Procedure Act Amendment Following the Revisions of 2005, 2006, and 2007

For the first seventy-five years of the nineteenth century Korea, known as the Kingdom of Joŏn (Chosŏn), was closed to the Western world. In 1876 Japan forced the opening of Korea, which ushered in a thirty-year period of western influence on Korean law. Until then, Korean law had been based on traditional Korean thought and largely influenced by Confucianism from China. For a time among western legal systems, the influence of American law was strongest, but incompatibility with Korean social conditions led to Korean preference for Continental law, first for French law and then for German law. Korea’s first modern court organization act was based on the German Court Organization Act [*Gerichtsverfassungs*] of 1877.

At the turn of the twentieth century, Russia and Japan competed for hegemony over Korea. In 1905, Japan, following victory in war against Russia, asserted control. In 1910 Japan annexed Korea.

Japanese rule of Korea was harsh and brutal; it was a colonial occupation that suppressed Koreans and their culture. It imposed Japanese law on Korea. It brought law into disrespect, since law was a tool of the occupiers. To this day the occupation burdens relations between Korea and Japan.

In 1945 the United States and the British Empire defeated Japan and ended the Second World War. The United States occupied Korea south of the 38th parallel of latitude and the Soviet Union, which entered the war against Japan only in the last days of the war, occupied Korea to the north. The United States military government sought to “de-Japanize Korean law by replacing Japanese influences with American law, [but] without much success.”⁶⁷⁸

In 1948 separate states were created in the two occupation areas. In 1950 the northern state, occupied by the Soviet Union, invaded the southern state, occupied by the United States. War continued until 1953, when an armistice was reached. The two states remain antagonistic. The northern state, the so-called People’s Democratic Republic of Korea, is Communist and perhaps the world’s last remaining totalitarian state. We give it no attention in this book.

Despite superficial appearance that the two Korean states are an Asian analogue to the two German states, that assumption is misleading. Not until October 1987—just two years before the fall of the Berlin Wall in November 1989—could one correctly draw such parallels. Unlike West Germany, until 1987 South Korea was not a democratic rule-of-law state. One party and one man rule prevailed. That came to end in 1987 with a peaceful, constitutional revolution. In 1987, for the first time in Korea’s history, a Korean constitution was made through democratic procedures. Since then Koreans have successfully worked to make the constitutional revolution a reality.⁶⁷⁹

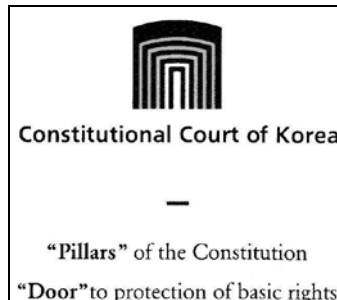
Modern and Traditional Korean Law

Korea’s culture is not European. Korean legal scholars have considered whether they might recreate a uniquely Korean law inspired by traditional,

⁶⁷⁸ Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 SO. ILL. U.L.J. 71, 72 (1997).

⁶⁷⁹ See TOM GINSBURG, *THE POLITICS OF LEGAL REFORM IN KOREA*, IN *LEGAL REFORM IN KOREA 1* (Tom Ginsburg, ed., 2004); Chang-rok Kim, *Where is the Korean Legal System Going?*, in *LAW IN A CHANGING WORLD: ASIAN ALTERNATIVES 11* (Morigiwa Yastutomo, ed., 1998); DAE-KHU YOON, *LAW AND DEMOCRACY IN KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987* (2010).

Confucian law. The challenge that they face is that traditional Korean law and practices existed in a pre-industrial era. Korea has changed dramatically through industrialization and political modernization. It is one of the twenty largest economies in the world. Coincident with that growth is a tremendous upsurge in litigation that bespeaks preferences for dispute resolution according to law over more informal methods drawn from the Confucian heritage.⁶⁸⁰ Korean scholars see little future in a return to traditional Korean law. They see adoption of such a system as having worse consequences than adoption and development of a foreign system. They recommend development of the existing system with an eye to contemporary needs.⁶⁸¹ They are sufficiently satisfied with the job that they are doing in adapting those models foreign to Korea to see a role for presenting Korean law as a model for other legal systems. For example, each year the Korean Supreme Court provides training programs in English and other language to more than a hundred foreign judges to introduce them to the law and judicial system of Korea.



Civil Procedure—Realizing the 1987 Rule of Law Revolution

Korea did not have an established system of civil procedure of its own until 1960. Korea’s independence from China was not recognized until 1895 and was followed within ten years by Japanese domination that lasted until 1945.

⁶⁸⁰ See Ahn, *Influence*, *supra* note 678, at 84; Kwon, *Litigating in Korea*, *supra* note 236, 7 J. KOREAN L. at 109, reprint at 1; Wan-Ho Lee, *Kurzer Abriß über koreanisches Recht in Vergangenheit und Gegenwart*, in Festschrift für Bernhard Großfeld zum 65. Geburtstag 687 (Ulrich Hübner & Werner F. Ebke, eds. 1999) (summarizing the results of a survey published in Korean in 1996 noting changes in attitude between 1965 and 1993).

⁶⁸¹ Moon-Hyuck Ho, *Korea und das deutsche Zivilprozeßrecht*, in DAS DEUTSCHE ZIVILPROZESS-RECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN 448, 465-466 (Walther J. Habscheid, ed. 1991).

The origin of contemporary Korean civil procedure is an indirect transplant of German law. In 1912, two years after annexation, Japan imposed its Code of Civil Procedure of 1890 on Korea. In system and language the Japanese code of 1890 was essentially the German Code of Civil Procedure of 1877 and shared its virtues. American occupation authorities judged the German-based, Japanese-imposed, Korean judicial system positively: “the structure of the judiciary was a serious, well-regulated affair, and was administered by competent, excellently trained personnel.”

After liberation, the Japanese Code of Civil Procedure, as amended in Japan prior to 1945, continued to apply in Korea. Only in 1960 did Korea adopt its own law, the Civil Procedure Act (referred to here as the “KCPA”). Even it, however, is in material content a translation of the Japanese code and therefore a descendant of the German. Not until the constitutional revolution of 1987 did Korea turn in earnest to civil procedure.

Foreign Influences on Contemporary Korean Civil Procedure

Since 1945 three modern foreign legal systems have vied for attention in Korea: the Japanese, the American, and the German. The Japanese and the American systems made their marks through historic occupation and contemporary economic importance; the German system has competed through the strength of its ideas and through its affinity to the Japanese system without the historical baggage of the Japanese occupation.

Considering that much of Korean law originates in Japanese law, the influence of contemporary Japanese law in Korea is modest. History and language explain this limited influence. More than two generations after the hated occupation ended, looking to Japan for legal inspiration, remains sensitive and even disconcerting. Learning Japanese, when already one must learn English, is an additional burden. Korean and Japanese jurists are as likely to converse in English as in Korean or Japanese.

The influence of the United States on Korea has been and is substantial. Koreans say that the U.S. occupation from 1945 to 1948 “Americanized” Korea.⁶⁸²

The influence of American law has not been as great as American influence in general, but it has been pervasive in some areas. Korean constitutions imitate the American. Korean courts import American constitutional concepts. Korean constitutional law textbooks include U.S.

⁶⁸² Chongko Choi, *South and North Korean Law: Comparison and Unification*, in *RECHTSREFORM IN DEUTSCHLAND UND KOREA IM VERGLEICH*, 273, 278-279 (Thomas Würtenberger, ed., 2006);

Supreme Court decisions; Korean scholars write many articles on the U.S. Supreme Court and translate others.⁶⁸³

The influence of American law on Korea is intensified by the economic might and global cultural dominance of the United States. It is magnified by dominance of English in global commerce. English is first foreign language for most Korean students. Where the older generation might and did study in many countries, the younger generation is likely to go to an English-speaking country, and especially to the United States.⁶⁸⁴ Korean bar examiners recognized the dominance of English when they made knowledge of English mandatory for bar admission and dropped as acceptable alternatives knowledge of any other language. The Korean Supreme Court puts knowledge of English first in communication between Korean judges and the world.⁶⁸⁵

Rejection of American and Renewal of German Influence?

In the late twentieth century Korea flirted with American models in civil procedure. Attempts to introduce Korean variations of American cross-examination and class actions were unsuccessful.⁶⁸⁶ This should not be surprising: some members of the American military government in Seoul in the immediate post-war years recognized that German law was more compatible with the Korean system than was the American.⁶⁸⁷

For all the cultural influence of the United States in Korea, Korean civil procedure owes little to American law. After looking closely at American procedure, Korean reformers turned back to familiar concepts of German procedure. Notwithstanding dominance of the English language, the influence of German civil procedure on Korean law remains dominant.⁶⁸⁸ Knowledge of German law is common among jurists. For example, eleven of the thirteen members of the Special Committee for the Civil Code Amendment formed in

⁶⁸³ Ahn, *Influence*, *supra* note 678, at 73, 79.

⁶⁸⁴ See Sang-Hyun Song, *Korean Students in U.S. Law Schools and Foreign Students at Seoul National University Law School*, 18 DICK. J. INT'L L. 467 (2000).

⁶⁸⁵ See, e.g. Byung-dae Park, *Keynote Speech, The First Judicial Symposium in English*, 1 J. KOREAN JUDICATURE 726 (Supreme Court of Korea, 2008).

⁶⁸⁶ Moon-Hyuck Ho, *The Reception and Transmission of Civil Procedure Law Experience in Korea and Important Points to be Considered*, in THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY, LEGISLATIVE AND LEGAL EDUCATIONAL ASSISTANCE TO OTHER COUNTRIES IN PROCEDURAL LAW (Masahisa Deguchi & Marcel Storme, eds. 2008).

⁶⁸⁷ See Chongko Choi, *Western Jurists on Korean Law: A Historical Survey*, 2 J. KOREAN L. 167, 182-184 (2002).

⁶⁸⁸ See Gyooho Lee, *Is Comparative Law and Economics Viable as a Comparative Approach to Korean Civil Procedure?*, 5 KOREAN J. L. & ECON. 85, 86-87, 118 (2008).

1999 studied law in Germany; only three had studied in the United States. Of the eleven who studied in Germany, five had taken doctoral degrees there, that is, Dr. jur. law degrees, the equivalent of Ph. D.s in law. To put that number into American perspective, perhaps ten American-born law professors have done that.

Korean constitutional law demonstrates the strength of German procedural law and legal methods. When Korea embraced American constitutional principles in 1987, it adopted forms of constitutional adjudication that are closer to German forms than they are to American one. In particular, Korea introduced a separate constitutional court.⁶⁸⁹

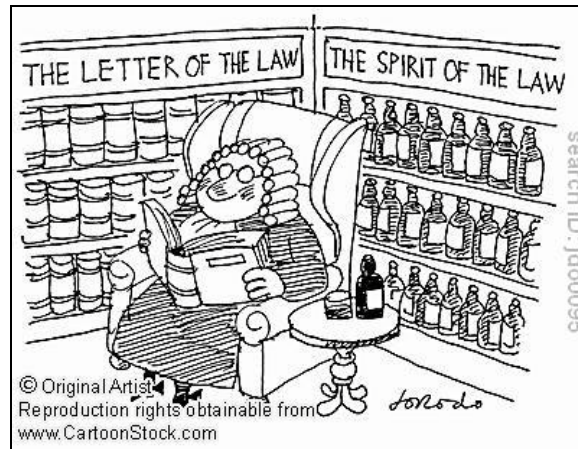
In the major revision of 2002 to the Korean Civil Procedure Act, Korea returned to the German system for ideas. The Korean reforms of the first decade of the twenty-first century reform are reminiscent of earlier German reforms in 1924 and 1976 in their emphasis, respectively, on oral hearings and on concentrating process.⁶⁹⁰

Thus today Korea has essentially the German code of civil procedure and is updating it to the contemporary version. While Korea does not have German practice in every respect, this has little to do with Korean national legal culture resisting a foreign culture, and everything to do with national institutions that have different capabilities (e.g., fewer lawyers and judges than in Germany) and with those institutions being slow to follow German reforms.

⁶⁸⁹ Ahn, *Influence*, *supra* note 678, 77, 86. See also Woo-young Rhee, *Democratic Legitimacy of law and the constitutional adjudication in the Republic of Korea*, in *LITIGATION IN KOREA* 135 (Kuk Cho, ed., 2010).

⁶⁹⁰ See Moon-Hyuck Ho, *Zur Reform des koreanischen Zivilprozessrechts im Jahr 2002*, in *RECHTSREFORM IN DEUTSCHLAND UND KOREA IM VERGLEICH*, 87 (Thomas Würtenberger, ed., 2006); Kim, *Oral Proceedings*, *supra* note 290, 7 *J. KOREAN L.* at 53, reprint at 32.

BIBLIOGRAPHIC NOTES



A. Introductions to Legal and Civil Justice Systems

B. Critiques of American Civil Justice

A. Introductions to Legal and Civil Justice Systems

We identify here mostly book-length general introductions to our legal systems in general and to our civil justice systems in particular.

Introductions to the American Legal System

There are several English-language works written as introductions to the American legal system for foreign readers or for American non-lawyer readers. They have the benefit that they address the whole system as such, while also giving a chapter or more over to civil justice. Recent ones include: ALEXANDER DÖRRBECKER, *INTRODUCTION TO THE US-AMERICAN LEGAL SYSTEM FOR GERMAN-SPEAKING LAWYERS AND LAW STUDENTS* (2 vols., 2nd ed, 2005); JAY M. FEINMAN, *LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM* (2000); *FUNDAMENTALS OF AMERICAN LAW* (Alan B. Morrison, ed. 1996); *INTRODUCTION TO THE LAW OF THE UNITED STATES* (David S. Clark and Tuğrul Ansay, eds., 2nd ed. 2002); ARTHUR T. VON MEHREN & PETER L. MURRAY, *LAW IN THE UNITED STATES* (2nd ed. 2007). There are similar German-language works. More recent ones include: DIETER BLUMENWITZ, *EINFÜHRUNG IN DAS ANGLO-AMERIKANISCHE RECHT: RECHTSQUELLENLEHRE, METHODE DER RECHTSFINDUNG, ARBEITEN MIT PRAKTISCHEN RECHTSFÄLLEN* (7th ed.

2003); PETER HAY, U.S.-AMERIKANISCHES RECHT: EIN STUDIENBUCH (4th ed. 2005). Books in Korean include [to be added].

Introductions to American Civil Justice

A recent English language introduction to American civil procedure for foreign readers is JOHN B. OAKLEY & VIKRAM D. AMAR, AMERICAN CIVIL PROCEDURE: A GUIDE TO CIVIL ADJUDICATION IN US COURTS (2009). A reasonably recent work is GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION (1993). Of the shorter introductions for American law students, one which commends itself for readers of this book because its authors place the contemporary American system in historical and comparative context is STEPHEN N. SUBRIN & MARGARET Y.K. WOO: LITIGATING IN AMERICA: CIVIL PROCEDURE: CIVIL PROCEDURE IN CONTEXT (2006).

There are several German language introductions to American civil procedure. Relatively recent books include: URIKE BÖHM, AMERIKANISCHES ZIVILPROZESSRECHT (2005); PETER HEIDENBERGER, DEUTSCHE PARTEIEN VOR AMERIKANISCHEN GERICHTEN (1988); DIETER G. LANGE & STEPHEN F. BLACK, DER ZIVILPROZESS IN DEN VEREINIGTEN STAATEN: EIN PRAKTISCHER LEITFADEN FÜR DEUTSCHE UNTERNEHMEN (1986) (also appeared in English privately printed by the authors' law firm under the title CIVIL LITIGATION IN THE UNITED STATES: A PRACTICAL GUIDE FOR GERMAN COMPANIES, 1985); ROLF A. SCHÜTZE, PROZESSFÜHRUNG UND –RISIKEN IM DEUTSCH-AMERIKANISCHEN RECHTSVERKEHR (2004); HAIMO SCHACK, AMERIKANISCHES ZIVILPROZESSRECHT (3rd ed. 2002); WILLIAM SCHURTMAN & OTTO L. WALTER, DER AMERIKANISCHE ZIVILPROZESS (1978). Of these works, that by Schack is the most academic, while that by Schütze is the most provocative. Professor Maxeiner has published an article length introduction: James R. Maxeiner, *Die Gefahr der Übertragung deutschen Rechtsdenkens auf das U.S.-amerikanische Zivilprozeßrechts*, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 1990, 440. Books in Korean include [to be added].

Introductions to the German Legal System

Since the accession of the United Kingdom to what is now the European Union, a number of English language introductions to German law have appeared. None, unfortunately, are by Americans. These include: HOWARD D. FISHER, THE GERMAN LEGAL SYSTEM & LEGAL LANGUAGE (2nd ed. 1999); NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS (3rd ed. 2002); INTRODUCTION TO GERMAN LAW (Joachim Zekoll and Matthias Reimann, eds., 2nd ed. 2005); GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW (1998) (this book is also available in German). The book edited by Zekoll and Reimann includes an excellent

introductory chapter by Reinhard Zimmermann, director of the Max Planck Institute for Foreign and International Private Law in Hamburg, titled *Characteristic Aspects of German Legal Culture*. Books in Korean include [to be added].

Introductions to German Civil Justice

English language readers are fortunate to have a comprehensive English language introduction to German civil procedure. It is a product of collaboration between American and a German experts in civil procedure. PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* (2004). Only a few years before a shorter work by two German scholars appeared in English: HARALD KOCH & FRANK DIEDRICH, *CIVIL PROCEDURE IN GERMANY* (1998). It is somewhat dated by reforms in 2002. The Zekoll and Reimann book just mentioned includes a fine one chapter, fully up-to-date introduction by Astrid Stadler and Wolfgang Hau titled *The Law of Civil Procedure*. Several out-dated older works deserve mention for the comparative insights they bring. The second volume of E.J. COHN, *A MANUAL OF GERMAN LAW* (2nd ed. 1968) has an excellent chapter on German civil justice. Three excellent older articles are: Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure, Parts I and II*, 71 *HARV. L. REV.* 1193, 1443 (1958, 1959), and Benjamin J. Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 *BUFFALO L. REV.* 409 (1960). Books in Korean include [to be added].

Introductions to the Korean Legal System

There is one such work in German: *EINFÜHRUNG IN DAS KOREANISCHE RECHT* (Korea Legislation Research Institute, 2010). Its coverage of civil justice is brief. There is, as yet, no general introduction to the Korean legal system in English. The closest that there is, is a guide for foreign businessmen. *INVESTMENT IN KOREA: GUIDE TO KOREAN LAWS AND REGULATIONS* (Office of International Legal Affairs, Ministry of Justice, 1999).

Introductions to Korean Civil Justice

There is no introductory book devoted to Korean civil justice, but the book *LITIGATION IN KOREA* (Kuk Cho, ed., 2010) includes two excellent articles on the topic, both originally published in the *Journal of Korean Law*, as well as articles on related matters of criminal and constitutional litigation. The two articles and their original publications are: Hyun Seok Kim, *Why do We Pursue “Oral Proceedings” in Our Legal System?*, 7 *J. KOREAN L.* 51 (2007); Youngjoon Kwon, *Litigating in Korea: A General Overview of the*

Korean Civil Procedure, 7 J. KOREAN L. 109 (2007). Professor Lee's book, now not entirely up-to-date, helps fill in gaps. GYOOHO LEE, IN SEARCH OF THE OPTIMAL TORT LITIGATION SYSTEM: REFLECTIONS ON KOREA'S CIVIL PROCEDURE THROUGH INQUIRY INTO AMERICAN JURISPRUDENCE (J.S.D. dissertation, Washington University in St. Louis, 1998), available at SSRN: <http://ssrn.com/abstract=1656205>. The guide for businessmen mentioned in the previous section, includes a 23 page chapter on dispute settlement. In recent years Korean scholars have published many relevant articles in the English or German languages. Home to many of these articles is the *Journal of Korean Law*, which is available through Hein Online. We have referenced some of these in the text. Finally, there is a large conference volume published by the Supreme Court of Korea which has much material in English of interest. Also to be noted are two books by Chongko Choi: LAW AND JUSTICE IN KOREA, NORTH AND SOUTH (2005) and LAWYERS IN KOREA (2008).

B. Critiques of American Civil Justice



The Benefit of Going to Law

TWO Beggars travelling along,
 One blind, the other lame,
 Pick'd up an Oyster on the Way,
 To which they both laid claim :
 The Matter rose so high, that they
 Resolv'd to go to Law,
 As often richer Fools have done,
 Who quarrel for a Straw.
 A Lawyer took it strait in hand,
 Who knew his Business was
 To mind nor one nor t'other side,
 But make the best o' th' Cause,
 As always in the Law 's the Case:
 So he his Judgment gave,
 And Lawyer-like he thus resolv'd
 What each of them should have ;
 Blind Plaintiff, lame Defendant, share
 The Friendly Laws impartial Care.
 A Shell for him, a Shell for thee.
 The Middle is the Lawyer's Fee.

Benjamin Franklin, in
Poor Richard, 1733. An Almanack.

It is a commonplace to say that the American system of civil justice fails to meet public expectations. Many have said that before us. We list many of

⁶⁹¹ Illustration by John Tenniel, from LEWIS CARROLL, THROUGH THE LOOKING GLASS (AND WHAT ALICE FOUND THERE 76 (1899 ed., 1st ed. 1871). The illustration, of course, was not written for the verse.

them here in annual chronological order. This list is meant to be an extensive, but not an exhaustive list of separate publications mostly calling for civil justice reform. With a few deliberate exceptions, it does not list publications on criminal justice, publications limited to jury issues, or articles. Its listing of bar association reports is only representative; it but scratches the surface of reports issued

1789 to 1848 (From the Constitution to the Field Code)

[1799] *Of the Defects of the Judiciary*, WILLIAM GRIFFITH [attrib.], EUMENES: BEING A COLLECTION OF PAPERS, WRITTEN FOR THE PURPOSE OF EXHIBITING SOME OF THE MORE PROMINENT ERRORS AND OMISSIONS OF THE CONSTITUTION OF NEW-JERSEY Nos. XXIX *et seq.* (1799).

[1802] A NEW ARRANGEMENT OF THE COURTS OF JUSTICE, OF THE STATE OF MARYLAND: PROPOSED (1802).

[1803] THOMAS BARTON [attrib.] OBSERVATIONS ON THE TRIAL BY JURY: WITH MISCELLANEOUS REMARKS CONCERNING LEGISLATION & JURISPRUDENCE, AND THE PROFESSOR OF THE LAW; ... BY AN AMERICAN (1803).

[1805] JESSE HIGGINS [attrib.], SAMPSON AGAINST THE PHILISTINES, OR THE REFORMATION OF LAWSUITS; AND JUSTICE MADE CHEAP, SPEEDY, AND BROUGHT HOME TO EVERY MAN'S DOOR (2nd ed., 1805).

Did the conventions, by which these principles were established, mean nothing by all these fine words? ... For surely no man will pretend that this declaration [of the open courts' clause] has been realized. *Id.* at 23.

[1807] WILLIAM DUANE, EXPERIENCE THE TEST OF GOVERNMENT: IN EIGHTEEN ESSAYS (1807).

[1809] REFLECTIONS UPON THE ADMINISTRATION OF JUSTICE IN PENNSYLVANIA BY A CITIZEN (1809).

[1819] FERRIS PELL, A REVIEW OF THE ADMINISTRATION AND CIVIL POLICE OF THE STATE OF NEW-YORK, FROM THE YEAR 1807, TO THE YEAR 1819 (1819).

[1822] HENRY DWIGHT SEDGWICK, THE ENGLISH PRACTICE: A STATEMENT, SHOWING SOME OF THE EVILS AND ABSURDITIES OF THE PRACTICE OF THE ENGLISH COMMON LAW, AS ADOPTED IN SEVERAL STATES OF THE UNITED STATES, AND PARTICULARLY IN THE STATE OF NEW YORK ... BY A LOVER OF IMPROVEMENT (New York, 1822).

[1826, 1839] James Kirke Paulding, *The Perfection of Reason*, in JAMES KIRKE PAULDING, THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM (1st ed. 1826, 2nd ed. 1839).

[1827] HUGH D. EVANS, AN ESSAY ON PLEADING WITH A VIEW TO AN IMPROVED SYSTEM (1827).

[1836] DAVID HENSHAW, AN ADDRESS, DELIVERED BEFORE AN ASSEMBLY OF CITIZENS FROM ALL PARTS OF THE COMMONWEALTH, AT FANEUIL HALL, BOSTON, JULY 4, 1836 (1836).

[1838] THEODORE SEDGWICK, JR., A STATEMENT OF FACTS IN RELATION TO THE DELAYS AND ARREARS OF BUSINESS IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK, WITH SOME SUGGESTIONS FOR A CHANGE IN ITS ORGANIZATION (1838)

[1839] GUILIAN C. VERPLANCK, SPEECH WHEN IN COMMITTEE OF THE WHOLE IN THE SENATE OF NEW-YORK, ON THE SEVERAL BILLS AND RESOLUTIONS FOR THE AMENDMENT OF THE LAW AND THE REFORM OF THE JUDICIARY SYSTEM (Albany NY, 1839)

[1840 TO 1848] David Dudley Field, Jr., various shorter pieces *reprinted in* SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD (3 vols., 1884 to 1890).

[1847] Robert William Wells, *Observations on the Pleadings and Practice of the Courts of Justice of Missouri: and, A Radical Change Therein Recommended*, in A LETTER ADDRESSED TO THE "METROPOLITAN" (1847), *substantially reprinted in* *Law Reform*, 21 U.S. MAG. & DEM. REV. 477, 482, 486 (1847).

[1847] *Memorial of the Members of the Bar in the City of New-York, Relative to Legal Reform I*, Doc. No. 48, 2 N.Y. ASSEMBLY DOC. (Feb. 9, 1847), *reprinted in 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 261 (1884).

[1848] FIRST REPORT OF THE PRACTICE COMMISSION (Feb. 29, 1848), *extensively excerpted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 262, 273 (A.P. Sprague ed., 1884).

[1848, 1850] WILLIAM RICHARDSON DICKERSON, THE LETTERS OF JUNIUS (pseud.) EXPOSING TO THE PUBLIC, FOR THEIR BENEFIT, THE MAL-PRACTICES IN THE ADMINISTRATION OF THE LAW, (1st ed. 1848, 2nd ed. 1850).

1849 to 1905 (From the Field Code to Pound's Address)

[1851, 1879 REPORT OF THE COMMISSIONERS [BENJAMIN R. CURTIS, N.J. LORD & R.A. CHAPMAN, COMMISSIONERS) APPOINTED TO REVISE AND REFORM THE PROCEEDINGS IN THE COURT OF JUSTICE IN THIS COMMONWEALTH (1851), *commentary portion reprinted in 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITING* 149-50 (Benjamin R. Curtis, Jr. ed., 1879)

“[We are] working under what can hardly be called a system of procedure, and which every well-informed lawyer condemns” Id, at 2.

[1855, 1871 et al.]SAMUEL TYLER, REPORT ON PLEADINGS AND PRACTICE IN EQUITY OF THE COMMISSIONERS, APPOINTED BY THE GENERAL ASSEMBLY OF MARYLAND, TO REVISE, SIMPLIFY AND ABRIDGE THE RULES OF PRACTICE, PLEADINGS, FORMS OF CONVEYANCING, AND PROCEEDING OF THE COURTS OF THE STATE (1855) (critical of new code pleading), largely reprinted as an introduction to Samuel Tyler, HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (1871 to 1919).

[1858] *McFaul v. Ramsey*, 61 U.S. 523, 524 (1858).

[1876] G.T. Bispham, *Law in America, 1776-1876*, 122 N. AM. REV. 154, 185-86 (1876).

[1879] ARPHAXED LOOMIS, HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS (1879).

[1882] AMERICAN BAR ASSOCIATION. MAJORITY AND MINORITY REPORTS OF A SPECIAL COMMITTEE OF NINE, ON THE REMEDY FOR THE DELAYS INCIDENT TO THE DETERMINATION OF SUITS IN THE HIGHEST COURTS OF THE UNITED STATES, TOGETHER WITH THE DEBATE OF THE ASSOCIATION THEREON (1882), *reprinted from 5 A.B.A. REPORTS* (1882).

[1885] AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE, APPOINTED TO CONSIDER AND REPORT WHETHER THE PRESENT DELAY AND UNCERTAINTY IN JUDICIAL ADMINISTRATION CAN BE LESSENERED, AND IF SO, BY WHAT MEANS WITH THE APPENDIX (1885), *reprinted in 8 A.B.A. REP.* 323 (1885).

[1886] REPORT OF THE SPECIAL COMMITTEE ON DELAY AND UNCERTAINTY IN JUDICIAL ADMINISTRATION, 9 A.B.A. REP. 325 (1886).

[1891] ALFRED RUSSELL, AVOIDABLE CAUSES OF DELAY AND UNCERTAINTY IN OUR COURTS: THE ANNUAL ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION AT ITS MEETING, IN BOSTON, AUGUST 27, 1891, *reprinted in 25 A.B.A. REP.* *** (1891).

[1995] JOHN FORREST DILLON, LAW AND JURISPRUDENCE OF ENGLAND AND AMERICA (1995).

[1896] WILLIAM L. PUTNAM, LEGAL REFORM, ADDRESS ... NASHUA, N.H., FEB. 26, 1896 (1898).

[1904] NEW YORK (State), COMMISSION ON LAW'S DELAYS, REPORT OF THE COMMISSION ON LAW'S DELAYS APPOINTED BY THE GOVERNOR, PURSUANT TO CHAPTER 485 OF THE LAWS OF AS SUPPLEMENTED AND AMENDED BY CHAPTER 634 OF THE LAWS OF TRANSMITTED TO THE LEGISLATURE, JANUARY 25, 1904 (1904).

[1905] IRE JEWELL WILSON, PENNSYLVANIA BAR ASSOCIATION: JUSTICE WITHOUT DELAY (1905).

1906 to 1937 (From Pound's Address to Federal Rules of Civil Procedure)

- [1906] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Reports 395 (1906).
- [1908] AMERICAN BAR ASSOCIATION. SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION (1908) – 25 PAGES
- [1908] William Howard Taft, *Delays and Defects in the Enforcement of the Law in this Country. An address delivered before the Civic Forum, New York City, at Carnegie Hall, April 28, 1908. Reprinted in PAUL S. REINSCH, READINGS ON AMERICAN STATE GOVERNMENT 173 (1911).*
- [1908] William Howard Taft, *The Administration of Justice—Its Speeding and Cheapening*, 21 REPORTS OF THE ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 233 (1908).
- [T]he inevitable effect of the delays incident to the machinery now required in the settlement of controversies in judicial tribunals is to oppress and put at disadvantage the poor litigant and give advantage to his wealthy opponent.” *Id.* at 241.
- [1909] William Howard Taft, Address at Orchestra Hall, Chicago , Illinois (September 16, 1909) in 1 WILLIAM HOWARD TAFT, PRESIDENTIAL ADDRESSES AND STATE PAPERS 191 (1910).
- [T]he situation is now ripe for the appointment of a commission by Congress to take up the question of the law’s delays in the federal courts and to report a system which shall not only secure quick and cheap justice to the litigants in the Federal courts but shall offer a model to the legislatures and courts of the States by the use of which they can themselves institute reforms. *Id.* at 199.
- [1909] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE APPOINTED TO CONSIDER THE SIMPLIFICATION OF THE NEW YORK PROCEDURE, NOVEMBER 1ST, 1909 (1909).
- [1910] Edward D’Arcy, “*Theory of the Case*”—*Wrecker of Law*, 70 CENT. L.J. 294, 295 (1910).
- [1910] AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION, *reprinted in* 35 A.B.A. REP. 614 (1910).
- [1911] AMERICAN BAR ASSOCIATION. REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION (1911), *reprinted in* 36 A.B.A. REP. *** (1911).
- [1911-1916] Elihu Root, *Addresses on the Administration of Justice*, *reprinted in* ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 431-532 (Robert Bacon and John Brown Scott, eds., 1916).
- [1912] MISSOURI BAR ASSOCIATION. REPORT OF THE SPECIAL COMMITTEE ON JUDICIAL ADMINISTRATION AND LEGAL PROCEDURE (1912).
- [1912] REPORT OF THE COMMITTEE APPOINTED BY THE GOVERNOR [OF OREGON] ... TO MAKE RECOMMENDATIONS OF THE REVISION OF OUR JUDICIAL SYSTEM (1912).
- [1912] MOORFIELD STOREY, THE REFORM OF LEGAL PROCEDURE [Storrs Lectures 1911] (1912).
- [1913] Thomas W. Shelton, *The Reform of Judicial Procedure*, 1 VA. L. REV. 89, 90 (1913).
- [1913] WILLIAM C. HOOK, SOME CAUSES OF THE STRUGGLE FOR THE SIMPLIFICATION OF LEGAL PROCEDURE, AN ADDRESS BEFORE THE AMERICAN BAR ASSOCIATION (1913).
- [1913] *Treadmill Justice*, in GEORGE W. ALGER, THE OLD LAW AND THE NEW ORDER 61 *et seq.* (1913).
- [1913] JOHN LARKIN THORNDIKE, AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION (1913), *reprinted in* 38 A.B.A. REP. *** (1913).
- [1914] SHERMAN L. WHIPPLE, THE IMPAIRMENT OF POPULAR CONFIDENCE IN THE ADMINISTRATION OF JUSTICE, REMARKS AT THE ANNUAL BANQUET OF THE STATE BAR ASSOCIATION OF CONNECTICUT AT NEW LONDON, FEBRUARY 2, 1914 (1914).
- [1914] AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION (1914), *reprinted in* 39 A.B.A. REP. *** (1914).

[1915] Elihu Root, *On Ending the Scandal of Law's Delays*, reprinted in ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 177 (Robert Bacon and John Brown Scott, eds., 1916).

[1915] Woodrow W. Wilson, *Jackson Day Address at Indianapolis, January 8, 1915*, reprinted in PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES, INTRODUCTION BY ALBERT SHAW 80 (1917).

I do know that the United States in its judicial procedure is many decades behind every other civilized Government in the world, and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access to justice, is the greater part of justice itself. *Id.* at 88.

[1917] AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE, 73 THE ANNALS, Sept. 1917 (Carl Kelsey & Henry W. Jessup, ed.).

[1917] FREDERIC DEWITT WELLS, THE MAN IN COURT (1917).

[1918] THOMAS W. SHELTON, SPIRIT OF THE COURTS (1918).

[1919] JOHN D. WORKS, JURIDICAL REFORM: A CRITICAL COMPARISON OF PLEADING AND PRACTICE UNDER THE COMMON LAW AND EQUITY SYSTEMS OF PRACTICE, THE ENGLISH JUDICATURE ACTS, AND CODES OF THE SEVERAL STATES OF THIS COUNTRY, WITH A VIEW TO GREATER EFFICIENCY AND ECONOMY (1919).

[1922] William Howard Taft, Chief Justice of the United States, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, Address delivered at the annual meeting of the American Bar Association in REPORT OF THE FORTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION HELD AT SAN FRANCISCO, CALIFORNIA, AUGUST 9, 10 AND 11, 1922 at 250 (1922).

[1923] REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE (1923).

[1924] ANDREW ALEXANDER BRUCE, THE AMERICAN JUDGE (1924).

[1926] HENRY W. TAFT, LAW REFORM: PAPERS AND ADDRESSES BY A PRACTICING LAWYER (1926).

[1934] Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 828 (1924).

[1934] Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354 (1934).

[1937] ISIDOR FEINSTEIN [= I.F. Stone], THE COURT DISPOSES (1937).

1937 to 1969

[1939] FRED RODELL, WOE UNTO YOU, LAWYERS! (1939).

[1949] JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

[1952] WILLIAM SEAGLE, LAW: THE SCIENCE OF INEFFICIENCY (1952).

[1955] WILLIAM PIERCE ROGERS, "HOW LONG MUST A PERSON WAIT TO HAVE HIS CASE TRIED?" (1955).

[1955] ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM (1955).

[1956] I.P. CALLISON, COURTS OF INJUSTICE: THE FAILURE OF JUSTICE IN THE STATE COURTS (1956)

[1958] FANNIE J. KLEIN, ATTORNEY GENERAL OF THE UNITED STATES, PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION: HELD AT THE DEPARTMENT OF JUSTICE, WASHINGTON, D.C., JUNE 16 AND 17, 1958 (1959).

[1959] HANS ZEISEL, HARRY KALVEN JR., & BERNARD BUCHHOLZ, DELAY IN THE COURT: AN ANALYSIS OF THE REMEDIES FOR DELAYED JUSTICE (1959).

[1959] SHELDON D. ELLIOTT, IMPROVING OUR COURTS: COLLECTED STUDIES ON JUDICIAL ADMINISTRATION (1959).

[1959] Earl Warren, Chief Justice of the United States, *Foreword*, AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON COURT CONGESTION, TEN CURES FOR COURT CONGESTION 7 (1959)

Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States.

- [1959] CLARENCE G. GALSTON, *BEHIND THE JUDICIAL CURTAIN* (1959).
 [1960] LAGGING JUSTICE (Glen Winters, ed.), *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE*, vol. 328.
 [1961] A. LEO LEVIN & EDWARD A. WOOLLEY, *DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA* (1961).
 [1963] BERNARD BOTEIN & MURRAY A. GORDON, *THE TRIAL OF THE FUTURE: CHALLENGE TO THE LAW* (1963).
 [1964] NEW YORK (State), LEGISLATURE. SENATE, COMMITTEE ON THE JUDICIARY, *RECOMMENDATIONS RESPECTING COURT DELAY, LAWYERS REGISTRATION, CONDEMNATION AND APPROPRIATION* (1964).

1970 to 1979

- [1971] MAURICE ROSENBERG, *DEVISING PROCEDURES THAT ARE CIVIL TO PROMOTE JUSTICE THAT IS CIVILIZED* (Thomas M. Cooley Lectures, 1971) *reprinted in* 69 MICH. L. REV. 797 (1971):

[F]oreign judges and scholars throng here to study our methods of judicial administration. Some might think these pilgrimages akin to visiting a morgue to learn health habits. But in my opinion, the visitors are right to make them. In this nation we have invested more energy, attention, concern, and resources than has any other place on earth in an effort to upgrade judicial administration. That the investment has left us far short of perfection is an obvious understatement and a fact that is no secret abroad. *Id.* at 798.

The pluralistic American system of civil justice remains the wonder of the world of judicial administration. It is riddled with archaic rigidities and indefensible paradoxes. It is often sluggish and irrational. As an instrument for resolving disputes, its greatest redeeming feature is that it stands alongside our system of criminal justice, where its warts seem beauty marks by contrast. It will improve; it must. *Id.* at 819.

- [1971] LEONARD DOWNIE, JR., *JUSTICE DENIED: THE CASE FOR REFORM OF THE COURTS* (1971).
 [1972] THE WORK OF THE SELECT COMMITTEE ON TRIAL COURT DELAY APPOINTED BY CHIEF JUSTICE DONALD R. WRIGHT ON MARCH 26, 1971 TO INVESTIGATE THE CAUSES OF TRIAL COURT DELAY IN CALIFORNIA, AND BETWEEN NOW AND MAY 1, 1972 (1972).
 [1972] BRUCE WASSERSTEIN, *WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES* (1972).
 [1973] ANNE STRICK, *INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF LAW VICTIMIZES US AND SUBVERTS JUSTICE* (1973).
 [1975] COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* (1975).
 [1976] THE AMERICAN ASSEMBLY, *LAW AND THE AMERICAN FUTURE* (Murray L. Schwartz, ed., 1976).
 [1977] MARVIN E. FRANKEL, *PARTISAN JUSTICE: TOO MUCH FIGHT? TOO LITTLE TRUTH? EQUAL JUSTICE?* (1977).
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