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I. Introduction

Whether of civil or common law persuasion, Western jurists agree that first instance procedural systems must be reasonably efficient and expeditious as well as ensure that decisions are made in the light of the relevant facts and law. In addition, the process should be procedurally fair. For example, each party should be afforded the opportunity to be heard.

These comparable goals and values have traditionally been pursued through strikingly different institutional arrangements. The American system concentrates the trial in a single episode. Before trial, the lawyer for each party carefully prepares the legal and factual issues that may arise; discovery is had of the cause materials available to the other side, and prospective witnesses are insistently questioned. At the trial itself, the examination of witnesses is, subject to minor qualifications, conducted by the lawyers; the judge presides but does not bear primary responsibility for the development of the case nor for the questioning of witnesses.

European systems such as that of the German Federal Republic present a very different picture. Trials are discontinuous. Typically, the lawyers are not fully prepared on the legal and factual issues that may arise when the trial begins. Pretrial discovery is not available; indeed, witnesses that have been identified before trial are usually not questioned by lawyers in the course of their preparation for trial. At the trial itself, the judge's role is central; the court has a large responsibility for the questioning of witnesses as well as for moving the case rapidly to the point when it can be taken for decision.[1]

At first blush, one might think that these different procedural styles result from American acceptance of the adversarial principle and European acceptance of the inquisitorial principle. The premise, however, would be faulty. Both sides of the Atlantic accept the adversarial princi-

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1 For a general discussion of civil procedure in Germany, *see* Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958). The portion of this article that discusses procedure in first instance, *id.* at 1199-268, is published with revisions in A. VON MEHREN & J. GORDLEY, THE CIVIL LAW SYSTEM 151-203 (2d ed. 1977). The revisions take into account relevant amendments to the Code of Civil Procedure (ZPO), including those effective on January 1, 1975, but not those that came into force on July 1, 1977. A stimulating comparative discussion — which may be too sanguine with respect to some aspects of the German system — is Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

ple.[2] Each party prepares and controls the dimensions of his cause; the enforcement of legal rights is left to the self-interest of those concerned.

Of course, no contemporary procedural system carries the adversarial principle to its logical extreme; too often an assumption on which it rests—that parties, though not themselves equal in litigational ability, will be represented by counsel of relatively equal effectiveness—does not hold in practice. However, differences in American and continental European views respecting the adversarial principle are far too small to explain the differences in first instance procedural style remarked above.

A recent discussion by Professor Damaska sees the continental style as a consequence of an hierarchical ideal of officialdom while the American style rests on a coordinate ideal. In the hierarchical model, adjudicators are professional officials, organized in a strict hierarchy, who render decisions according to technical standards. In coordinate systems, adjudicators are lay officials (*e.g.*, the jury), authority is distributed horizontally, and in deciding controversies recourse to substantive standards of justice is encouraged.[3]

Damaska goes on to argue that the hierarchical model implies procedural arrangements found in contemporary continental European civil procedure: regular and comprehensive hierarchical review, the primordial importance of the case file which condenses and abstracts the cause materials, piecemeal trial, and a desire to regulate the proceedings to the extent feasible by "an internally consistent network of unbending rules."[4] Contemporary American civil procedure exhibits in considerable measure the contrasting implications of the coordinate model: concentrated trial, relatively little emphasis on regular appellate review, use of live testimony (rather than testimony recorded in written form), reliance on private action, especially in preparing material for consideration at trial, and, finally, trials subject to extensive technical regulation but with the adjudicator retaining considerable discretion.[5]

This approach is interesting and suggestive.[6] It may, however, give too little attention to discrete institutional characteristics that profoundly

2 "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." Langbein, *supra* note 1, at 824 n.4. It should be noted that the "judicial conduct of fact-gathering" to which Langbein refers does not involve the court in independent investigatory activities; what is meant are judicial conduct of the examination of witnesses, naming of expert witnesses by the court, judicial control of the sequence in which evidence is presented, and so forth.

The courts could probably do a good deal more than they typically do presently in *instigating* the presentation of evidence; as a practical matter the taking of only one form of evidence, the hearing of witnesses, requires a party request. *See* Schneider, *Die Ablehnung von Beweisantragen im Zivilprozess*, 75 ZEITSCHRIFT FÜR ZIVILPROZESS 173, 177 (1962); D. COESTER-WALTJEN, INTERNATIONALES BEWEISRECHT 22-23 (1983). The extent to which the contemporary American and German systems are appropriately characterized as "adversarial" is discussed in A. JUNKER, DISCOVERY IN DEUTSCHEN-AMERIKANISCHEN RECHTSVERKEHR 78-84 (1987).

3 *See generally* M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986).

4 *Id.* at 54-55.

5 *See id.* at 57-66.

6 For a general discussion of Professor Damaska's views, *see* von Mehren, Book Review, 97 YALE L.J. 341 (1987).

shape civil procedure in first instance but whose presence cannot be explained in terms of preferences for a coordinate or an hierarchical officialdom. This essay explores the importance for procedural arrangements generally of whether the system's trial stage is concentrated or discontinuous. Its thesis is that, although historical considerations, social and political values, and sociological and psychological assumptions are important in assessing comparatively contemporary American and continental European civil procedure in first instance, an institutional feature has great explanatory power. The entailments of a truly concentrated trial system are very different from those of a truly discontinuous trial system.[7]

As has already been noted, both the American and continental European systems accept the need for a reasonably complete development of the factual side of the controversy before decisions are taken. At the same time, both recognize the importance of accomplishing the task of preparation in a relatively efficient and expeditious manner. Systems that insist on a concentrated trial and reject the inquisitorial principle can pursue the complementary, but not entirely compatible, goals of comprehensiveness and expedition in basically two ways: reliance can be placed upon the parties' pleadings or, alternatively, upon pretrial exchanges and investigations that permit each side to probe the other's case. Systems that combine the adversarial principle with a discontinuous trial could also use these techniques. However, they have another choice: continuances at trial can be permitted where needed to allow the development and presentation of new cause material required to meet the opponent's presentation.

Theoretically, a system's decision concerning whether to provide for concentrated trials or for discontinuous ones could flow from judgments respecting how the most acceptable balance can be struck between the goals of adequate preparation, on the one hand, and reasonably expeditious and not excessively costly preparation, on the other. In reality, however, historically given institutional considerations may make it impossible for some systems to utilize the discontinuous trial. For example, the American system is institutionally required to concentrate trials because of the jury. (Courts of Equity, which did not have juries, used discontinuous trials.) The presence of a jury makes a discontinuous trial impractical. Great administrative difficulty and personal inconvenience would be involved in reconvening the jury from time to time over an extended period. Moreover, at least until relatively recently, material presented at widely separated points in time could not be preserved in a form that would have enabled the jury to refresh its recollection when it ultimately came to deliberate and render the verdict.[8]

7 For an earlier exploration by the author of these themes, see von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART 361 (N. Horn ed. 1982).

8 It has been suggested that modern technology in the form of videotaped evidence could make the jury system compatible with the discontinuous trial. *See* M. FRANKEL, PARTISAN JUSTICE 109-14 (1980).

Each of the three techniques described has advantages and disadvantages. The strengths and weaknesses of the first two can be suggested by brief glances at American civil procedure in first instance, before as well as under the Federal Rules of Civil Procedure. Because the third technique is unfamiliar to American jurists, its attractions and difficulties deserve a somewhat fuller development. This is undertaken in a discussion of recent reforms in first instance civil procedure in the Federal Republic of Germany. Thereafter, comparative reflections are ventured on recent developments under the German Code of Civil Procedure and under the Federal Rules of Civil Procedure.

II. First Instance Procedure in Concentrated Trial Systems: The American Experience

A concentrated trial requires that preparation for the presentation of the matter to the adjudicator be essentially complete before the trial begins. With respect to cause materials available to a party, the obstacles to full preparation of a case prior to trial are inadequate canvassing and understanding of the factual and legal issues that can arise from these materials. However, a further problem remains: how is a party to prepare for trial with respect to legal and factual issues arising from cause material unavailable to him, in particular from cause material controlled by the adversary? A party can hardly complain if he (or his counsel) fails to prepare his case fully, especially so far as that case arises from cause material under his control. Grounds for complaint exist, however, where a party's preparation is inadequate because the relevance of a given legal or factual issue emerges from cause material that the other party discloses only at trial. Accordingly, concentrated-trial systems seek to minimize the possibility that a party will be surprised in this fashion at the trial stage where time constraints may well render effective response impossible.

Concentrated-trial systems that accept the adversarial principle have essentially two ways in which they can approach this problem. The first relies on an extended pleading process and the second utilizes pretrial exchanges and investigations to frame the issues and to give notice of the legal and factual positions that each party intends to take.

During the 19th Century, American procedural systems relied on the pleading process to avoid surprise. Each party's pleadings had to state his position as well as respond to every position taken in the opposing party's pleadings. Response could take the form of admission, denial, or "confession and avoidance" by way of affirmative defense. This exchange was to continue until no further points of agreement or disagreement between the parties emerged. Only the issues thus defined were considered at the trial stage.

Any approach to issue framing and notice giving that depends essentially on the pleading process is inherently complex and rigid. If the process is to be held within reasonable bounds, the pleadings must set out legal propositions. The need to do so renders the cause, as presented in the pleadings, abstract and gives a considerable advantage to

the more imaginative and technically skilled lawyer. In the United States these difficulties were exacerbated because, for historical reasons, pleadings were framed in terms of the common-law forms of action even though they were, in various respects, remote from contemporary reality. The forms of action had originally developed in quite different economic and social circumstances. Moreover, in time, fictitious allegations had been introduced in order to modernize the substantive law that each form secreted. However, even without the incubus of the forms of action, a pleading approach to the surprise problem—though potentially relatively expeditious and reasonably inexpensive—is probably too technical and arbitrary to maintain itself except on a *faute-de-mieux* basis.

Accordingly, in a movement for procedural reform that began in the mid-19th Century with the work of David Dudley Field and culminated in the promulgation in 1938 of the Federal Rules of Civil Procedure, the pleading approach was supplanted by an approach that combines an abbreviated pleading process with arrangements designed to permit each party to familiarize himself before trial with the details of the positions and the evidence that the other party may advance when the controversy is ultimately presented to the adjudicator. Although the original rationale for the introduction of such pretrial procedures was the avoidance of surprise, they have come to serve another function as well: a party can be required to disclose cause material under his control that he would, because it favors the other party, otherwise suppress. A much simpler and less extended form of discovery—the full exchange by the parties before trial of documents and witness statements—would suffice to deal with the surprise problem and would produce fewer problems than expanded discovery entails. The latter approach to the surprise problem avoids the difficulties associated with a full blown pleading approach but gives rise to others. Particularly, as pretrial procedures come to serve purposes other than the mere avoidance of surprise at the trial, use of the system increasingly becomes extremely time-consuming and very costly.

Reliance on these techniques thus generates its own particular problems. Above all, there is a strong tendency for discovery to be used more extensively and aggressively with the consequence that proceedings become more and more expensive and lengthy. These developments in due course call forth reform efforts. One of the forms these efforts are taking is perhaps a modest return to reliance on the pleadings. As amended in 1983, Rule 11 of the Federal Rules provides for the imposition of sanctions—in particular an order to pay the other party resulting expenses, including a reasonable attorney's fee—where an attorney signs a pleading unless "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry . . . [the pleading] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ."

However, in view of the system's institutional setting, arrangements, and values, solutions to perceived abuses or excesses in pretrial proceedings under the Federal Rules can today hardly be addressed in terms of a return to a highly developed system of pleading. Inevitably, improve-

ments must, for the most part, be sought by giving the judge a larger and stronger role at the pretrial stage. The 1983 amendments to Rule 16 and Rule 26 are recent and dramatic proof of this proposition. These developments are discussed in the last section of this essay.

III. First Instance Procedure in Discontinuous Trial Systems: The German Experience

The basic problem encountered by discontinuous trial systems is delay after the trial has begun and not the avoidance of surprise. Delay can have one or both of two causes. First, the system may be stretched beyond its capacity so that the court is compelled to apportion small amounts of time to each of the matters before it rather than allow as much time as can be effectively used. The only solution for such delay is to increase the capacity of the system. Second, delay occurs because one or both parties are not ready to proceed promptly and in full measure to each successive step in the discontinuous proceeding.

We do not consider the delay problem caused by the system's insufficient capacity but only delay for which the parties in some sense bear responsibility. The problem that this form of delay raises has different characteristics in concentrated and in discontinuous trial systems. In concentrated systems, the problem centers upon the pretrial stage. Furthermore, concentration of the trial tends to limit somewhat the extent to which a party will seek, or can obtain, repeated time extensions at the pretrial stage. The deadlines set for various steps to be taken during this stage will, by and large, involve substantial periods rather than driblets of time. Also, in courts with crowded dockets, postponing the time set for trial typically involves significant further delay in getting to trial. The hand of the court and of any party interested in bringing the controversy to the stage of decision is significantly strengthened by the serious delay in beginning the trial stage that prolonging the pretrial stage entails.

In discontinuous systems, this delay problem centers upon the trial stage. It is easy enough to bring the matter before the court. The difficulty is to ensure, once the proceedings have begun, that the cause is prepared and fully presented with reasonable promptness. Each instance of delay at the trial stage is, in itself, usually relatively unimportant. A further hearing normally can be scheduled for the near future. Consequently, the other party (or his lawyer) finds persuasive opposition difficult and the court is psychologically inclined to grant requests for postponement.

In modern times the problem of delay caused by one or both parties has played a central role in various German movements for procedural reform. In July 1977, there took effect the most important and extensive reforms relating to procedure in first instance since the German Code of Civil Procedure came into force in 1877. These reforms addressed the problem of party-caused delay.[9] The Commission that proposed the

9 For recent evaluations of the 1977 reforms, *see* Greger, *Rechtstatsächliche Erkenntnisse zu den Auswirkungen der Vereinfächungsnovelle in der Praxis*, 100 ZEITSCHRIFT FÜR ZIVILPROZESS 377 (1987) (survey of Bavarian judicary); Pieper, *Eiljustiz statt materieller Richtigkeit?*, FESTSCHRIFT FÜR RUDOLF WAS-

1977 reforms remarked in its report that "[w]hen the work began, the call for an expedited procedure was in the foreground. The increasing delay in the procedure endangered the protective function of the proceedings and threatened to undermine the administration of justice."[10]

In reforming first instance procedure with a view to reducing party-caused delay, several courses of action were, in theory, open to the German legislature. However, radical solutions such as a dramatic shift from the adversarial principle to the inquisitorial principle and the substitution of official prosecution for party prosecution were not advanced.[11] Basically two approaches were considered: (1) maintain the discontinuous trial but give at the trial stage greater emphasis to the principle of official prosecution; (2) move significantly in the direction of a concentrated trial, providing for development of the cause prior to the trial stage either by (a) adopting a more developed pleading process or (b) requiring full pretrial preparation and providing the lawyers with the tools they would need to achieve this level of preparation.

The German reform did not take the step, which is essential if an adversarial system is to have a truly concentrated trial, of placing on the lawyers the burden of preparing fully before the trial. It was believed that such an approach, overall, would not expedite the handling of litigation, often would not work, and would render the proceedings more costly.[12]

The reformers moved on two interconnected fronts. First, machinery was put in place to make the trial significantly less discontinuous than had been the case in the past. Second, a much higher degree of pretrial preparation was required. These goals were pursued in two ways. The court was given greater directive powers and responsibilities. Theoretically speaking, the system moved away from the principle of party prosecution toward the principle of official prosecution or, perhaps more accurately, official management. In addition, more responsibility for pretrial preparation was placed on the parties and the pleading process took on greater importance.

Article 272 of the Code of Civil Procedure, as revised in 1977, states the reform's theme:

> The legal controversy is in principle to be disposed of in a thoroughly prepared session for oral argument (principal session) (*in einem umfassend vorbereiteten Termin zur mündlichen Verhandlung (Haupttermin)*).

SERMANN 773, 787 (C. Broda et al. ed. 1985) (relatively ineffective and at the expense of substantive justice).

10 BUNDESMINISTERIUM DER JUSTIZ, BERICHT DER KOMMISSION FÜR DAS ZIVILPROZESSRECHT 18 (1977). The criticism has been made that the reform proposals were not based on thorough empirical investigation. *See* Pieper, *supra* note 9, at 787.

11 Some writers argue that the reforms to date have been far too limited to achieve significant results. *See, e.g.*, Bender, *Mehr Rechtsstaat durch Verfahrensvereinfachung*, FESTSCHRIFT FÜR RUDOLF WASSERMANN 629 (C. Broda et al. ed. 1985). Bender would greatly simplify procedural requirements and severely limit appellate review in matters that were considered relatively insignificant for the parties. *See id.*

12 BUNDESMINISTERIUM DER JUSTIZ, *supra* note 10, at 31-32. There may well have been deeper reasons for the lack of interest in solutions that entailed pretrial interrogatory and discovery procedures. *See* p. 626 *infra*.

> The presiding judge orders either a prior first session for argument (*einem frühen ersten Termin zur mündlichen Verhandlung*) or provides for a written preliminary procedure (*ein schriftliches Vorverfahren*).
>
> The oral argument is to take place as soon as possible.

The German system had long cherished the ideal of concentrating preliminary argument, proof-taking, and final argument in a single session. In 1924, article 272b was added to the Code.[13] This provision empowered the court to make various preparatory orders on its own motion prior to sessions for oral argument. For example, the parties could be required to complete or explain their preparatory writings and to produce certain documents; witnesses nominated by the parties in their writings could also be summoned to the oral argument. The ambition was, as article 272b put it, to "dispose of the legal controversy as far as possible in one oral hearing." However, prior to 1977 the desired concentration had not been achieved.

Revised article 272, which came into force in 1977, envisages a thoroughly prepared principal session for oral argument at the end of which, in the great majority of cases, the cause can be taken by the court for decision. Revised article 273, which also dates from 1977, admonishes the court to see to it that the parties state their positions in a timely and comprehensive fashion at every stage of the proceedings. This article also contains the preparatory powers that article 272b, now deleted, had first given the courts in 1924.

Article 272, as revised in 1977, contemplates that the principal session will be prepared either by a prior first session or by a written procedure. The so-called prior first session is regulated in article 275. In preparation for such a session, the court can require that the defendant reply to the complaint in writing and within a time set by the court. Alternatively (*andernfalls*), the court can order the defendant to communicate to the court promptly and in writing the means of defense (*Verteidigungsmittel*) on which he intends to rely. The plaintiff can also be required to respond within a given time and in writing to the defendant's reply.[14]

The alternative to a prior first session is the written preparatory procedure regulated in article 276.[15] If the court chooses to employ this method of preparing for the principal session, the defendant will be required to indicate promptly whether he intends to defend; if so, he must within a relatively short time (normally two weeks) reply in writing to the complaint.

The principal session is regulated in article 278. At the session, parties who appear are heard with respect to the cause, proof is taken, and issues of fact and law are argued. The contemplation is that normally the matter will be ripe for decision at the session's close. However, the court

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13 Ordinance of Dec. 22, 1923, art. I§ A(2), [1923] 1 RGBl 1240, which became art. 272b.

14 At least in Bavaria, this possibility is used relatively infrequently. *See* Greger, *supra* note 9, at 379.

15 In Bavaria, individual courts have a tendency to prefer one form of preparation over the other; taking the system as a whole, however, no clear preference exists. *See id.* at 378. The written preparatory procedure has, however, become considerably more important than it was in 1978. *Id.*

is not permitted to rest its decision on a legal point that a party can be said "to have overlooked or to have considered irrelevant . . ." unless the point affects only an accessory claim (*Nebenforderung*) or the party had an opportunity to take a position with respect to the issue. Therefore, if a second principal session is to be avoided, the court must make certain that, in preparing for the first principal session, the parties have not overlooked important legal issues. If for any reason a further session is required,[16] it is to be held as promptly as possible.

The parties must cooperate in the effort to concentrate the first instance proceedings. Article 282 provides that each party is to produce his means of attack and defense, legal and factual alike, in a timely and careful manner, one that seeks to facilitate the proceedings. Specifically, "means of attack and defense, on which the other party probably could not take a position without undertaking inquiries, are to be communicated before the oral hearing by preparatory writings in sufficient time so that the other party can make the necessary inquiries." In addition, article 385a, introduced by the 1977 reform, provides that a court can have witnesses heard by a "requested" or a "delegated" judge[17] in a proof taking before any oral hearing has occurred. A witness can also be requested, in the situations contemplated by article 377III and IV, to make written statements before the holding of an oral hearing.[18] Prior to the reform, article 272b had authorized the ordering of comparable measures but certain of them—for example, the hearing of witnesses—were to be carried out only after the oral hearing had begun.

A party's failure to meet the standard set by article 282 can have several consequences. Article 283 provides that when a party in an oral hearing is unable to take a position with respect to a late submission of his opponent, the court is to grant permission to file a written statement of position after the session's close. In the interest of expedition, the court sets down a date for announcing its decision at the same time; of course, timely statements of position must be considered by the court in reaching that decision.

The principal sanctions for a party's failure to discharge its general article 282 duty to facilitate the proceeding are set out in article 296. The second paragraph of that article provides as follows:

> Means of attack and defense that are not produced in a timely fashion pursuant to § 282 para. 1 or that are not communicated in a timely manner pursuant to § 282 para. 2, can be refused admission when their reception would, in the court's free assessment (*nach der freien Überzeugung des Gerichts*), delay the disposition of the controversy and the delay in submission is due to gross negligence.

16 In Bavaria, in most Landgerichte a second principal session is required in fewer than half of the cases. *See id.* at 381.

17 For a discussion of the role of these judges, see A. VON MEHREN & J. GORDLEY, *supra* note 1, at 188-89.

18 Article 385a further authorizes the obtaining, prior to any oral hearing, of official information and expert opinions. The court can also "take a view" before holding the hearing.

A stricter exclusionary rule attaches under paragraph 1 of article 296 where the court has set deadlines[19] for the submission of the means of attack or defense in question that are not met. In such cases, late submissions are accepted only if the court is convinced in its free assessment that admission will *not* delay the disposition of the controversy or if the responsible party can furnish a satisfactory excuse for the delay.

Because German civil procedure, like continental European civil procedure generally, permits at the first level of appellate review a full redoing of the case, including reconsideration of evidence submitted below and the taking of new evidence, article 296 would lose much of its significance if means of attack or defense excluded in first instance on the ground of untimeliness could be freely introduced at the appeal stage. Accordingly, paragraph 3 of article 528 provides that "[m]eans of attack and defense that were properly rejected in first instance, continue to be excluded." Prior to the 1977 reform, article 529, now repealed, provided for the rejection of means of attack and defense, "that could have been presented" below and "whose consideration would delay the handling of the litigation," when the second instance court, in its judgment, concluded that the failure to submit below was intended to delay the proceedings or was due to gross negligence. However, submissions that had been tendered to, but refused by, the court of first instance had to be received. New article 528 is thus far less permissive than former article 529.[20]

The 1977 reform addresses not only the duties of judges but of parties (and their lawyers) as well. Judges are to see to it that the case is fully and promptly prepared; parties and lawyers are to facilitate the proceedings by producing means of attack and defense in a careful and comprehensive manner. As we have seen, the reform provides the judges with various tools to facilitate their task; however, new tools were not given to the parties and their lawyers.[21]

Today, just as before 1977, the parties are hardly in a position to ferret out and question witnesses.[22] "Nor can the lawyers help the parties much. The canons of professional ethics (*Grundsätze des anwaltlichen*

19 Art. 273, ¶ 2, no. 1; art. 275, ¶ 1, sent. 1, ¶¶ 3 & 4; art. 276, ¶ 1, sent. 2, ¶ 3; art. 277.

For purposes of imposing procedural penalties, no distinction is drawn in German law in terms of whether party or counsel is responsible for a submission being late. *E.g.*, BGH, Third Civil Senate, Decision of 11 Mar. 1976, 66 EBGH 122. Of course, the post-1977 consequences of holding a party responsible for his lawyer's delay are much more serious than were the pre-1977 consequences. *Cf.* Schneider, *Die Zurückweisung verspäteten Vorbringens*, [1965] ZURISTISCHE RUNDSCHAU 328, 331.

20 It has been argued that article 528 is still too permissive. *See* Wolff, *Die Berücksichtigung verspäteten Vorbringens in der Berufungsinstanz*, 94 ZEITSCHRIFT FÜR ZIVILPROZESS 310 (1981).

21 *Cf.* zur Megede, *Entlastung der Gerichte in Zivilsachen durch Rechtsanwälte?*, FESTSCHRIFT FÜR RUDOLF WASSERMANN 765 (C. Broda ed. 1985).

22 W. PREIBISCH, AUSSERGERICHTLICHE VORVERFAHREN IN STREITIGKEITEN DER ZIVILGERICHTSBARKEIT 278 (1982).

A request that the court order the taking of proof must rest on a tangible basis: the court will not order the taking of a so-called *Ausforschungsbeweis*. BGH, Second Civil Senate, Decision of 14 Mar. 1968, 27 NEUE JURISTISCHE WOCHENSCHRIFT 1233. However, where the evidence in question is within the control of the other party, the difficulties faced by the party requesting that the proof be taken are considered in determining whether an adequate basis for the request has been made out. *See* Gamp, *Die Bedeutung des Ausforschungsbeweis im Zivilprozess*, 60 DEUTSCHE RICHTERZEITUNG 165

Standesrechts) allow lawyers only to a limited extent to clarify the factual situation themselves."[23] The 1977 reform has not produced changes in article 6 of the canons which addresses the role that lawyers are to play in questioning witnesses prior to trial.[24]

The current version of article 6 was promulgated by the Bundesrechtsanwaltskammer in 1973. It provides that "[o]ut of court the lawyer may interrogate persons, who come into question as witnesses, with respect to their knowledge when such is necessary for a dutiful (*pflichtgemässen*) clarification of the factual situation, advice, or representation." The article concludes with the admonition that "[i]n every case, even the appearance of impermissible influence is to be avoided."

The position taken by the canons of ethics with respect to out-of-court contacts between lawyers and witnesses has changed somewhat over the decades. In the 1957 canons, as previously, the problem was addressed as part of the provisions dealing with criminal law.[25] Since 1963, the issue has been treated in general terms. The 1929 canons declared that "in itself, questioning of a witness by a lawyer was permissible." However, "especial care and foresight" were advised and "scrupulously everything was to be avoided that could be interpreted as an effort to influence" the witness.[26] The 1934 canons spoke of such questioning as "not permissible."[27] By 1957, the canons permitted questioning when necessary and justified by special circumstances.[28] In 1963, and again in 1973, the canons took a somewhat more permissive position. Questioning is permissible when required for a dutiful clarification of the factual situation.[29]

It still remains true, however, that German judges are suspicious of witnesses who have been examined by a lawyer prior to giving their testimony in court.[30] Rather than urging a more active pre-trial role for lawyers, commentators rely on the preparatory proceedings directed by the

(1982). In practice, proof offers are rarely rejected as too speculative. *See* L. ROSENBERG & K. SCHWAB, ZIVILPROZESSRECHT § 119 ¶ 3 (13th ed. 1981).

It is also worth remarking that in certain situations the courts require one party to assist the other in bringing out relevant facts. This is done either by shifting the burden of proof or by treating a party's failure to assist as an element in evaluating evidence under article 286 of the Code. *See* Peters, *Beweisvereitelung und Mitwirkungspflicht des Beweisgegners*, 82 ZEITSCHRIFT FÜR ZIVILPROZESS 200 (1969); P. SCHAAFF, DISCOVERY UND ÄNDERE MITTEL DER SACHVERHALTSAUFKLÄRUNG IN ENGLISCHEN PRE-TRIAL-VERFAHREN IM VERGLEICH ZUM DEUTSCHEN ZIVILPROZESS 130-31 (1983). As a consequence of these developments, one can now speak, though not without reservations, of a "*Kooperationsmaxime*" in German civil procedure. *See* B. HAHN, KOOPERATIONSMAXIME IM ZIVILPROZESS? 299-302 (1983).

23 W. PREIBISCH, *supra* note 22, at 278; *see also* Schwab, *Beschleunigung des Verfahrens*, Humane Justiz 29, 33 (P. Gilles ed. 1977).

24 *See* J. LINGENBERG & F. HUMMEL, KOMMENTAR ZU DEN GRUNDSÄTZEN DES ANWALTLICHEN STANDESRECHTS 67, § 6 comment 2 (1981).

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *See id.* at 66, § 6 comment 1; *see also* Kötz, *Civil Litigation and the Public Interest*, 1 CIV. JUST. Q. 237, 241 (1982) ("German judges would take an extremely dim view of the reliability of witnesses who previously had discussed the case with counsel"); zur Megede, *supra* note 21, at 786.

Another indication of the extent to which the system seeks to insulate witnesses from any possible party influence is the view that proof orders should, in principle, not indicate which party seeks

court to give a party a reasonable opportunity to prepare his case before the principal proceeding begins.[31] The 1977 reform has, therefore, not directly strengthened the pre-trial investigatory capacity of the party or his lawyer.

The central issue that has emerged regarding the role of the courts under the 1977 reform is how rigidly and rigorously the system of exclusion is to operate. At issue is the proper balance between expeditious justice and substantive justice.[32] Where the party's general article 282 obligation to facilitate proceedings is in question, the sanction of exclusion operates only where the delay in submission involved gross negligence.[33] The sanction operates more harshly where a party fails to respond in a timely fashion to preparatory measures ordered by the court. In such cases, article 296I provides that a late submission is to be accepted only if the court is convinced either that the admission will not delay the disposition of the controversy or the party can provide a satisfactory excuse for the delay.

The preparatory measures that fall within article 296I are the following: orders, which can be handed down at any stage in the proceedings, directing supplementation or explanation of a preparatory writing or requiring a party to present documents;[34] and orders for written responses to the complaint[35] or to the defendant's reply[36] made to prepare a prior first session.

In practice, the courts only rarely excuse delay in taking these preparatory steps.[37] Accordingly, the crucial issue for the application of article 296I is whether admitting late material delays the disposal of the controversy within the meaning of article 296. To the extent that the submission raises issues on which witnesses must be heard, a further session is required to hear them; accordingly, admission will clearly delay the disposition of the controversy if the court would, but for the submission, have been in a position to render judgment at the session's close.

Therefore, controversy respecting the application of article 296I primarily arises where the delayed submission is offered for a session that would presumably not have disposed of the controversy even had the submission been timely. In a decision by its Seventh Civil Senate, the highest civil court, the *Bundesgerichtshof*, originally took the position that, unless the first session was clearly intended as only an opportunity to explore the controversy with the parties on a preliminary basis, untimely submissions were to be rejected.[38] The test applied was whether the pro-

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to establish the points on which evidence is to be taken. *See* Teplitz, *Der Beweisantrag im Zivilprozess und seine Behandlung durch die Gerichte*, 8 JURISTISCHE SCHULUNG 71, 75-76 (1968).

31 *See, e.g.*, Preibisch, *supra* note 22, at 278-80.

32 *See* Pieper, *supra* note 9. Pieper's essay discusses the various positions taken by the German courts after 1977 in applying article 296 of the Code of Civil Procedure.

33 ZPO art. 296II.

34 ZPO art. 273II no. 1.

35 Art. 275I, sent. 1; art. 277I-III.

36 Art. 275III; art. 277IV.

37 *See* Deubner, *Zurückweisung verspäteten Vorbringens als Rechtsmissbrauch*, 40 NEUE JURISTISCHE WOCHENSCHRIFT 465 (1987).

38 BGH, Seventh Civil Senate, Decision of 2 Dec. 1982, 86 EBGH 31.

ceedings would last longer if the late submission were admitted rather than rejected; it was irrelevant that the effect on the duration of the proceedings, had the submission been made in a timely fashion, would have been identical with that of admitting the untimely submission.[39] This exclusionary rule was to be relaxed only in cases where it was unmistakably clear that the prior first session was not intended to reach the merits.[40]

In 1986, the Sixth Civil Senate of the *Bundesgerichtshof* took a significantly more permissive view.[41] The Seventh Civil Senate's position was seen as resting on a purely formal ground. The Sixth Senate's test was whether the court would have been in a position to dispose of the controversy without requiring a further session had the submission been timely. If not, the Sixth Senate saw no difference in practical effect between timely submission before the session and untimely submission at the session; consideration of the submission would require a further session regardless of its timeliness. The practical importance of this change of position is suggested by the fact that, in 1986, three-quarters of the Bavarian Landgericht chambers used the prior first session at least one time out of two for a quick review of the matter (a *Durchlauftermin*).[42]

The directive or managerial functions that now rest on first instance judges include, in addition to those already discussed, a duty to bring to a party's attention gaps or ambiguities in the presentation of his case. Under article 273I, no. 1, the court is to draw attention to deficiencies in the preparatory writings and in other material presented to the court. A general duty of clarification has long rested on judges under article 139; the first paragraph of the article in its present version is to the effect that

> The presiding judge must see to it that the parties explain their positions fully as to all relevant facts and make the appropriate motions, in particular supplement inadequate statements of the facts relied upon and indicate the means of proof. For this purpose, the judge must, insofar as is required, discuss the factual situation and the issues with the parties from both the factual and legal points of view and put questions [to them].

These duties of clarification assume greater significance as the trial becomes more concentrated. In particular, they now serve as counterweights to the strict exclusionary rules introduced in 1977 with a view to rendering the trial less episodic.[43] Where the court has not discharged its duty of clarification, it may well share responsibility with the parties for a submission's untimeliness. In such cases, article 296 does

39 *Id.* at 34.

40 *Id.* at 39 (where the session was unmistakably a "*Durchlauftermin*," one for a quick review of the matter with the parties in preparation for a principal session, untimely submissions were admissible).

41 Decision of 21 Oct. 1986, 98 EBGH 368.

42 Greger, *supra* note 9, at 379-80. It seems that in Bavaria relatively little use is currently being made of article 296. For the period from late October 1986 until December 1986, some ninety percent of the judges reported that in a prior first session they never, or only very rarely, excluded submissions on the ground of untimeliness. *Id.* at 380. In ninety percent of the Bavarian courts, exclusion in the principal session occurred in fewer than ten percent of the cases. *Id.* at 382. It was agreed, however, that the existence of article 296 has had a beneficial effect. *Id. See also id.* at 384.

43 "The new clarification duties, especially ZPO §§ 278III and 277II, were introduced into the Code of Civil Procedure in order to make the harsh time and exclusion rules bearable." Constitutional Court, First Senate, Decision of 30 Jan. 1985, 69 EBVG 126, 133.

not apply because a party is not to be prejudiced by the court's failure to observe a procedural requirement.[44] On occasion, however, the lower courts either do not realize that they have committed a procedural error or fail to draw the conclusion that, in consequence, exclusion under article 296 is improper.[45]

The argument that the 1977 reform violates the constitutional principle of equality before the law—article 3(1) of the Basic Law—and the constitutional right to a proper court hearing (*rechtliches Gehör*)—article 103(1)—has been rejected by the Constitutional Court.[46] Even article 528III, under which means of attack and defense, properly excluded in first instance on grounds of untimeliness. are likewise excluded in the first level of appellate proceedings, is constitutional in principle[47] although the provision undermines in significant measure the cherished principle of continental civil procedure that the parties have two full opportunities—one in first instance, the other in second instance—to present the case in both its factual and legal aspects to the adjudicator. However, various applications of the 1977 reform have, in view of the particular circumstances of the case, been held unconstitutional.[48]

Judging by the number of decisions that have considered whether the courts have used too vigorously the sanctions provided by the 1977 reforms, the judges are acting energetically. Unfortunately, the available material sheds little light on the extent to which the limitations that exist in German practices on the lawyer's pretrial preparation, especially where relevant material is controlled by the other side, are producing harsh results because, although a side is surprised at the trial stage, a remedial submission is excluded under article 296 as untimely.

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44 Constitutional Court, First Senate, Decision of 14 Apr. 1987, 40 NEUE JURISTISCHE WOCHENSCHRIFT 2003 (1987); *see also* Deubner, *supra* note 37, at 1586.

45 *See* Deubner, *supra* note 37, at 1585-86. However, many decisions use the clarification duty to mitigate article 296's rigor. *See* Leipold, *Auf der Suche nach dem richtigen Mass bei der Zurückweisung verspäteten Vorbringens*, 97 ZEITSCHRIFT FÜR ZIVILPROZESS 395, 407-08 (1984).

Commentators disagree as to interaction between articles 139 and 296. Some take the position that only the impartiality principle, *Unparteilichkeit*, sets a limit to the judicial initiative under article 139. *E.g.*, H. THOMAS & H. PUTZO, ZIVILPROZESSORDNUNG § 139 comment 1 (14th ed. 1986). Others advance the position that rules respecting the inadmissibility of untimely matter should operate to restrict use of the court's article 139 powers. A. BAUMBACH & P. HARTMANN, ZIVILPROZESSORDRUNG § 139 comment 1 (43d ed. 1985).

46 The Second Senate of the Constitutional Court wrote in 1981: "[t]hat the legislator in civil procedure has, as a procedural matter, created the possibility to reject late submissions of a party in the interest of tightening up, *Straffung*, and expediting litigation does not, to be sure, encounter constitutional objections. Even the fundamental principle of the right to a proper hearing, *rechtlichen Gehörs*, does not stand in the way of such a rule." Decision of 29 Apr. 1980, 54 EBVG 117, 123. The Senate went on, however, to hold application of ZPO art. 296 unconstitutional in the circumstance of the case.

For a general discussion of the control that the Constitutional Court has exercised under the Basic Law over procedural questions, see E. SCHUMANN, BUNDESVERFASSUNGSGERICHT, GRUNDGESETZ UND ZIVILPROZESS (1983).

47 Constitutional Court, First Senate, Decision of 7 Oct. 1980, 55 EBVG 72.

48 *E.g.*, Constitutional Court, Second Senate, Decision of 29 Apr. 1980, *supra* note 46; *see also* Constitutional Court, First Senate, Decision of 7 Oct. 1980, *supra* note 47, at 396-401.

IV. Some Comparative Reflections

In recent decades discontent with first instance procedure has been frequently voiced in both the United States and the Federal Republic of Germany. Delay has been the principal sore point for both systems. As already shown,[49] the problem was central to recent German procedural reforms. At least since the 1960's delay and the related issue of expense have been at the heart of Federal Rules reform. The 1983 amendments of Rule 16 Pretrial Conferences; Scheduling; Management and Rule 26 General Provisions Governing Discovery address the delay and cost problems that have developed in the pretrial phase of American first instance proceedings.

The efforts of these two systems to deal with delay and related problems are causing them to converge in a curious and interesting fashion. In the first place, for both systems the distinction between trial and pretrial phases is becoming less important; secondly, judges are more and more being called upon to play directive and managerial roles; lastly, these developments raise for each system somewhat comparable questions respecting the proper balance between efficiency and justice.

Delay problems are caused both by a system's insufficient capacity and by party abuse of the system. The capacity of a given system can be increased in many ways. Adding personnel is perhaps the most obvious. Development of substantive-law rules that are more clear-cut and dispositive than those they replace should reduce the range of potentially relevant evidence and make it possible in many cases for the adjudicator to decide with less reflection.

A system's capacity can also be increased by changing particular institutional arrangements. For example, if collegial courts are used in first instance, personnel can be employed more efficiently by relying to a greater extent on single-judge courts. The Germans took this step in 1924 by introducing a single-judge proceeding into the collegial *Landgerichte*. In 1974, amendments to articles 348-50 of the Code of Civil Procedure sought to increase significantly the reliance on, and the effectiveness of, single judges in handling first instance proceedings.[50]

The capacity of a procedural system can also be enlarged by taking steps to reduce the delay that occurs because one or both parties are dilatory. A reduction in delay for which a party is basically responsible serves not only the other party's claim to receive reasonably prompt justice but also increases the system's capacity and makes litigation generally more expeditious.

In spite of their quite different procedural structures, in recent decades the quest for prompter justice has led German and American reformers to adopt solutions that exhibit interesting similarities. Increasingly, both German and American judges have become litigation directors—managers. The additional directing responsibility that the

49 *See* pp. 614-15 *supra*.

50 This reform may not have achieved what was hoped. *See* März, *Das Landgericht in Zivilsachen—ein anachronistischer Januskopf?*, FESTSCHRIFT FÜR RUDOLF WASSERMANN 735, 759-64 (ed. C. Broda 1985).

1977 amendments to the German Code of Civil Procedure placed on judges, and the tools they were given to carry out this responsibility, have already been discussed. Today German judges carry, and are equipped to discharge, much larger managerial responsibilities than in the past.

The Federal Rules of Civil Procedure, as amended in 1983, go significantly further than the German Code in placing directing and managerial responsibility on first instance judges.[51] Rule 16(a) permits the court "in its discretion, [to] direct the attorneys for the parties and any unrepresented party to appear before it for a conference or conferences before trial. . . ." Among the purposes of such conferences are "expediting the disposition of the action" and "establishing early and continuing control so that the case will not be protracted because of lack of management."

Rule 16(b) requires that, "[e]xcept in categories of actions exempted by district court rule as inappropriate," the court shall after appropriate consultation

> enter a scheduling order that limits the time
>
> (1) to join other parties and to amend the pleadings;
>
> (2) to file and hear motions; and
>
> (3) to complete discovery.
>
> The scheduling order also may include
>
> (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
>
> (5) any other matters appropriate in the circumstances of the case.
>
> The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

The system of pretrial procedures and scheduling orders now provided by Rule 16 is a natural, though not an inevitable, development for a procedural system that combines an abbreviated pleading process and a concentrated trial with arrangements designed to permit each party to familiarize himself with the details of the position and the evidence that the other party may ultimately present at the trial. In particular, large reliance on pretrial discovery inevitably involves the judge deeply in the process of gathering cause materials. Pretrial discovery can lead to long delay and great expense; the more inclusive the potential scope of discovery, the greater the need to monitor the process. In the nature of the problem, control cannot be mechanical or automatic; an exercise of judicial authority and discretion is required.

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51 This is especially true for so-called complex litigation, now the subject of a separate litigation manual. For a variety of reasons, including different approaches to the class action problem, American complex litigation has no true German counterpart. Moreover, the American courts are experimenting in a way which would not be found in Germany by integrating various alternative dispute resolution processes into the trial process, *e.g.*, arbitration, mini-trials, so-called summary jury trials and mediation. *See* Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 267-77 (1985).

The scope of the judicial control over the pretrial phase engendered by the discovery process is seen in Rule 26(b)(1). It is there provided that:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

The Federal Rules have thus called the "managerial judge"[52] into being. "These new judicial functions have radically transformed the federal judge from a passive umpire to a managerial activist."[53] As a part of the same development, the traditional line in American procedure between the pretrial phase—necessarily discontinuous—and the concentrated trial phase has been blurred. Today the federal judge assumes control over the pretrial phase of proceedings with the consequence, among others, that contemporary judges, unlike their traditional counterparts, know a great deal about the case before it comes to trial when the same judge handles the pretrial and trial stages as seems to be the current federal practice.[54] Seen in their totality, federal proceedings have for the judge, though not for the jury, become discontinuous; just as the German principal session, the federal concentrated trial is now for the judge the final event in an episodic process.

These changes may, over time, cause the federal judge's role at the trial stage to move closer to that of the German judge. Where the lawyers are active at the pretrial stage and the judge is not, the traditional American practice of the lawyers questioning witnesses and presenting the matter at the trial stage is natural and probably inevitable. However, where the judge and lawyers are both thoroughly familiar with the case when the trial phase begins, the judge is in a position to play a much larger role than in the past in the examination of witnesses and in other aspects of the factual development of the case. At least for nonjury trials, forces are thus at work that may cause federal judges to exercise a stronger control at the trial stage over such matters as the examination of witnesses. Of course, a difference of importance remains in the positions of German and federal judges. Neither the German judge nor the German lawyer is in a position to explore thoroughly the factual side of the

52 Resnick, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). The article is an instructive and stimulating discussion both of how—and why—the role of federal judges has changed in recent decades and of the costs that the changes may entail. For a thoughtful rejoinder, see Peckham, *supra* note 51, at 260-67.

53 Peckham, *supra* note 51, at 254.

54 In 1969, "most metropolitan federal district courts transferred from a master calendar system to an individual assignment system. . . . In an individual assignment system, each case is assigned to one judge, who follows the case from filing until termination." *Id.* at 257.

case before the discontinuous trial begins; under the Federal Rules, not only the lawyers, but now the judge as well, know a great deal about the facts. American lawyers, with a full grasp of the facts, are both psychologically and technically in a much better position than their German colleagues to resist judicial management of such aspects of the case's presentation as the examination of witnesses.

The convergence between the German discontinuous trial and the American concentrated trial does not affect one advantage enjoyed by the former system, the absence of pretrial contact between lawyer and witness. A concentrated trial system could avoid such pretrial contact only by turning from adversarial to inquisitorial methods for developing the case materials. Accordingly, federal procedure must accept the disadvantage that the witness's story at trial may well be affected by pretrial contact with the perspective brought to the case by the lawyer who interviews and questions him even where the lawyer observes every propriety.[55] Perhaps this consideration explains why the German reformers, in their effort to achieve prompt justice by concentrating the trial stage, did not remove the constraints that the German system has traditionally imposed upon lawyers interviewing witnesses prior to their appearance in court.

The German and the federal procedural systems have thus converged in several significant respects.[56] In both, judges are increasingly managerial. Moreover, the German trial phase is less discontinuous than in the past and the judge is more involved than formerly in the pretrial phase; for its part, federal procedure has taken giant strides in the direction of integrating an episodic pretrial phase with a concentrated trial. The two systems may also be converging at a deeper and more subtle level, that of values. It appears that both are giving increased emphasis to efficiency and less emphasis to other justice values.

The pursuit of one value is often at the cost of another value. Clearly, interaction is not necessarily harmonious or supportive between efficiency, on the one hand, and objectivity or the reasonably full opportunity to present one's case, on the other. At least until 1986, the efficiency value served by the 1977 German reforms was probably pursued at too great a cost to the opportunity to present one's case.[57] In this period, a great many courts of first instance took the position that a submission made beyond the time period fixed by the court should be refused even though late admission would not prolong the proceedings any more than timely submission would have.

The refusal to admit the untimely submission served, of course, the cause of efficiency; the court had less to do to dispose of the matter. But,

55 *See* J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 86 (1949).

56 One significant aspect in which there is little or no convergence is that the American system, as a matter of principle, makes it possible for each side to obtain relevant information in the other party's control even though the latter did not intend to use the material at trial so that the surprise problem is not implicated. The German system is presumably philosophically opposed to such sweeping investigation; in all events, it has never contemplated providing machinery by which such information could be obtained in civil litigation.

57 *See* pp. 620-21 *supra*; *cf.* Pieper, *supra* note 9.

is it just to impose the drastic sanction of exclusion where the delay that results from admitting the untimely submission would have resulted as well from the admission of the submission had it been timely? In the circumstances, untimeliness does not harm the administration of justice. Of course, on occasion one is punished for conduct that is objectively wrongful even though no harm has been done. A driver who exceeds the speed limit is fined on the theory that conduct dangerous to society will thereby be deterred. But is the deterrent effect that may flow from the exclusion in principle of untimely submissions such a significant contribution to the cause of efficiency as to overcome the policy favoring the just resolution of the parties' dispute? Further, is it appropriate for a legal system to seek relief from overburdened dockets by applying an exclusionary rule where the conduct on which the exclusion rests does not in any way add to the court's burden?

In 1986, as we have seen,[58] the highest German court for civil matters concluded that the exclusion in principle of untimely submissions was improper. In reaching this result the *Bundesgerichtshof* answered in the negative the two questions just put. The proper balance between efficiency and other values must now be struck in more particularized contexts. The concern remains that the overall administration of the 1977 reforms may give too much weight to efficiency.[59] Indeed, the mechanisms adopted to deal with the delay problem pose a temptation for overworked judges: exclusion makes it unnecessary for the courts to go to the effort involved in clarifying the factual and legal issues raised by the rejected submissions.[60]

The clash between efficiency and other values in the newly revised Federal Rules occurs in a context very different from the German system. Likewise, the forms that the clash take are more varied and complex than those encountered in German procedure. But the fear is not without basis that the efficiency value that inheres in the very concept of the managerial judge may result in the federal courts giving less weight than is desirable to other justice values in their handling of cases.[61] We do well to bear in mind always that the measure of justice cannot be speed alone.

58 *See* p. 621 *supra*.

59 The 1977 reforms have produced a degree of inefficiency in their own way. For example, exclusionary rules have provoked litigation which seeks to overturn exclusionary rulings. To avoid exclusion, recourse is had to various evasive tactics that are procedurally inefficient, e.g., accepting a default judgment, *Versäumnisurteil*, so that the proceeding can be fully reopened, or entirely suppressing the matter in first instance so that it can be brought forward on appeal, *Benüfung*, without running the risk of article 528 exclusion. *See* Lindemann, *Hausgemachte Überlastung der Zivilgerichte?*, 33 Anwaltsblatt 389 (1983).

60 *See* Bundesgerichtshof, Sixth Civil Senate, Decision of 21 Oct. 1986, 98 EBGH 368, 374. *Cf.* Deubner, *supra* note 37, at 468; Deubner, *Das unbewä ltigte Gesetz—Neue Entscheidungen zur Zürückweisung verspä teten Vorbringens*, 40 NEUE JURISTISCHE WOCHENSCHRIFT 1583, 1584 (1987).

61 *See* Resnick, *supra* note 52.