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The German Advantage in Civil Procedure

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Our lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial.¹ The shortcomings inhere in a system that leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.

We have comforted ourselves with the thought that a lawyerless system would be worse.² The excesses of American adver-

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¹ E.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298-1303 (1978).

² E.g., STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 38,

sary justice would seem to pale by comparison with a literally nonadversarial system—one in which litigants would be remitted to faceless bureaucratic adjudicators and denied the safeguards that flow from lawyerly intermediation.

The German advantage. The main theme of this article is drawn from Continental civil procedure, exemplified for me by the system that I know reasonably well, the West German.³ My theme is that, by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice. But I shall emphasize that the familiar contrast between our adversarial procedure and the supposedly nonadversarial procedure of the Continental tradition has been grossly overdrawn.

To be sure, since the greater responsibility of the bench for fact-gathering is what distinguishes the Continental tradition, a necessary (and welcome) correlative is that counsel's role in eliciting evidence is greatly restricted. Apart from fact-gathering, however, the lawyers for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure.⁴ There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigators suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from fact, they discuss and distinguish precedent, they interpret statutes, and they formulate views of the law that further the interests of their clients. I shall urge that German experience shows that we would do better if we were greatly to restrict the adversaries' role in fact-gathering.

40-41, 43 (1984).

³ A somewhat similar account of Continental practice could be based upon other Western European systems, although details would differ, particularly as one moves from the Northern European systems that have been most influenced by Austrian-German legal culture, to the systems of Southern Europe, where judicial domination of fact-gathering is less prominent and where less adequate resources have been devoted to developing and motivating the bench. See Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 858-59 (1971).

⁴ Von Mehren remarks that, especially by contrast with criminal procedure, where adversarial components are thoroughly subordinated in the Continental tradition, "the civil-procedure systems of France, Germany and the United States were—and remain—adversarial." Von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 361 n.3 (N. Horn ed. 1982). When writers take the shortcut and speak of German or other Continental civil procedure as "nonadversarial" (a usage that I think should be avoided although I confess to having been guilty of it in the past), the description is correct only insofar as it refers to that distinctive trait of Continental civil procedure, judicial conduct of fact-gathering.

Convergence. The concluding theme of this article directs attention to recent trends in American civil procedure. Having developed the view that judicialized fact-gathering has immense advantages over traditional American practice, I point to the growing manifestations of judicial control of fact-gathering in certain strands of federal procedure. The *Manual for Complex Litigation*⁶ is infused with notions of judicial management of fact-gathering for the multi-party Big Case, but there has been no natural stopping place, and these techniques have been seeping into the conduct of ordinary litigation in the development that has been called "managerial judging."⁶

In principle, managerial judging is more compatible with the theory of German procedure than with our own. Having now made the great leap from adversary control to judicial control of fact-gathering, we would need to take one further step to achieve real convergence with the German tradition: from judicial control to judicial conduct of the fact-gathering process. In the success of managerial judging, I see telling evidence for the proposition that judicial fact-gathering could work well in a system that preserved much of the rest of what we now have in civil procedure.

I should emphasize, however, that the main concern of this article is not the sprawling Big Case, but the traditional bipolar lawsuit in contract, tort, or entitlement. The Big Case is testing and instructive but quantitatively unimportant. Ordinary litigation is the place to compare and to judge civil procedural systems.⁷

Outline. After sketching the main features of German civil procedure (Part I), I contrast the striking shortcomings of American procedure: the wastefulness and complexity of our division into pretrial and trial procedure (Part II), and the truth-defeating distortions incident to our system of partisan preparation and production of witnesses (Part III) and experts. I devote special attention to the German practice in obtaining impartial expert testimony (Part IV). I pause to notice how flimsy are the theoretical justifications that have been advanced in support of adversary domination of fact-gathering in civil litigation (Part V). Because a more judge-centered fact-gathering process would direct attention to the powers of the bench, I describe the incentive structure of the German career judiciary (Part VI) and the appellate safeguards for litigants (Part VII). Finally, I point to the potential for the con-

⁶ MANUAL FOR COMPLEX LITIGATION (5th ed. 1982).

⁶ Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

⁷ Regarding the role of the Small Case in these developments, see *infra* note 138.

vergence of the two systems arising from the appearance of managerial judging in the United States (Part VIII).

I. OVERVIEW OF GERMAN CIVIL PROCEDURE⁸

There are two fundamental differences between German and Anglo-American civil procedure, and these differences lead in turn to many others. First, the court rather than the parties' lawyers takes the main responsibility for gathering and sifting evidence, although the lawyers exercise a watchful eye over the court's work. Second, there is no distinction between pretrial and trial, between discovering evidence and presenting it. Trial is not a single continuous event. Rather, the court gathers and evaluates evidence over a series of hearings, as many as the circumstances require.⁹

⁸ Readers interested in the detail of the German system will find, in addition to the indigenous treatises, a surprisingly rich English-language literature. The remarkable mini-treatise, Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958) [hereafter cited as Kaplan-von Mehren], although approaching its thirtieth anniversary, remains fundamentally accurate. See also 2 E.J. COHN, *MANUAL OF GERMAN LAW* 162-248 (2d ed. 1971). For comparative observations growing out of the Kaplan-von Mehren study, see Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO L. REV. 409 (1960) [hereafter cited as Kaplan]. William B. Fisch updated the Kaplan-von Mehren article, with particular attention to the 1977 amendments that are discussed *infra* note 9, in Fisch, *Recent Developments in West German Civil Procedure*, 6 HASTINGS INT'L & COMP. L. REV. 221, 236-60 (1983). On the 1977 reforms see also Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687 (1983). Regarding the appellate system, see Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1981). On the differing roles of lawyers, judges, and other legal professionals, see Kötz, *The Role and Functions of the Legal Professions in the Federal Republic of Germany*, in DEUTSCHE LANDESREFERATE ZUM PRIVATRECHT UND HANDELSRECHT, XI INTERNATIONALER KONGRESS FÜR RECHTSVERGLEICHUNG 69 (U. Drobnig & H. Puttfarcken ed. 1982) [hereafter cited as Kötz, *Legal Profession*]; see also DIETRICH RUESCHMEYER, *LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 27-62 (1973).

⁹ Reforms enacted in 1976 and in force since 1977, based on practice pioneered in Stuttgart and widely known as the "Stuttgart Model," encourage the courts to dispose of a case in a single hearing when circumstances permit. See, e.g., LEO ROSENBERG & KARL-HEINZ SCHWAB, *ZIVILPROZESSRECHT* § 84, at 456-60, § 107, at 614-17 (13th ed. 1981); see *id.* § 107, at 614 for bibliography. For English-language discussion, see Bender, *The Stuttgart Model*, in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 433 (M. Cappelletti & J. Weisner ed. 1979).

As modified, the code reads: "Ordinarily (*in der Regel*), the case should be resolved in a single hearing, comprehensively prepared." ZIVILPROZESSORDNUNG [ZPO] (Code of Civil Procedure) § 272(I). In aid of this comprehensive preparation, ZPO § 273, formerly ZPO § 272(b), authorizes the court to take various steps in advance of the hearing (for example, requiring the parties to clarify positions, obtaining documents, summoning parties and witnesses to the hearing). Many simpler cases do lend themselves to one-hearing disposition, either through court-aided settlement or by judgment. When this happens the German procedure resembles the American pattern of pretrial preparation followed by a concentrated trial. However, even in such cases, because the court has the option to schedule further hearings if developments at the initial hearing seem to warrant further proofs or submis-

Initiation. The plaintiff's lawyer commences a lawsuit in Germany with a complaint. Like its American counterpart, the German complaint narrates the key facts, sets forth a legal theory, and asks for a remedy in damages or specific relief.¹⁰ Unlike an American complaint, however, the German document proposes means of proof for its main factual contentions.¹¹ The major documents in the plaintiff's possession that support his claim are scheduled and often appended; other documents (for example, hospital files or government records such as police accident reports or agency files) are indicated; witnesses who are thought to know something helpful to the plaintiff's position are identified. The defendant's answer follows the same pattern. It should be emphasized, however, that neither plaintiff's nor defendant's lawyer will have conducted any significant search for witnesses or for other evidence unknown to his client. Digging for facts is primarily the work of the judge.¹²

Judicial preparation. The judge to whom the case is entrusted examines these pleadings and appended documents.¹³ He routinely sends for relevant public records. These materials form the beginnings of the official dossier, the court file. All subsequent submissions of counsel, and all subsequent evidence-gathering, will be entered in the dossier, which is open to counsel's inspection continuously.

sions, German procedure is devoid of the opportunities for surprise and tactical advantage that inhere in the Anglo-American concentrated trial. See *infra* text accompanying note 23.

For cases that do not lend themselves to one-hearing resolution, the 1977 amendments have not altered the episodic character of the procedure. Further hearings may be ordered as necessary. See, e.g., ZPO § 278(IV). "The whole procedure up to judgment may therefore be viewed as being essentially a series of oral conferences." Kötz, *Civil Litigation and the Public Interest*, 1 Civ. Just. Q. 237, 243 (1982) [hereafter cited as Kötz, *Civil Litigation*].

German procedure recognizes something called the *Konzentrationsmaxime*, which, if translated as the "principle of concentration" and equated with the rule of concentrated trial in Anglo-American law, is a serious false cognate. The *Konzentrationsmaxime* expresses nothing more than the general efficiency value that the court should handle the case as rapidly as possible, and where possible in a single hearing. See, e.g., ADOLF BAUMBACH, ZIVILPROZESSORDNUNG § 253, Übersicht at 634, ¶ 2(E) (43d ed. 1985).

¹⁰ See ZPO § 253 (complaint); *id.* §§ 271, 274(II) (service on the defendant).

¹¹ ZPO § 253(IV) invokes ZPO § 130, including § 130(5), calling for the party to designate the means of proof he thinks will support his contentions of fact. For a specimen complaint and other items of record from a hypothetical lawsuit rendered in English, see 2 E. COHN, *supra* note 8, at 191-97.

¹² For English-language discussion of this point, which is so striking to those of us bred in the Anglo-American tradition, see Kaplan-von Mehren, *supra* note 8, at 1206-07, 1247-49.

¹³ In former times there was greater use of collegial first-instance courts, but by 1974 the tradeoff between dispatch and safeguard was resolved in favor of dispatch, and ZPO § 348 now presupposes a single-judge court in most circumstances. For background in English see Fisch, *supra* note 8, at 227-36; on the former practice, see Kaplan-von Mehren, *supra* note 8, at 1206-07, 1247-49.

When the judge develops a first sense of the dispute from these materials, he will schedule a hearing and notify the lawyers. He will often invite and sometimes summon the parties as well as their lawyers to this or subsequent hearings. If the pleadings have identified witnesses whose testimony seems central, the judge may summon them to the initial hearing as well.¹⁴

Hearing. The circumstances of the case dictate the course of the hearing. Sometimes the court will be able to resolve the case by discussing it with the lawyers and parties and suggesting avenues of compromise. If the case remains contentious and witness testimony needs to be taken, the court will have learned enough about the case to determine a sequence for examining witnesses.

Examining and recording. The judge serves as the examiner-in-chief. At the conclusion of his interrogation of each witness, counsel for either party may pose additional questions, but counsel are not prominent as examiners.¹⁵ Witness testimony is seldom recorded verbatim; rather, the judge pauses from time to time to dictate a summary of the testimony into the dossier.¹⁶ The lawyers sometimes suggest improvements in the wording of these summaries, in order to preserve or to emphasize nuances important to one side or the other.

Since the proceedings in a difficult case may require several hearings extending across many months, these summaries of concluded testimony—by encapsulating succinctly the results of previous hearings—allow the court to refresh itself rapidly for subsequent hearings. The summaries also serve as building blocks from which the court will ultimately fashion the findings of fact for its written judgment. If the case is appealed, these concise summaries constitute the record for the reviewing court. (We shall see that the first appellate instance in German procedure involves review *de novo*, in which the appellate court can form its own view of the facts, both from the record and, if appropriate, by recalling witnesses or summoning new ones.¹⁷)

¹⁴ The nineteenth-century tradition that one of the parties had to nominate a witness before the court could examine him (*Verhandlungsmaxime*) has long been something of a fiction, since a party usually detects a strong incentive to follow judicial suggestion in nominating some line of proof. The reforms of the 1970s directed to accelerating the procedure have further accentuated the court's authority to investigate independent of party nomination. For recent complaint from the bar that the bench is straining too far in this direction, see Birk, *Wer führt den Zivilprozess—der Anwalt oder der Richter?* 38 NEUE JURISTISCHE WOCHENSCHRIFT 1489, 1496 (1985).

¹⁵ See ZPO §§ 395-97.

¹⁶ See Kötz, *Civil Litigation*, *supra* note 9, at 240.

¹⁷ See *infra* text accompanying notes 115-20.

Anyone who has had to wade through the longwinded narrative of American pretrial depositions and trial transcripts (which preserve every inconsequential utterance, every false start, every stammer) will see at once the economy of the German approach to taking and preserving evidence.¹⁸ Our incentives run the other way; we pay court reporters by the page and lawyers mostly by the hour.

A related source of dispatch in German procedure is the virtual absence of any counterpart to the Anglo-American law of evidence. German law exhibits expansive notions of testimonial privilege, especially for potential witnesses drawn from the family.¹⁹ But German procedure functions without the main chapters of our law of evidence, those rules (such as hearsay) that exclude probative evidence for fear of the inability of the trier of fact to evaluate the evidence purposively. In civil litigation German judges sit without juries (a point to which this essay recurs²⁰); evidentiary shortcomings that would affect admissibility in our law affect weight or credit in German law.

Expertise. If an issue of technical difficulty arises on which the court or counsel wishes to obtain the views of an expert, the court—in consultation with counsel—will select the expert and define his role. (This aspect of the procedure I shall discuss particularly in Part IV below.)

Further contributions of counsel. After the court takes witness testimony or receives some other infusion of evidence, counsel have the opportunity to comment orally or in writing. Counsel use these submissions in order to suggest further proofs or to advance legal theories. Thus, nonadversarial proof-taking alternates with adversarial dialogue across as many hearings as are necessary. The process merges the investigatory function of our pretrial discovery and the evidence-presenting function of our trial. Another manifestation of the comparative efficiency of German procedure is that a witness is ordinarily examined only once. Contrast the American practice of partisan interview and preparation, pretrial deposition, preparation for trial, and examination and cross-examination at trial. These many steps take their toll in expense and irritation.

Judgment. After developing the facts and hearing the adversaries' views, the court decides the case in a written judgment that

¹⁸ *But see infra* text accompanying note 79.

¹⁹ ZPO §§ 383-89. *See generally* A. BAUMBACH, *supra* note 9, §§ 383-389, at 1018-29.

²⁰ *See infra* text accompanying notes 144-53.

must contain full findings of fact and make reasoned application of the law.²¹

II. JUDICIAL CONTROL OF SEQUENCE

From the standpoint of comparative civil procedure, the most important consequence of having judges direct fact-gathering in this episodic fashion is that German procedure functions without the sequence rules to which we are accustomed in the Anglo-American procedural world. The implications for procedural economy are large. The very concepts of "plaintiff's case" and "defendant's case" are unknown. In our system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular—for the issue of law or fact that might dispose of the case.²² Free of constraints that arise from party presentation of evidence, the court investigates the dispute in the fashion most likely to narrow the inquiry. A major job of counsel is to guide the search by directing the court's attention to particularly cogent lines of inquiry.

Suppose that the court has before it a contract case that involves complicated factual or legal issues about whether the contract was formed, and if so, what its precise terms were. But suppose further that the court quickly recognizes (or is led by submission of counsel to recognize) that some factual investigation might establish an affirmative defense—illegality, let us say—that would vitiate the contract. Because the court functions without sequence rules, it can postpone any consideration of issues that we would think of as the plaintiff's case—here the questions concerning the formation and the terms of the contract. Instead, the court can concentrate the entire initial inquiry on what we would regard as a defense. If, in my example, the court were to unearth enough evidence to allow it to conclude that the contract was illegal, no investigation would ever be done on the issues of formation and terms. A defensive issue that could only surface in Anglo-American procedure following full pretrial and trial ventilation of the whole of the plaintiff's case can be brought to the fore in German procedure.

²¹ For discussion of the importance of those safeguards, see *infra* text accompanying notes 110-14.

²² For English-language discussion, see Kaplan-von Mehren, *supra* note 8, at 1208-31, especially 1224-28.

Part of what makes our discovery system so complex is that, on account of our division into pretrial and trial, we have to discover for the entire case. We investigate everything that could possibly come up at trial, because once we enter the trial phase we can seldom go back and search for further evidence.²³ By contrast, the episodic character of German fact-gathering largely eliminates the danger of surprise; if the case takes an unexpected turn, the disadvantaged litigant can count on developing his response in another hearing at a later time. Because there is no pretrial discovery phase, fact-gathering occurs only once; and because the court establishes the sequence of fact-gathering according to criteria of relevance, unnecessary investigation is minimized. In the Anglo-American procedural world we value the early-disposition mechanism, especially summary judgment, for issues of law. But for fact-laden issues, our fixed-sequence rule (plaintiff's case before defendant's case) and our single-continuous-trial rule largely foreclose it.

The episodic character of German civil procedure—Benjamin Kaplan called it the “conference method”²⁴ of adjudication—has other virtues: It lessens tension and theatrics, and it encourages settlement. Countless novels, movies, plays, and broadcast serials attest to the dramatic potential of the Anglo-American trial. The contest between opposing counsel; the potential for surprise witnesses who cannot be rebutted in time; the tricks of adversary examination and cross-examination; the concentration of proof-taking and verdict into a single, continuous proceeding; the unpredictability of juries and the mysterious opacity of their conclusory verdicts—these attributes of the Anglo-American trial make for good theatre. German civil proceedings have the tone not of the theatre, but of a routine business meeting—serious rather than tense. When the court inquires and directs, it sets no stage for advocates to perform. The forensic skills of counsel can wrest no material advantage, and the appearance of a surprise witness would simply lead to the scheduling of a further hearing. In a system that cannot distinguish between dress rehearsal and opening night, there is scant occasion for stage fright.

In this business-like system of civil procedure the tradition is strong that the court promotes compromise.²⁵ The judge who gath-

²³ For discussion of the parallels to discovery waves under the *Manual for Complex Litigation* and to bifurcated trials under Federal Rule of Civil Procedure 42, see *infra* text accompanying notes 134-35.

²⁴ Kaplan, *supra* note 8, at 410.

²⁵ ZPO § 279 imposes upon the court the duty to explore the possibility of a settlement

ers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved. As the case progresses the judge discusses it with the litigants, sometimes indicating provisional views of the likely outcome.²⁶ He is, therefore, strongly positioned to encourage a litigant to abandon a case that is turning out to be weak or hopeless, or to recommend settlement. The loser-pays system of allocating the costs of litigation gives the parties further incentive to settle short of judgment.²⁷

at every stage of the proceeding. "Settlement is sometimes prized as the crown of the judicial function, as the goal for which a healthy legal system continually strives." OTTMAR JAUERNIG, ZIVILPROZESSRECHT § 48 (VII), at 171 (20th ed. 1983). Kaplan and his coauthors remark: "The intensity and candor of the court's drive toward settlement will astonish an American observer. In few cases does settlement go unmentioned and it is the judge who generally initiates the discussion." Kaplan-von Mehren, *supra* note 8, at 1223.

In 1977 I spent some time observing the conduct of civil cases in the main first-instance court (Landgericht, or LG) in Frankfurt. In one case, involving the amount of child support, the presiding judge told a defendant who was resisting the settlement recommended by the court: "If we have to go to judgment, I assume that the judgment would not look much different than the suggested settlement." He settled.

Settlement has many advantages, especially in the eyes of judges who promote it:

(1) It accelerates resolution of the case.

(2) No one is stigmatized as the loser.

(3) The court is spared writing a judgment, which is a considerable attraction in a legal system that takes the contents of the written judgment so seriously, *see infra* text accompanying notes 111-13. Kötz warns in this regard that "an activist judge who applies pressure in order to persuade the parties to accept a settlement may be motivated, not so much by a desire to end the litigation in a peaceable manner and thereby to protect the public interest in reducing delay in the courts but, instead, by a wish to reduce his workload." Kötz, *Civil Litigation*, *supra* note 9, at 238.

(4) Because settlement precludes appeal, the court knows that if it embodies its result in a settlement rather than a judgment, there is no possibility of being reversed. (Regarding reversal rates as a factor affecting progress in judicial careers, *see infra* text accompanying note 95.)

The Kaplan-von Mehren article makes the instructive comparative point that the greater judicial involvement in settlement in German procedure reflects the German judge's early and active role in developing the facts. "In American practice, on the other hand, a large percentage of settlements are concluded with the judges playing no part, for barring preliminary motions or a pretrial conference, cases commonly do not appear before the judges until the stage of trial." Kaplan-von Mehren, *supra* note 8, at 1223 n.120. On the correlation between the growing involvement of American judges in pretrial discovery and their larger role in promoting settlement, *see infra* text accompanying notes 124-32 & note 132.

²⁶ The presiding judge is required to discuss the factual and legal aspects of the case with the parties, ZPO § 139(I), and to advise the parties of his doubts, ZPO § 139(II).

²⁷ ZPO § 91 announces the basic principle, although the details extend across several special statutes, including the Kostenordnung [KOSTO] (Statute on Costs) and the Bundesrechtsanwaltsgebührenordnung [BRAGO] (Federal Statute on Lawyers' Fees). *See generally* 1 STEIN-JONAS, KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 91 Vorbemerkungen at 293-304 (20th ed. 1984). For brief treatment in English, *see* 2 E. COHN, *supra* note 8, at 182-90; Kaplan-von Mehren, *supra* note 8, at 1461-70; *see also* Pfennigstorf, *The European Ex-*

III. WITNESSES

Adversary control of fact-gathering in our procedure entails a high level of conflict between partisan advantage and orderly disclosure of the relevant information. Marvin Frankel put this point crisply when he said that "it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth*."²⁸

If we had deliberately set out to find a means of impairing the reliability of witness testimony, we could not have done much better than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial. Jerome Frank described the problem a generation ago:

[The witness] often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed.²⁹

Thus, said Frank, "the partisan nature of trials tends to make partisans of the witnesses."³⁰

Cross-examination at trial—our only substantial safeguard against this systematic bias in the testimony that reaches our courts—is a frail and fitful palliative. Cross-examination is too often ineffective to undo the consequences of skillful coaching. Further, because cross-examination allows so much latitude for bullying and other truth-defeating stratagems, it is frequently the source of fresh distortion when brought to bear against truthful testimony.³¹ As a leading litigator boasted recently in an ABA pub-

perience with Fee Shifting, LAW & CONTEMP. PROBS., Winter 1984, at 37; *infra* note 78.

In a valuable recent analysis of the effects of cost-shifting regimes, Steven Shavell makes the point that cost-shifting actually increases the parties' propensity to litigate in the situation where each overvalues his chances of prevailing. Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 65-66 (1982). The German effort at active judicial clarification of the facts and issues is a counterforce likely to correct such misperceptions much of the time.

²⁸ Frankel, *supra* note 1, at 1038 (emphasis in original).

²⁹ J. FRANK, *supra* note 1, at 86.

³⁰ *Id.*

³¹ Wigmore's celebrated panegyric—that cross-examination is "the greatest legal engine ever invented for the discovery of truth"—is nothing more than an article of faith. 5 JOHN H. WIGMORE, EVIDENCE § 1367, at 29 (3d ed. 1940). Judge Frankel explains why: "The litigator's devices, let us be clear, have utility in testing dishonest witnesses, ferreting out falsehoods, and thus exposing the truth. But to a considerable degree these devices are like other potent weapons, equally lethal for heroes and villains." Frankel, *supra* note 1, at 1039.

lication: "By a carefully planned and executed cross-examination, I can raise at least a slight question about the accuracy of [an adverse] witness's story, or question his motives or impartiality."³²

When we cross the border into German civil procedure, we leave behind all traces of this system of partisan preparation, examination, and cross-examination of witnesses. German law distinguishes parties from witnesses. A German lawyer must necessarily discuss the facts with his client, and based on what his client tells him and on what the documentary record discloses, the lawyer will nominate witnesses whose testimony might turn out to be helpful to his client. As the proofs come in, they may reveal to the lawyer the need to nominate further witnesses for the court to examine. But the lawyer stops at nominating; virtually never will he have occasion for out-of-court contact with a witness. Not only would such contact be a serious ethical breach, it would be self-defeating. "German judges are given to marked and explicit doubts about the reliability of the testimony of witnesses who previously have discussed the case with counsel or who have consorted unduly with a party."³³

No less a critic than Jerome Frank was prepared to concede that in American procedure the adversaries "sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked."³⁴ That is a telling argument for including adversaries in the fact-gathering process, but not for letting them run it. German civil procedure preserves party interests in fact-gathering.

For a well-known discussion of deliberately misleading techniques of examination and cross-examination, drawn mostly from how-to books, see J. FRANK, *supra* note 1, at 81-85. For recent discussion (by a booster of adversary procedure) of the shortcomings of cross-examination as a remedy for coaching, see Landsman, *Reforming the Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547, 570-71 (1984). In the hands of many of its practitioners, cross-examination is not only frequently truth-defeating or ineffectual, it is also tedious, repetitive, time-wasting, and insulting.

³² Hanley, *Working the Witness Puzzle*, LITIGATION, Winter 1977, at 8, 10.

³³ Kaplan-von Mehren, *supra* note 8, at 1201. Kötz has written lately in a similar vein: "German attorneys will be highly reluctant to talk with prospective witnesses. This results in part from an ethical standard as expressed in the canons promulgated by the German Bar Association where it is said: 'Questioning of witnesses out of court is advisable only when special circumstances justify it. In such questioning even the appearance of attempting to influence the witness must be avoided.' [Citing *Richtlinien der Bundesrechtsanwaltskammer für die Ausübung des Anwaltsberufs*, § 4 (May 11, 1957).] If any attorneys were prepared to wink at this standard, which is doubtful, they would have to take account of the further fact that German judges would take an extremely dim view of the reliability of witnesses who previously had discussed the case with counsel." Kötz, *Civil Litigation*, *supra* note 9, at 241.

³⁴ J. FRANK, *supra* note 1, at 80.

The lawyers nominate witnesses, attend and supplement court questioning, and develop adversary positions on the significance of the evidence. Yet German procedure totally avoids the distortions incident to our partisan witness practice.

IV. EXPERTS

The European jurist who visits the United States and becomes acquainted with our civil procedure typically expresses amazement at our witness practice. His amazement turns to something bordering on disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts. In the Continental tradition experts are selected and commissioned by the court, although with great attention to safeguarding party interests. In the German system, experts are not even called witnesses. They are thought of as "judges' aides."³⁵

Perverse incentives. At the American trial bar, those of us who serve as expert witnesses are known as "saxophones." This is a revealing term, as slang often is.³⁶ The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. I sometimes serve as an expert in trust and pension cases, and I have experienced the subtle pressures to join the team—to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts. The more measured and impartial an expert is, the less likely he is to be used by either side.³⁷

³⁵ *E.g.*, KURT JESSNITZER, *DER GERICHTLICHE SACHVERSTÄNDIGE* 72, 78 (7th ed. 1978).

³⁶ Equally revealing is the slang used to describe the preparation of ordinary witnesses: "sandpapering" and "horseshedding." For remarks on the latter, see MARVIN E. FRANKEL, *PARTISAN JUSTICE* 15 (1980).

³⁷ Advertisements like the following (from the journal of the trial lawyers' association) conjure up a vision more of the huckster than of the scientist: "EXPLODING BOTTLES-FLYING CAPS[:] expert with 20 years worldwide experience . . . 100% success to date." *TRIAL*, Feb. 1985, at 92.

One excuse for the litigation-biased expert is the claim that "there is no such thing as a neutral, impartial [expert] witness. . . . [He] is bound to be biased and partial, and strongly motivated towards advocacy of his particular prejudiced point of view." Diamond, *The Fal-*

At trial, the battle of experts tends to baffle the trier, especially in jury courts. If the experts do not cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing. The system invites abusive cross-examination. Since each expert is party-selected and party-paid, he is vulnerable to attack on credibility regardless of the merits of his testimony. A defense lawyer recently bragged about his technique of cross-examining plaintiffs' experts in tort cases. Notice that nothing in his strategy varies with the truthfulness of the expert testimony he tries to discredit:

A mode of attack ripe with potential is to pursue a line of questions which, by their form and the jury's studied observation of the witness in response, will tend to cast the expert as a "professional witness." By proceeding in this way, the cross-examiner will reap the benefit of a community attitude, certain to be present among several of the jurors, that bias can be purchased, almost like a commodity.³⁸

Thus, the systematic incentive in our procedure to distort expertise leads to a systematic distrust and devaluation of expertise. Short of forbidding the use of experts altogether, we probably could not have designed a procedure better suited to minimize the influence of expertise.³⁹

The Continental tradition. European legal systems are, by contrast, expert-prone.⁴⁰ Expertise is frequently sought. The literature emphasizes the value attached to having expert assistance

lacy of the Impartial Expert, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221, 229-30 (1959), reprinted in DAVID W. LOUISELL, GEOFFREY C. HAZARD, JR. & COLIN C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE 842, 846 (5th ed. 1983). However, it is important not to confuse litigation-bias (hiring somebody to conform his views to the needs of your lawsuit) with the good faith differences of opinion that can develop in scientific fields or in other areas of expertise concerning questions that have not been authoritatively resolved. It is true that bias may provoke a difference of opinion; it is false to reason that a difference of opinion must reflect bias.

³⁸ Ryan, *Making the Plaintiff's Expert Yours*, FOR THE DEFENSE, Nov. 1982, at 12, 13; see also Trine, *Cross-examining the Expert Witness in the Products Case*, TRIAL, Nov. 1983, at 86 (taking as its leitmotif the advice from a fisherman's manual that "[t]he concept behind playing a trout is to tire him to the point where he may be easily handled or netted, yet is not at the portals of death").

³⁹ See, for example, the trial judge's account of a proceeding that concerned an issue of Salvadoran law: "[T]he experts for the respective sides contradict each other in every material respect." *Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corp.*, 533 F. Supp. 290, 293 (S.D. Fla. 1982), cited in Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151, 158 n.10 (1983).

⁴⁰ See generally INSTITUT DE DROIT COMPARÉ DE PARIS, *L'EXPERTISE DANS LES PRINCIPAUX SYSTÈMES JURIDIQUES D'EUROPE* (1969).

available to the courts in an age in which litigation involves facts of ever-greater technical difficulty.⁴¹ The essential insight of Continental civil procedure is that credible expertise must be neutral expertise. Thus, the responsibility for selecting and informing experts is placed upon the courts, although with important protections for party interests.

Selecting the expert. German courts obtain expert help in lawsuits the way Americans obtain expert help in business or personal affairs. If you need an architect, a dermatologist, or a plumber, you do not commission a pair of them to take preordained and opposing positions on your problem, although you do sometimes take a second opinion. Rather, you take care to find an expert who is qualified to advise you in an objective manner; you probe his advice as best you can; and if you find his advice persuasive, you follow it.

When in the course of winnowing the issues in a lawsuit a German court determines that expertise might help resolve the case, the court selects and instructs the expert. The court may decide to seek expertise on its own motion, or at the request of one of the parties.⁴² The code of civil procedure allows the court to request nominations from the parties⁴³—indeed, the code requires the court to use any expert upon whom the parties agree⁴⁴—but neither practice is typical. In general, the court takes the initiative in nominating and selecting the expert.

The only respect in which the code of civil procedure purports to narrow the court's discretion to choose the expert is a provision whose significance is less than obvious: "If experts are officially designated for certain fields of expertise, other persons should be chosen only when special circumstances require."⁴⁵ One looks outside the code of civil procedure, to the federal statutes regulating various professions and trades, for the particulars on official designation.⁴⁶ For the professions, the statutes typically authorize

⁴¹ *E.g.*, Arens, *Stellung and Bedeutung des technischen Sachverständigen im Prozess*, in *EFFEKTIVITÄT DES RECHTSSCHUTZES UND VERFASSUNGSMÄSSIGE ORDNUNG* 299 (P. Gilles ed. 1983). For a volume of conference proceedings largely devoted to this topic, see *DER TECHNISCHE SACHVERSTÄNDIGE IM PROZESS* (F. Nicklisch ed. 1984) (*see especially id.* at 273ff., for the editor's English-language general report).

⁴² *See* ZPO § 404(I); K. JESSNITZER, *supra* note 35, at 97.

⁴³ ZPO § 404(III).

⁴⁴ ZPO § 404(IV).

⁴⁵ ZPO § 404(II).

⁴⁶ For a list of statutes that authorize licensing and similar bodies to designate experts, *see* 2 STEIN-JONAS, *KOMMENTAR ZUR ZIVILPROZESSORDNUNG* § 404(II), at 1674-75 (19th ed. 1972); *see also* K. JESSNITZER, *supra* note 35, at 122-23.

the official licensing bodies to assemble lists of professionals deemed especially suited to serve as experts. In other fields, the state governments designate quasi-public bodies to compile such lists. For example, under section 36 of the federal code on trade regulation, the state governments empower the regional chambers of commerce and industry (Industrie- und Handelskammern) to identify experts in a wide variety of commercial and technical fields. That statute directs the empowered chamber to choose as experts persons who have exceptional knowledge of the particular specialty and to have these persons sworn to render professional and impartial expertise.⁴⁷ The chamber circulates its lists of experts, organized by specialty and subspecialty, to the courts. German judges receive sheaves of these lists as the various issuing bodies update and recirculate them.

Current practice. In 1984 I spent a little time interviewing judges in Frankfurt about their practice in selecting experts.⁴⁸ My sample of a handful of judges is not large enough to impress statisticians, but I think the picture that emerges from serious discussion with people who operate the system is worth reporting. Among the judges with whom I spoke, I found unanimity on the proposition that the most important factor predisposing a judge to select an expert is favorable experience with that expert in an earlier case. Experts thus build reputations with the bench. Someone who renders a careful, succinct, and well-substantiated report and who responds effectively to the subsequent questions of the court and the parties will be remembered when another case arises in his specialty. Again we notice that German civil procedure tracks the patterns of decision-making in ordinary business and personal affairs: If you get a plumber to fix your toilet and he does it well, you incline to hire him again.

When judges lack personal experience with appropriate experts, I am told, they turn to the authoritative lists described above. If expertise is needed in a field for which official lists are unavailing, the court is thrown upon its own devices. The German judge then gets on the phone, working from party suggestions and from the court's own research, much in the fashion of an American litigator hunting for expertise. In these cases there is a tendency to turn, first, to the bodies that prepare expert lists in cognate areas;

⁴⁷ GEWERBEORDNUNG [GEWO] (Code on Trade Regulation) § 36.

⁴⁸ I wish especially to acknowledge rewarding discussions with Dr. Erika Bokelmann, Richterin am Oberlandesgericht Frankfurt; Dr. Heinrich Götzke, Vorsitzender Richter am Landgericht Frankfurt; and Dr. Ernst Windisch, Richter am Bundesgerichtshof.

or, if none, to the universities and technical institutes.

If enough potential experts are identified to allow for choice, the court will ordinarily consult party preferences. In such circumstances a litigant may ask the court to exclude an expert whose views proved contrary to his interests in previous litigation or whom he otherwise disdains. The court will try to oblige the parties' tastes when another qualified expert can be substituted. Nevertheless, a litigant can formally challenge an expert's appointment only on the narrow grounds for which a litigant could seek to recuse a judge.⁴⁹

Preparing the expert. The court that selects the expert instructs him, in the sense of propounding the facts that he is to assume or to investigate, and in framing the questions that the court wishes the expert to address.⁵⁰ In formulating the expert's task, as in other important steps in the conduct of the case, the court welcomes adversary suggestions. If the expert should take a view of premises (for example, in an accident case or a building-construction dispute), counsel for both sides will accompany him.⁵¹

Safeguards. The expert is ordinarily instructed to prepare a written opinion.⁵² When the court receives the report, it is circulated to the litigants. The litigants commonly file written comments, to which the expert is asked to reply. The court on its own motion may also request the expert to amplify his views. If the expert's report remains in contention, the court will schedule a hearing at which counsel for a dissatisfied litigant can confront and interrogate the expert.

The code of civil procedure reserves to the court the power to order a further report by another expert if the court should deem the first report unsatisfactory.⁵³ A litigant dissatisfied with the expert may encourage the court to invoke its power to name a second expert. The code of criminal procedure has a more explicit standard for such cases, which is worth noticing because the literature suggests that courts have similar instincts in civil procedure.⁵⁴ The court may refuse a litigant's motion to engage a further expert in a

⁴⁹ ZPO § 406(I). See generally A. BAUMBACH, *supra* note 9, § 406, at 1047-49.

⁵⁰ E.g., PETER ARENS, *ZIVILPROZESSRECHT* 203 (2d ed. 1982).

⁵¹ K. JESSNITZER, *supra* note 35, at 183.

⁵² ZPO § 411(I) authorizes the court to require the expert to report in writing. The language of the statute may make this look exceptional ("If a written report is ordered . . ."), but in practice ordering the report is quite the norm. See K. JESSNITZER, *supra* note 35, at 166-67.

⁵³ ZPO § 412(I).

⁵⁴ See, e.g., K. JESSNITZER, *supra* note 35, at 232.

criminal case, the code says,

if the contrary of the fact concerned has already been proved through the former expert opinion; this [authority to refuse to appoint a further expert] does not apply if the expertise of the former expert is doubted, if his report is based upon inaccurate factual presuppositions, if the report contains contradictions, or if the new expert has available means of research that appear superior to those of a former expert.⁵⁵

When, therefore, a litigant can persuade the court that an expert's report has been sloppy or partial, that it rests upon a view of the field that is not generally shared, or that the question referred to the expert is exceptionally difficult, the court will commission further expertise.⁵⁶

A litigant may also engage his own expert, much as is done in the Anglo-American procedural world, in order to rebut the court-appointed expert. The court will discount the views of a party-selected expert on account of his want of neutrality, but cases occur in which he nevertheless proves to be effective. Ordinarily, I am told, the court will not in such circumstances base its judgment directly upon the views of the party-selected expert; rather, the court will treat the rebuttal as ground for engaging a further court-appointed expert (called an *Oberexperte*, literally an "upper" or "superior" expert), whose opinion will take account of the rebuttal.⁵⁷

To conclude: In the use of expertise German civil procedure strikes an adroit balance between nonadversarial and adversarial values. Expertise is kept impartial, but litigants are protected against error or caprice through a variety of opportunities for consultation, confrontation, and rebuttal.

The American counterpart. It may seem curious that we make so little use of court-appointed experts in our civil practice, since "[t]he inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned"⁵⁸ and has been extended and codified in the Federal Rules of Evidence⁵⁹ and the Uniform

⁵⁵ STRAFPROZESSORDNUNG [StPO] (Code of Criminal Procedure) § 244(IV). See generally 3 LÖWE-ROSENBERG, DIE STRAFPROZESSORDNUNG UND DAS GERICHTSVERFASSUNGSGESETZ § 244 (IV), ¶¶ 143-150 (23d ed. 1978).

⁵⁶ See K. JESSNITZER, *supra* note 35, at 231-32.

⁵⁷ Cf. *id.* at 235-36.

⁵⁸ FED. R. EVID. 706 advisory committee note.

⁵⁹ FED. R. EVID. 706.

Rules of Evidence (Model Expert Testimony Act).⁶⁰ The literature displays both widespread agreement that our courts virtually never exercise this authority, and a certain bafflement about why.⁶¹

While "simple inertia"⁶² doubtless accounts for much (our judges "are accustomed to presiding over acts initiated by the parties"⁶³), comparative example points to a further explanation. The difficulty originates with the locktight segmentation of our procedure into pretrial and trial compartments, and with the tradition of partisan domination of the pretrial. Until lately, it was exceptional for the judge to have detailed acquaintance with the facts of the case until the parties presented their evidence at trial. By then the adversaries would have engaged their own experts, and time would no longer allow a court-appointed expert to be located and prepared. Effective use of court-appointed experts as exemplified in German practice presupposes early and extensive judicial involvement in shaping the whole of the proofs. It seems possible that the rise of managerial judging (discussed below in Part VIII) may at last achieve that precondition for effective use of court-appointed experts in our system.⁶⁴

V. SHORTCOMINGS OF ADVERSARY THEORY

The case against adversary domination of fact-gathering is so compelling that we have cause to wonder why our system tolerates it. Because there is nothing to be said in support of coached witnesses, and very little to be said in favor of litigation-biased experts, defenders of the American status quo are left to argue that the advantages of our adversary procedure counterbalance these grievous, truth-defeating distortions. "You have to take the bad with the good; if you want adversary safeguards, you are stuck with adversary excesses."

The false conflict. This all-or-nothing argument overlooks the fundamental distinction between fact-gathering and the rest of civil litigation. Outside the realm of fact-gathering, German civil procedure is about as adversarial as our own. Both systems welcome the lawyerly contribution to identifying legal issues and

⁶⁰ UNIF. R. EVID. 706, 13 U.L.A. 319 (1974).

⁶¹ See, e.g., 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 706[01], at 706-8 to -12 (Supp. 1985).

⁶² Merryman, *supra* note 39, at 165.

⁶³ *Id.*

⁶⁴ See *infra* text accompanying note 130.

sharpening legal analysis.⁶⁵ German civil procedure is materially less adversarial than our own only in the fact-gathering function, where partisanship has such potential to pollute the sources of truth.

Accordingly, the proper question is not whether to have lawyers, but how to use them; not whether to have an adversarial component to civil procedure, but how to prevent adversarial excesses. If we were to incorporate the essential lesson of the German system in our own procedure, we would still have a strongly adversarial civil procedure. We would not, however, have coached witnesses and litigation-biased experts.

The confusion with criminal procedure. Much of the rhetoric⁶⁶ celebrating unrestrained adversary domination of judicial proceedings stems from the criminal process, where quite different policies are at work.⁶⁷ It has been argued that partisan fact-gathering is appropriate to the special values of criminal procedure—the presumption of innocence, the beyond-reasonable-doubt standard of proof, and the privilege against self-incrimination.⁶⁸ Bestowing upon the criminal accused the right to conduct his own fact-gathering, despite the risk that he may misuse this power in truth-defeating ways, can be understood as one more way of adjusting the scales to protect the accused. “The specter of capital punishment and the often barbaric conditions of our penal institutions in the past and present, as well as the unique stigma of conviction of a crime, have had a profound impact upon the protections accorded the defendant and the freedom of action accorded the defense lawyer in a criminal case.”⁶⁹ While I happen to disagree that adversary procedure is a particularly effective way to im-

⁶⁵ See *supra* text accompanying note 4.

⁶⁶ The obligatory illustration is Lord Brougham’s speech in the defense of Queen Caroline: “[A]n 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 . . . is his first and only duty . . .” 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821), cited in Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976).

⁶⁷ Monroe Freedman’s well-known book, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975), typifies this viewpoint. Regarding limiting this policy to criminal as opposed to civil procedure, see, e.g., Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 83, 91-92 (D. Luban ed. 1984); Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RESEARCH J. 543, 548-50.

⁶⁸ See, e.g., *Garner v. United States*, 424 U.S. 648, 655 (1976), asserting that “the preservation of an adversary system of criminal justice” is “the fundamental purpose of the Fifth Amendment.”

⁶⁹ Schwartz, *supra* note 67, at 550.

plement our concern for safeguard in the criminal process,⁷⁰ my present point is simply that regardless of right or wrong, that concern is absent in the world of civil procedure. In civil lawsuits we are not trying systematically to err in favor of one class of litigants.

Equality of representation. The German system gives us a good perspective on another great defect of adversary theory, the problem that the Germans call "Waffenungleichheit"—literally, inequality of weapons, or in this instance, inequality of counsel. In a fair fight the pugilists must be well matched. You cannot send me into a ring with Muhammed Ali if you expect a fair fight. The simple truth is that very little in our adversary system is designed to match combatants of comparable prowess, even though adversarial prowess is a main factor affecting the outcome of litigation. Adversary theory thus presupposes a condition that adversary practice achieves only indifferently. It is a rare litigator in the United States who has not witnessed the spectacle of a bumbling adversary whose poor discovery work or inability to present evidence at trial caused his client to lose a case that should have been won. Disparity in the quality of legal representation can make a difference in Germany, too, but the active role of the judge places major limits on the extent of the injury that bad lawyering can work on a litigant.⁷¹ In German procedure both parties get the same fact-gatherer—the judge. (I discuss below (in Part VI) the incentives and safeguards designed to attract and motivate able judges.)

Prejudgment. Perhaps the most influential justification for adversary domination of fact-gathering has been an argument put forward by Lon Fuller: Nonadversarial procedure risks prejudgment—that is, prematurity in judgment.⁷² Fuller worried that the

⁷⁰ It seems unlikely that privatized fact-gathering favors the accused in American criminal procedure. In the typical case the prosecution's greater resources disadvantage the accused by comparison with the nonadversarial fact-gathering of German criminal procedure. For a discussion of German criminal procedure, see Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 206-12 (1979).

⁷¹ The active role of the German judge extends to matters of law as well as fact. The discussion of this point in the Kaplan-von Mehren article remains quite sound: There is "an overriding principle of German law, *jura novit curia*, the court knows—and is bound to apply—general law without prompting from the parties." Kaplan-von Mehren, *supra* note 8, at 1224-25 (discussing ZPO § 139); *cf. id.* at 1227-28.

⁷² Fuller's argument is usually cited to a speech text, Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961). See, e.g., Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672 n.5 (1978) (citing that work as "[t]he first successful attempt to analyze the adversary system"). Fuller's argument first appeared in the report of a body known as the Joint Conference on Professional Responsibility. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958) [hereafter cited as Fuller]. Randall cosigned the report for the ABA but must have had

judge would make up his mind too soon.

What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. . . .

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.⁷³

This passage obtains much of its force from the all-or-nothing contrast that so misdescribes German civil procedure. In a system like the German, which combines judicial fact-gathering with vigorous and continuing adversarial efforts in nominating lines of factual inquiry and analyzing factual and legal issues, the adversaries perform just the role that Fuller lauds, helping hold the decision in suspension while issues are framed and facts explored.

In German procedure counsel oversees and has means to prompt a flagging judicial inquiry; but quite apart from that protection, is it really true that a "familiar pattern" would otherwise beguile the judge into investigating too sparingly? If so, it seems odd that this asserted "natural human tendency" towards premature judgment does not show up in ordinary business and personal decision-making, whose patterns of inquiry resemble the fact-gathering process in German civil procedure. Since the decision-maker does his own investigating in most of life's decisions, it seems odd to despair of prematurity only when that normal mode of decision-making is found to operate in a courtroom. Accordingly, I think that Fuller overstates the danger of prematurity that inheres in allowing the decision-maker to conduct the fact-gathering; but to the extent that the danger is real, German civil procedure applies just the adversarial remedy that Fuller recommends.⁷⁴

Depth. Fuller's concern about prematurity shades into a dif-

nothing to do with writing it. Portions of Fuller's argument were republished in the posthumously assembled work that appeared as Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

⁷³ Fuller, *supra* note 72, at 1160.

⁷⁴ The assumption that adversary procedure corrects for the dangers of prejudgment needs itself to be probed. I have known American litigators to complain of particular judges tending to make up their minds too soon, even on the pleadings.

ferent issue: how to achieve appropriate levels of depth in fact-gathering. Extra investment in search can almost always turn up further proofs that would be at least tenuously related to the case. Adversary domination of fact-gathering privatizes the decision about what level of resources to invest in the case. The litigants who are directly interested in the outcome decide how much to spend on search. In German procedure, by contrast, these partisan calculations of self-interest are subordinated, for a variety of reasons. The initiative in fact-gathering is shared with the judge; and the German system of reckoning and allocating the costs of litigation is less sensitive to the cost of incremental investigative steps than in our system where each side pays for the proofs that it orders.⁷⁵ On the other hand, the German judge cannot refuse to investigate party-nominated proofs without reason,⁷⁶ and this measure of party control greatly narrows the difference between the two systems.

Writing in 1958, Kaplan and his co-authors recorded their "impression" that German civil "proceedings do not in practice serve as an engine of discovery comparable in strength to the modern American methods,"⁷⁷ in part because German courts are hostile to fishing.⁷⁸ Further, the authors worried that the technique of

⁷⁵ See sources cited *supra* note 27.

⁷⁶ A. BAUMBACH, *supra* note 9, § 286, at 749-51, ¶¶ 3(B)(a)-(l).

⁷⁷ Kaplan-von Mehren, *supra* note 8, at 1246.

⁷⁸ *Id.* at 1247.

The extreme form of fishing that our discovery process invites, viz., bringing a lawsuit in order to discover whether you might actually have one, is unknown not only in Continental procedure, but in English procedure as well. See, e.g., Jolowicz, *Some Twentieth Century Developments in Anglo-American Civil Procedure*, in 1 *STUDI IN ONORE DI ENRICO TULLIO LIEBMAN* 217, 241-44 (1979).

The absence of fishing-type lawsuits is more a function of the loser-pays cost-shifting principle common to all major legal systems except our own than it is a function of different investigative procedures. In this connection see Kaplan's remarks on aspects of discovery in England:

[R]epresenting a possible loser, the solicitor is interested in holding down the expenses on his own side and in seeing to it that his opponent's reimbursed expenses are kept well within reason; representing a potential winner, he is still concerned lest he incur expenses that will be found inessential and thus will not be reimbursed.

Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 *MICH. L. REV.* 821, 822 (1971).

Hostility to fishing is not confined to other legal systems, nor based solely on considerations of efficiency. Judge Rifkind lamented a decade ago that

the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.

Rifkind, *Are We Asking Too Much of Our Courts?* 70 *F.R.D.* 96, 107 (1976).

recording witness testimony in succinct summaries could bleach out “[f]ine factual differentiations.”⁷⁹ They found German procedure to be “far less preoccupied than the American with minute investigation of factual detail of reliability of individual witnesses.”⁸⁰

Defenders of the American status quo may take too much comfort from these observations. A main virtue of German civil procedure, we recall, is that the principle of judicial control of sequence works to confine the scope of fact-gathering to those avenues of inquiry deemed most likely to resolve the case. Fact-gathering occurs when the unfolding logic of the case dictates that investigation of particular issues is needed. That practice does indeed contrast markedly with the inclination of American litigators “to leave no stone unturned, provided, of course, they can charge by the stone.”⁸¹ The primary reason that German courts do less fact-gathering than American lawyers is that the Germans eliminate the waste. Likewise, when American observers notice that there is less harrying of witnesses with “those elaborate testings of credibility familiar to American courtrooms,”⁸² I incline to think that the balance of advantage rests with the Germans, since so

Although the Kaplan-von Mehren article correctly observes that German hostility to fishing is a tension point in the contrast with American practice, the example that the authors choose to illustrate the point is wrong. Without citation to authority, they say: “Suppose an eyewitness to an occurrence, testifying in court, states that another person was present: is it permissible [for the court or the adversaries] to ask him then and there to give up the person’s name? The answer commonly given is no.” Kaplan-von Mehren, *supra* note 8, at 1247. However, the authors continue, “there is no bar to a party’s asking the witness the same question in the court corridor,” *id.*, after which, presumably, that side would nominate the newly-identified witness for subsequent judicial examination. I have put this example to countless German legal professionals familiar with German civil procedure, and I have never found one who thought it was other than flatly wrong. Whatever the etiquette may have been in Hamburg in the 1950s when Kaplan and his coauthors were at work, there is today no convention restricting judge or counsel from following up such leads during the course of courtroom examination of a witness.

⁷⁹ Kaplan-von Mehren, *supra* note 8, at 1236.

⁸⁰ *Id.* at 1237. In a similar vein the authors observe that the German judge’s “questing attitude” toward developing the case, encouraged by ZPO § 139 (on which, see *supra* note 71), tends “to debilitate German lawyers by providing them with an inward excuse for sloppy work,” although “it would be hard to say whether in the long run this is outweighed by benefits, such as helping the party represented by an ineffective lawyer.” Kaplan-von Mehren, *supra* note 8, at 1228. Followers of the public speeches of Chief Justice Warren Burger are aware that concern about the extent of sloppy lawyering is not confined to Germany. Sloppiness aside, it is certainly the case that, because German judges bear the main responsibility for fact-gathering, German lawyers do less (and get paid less) than American lawyers. See *infra* note 89.

⁸¹ Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985).

⁸² Kaplan-von Mehren, *supra* note 8, at 1236.

much of what passes for cross-examination in our procedure is deliberately truth-defeating.⁸³

Interestingly, detractors of Continental procedure have also voiced the opposite criticism—complaining of excessive rather than inadequate depth. Stephan Landsman, for example, defending American adversary practice against the complaint that it sets too low a value on the discovery of material truth, warns against inquisitorial zeal. “The weakness of human perception, memory, and expression will often render the discovery of material truth impossible. To become preoccupied with truth may be both naive and futile. It is to the advantage of the adversary system that it does not define its objectives in such an absolute and unrealistic fashion.”⁸⁴ This argument overlooks a crucial distinction—between the case with unknowable facts and the case in which the truth-defeating excesses of American adversary fact-gathering cause knowable facts to be obscured. The former scarcely excuses the latter. I side with Blackstone in thinking that fact-finding is the central task of civil litigation. “[E]xperience will abundantly shew,” he wrote, “that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of.”⁸⁵ Resolve the facts, resolve what actually happened, and the law usually takes care of itself.

The choice between adversarial and judicial conduct of fact-gathering need not correlate strongly with the level of search achieved in a legal system. Factors unrelated to that choice, such as the clarity of the substantive law or the attitude toward fishing, will influence the levels of search. If the Germans saw any virtue in the American practice of allowing the adversaries to cascade each other with undigested files and records, they could in principle incorporate our luxuriant fishing tradition into their procedure (perish the thought) while still preferring court-appointed experts and

⁸³ See *supra* note 31.

⁸⁴ S. LANDSMAN, *supra* note 2, at 36.

⁸⁵ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *330 (1768).

This emphasis on fact-finding as the central function of the civil procedural system remains, I believe, the dominant view both in the Anglo-American tradition and in Continental civil procedure. I think that the work of John Thibaut and Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978), does not represent a true departure from this view. When the authors call it a “misconception that the fundamental objective of the legal process is the discovery of truth,” *id.* at 556, they are not denying that the proper work of the legal system is typically to establish the sequence of past events. Rather, they are pointing out that the experimental method for ascertaining truth in the sciences must be largely foreclosed to the law, in part because legal disputes so characteristically do arise out of past facts.

forbidding adversary contact with nonparty witnesses. Furthermore, within the realm of judge-conducted fact-gathering, we would expect the levels of search to vary significantly among legal systems, depending upon the incentives for judicial diligence, the scope of adversary oversight, and the effectiveness of appellate review.

VI. JUDICIAL INCENTIVES

Viewed comparatively from the Anglo-American perspective, the greater authority of the German judge over fact-gathering comes at the expense of the lawyers for the parties. Adversary influence on fact-gathering is deliberately restrained. Furthermore, in routine civil procedure, German judges do not share power with jurors. There is no civil jury.⁸⁶

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

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

The career judiciary. The distinguishing attribute of the bench in Germany (and virtually everywhere else in Europe) is that the profession of judging is separate from the profession of lawyering. Save in exceptional circumstances, the judge is not an ex-lawyer like his Anglo-American counterpart. Rather, he begins his professional career as a judge.

In Germany judges and lawyers undergo a common preparatory schooling. After completing a prescribed course of university legal education that lasts several years,⁸⁷ the young jurist sits a

⁸⁶ See *infra* text accompanying notes 144-53.

⁸⁷ For good English-language accounts see RUDOLF B. SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 157-82 (4th ed. 1980); Griess, *Legal Education in the Federal Republic of Germany*, 14 *J. Soc'y Pub. Tchrs. L.* 166 (1978).

first state examination. After passing this examination satisfactorily, he enters upon an apprenticeship that now lasts two and one-half years. He clerks for judges in the civil and criminal courts, assists in the prosecutor's office, and works in a lawyer's office. At the conclusion of this tour of duty, the young jurist sits a second state examination, remotely akin to our bar examination, which concludes the certification process. Thereafter, the career lines of judge and lawyer diverge.

Recruitment. Although West Germany is a federal state, the state and federal courts comprise an integrated system. The courts of first instance and the first layer of appellate courts are state courts, while the second (and final) layer of appellate jurisdiction operates at the federal level.⁸⁸ Thus, even though the basic codes of civil and criminal law and procedure are federal codes, the state courts have exclusive jurisdiction until the final appellate instance. It follows that most judges are state judges;⁸⁹ and since appointment to the federal bench is by way of promotion from the state courts,⁹⁰ all entry-level recruitment to the bench occurs at the state level.

In each of the eleven federal states, the ministry of justice is responsible for staffing the courts. Entry-level vacancies are advertised and applications entertained from young jurists. The judiciary is a prized career: influential, interesting, secure, and (by comparison with practice of the bar) prestigious and not badly compensated. "[O]nly the graduates with the best examination results have any chance of entering the judicial corps."⁹¹

Advancement. A candidate who is accepted begins serving as a judge without any prior legal-professional experience, typically in

⁸⁸ For detailed discussion in English, see Meador, *supra* note 8.

⁸⁹ Data for 1983 appears in STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH 1984 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 338 (1984). Table 15.2, "Judges in State and Federal Service," shows 16,429 state and 493 federal judges.

Using data for the year 1973, Kötz estimates that about one German lawyer in five is a judge. "To the foreign observer," he notes, "the most conspicuous feature of the German legal profession is perhaps the very large judiciary . . ." Kötz, *Legal Profession*, *supra* note 8, at 71. The size of the German bench is, of course, no mystery. "The real reason that the Germans need more judges is the same reason that they need fewer lawyers: their civil procedure assigns to the judiciary much of the workload that we leave to private counsel." Langbein, *Judging Foreign Judges Badly: Nose Counting Isn't Enough*, *JUDGES' J.*, Fall 1979, at 4, 6.

⁹⁰ Except for the federal constitutional court, discussed *infra* text accompanying note 101.

⁹¹ Manfred Wolf, *Ausbildung, Auswahl und Ernennung der Richter*, in *HUMANE JUSTIZ: DIE DEUTSCHEN LANDESBERICHTE ZUM ERSTEN INTERNATIONALEN KONGRESS FÜR ZIVIL-PROZESSRECHT IN GENT 1977*, at 73, 77 (P. Gilles ed. 1977).

his late twenties.⁹² At the outset his position is probationary, although he must be promoted to tenure or dismissed within five years.⁹³ His first assignment may be to a court of petty jurisdiction (Amtsgericht), or else he will become the junior member of a collegial chamber of the main court of general jurisdiction (Landgericht, hereafter LG), where he can receive guidance from experienced judges.⁹⁴

The work of a German judge is overseen and evaluated by his peers throughout his career, initially in connection with his tenure review, and thereafter for promotion through the several levels of judicial office and salary grades. A judge knows that his every step will be grist for the regular periodic reviews that will fill his lifelong personnel file. His "efficiency rating"⁹⁵ is based in part upon objective factors, such as caseload discharge rates and reversal rates, and in part on subjective peer evaluation. The presiding judge of a chamber has special responsibility for evaluating the work of the younger judges who serve with him, but the young judges are rotated through various chambers in the course of their careers, and this reduces the influence of an aberrant rating from any one presiding judge. These evaluations by senior judges pay particular regard to (1) a judge's effectiveness in conducting legal proceedings, including fact-gathering, and his treatment of witnesses and litigants; and (2) the quality of his opinions—his success in mastering and applying the law to his cases.⁹⁶

This meritocratic system of review and promotion is meant to

⁹² *Id.* For English-language discussion of the recruitment and promotion process in Bavaria, see Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 *JUDICATURE* 16, 21-25 (1983).

⁹³ DEUTSCHES RICHTERGESETZ [DRiG] (Statute on the German Judiciary) § 12(2). DRiG § 22 governs the grounds for dismissing an untenured judge; see GÜNTHER SCHMIDT-RÄNTSCH, DEUTSCHES RICHTERGESETZ § 22, at 202-08 (3d ed. 1983). There are special rules limiting the competence of untenured judges, DRiG §§ 27-29, in order to assure litigants that major decisional responsibility will be in the hands of tenured (i.e., unquestionably independent) judges. See EDUARD KERN & MANFRED WOLF, *GERICHTSVERFASSUNGSRECHT* 138-39 (5th ed. 1975).

⁹⁴ Although much of the work of a LG chamber is now assigned to a single judge for discharge without collegial participation, see *supra* note 13, the basic unit of organization remains the collegial chamber, and there is still an important residue of collegial first-instance business.

⁹⁵ Herrmann, *The Independence of the Judge in the Federal Republic of Germany*, in *CONTEMPORARY PROBLEMS IN CRIMINAL JUSTICE: ESSAYS IN HONOUR OF PROFESSOR SHIGEMITSU DANDO* 61, 73 (1983).

⁹⁶ These factors were mentioned to me repeatedly in 1984 when I had occasion to inquire about the promotion process in interviews with German judges and with German law professors specializing in civil procedure and judicial administration. See also *infra* note 113 and accompanying text.

motivate the judge to perform at his best. In the main first-instance court (LG), which is sectioned into many three-judge panels called chambers, the judge aspires to advance to the position of presiding judge of a chamber, a job of greater importance and status with corresponding salary improvement. From there the main career path leads to the first appellate instance (Oberlandesgericht, hereafter OLG), which is also divided into many chambers, each led by a presiding judge who is promoted to that job after distinguishing himself as an ordinary judge of the court.⁹⁷ And the final appellate instance, the federal supreme court for nonconstitutional law (Bundesgerichtshof, hereafter BGH), is staffed almost entirely with judges who have been promoted from the OLG.⁹⁸

Meritocratic review and promotion are meant to reward and thereby to inspire judges to be diligent in fact-gathering, to stay current in the law, and to be fair and accurate in the conduct of hearings and the rendering of judgments.

Specialization. I have been speaking throughout this article of the ordinary courts. Of the 17,000 judges who were sitting in Germany as of 1983, the most recent year for which the statistics are published, 13,000 sat in the ordinary courts.⁹⁹ The others served in the specialized court systems for administrative law, tax and fiscal matters, labor and employment law, and social security.¹⁰⁰ Further-

⁹⁷ Wolf, *supra* note 91, at 77; see also Meador, *supra* note 92, at 22-23.

⁹⁸ Meador, *supra* note 92, at 24-25. The BGH now has more than a hundred judges and a dozen chambers. Call to that court is perhaps not quite the prize that we might imagine the pinnacle to be. There has been some concern that not enough of the best OLG judges aspire to join the BGH, despite the enhancement in rank, authority, and compensation that promotion to the BGH entails. The opportunity for promotion to the BGH usually comes when a judge is well into his forties or fifties and long settled in his home state. The BGH sits in Karlsruhe, an unexciting city on the southwestern fringe of the country. Some prominent OLG judges decline to exile themselves and their families to Karlsruhe from life in Munich, Dusseldorf, Frankfurt, or Hamburg. We can imagine the problem in American terms by supposing that we had created a supreme court of nonconstitutional law and sited it in Akron, Boise, or Macon; perhaps we would have found Learned Hand and Henry Friendly not too anxious for that last round of promotion. But laying aside this peculiarity about the BGH, it can be said with great confidence that most German judges aspire to maximize their chances for promotion through the lower levels of the pyramid.

⁹⁹ STATISTISCHES BUNDESAMT, *supra* note 89, at 338 (Table 15.2).

¹⁰⁰ For discussion in English, see ARTHUR T. VON MEHREN & JAMES R. GORDLEY, *THE CIVIL LAW SYSTEM* 133-37 (2d ed. 1977); Meador, *supra* note 8, at 31-34. Continental specialized court systems are distinguished from ours by having their own appellate systems. In the United States, appeal lies from the specialized tax court to the regular courts of appeal, and thereafter to the Supreme Court. In Germany, appeal lies from the tax court to the supreme court for tax matters, with no possibility of review by the federal supreme court of ordinary jurisdiction (BGH).

more, the Germans operate a separate supreme constitutional court (Bundesverfassungsgericht), to which the other courts refer some contentious constitutional business. Appointment to the constitutional court is by design highly political; members are seldom part of the career judiciary that I have been describing.¹⁰¹

The specialized courts and the constitutional court siphon off business that Americans would expect to see in the ordinary courts. Within the German ordinary courts of first instance there are special divisions that have counterparts in our tradition—for crime, for what we would call probate, for domestic relations. In addition, commercial law matters are removed to specialized chambers.¹⁰² Thus, the German ordinary courts of first instance have a somewhat narrower diet than our own.

At the appellate level, including the first appellate instance (OLG) that proceeds by review *de novo*, there is extensive specialization. An OLG is quite large by our standards, sometimes staffed with more than a hundred judges, who sit in chambers containing four or five judges. Cases are allocated among these chambers on the basis of subject matter.¹⁰³ All the medical malpractice cases go to one chamber, the maritime cases to another, and so forth. This system permits the judges to develop over the years just that sort of expertise in legal subspecialties that we expect of lawyers, particularly lawyers in large-firm practice, in the United States. The litigants get judges who know something about the field, in contradistinction to the calculated amateurism of our appellate tradition.¹⁰⁴

Political influence. Judicial appointments and promotions is-

¹⁰¹ For an English-language account, now a little dated, see DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* 113-59 (1976).

¹⁰² *GERICHTSVERFASSUNGSGESETZ* [GVG] (Statute on the Organization of the Courts) §§ 93-95. See generally OTTO R. KISSEL, *GERICHTSVERFASSUNGSGESETZ* §§ 93-95, at 894-911.

¹⁰³ For commentary in English, see Meador, *supra* note 8, at 44-72.

¹⁰⁴ The case for the generalist judiciary is argued anew in RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 147-60 (1985). It would entail a large digression in the present article to detail all of my disagreements with Judge Posner's treatment of this subject. I find particularly unpersuasive Posner's central claim that specialized courts are unworkable in fields where differences of view persist among the specialists. "It is remarkable in how few fields of modern American law there is a professional consensus on fundamental questions." *Id.* at 153. This is an exaggeration, and one that resembles in an eerie way the all-law-is-politics theme of a contemporary legal-academic movement with which Posner is ordinarily not associated. The truth is that even in fields like constitutional law or torts (Posner's examples) where much is unsettled, there are vast areas of consensus. The work of legal doctrine is to forge consensus. The more learned the court, the more likely is the court to do that job well.

sue in the name of the state or federal minister of justice, who is an important political official, usually a member of the state or federal parliament and of the cabinet. The minister acts in consultation with an advisory commission of senior judges;¹⁰⁵ in some of the German states that commission has a formal veto power.

Directly political concerns appear to be very subordinated in the selection and advancement of judges. Because this subject is not much ventilated in the literature, I have inquired about it when talking with German judges and legal academics. The impression I have gained is that political considerations do not materially affect appointment or promotion until the level of the federal supreme court (BGH).¹⁰⁶ Party balance is given weight in BGH appointments, but political connections do not substitute for merit. Positions on the BGH go to judges who have distinguished themselves on the OLG.

We must remember that the decision to isolate important components of constitutional and administrative-law jurisdiction outside the ordinary courts in Germany lowers the political stakes in judicial office, by comparison with our system, in which every federal district judge (and for that matter, every state judge) purports to brandish the Constitution and thus to be able to wreak major social and institutional change.

American contrasts. If I were put to the choice of civil litigation under the German procedure that I have been praising in this article or under the American procedure that I have been criticizing, I might have qualms about choosing the German. The likely venue of a lawsuit of mine would be the state court in Cook County, Illinois, and I must admit that I distrust the bench of that court. The judges are selected by a process in which the criterion of professional competence is at best an incidental value.¹⁰⁷ Fur-

¹⁰⁵ For discussion of Bavarian practice, see Meador, *supra* note 92, at 22-23.

¹⁰⁶ See Wolf, *supra* note 91, at 77-78.

¹⁰⁷ The following remarks by Justice Seymour Simon of the Illinois Supreme Court, made in an unpublished speech, deserve wide attention:

For 15 years I was an elected ward committeeman in the nation's most publicized local political party organization, the Democratic Party of Cook County. As a committee member, I attended slate-making sessions for judges as well as other candidates—sessions which, until recent years, always were held behind closed doors. There, I have seen those seeking to be picked as judges sponsored and praised by their committeemen, but praised not for their learning and experience in the law, praised not for their academic backgrounds or legal achievements, but praised instead for their loyalty to their political party, for their work in the precincts or, in the political lingo that became standard usage in appraising the quality of judicial aspirants, "for remembering from whence they came." Recently a committeeman who was also an alderman was quoted as favoring an aspirant because he would be an "alderman's judge." I have

ther, while decent people do reach the Cook County bench in surprising numbers, events have shown that some of their colleagues are crooks. If my lawsuit may fall into the hands of a dullard or a thug, I become queasy about increasing his authority over the proceedings.

German-style judicial responsibility for fact-gathering cannot be lodged with the Greylord judiciary. Remodeling of civil procedure is intimately connected to improvement in the selection of judges. I do not believe that we would have to institute a German-style career judiciary in order to reform American civil procedure along German lines, although I do think that Judge Frankel was right to "question whether we are wise" to disdain the Continental model, and to "wonder now whether we might benefit from some admixture of such [career judges] to leaven or test our trial benches of elderly lawyers."¹⁰⁸ The difference in quality between the state and federal trial benches in places like Cook County is sufficient to remind us that measures far short of adopting the Continental career judiciary can bring about material improvement.¹⁰⁹

heard would-be judicial candidates asked to pledge their support to all the other candidates on their party's ticket even though they had no idea who these candidates would be. Sometimes judgeships were parceled out to ward organizations because it was "their turn" or as a reward for performance in previous elections. . . .

. . . .
John Gilligan, Governor of Ohio from 1971 to 1975 . . . , wrote this about judicial elections: "It's a murderous ordeal to go through. It takes a full year out of your life handing out matchbooks and going to wiener roasts. There are lawyers who would be very fine judges who simply would not subject themselves to that. . . ."

. . . .
Of still greater concern is the unfortunate truth that the all-pervasive need for campaign funds in modern politics intertwines judicial elections with political fundraising. . . . Although under our Supreme Court Rules and those of the ABA a [campaign] committee ostensibly shields a candidate from the identity of his campaign contributors, a candidate is not prohibited from attending his own fundraising parties where he can observe who shows up and who doesn't. For that matter, I wonder how many judicial candidates turn down checks handed to them by acquaintances who meet them on the street. And, all campaign contributions, including names of contributors of more than \$150, must be reported by the fundraising committee so that anyone who is curious, including the candidate or his friends or family, can examine these reports. And there is no rule against examining an opponent's reports.

S. Simon, After "Greylord" What? Address at the Chicago Bar Association and Illinois State Bar Association 1983 Dinner Honoring Illinois Supreme Court 4-5, 6-7, 10-11 (November 4, 1983) (unpublished speech; copy on file with *The University of Chicago Law Review*).

¹⁰⁸ Frankel, *supra* note 1, at 1033.

¹⁰⁹ Part of what makes the federal bench more attractive—that the supremacy clause makes federal judges more powerful—is beyond emulation. But other attributes of the federal judicial career that could be copied must affect the quality of the recruits. For example, the federal salary scale, while hardly munificent, is significantly better than at the state

Americans will long remain uncomfortable at the prospect of a more bureaucratic judiciary. We have not had good experience attracting and controlling an able career bureaucracy in the higher realms of public administration, although we have scarcely tried. Some observers point to that elusive construct, national character. Europeans in general and Germans in particular are thought to be more respectful of authority, hence better disposed toward the more bureaucratic mode of justice that judicialized fact-gathering entails.

Cultural differences surely do explain something of why institutional and procedural differences arise in different legal systems. The important question for present purposes is what weight to attach to this factor, and my answer is, "Not much." It is all too easy to allow the cry of "cultural differences" to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example. Cultural differences that help explain the origins of superior procedures need not restrict their spread. If Americans were to resolve to officialize the fact-gathering process while preserving the political prominence of the higher bench, we would probably turn initially to some combination of judges, magistrates, and masters for getting the job done. Over time, we would strike a new balance between bench and bar, and between higher and lower judicial office.

The rise of American managerial judging (discussed in Part VIII below) should put us on notice that we may no longer have the leisure to decide whether we want more judicial authority over civil litigation. If greater judicial control of civil proceedings is inevitable, greater attention to safeguarding litigants' interests against abuse of judicial power must follow. The German model should inspire attention to the way judicial career incentives (above all, meritocratic selection, review, and promotion) can serve as safeguards for litigants.

VII. APPELLATE REVIEW

Like the career incentives that encourage good judicial performance, the German appellate process is designed to protect liti-

level, especially when account is taken of the generous federal judicial pension scheme. Lifetime tenure makes the federal judicial career more attractive, sparing federal judges from the career uncertainty and indignity to which state trial judges are exposed through the elective process, on which see *supra* note 107. The appointive process for selecting judges enhances the influence of the organized bar and other interest groups that have some concern to assure professional competence in the judiciary.

gants from caprice, error, or sloth. The adversarial component of lawyerly oversight, to which this article has so often referred, ultimately depends for its effectiveness upon the threat of appellate review. From the standpoint of comparison with American procedure, two attributes of German appellate practice appear especially noteworthy: (1) the requirement, meant to facilitate review, that the first-instance court disclose in writing its findings of fact and reasons of law; and (2) the *de novo* standard of review.

Disclosure of grounds. Unless the first-instance court is successful in encouraging the parties to settle,¹¹⁰ it must decide the case by means of a written judgment containing findings of facts and rulings of law.¹¹¹ The thoroughness of the German judgment is legendary.¹¹² Empirical study has shown how seriously the first-instance courts take their judgment-writing responsibility.¹¹³ Judges know that they will be judged on the quality of their opinions. Good opinions reduce the reversal rate and win esteem in the peer evaluation process. Judges know that the reviewing court will have convenient access to the whole of the evidence and the submissions received at first-instance, since the dossier goes up with the appeal. Especially when coupled with searching review by an appellate court of great ability, the requirement of written findings and reasons is a bulwark against arbitrary or eccentric adjudication. In our system, by contrast, the conclusory general verdict of a jury is the antithesis of a reasoned judgment; nor do we insist on much better in the realm of bench trials.¹¹⁴ Fact-finding in American courts all too often resembles Caligula dealing with vanquished gladiators: thumbs up or thumbs down, yours but to wonder why.

Review de novo. Ultimately, it is the prospect of appellate review in German civil procedure that makes the other safeguards effective, both as deterrents and as correctives. The dissatisfied litigant has the right of appeal *de novo* (*Berufung*) in the first appellate instance (typically the OLG).¹¹⁵ No presumption of correctness

¹¹⁰ See *supra* note 25.

¹¹¹ ZPO § 313(I)(5)-(6); see 2 STEIN-JONAS, *supra* note 46, § 313(IV)-(V), at 1279-84.

¹¹² See Weyrauch, *The Art of Drafting Judgments: A Modified German Case Method*, 9 J. LEG. ED. 311, 316-26 (1956).

¹¹³ In a considerable sample of nondivorce cases that went to judgment (i.e., that resisted settlement) in the main first-instance court (LG), an average 43% of the total time devoted to all aspects of the courts' work (including review of the dossier, fact-gathering, and oral hearings) was spent on writing the judgment. 2 BUNDESRECHTSANWALTSKAMMER, TATSACHEN ZUR REFORM DER ZIVILGERICHTSBARKEIT: AUSWERTUNGEN 64-65 (1974).

¹¹⁴ See Leubsdorf, *Constitutional Civil Procedure*, 63 TEXAS L. REV. 579, 630 & n.311 (1984).

¹¹⁵ Appeal *de novo* lies from the court of petty jurisdiction (*Amtsgericht*) to the court

attaches to the initial judgment. What makes this astonishingly liberal system of appellate review possible is the extreme economy of the technique, previously discussed, of recording in pithy summaries the evidence gathered at first instance.¹¹⁶ Retrial becomes for the most part only rereading.

The OLG "may choose to rehear evidence and is likely to do so when demeanor of a witness seems important or when the record fails to give sufficient detail."¹¹⁷ The main task in review *de novo* is not, however, gathering new evidence, but considering afresh the record and the judgment from below. OLG review guarantees to the dissatisfied litigant a second look by a panel of long-experienced judges on all matters of law and fact. In other words, for a litigant who wishes it, fact-finding will be reassigned from the court that did the primary fact-gathering (and this is another way in which German procedure may be said to respond to Lon Fuller's concern about the danger of prejudgment in the investigating court¹¹⁸). OLG review is collegial; a panel of several judges decides the case.¹¹⁹ And because the OLG panels are specialized by subject matter, chances are that some of the judges who decide the case will be masters of the particular field of law.

From the OLG there is a further level of review (by the BGH) according to a standard of review (Revision) that approximates the Anglo-American notion of review for error.¹²⁰

Adequacy of safeguards. There is no denying the power of the German judge, yet complaints about the misuse of judicial power are extremely rare. The career incentives and the system of appellate review have been designed to deter and correct abuse. Experience suggests that they work.

of general jurisdiction (LG). For the LG, which is the main first-instance court, the OLG is the court with responsibility for review *de novo*.

Following are some figures that give a feel for the frequency of appeal *de novo* to the OLG from the LG. In 1981 the LGs had a first-instance caseload of 574,860 cases and the OLGs had a caseload of 85,021. The LGs decided 106,538 cases by full judgment ("streitiges Urteil"), which is the main cohort of cases that can give rise to appeal *de novo*; in the same year the OLG decided 25,299 cases by "streitiges Urteil." STATISTISCHES BUNDESAMT, *supra* note 83, at 339 (Table 15.4.1).

¹¹⁶ See *supra* text accompanying notes 15-18.

¹¹⁷ Kaplan-von Mehren, *supra* note 8, at 1451; see *id.* at 1453 (discussing the purposes of review *de novo*).

¹¹⁸ See *supra* text accompanying notes 72-74.

¹¹⁹ See Kaplan-von Mehren, *supra* note 8, at 1451.

¹²⁰ *Id.* at 1454.

VIII. AMERICAN MANAGERIAL JUDGING: CONVERGENCE?

Important changes have occurred in recent years that diminish the contrast between German and American civil procedure. Under the rubric of case management, American trial judges are exercising increasing control of the conduct of fact-gathering. Although many American courtrooms remain untouched by the new developments, the changes have occurred broadly enough to have about themselves the look of the future.

The Manual. Managerial judging arose in the federal courts as a response to the increasing quantity of so-called "complex litigation"—cases that involve "unusual multiplicity or complexity of factual issues."¹²¹ *The Manual for Complex Litigation* was created to deal with these cases, but because complexity is a matter of degree, managerial judging was hard to confine to the Big Case. The *Manual* identifies antitrust, securities, mass disaster, product liability, class action, and multiparty cases, among others, as typical.¹²² In cases with many parties and many issues, the feeling grew that court-centered control was needed to prevent the confusion and duplication that would result if the adversaries were "left to themselves, each pursuing the course that is most favorable to his particular client."¹²³ Accordingly, "[t]he essence" of what the *Manual* propounds "is the exercise of judicial control over complex litigation plus a positive plan for discovery and pretrial preparation."¹²⁴

The *Manual* effects judicial control over adversary fact-gathering through a set of interconnected measures:

- (1) The judge uses pretrial conferences to explore the case with counsel and to identify key issues.¹²⁵
- (2) The judge is expected to promote settlement from the earliest opportunity.¹²⁶
- (3) The judge also helps sharpen the issues. "To the extent feasible the judge should narrow the issues in the course of the first pretrial conference and limit discovery

¹²¹ MANUAL, *supra* note 5, § 0.22.

¹²² *Id.*

¹²³ *Id.* § 1.10.

¹²⁴ *Id.* (italics deleted).

¹²⁵ *Id.* § 1.20. The *Manual* also encourages "the practice of obtaining counsel's views of the case by requiring the filing before discovery of initial pretrial briefs containing all the legal and factual contentions of the parties." *Id.* We have seen that it is characteristic of German practice that counsel may guide the court's work by submitting written commentary on issues of law or fact. See *supra* text between notes 20 and 21.

¹²⁶ MANUAL, *supra* note 5, § 1.21.

accordingly."¹²⁷

(4) Issue definition leads to the regulation of discovery. The court convenes discovery conferences and breaks discovery into "waves."¹²⁸ Thus, the court decides what subjects may be investigated in what sequence. This power has now been codified for the ordinary Federal Rules of Civil Procedure in revised rule 26(f): "Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery" ¹²⁹

(5) The *Manual* recommends that the court explore the need for expert testimony early, in part in order "to determine whether court appointment of an expert is desirable."¹³⁰

Convergence. What makes the *Manual* look "proto-Germanic" in the eyes of the comparative lawyer is the informal feel of "the conference method,"¹³¹ and the active judicial role in defining issues, promoting settlement,¹³² and fixing the sequence for fact-gathering.

To be sure, managerial judging in the pretrial process leaves adversary domination of the trial (especially jury trial) largely unaffected. But the vast preponderance of cases settle or are dismissed before trial; pretrial procedure is the whole procedure for most of our caseload.¹³³

¹²⁷ *Id.* § 1.30.

¹²⁸ *Id.* § 0.50 ("Ordinarily, in a complex case, use of sequential discovery—first wave, second wave, and special issue—promotes efficiency, orderliness, and early completion of all permissible discovery."); see also *id.* § 1.50.

¹²⁹ FED. R. CIV. P. 26(f). "Rule 26(f) mandates the holding of a discovery conference upon proper motion by a party. In the complex case, however, the judge should not ordinarily wait for the filing of such a motion . . ." *MANUAL*, *supra* note 5, § 1.95. Judge Schwarzer has expressed "dissatisfaction" that the *Manual* is inadequately directive. WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* § 1-1, at 4 (1982).

¹³⁰ *MANUAL*, *supra* note 5, § 2.60; see also *id.* § 3.40.

¹³¹ See *supra* note 24 and accompanying text. Judith Resnik remarks on the informality of managerial judging, noticing that these conferences resemble "ordinary business meetings." Resnik, *supra* note 6, at 407.

¹³² Resnik, who popularized the term "managerial judging," observes the similarity to the German practice in promoting settlement as it was described in the Kaplan-von Mehren article. "Ironically, their description of the German judge—'. . . as insistent promoter of settlements'—now seems apt for the American judge as well." Resnik, *supra* note 6, at 386 (citing Kaplan-von Mehren, *supra* note 8, at 1472).

¹³³ "[O]ver ninety percent of the cases in most courts terminate through settlement or dismissal prior to trial." Miller, *The Adversary System: Dinosaur or Phoenix?* 69 MINN. L. REV. 1, 14 (1984); see *id.* at 4 n.7 (citing ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 1983, at 142 (Table 29)).

Moreover, judicial control of the pretrial process interacts with certain features of trial procedure. Early identification of issues and issue-specific discovery can lead to issue-specific trial, that is partial trial, under rule 42(b).¹³⁴ One could envision manipulating these powers to replicate something of the German court's control over the sequence of issue-identification and fact-gathering in the development of a lawsuit.¹³⁵ And under rule 53(c), which empowers the court to refer issues to a master for investigation and report,¹³⁶ one could imagine further movement toward judicial conduct of fact-gathering. That is, however, still a glimmer; the important trend has been toward judicial control of the adversaries' conduct of the investigatory function, not judicial conduct of the investigation.

Thus, while managerial judging leaves untouched some of the worst abuses of our trial procedure such as coached witnesses and partisan experts, it has reoriented pretrial procedure away from adversary domination; and in a legal system that actually tries only a tiny fraction of its civil caseload, judicial capture of pretrial could become more important than continuing adversary control of trial.

The importance of managerial judging ought not to be overstated. Managerial judging is prevalent in the federal courts, but less evident in the state systems where complex litigation is less prevalent. (Many of the state systems also lack an essential predicate for managerial judging, the continuous-case-management system in which a case remains assigned to the same trial judge from initial docketing to final judgment.) Moreover, even within the federal system, managerial judging is routine only for complex cases that require to be dealt with under the *Manual*. Outside the realm of the Big Case, the litigant gets managerial judging only if, by the fortuity of the case-assignment wheel, he draws a managerial judge. If you get assigned to Robert Keeton or Prentice Marshall or William Schwarzer, you get managerial judging. If you draw a traditional federal district judge, you get old-style adversary domi-

¹³⁴ FED. R. CIV. P. 42(b).

¹³⁵ See *supra* text accompanying notes 22-27.

¹³⁶ FED. R. CIV. P. 53(c). But see Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?* 1983 AM. B. FOUND. RESEARCH J. 143. For an account of the work of the court-appointed masters in managing pretrial procedures in the mammoth AT&T antitrust case, see Hazard & Rice, *Judicial Management of the Pre-trial Process in Massive Litigation: Special Masters as Case Managers*, in WAYNE D. BRAZIL, GEOFFREY C. HAZARD, JR. & PAUL R. RICE, *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* 77 (1983).

nation of the pretrial process. It is hard to imagine that our system can long continue to leave such fundamental choices to luck and whim.

Safeguards. Not only does whim determine whether a litigant gets managerial judging, but whim can surface in the conduct of managerial judging. Judith Resnik observes:

[M]anagerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of the reach of appellate review.

. . . .

. . . [B]ecause managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority.¹³⁷

Viewed from the perspective of comparative law, therefore, American managerial judging displays contrasting tendencies. On the one hand, it exhibits convergence toward the Continental model of judicial domination of the fact-gathering process. On the other hand, the haphazard growth of managerial judging has not been accompanied by Continental-style attention to safeguarding litigants against the dangers inherent in the greatly augmented judicial role. The career incentives for our judiciary are primitive, and the standards of appellate review barely touch the pretrial process.

The trend toward managerial judging is irreversible,¹³⁸ because

¹³⁷ Resnik, *supra* note 6, at 378, 380. Under the rubric of "managerial judging," Resnik brings two trends: the one that so interests us in the present article, the growth of judicial participation in the fact-gathering work of the pretrial process; and the phenomenon to which Chayes directed attention a decade ago, the increasing judicial responsibility for devising and adjusting complex remedial orders in the post-trial process, primarily for public law litigation. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

¹³⁸ Resnik's article, which is so instructive in pointing to the dangers that lurk in unconstrained managerial judging, sometimes conveys the impression that managerial judging is a foible that the judiciary might be persuaded to abandon. *E.g.*, Resnik, *supra* note 6, at 445 (the federal bench has been "[s]educed by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age"; further, "[n]o one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary's authority."). This yearning for the golden age of judicial passivity exaggerates the potential for retracing our steps, because it does not give due weight to the factors that gave rise to managerial judging: the growth in complex litigation and the difficulty of distinguishing the Big Case from slightly smaller cases.

the trend toward complexity in civil litigation that gave rise to managerial judging is irreversible. If we were to learn from the success of the long established German tradition of managerial judging, we would not only improve our safeguards, we would encourage more complete judicial responsibility for the conduct of fact-gathering. For example, we might have the judge (or a surrogate such as a master or a magistrate) depose witnesses and assemble the rest of the proofs, working in response to adversary nomination and under adversary oversight as in German procedure. We might then be able to forbid the adversaries from contact with witnesses—in other words, we could abolish the coaching that disgraces our civil justice. We would also be able to routinize the use of court-appointed experts. And if we were to concern ourselves with devising a standard of appellate review appropriate to the seriousness of managerial judging, we might want to experiment with the German technique of succinct recordation of evidence.¹³⁹

Concentration. When Kaplan sought “the grand discriminant, the watershed feature, so to speak, which shows the English and American systems to be consanguine and sets them apart from the

In emphasizing the Big Case as the origin of managerial judging in American procedure, I do not mean to imply that I think that managerial judging ought to be confined there. To the contrary, I agree with the point that Hein Kötz has long asserted, most recently in Kötz, *Zur Funktionsteilung zwischen Richter und Anwalt im deutschen und englischen Zivilprozess*, in *FESTSCHRIFT FÜR IMRE ZAJTAY* 277, 290-91 (R.H. Graveson et al. eds. 1982), that the German advantage in civil procedure is at its greatest in the Small Case, where the costliness of adversary fact-gathering is intolerable. See also Jolowicz, *supra* note 78, at 270 (cited by Kötz, predicting that the Anglo-American systems will experience “an abandonment of the adversary process, even if only for small claims”). For cogent evidence of the judicial hand in small claims litigation, see Galanter, Palen & Thomas, *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699, 706-08 (1979).

A full account of the decline of adversary fact-gathering in the real practice of modern American dispute resolution would also give due attention to the rise of administrative decision-making. See, e.g., JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983), describing one corner of the field:

There are perhaps 5,600 state agency personnel (supported by 5,000 more) whose sole function is to adjudicate disability claims. Over 625 federal administrative law judges hear administrative appeals from state agency denials. This total of more than 6,000 adjudicators approaches the size of the combined judicial systems of the state and federal governments of the United States. And the claims that these officials adjudicate are not small. The average, present, discounted value of the stream of income from a successful disability application is over \$30,000. Disability claims, on the average, thus have a value three times that required by statute for the pursuit of many civil actions in federal district courts.

Id. at 18.

¹³⁹ *MANUAL*, *supra* note 5, § 2.711, relying upon FED. R. EVID. 1006, notices the possibility of using summary rather than verbatim testimony for “[v]oluminous or complicated data.” On the parallel to German techniques of recording and consulting testimony, see *supra* text accompanying notes 15-18.

German, the Italian, and others in the civil-law family," he found it in our "single-episode trial as contrasted with discontinuous or staggered proof-taking" on the Continent.¹⁴⁰ Arthur von Mehren has advanced a similar view, showing in a recent article how extensively the concentrated trial has affected the rest of our civil procedure.¹⁴¹

For the future, however, I doubt that the contrast between systems of concentrated and discontinuous trial will have such prominence in thinking about comparative civil procedure. The tendency of our pretrial process to displace the trial, a phenomenon long evident in American criminal procedure,¹⁴² is now increasingly manifest in civil procedure as well. Between discontinuous trial in the Continental tradition and our system of discontinuous pretrial proceedings followed by concentrated trial, the difference need not be all that great, especially since so few of our cases actually go to trial. Although ostensibly conducted in preparation for the concentrated trial, managerial judging in its more important aspects is directed toward suppressing the trial. Managerial judging succeeds best when pretrial clarification produces settlement, capitulation, or dismissal.

Even when civil cases do advance to trial in our system, much of what has made the trial so consequential is the latitude for adversary distortion in the fact-adducing process. Accordingly, I incline to point to a different "grand discriminant" between the two legal cultures—not concentration, but adversarial versus judicial responsibility for gathering and presenting the facts. If our concentrated trial occurred after nonadversarial fact-gathering in the pretrial process, our trial might ultimately resemble somewhat the current German review-de-novo proceeding for first appeals.¹⁴³ At trial the court would recall and examine key witnesses afresh, while facts not in serious controversy would be elicited from the pretrial dossier.

The jury. "The common law system," writes von Mehren, "had to concentrate trials because of the jury. . . . The presence

¹⁴⁰ Kaplan, *supra* note 78, at 841.

¹⁴¹ Von Mehren, *supra* note 4.

¹⁴² I have discussed the origins and the shortcomings of our nontrial plea bargaining procedure in Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & Soc'y Rev. 261 (1979), and Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

¹⁴³ See *supra* text at note 116. Note further that developments in German procedure have also been undermining the contrast between concentrated and discontinuous trial. Regarding the German effort to limit discontinuity, see *supra* note 9; see also von Mehren, *supra* note 4, at 370-71.

of a jury makes a discontinuous trial impractical."¹⁴⁴ Historically, it is surely correct that concentration of the trial eliminated the problems of reassembling and controlling groups of laymen across long intervals, problems that would otherwise have bedeviled a system of routine but discontinuous jury trial. "Moreover, at least until relatively modern times, there was probably no way in which material presented at widely separate points in time could have been preserved in a form that would have enabled the jury to refresh its recollection when it ultimately came to deliberate and render the verdict."¹⁴⁵ In an age of stenographically reported and now videotaped testimony, however, those concerns look less fundamental.¹⁴⁶

Although civil jury trial is a comparative rarity within the declining subset of our cases that go to any kind of trial,¹⁴⁷ the jury entitlement is enshrined in the seventh amendment and in comparable state constitutional guarantees. There is a substantial body of opinion that the civil jury is a worthwhile safeguard, and that view can scarcely be gainsaid as long as our trial bench remains, at the margin, so unreliable.

The question arises, therefore, whether the jury guarantee will continue to dominate our increasingly juryless practice. In the context of comparative civil procedure, the question is whether the jury tradition that underlies the Anglo-American concentrated trial is a true "grand discriminant," capable of preventing convergence toward Continental procedure. An initial cause for doubt is that the Anglo-American tradition has been for half a century decisively sundered in the matter of the jury entitlement. The English effectively abolished civil jury trial in 1933.¹⁴⁸ Paradoxically, however, theirs is the more faithful adherence to the tradition of the concentrated trial, because their pretrial process is less developed. What has continued to unite English and American civil pro-

¹⁴⁴ Von Mehren, *supra* note 4, at 364 (note omitted).

¹⁴⁵ *Id.* at 364-65.

¹⁴⁶ See, e.g., M. FRANKEL, *supra* note 36, at 109-14, discussing the Ohio experiment in which judicially edited videotaped evidence is replayed for the trial jury. Frankel observes the potential for this technique to help liberate us from the concentration requirement, and thus to bring us closer to Continental civil procedure. *Id.* at 113-14.

¹⁴⁷ Two decades ago Kenneth Culp Davis gathered data indicating that "[f]ive out of six trials in courts of general jurisdiction are without juries." Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 723 (1964).

¹⁴⁸ ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) ACT, 1933, 23 & 24 Geo. 5, ch. 49, § 6. See *Ward v. James*, [1966] 1 Q.B. 273, 279-303, for discussion of the minute residual sphere of civil jury trial in England.

cedure, therefore, is adversary domination of fact-gathering.¹⁴⁹

But must the American jury entitlement ultimately defeat convergence toward the German model? In other words, is judicial responsibility for fact-gathering incompatible with lay adjudication? We have little direct experience, since European legal systems do not share our preoccupation with the jury in civil procedure. The Germans employ juror-like lay judges for first-instance proceedings in various of the specialized courts (labor, social, commercial, administrative, tax) and in the courts that handle cases of serious crime.¹⁵⁰ The lay judging system combines lay and professional judges in a single panel (a "mixed court") that deliberates and decides together. I have elsewhere had occasion to describe the German mixed court, and to contrast it with our jury court in the realm of criminal procedure.¹⁵¹ I came to the conclusion that while each form of court structure has advantages, the two are broadly comparable in serving the main purposes of the jury guarantee.¹⁵² Elsewhere in Europe, true jury courts have been incorporated into criminal procedural systems that retain strongly nonadversarial pretrial processes.¹⁵³ Key witnesses who have been examined in the officialized pretrial are simply recalled for the jury. Accordingly, the indications are that judicial conduct of fact-gathering could be smoothly integrated into the jury tradition.

Abridging adversary theory. It is curious that managerial judging took hold so easily in a legal system supposedly governed by the counterprinciple of judicial inactivity.¹⁵⁴ Because manage-

¹⁴⁹ At least for the present, the Americans do not find English companions on the early steps of the path of convergence toward German-style judicial responsibility for fact-gathering. The predicate is lacking—the English have not followed us into managerial judging. The English have restricted in a variety of ways the growth of complex multi-party litigation, the phenomenon that gave rise to American managerial judging. English substantive law is narrower, their pretrial system is primitive, their multi-party practice is less permissive, and their loser-pays cost-shifting rules deter adventurous litigation. See R. Prichard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, J. LEGAL STUD. (forthcoming); Jolowicz, *supra* note 78, at 226-57, especially 242-44.

¹⁵⁰ See generally EKKEHARD KLAUSA, *EHRENAMTLICHE RICHTER: IHRE AUSWAHL UND FUNKTION, EMPIRISCH UNTERSUCHT* (1972).

¹⁵¹ Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* 1981 AM. B. FOUND. RESEARCH J. 195.

¹⁵² *Id.* at 215-19.

¹⁵³ See GERHARD CASPER & HANS ZEISEL, *DER LAIENRICHTER IM STRAFPROZESS* 9-10 (1979).

¹⁵⁴ See Miller, *supra* note 133, at 21-22, for some interesting conjectures on why the bar has not resisted the rise of managerial judging. For the cheering endorsement of the American College of Trial Lawyers, see AMERICAN COLLEGE OF TRIAL LAWYERS, *RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION* (1981).

rial judging imposes such major limits on partisan autonomy in fact-gathering, it is in principle irreconcilable with that branch of adversary theory that purports to justify adversary fact-gathering.

Regardless of where managerial judging is headed for the future, it has already routed adversary theory. I take that as further support for the view advanced in Part V that adversary theory was misapplied to fact-gathering in the first place. Nothing but inertia and vested interests justify the waste and distortion of adversary fact-gathering. The success of German civil procedure stands as an enduring reproach to those who say that we must continue to suffer adversary tricksters in the proof of fact.