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CIVIL PROCEDURE — REFLECTIONS ON THE COMPARISON OF SYSTEMS*

BENJAMIN KAPLAN**

NINETEEN sixty-one promises to be a jubilee year for procedure and proceduralists in the State of New York. For the legislature will be considering a proposal, prepared over a period of more than five years by the Advisory Committee on Practice and Procedure, to overhaul the entire existing complex of statutes and rules governing the conduct of civil cases in the courts. This proposal will be vigorously debated in and out of official halls; indeed one can already hear the premonitory rumblings of combat if one puts one's ear to the ground. I do not intend in this lecture to enter the lists and deal specifically with the proposal. Although I am an ancient member of the New York Bar, bearing scars of innumerable collisions with the fifteen hundred sections of the Civil Practice Act, I have for some years been an academic outlander, and criticism of the new legislation by me might be no more welcome in some quarters than Mr. Khrushchev's volunteered views about one of our national elections. In all events, I am determined to remain aseptically noncontroversial, and I shall say merely that the legislation—of which Professor Weinstein of Columbia was the chief designer, and to which Professor Kochery of Buffalo and other colleagues contributed—is by and large a great improvement over the procedural patterns it is intended to supersede.

With this profession of strict neutrality about the New York reform, I take up a position *au-dessus de la mêlée*. In fact for a long moment I shall abandon the local scene altogether and talk about procedure in a Continental civil-law system, that of Western Germany. I shall try to pack that procedure into a medium-sized nutshell. I shall then speak of certain of the forces that shaped the German system, and reach out for various contrasts between the German and American procedure. I shall attempt a few observations about comparative procedure and procedure in general, veering back occasionally to our particular domestic concerns.

I.

To begin, the rules governing civil procedure in Germany today are laid down by legislative enactment stemming from the famous code of 1877; judicial rule-making plays virtually no part. There is no jury. The courts, at least those concerned in the regular proceedings for cases of consequence, are collegial in structure, acting through benches of three or—in the court of final review—five judges. To some extent, however, the plural bench may use a single judge as a representative or helper.

One of the leitmotifs of the German process is sounded by the Siegfried

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horn of the summons in the action. This invites appearance at a *Termin zur mündlichen Verhandlung*, a court-session for oral-argument, or rather for conference, since the ideal style of proceeding is less that of a contentious confrontation than a cooperative discussion. The conference is set perhaps three to four weeks after initial service of the papers—which by the way is usually accomplished by mail—and it is commonly attended by the parties as well as counsel. Now the point to be made is that the whole procedure up to judgment may be viewed as being essentially a series of such conferences, the rest of the process having a sort of dependent status. Prooftaking occurs to the extent necessary in the spaces, as it were, between conferences. Intermediate decisions are made along the way. But the conferences are the heart of the matter. Very promptly, then, the litigants are brought under the eye of the court and the case begins to be shaped; and this treatment is applied to the action at intervals until it is fully opened and finally broken. "Conference" betokens informality and this characterizes the entire German procedure. "Conference" also suggests what is the fact, that possibilities of settlement are openly, vigorously, and continually exploited.

I must relate German pleadings to the conference method—I shall use the word "pleadings" although these writings are quite different from the American variety. The action starts with a complaint served together with the summons, but beyond this there is no prescribed number or sequence of pleadings. Pleadings are to be put in in such numbers and at such times as to prepare for, strengthen, and expedite the conferences and thereby the general movement of the case. They have no position independent of the conferences. Indeed the framers of the code of 1877 looked to a free, oral restatement of the pleadings at conference. Such oral recapitulation no longer occurs: the court reads the pleadings in advance and the lawyers are assumed to adopt the pleadings except as they speak up to the contrary. Still no question arises as to the sufficiency of the pleadings as such, nor is there any motion practice directed to the pleadings themselves. In short, pleadings merge into, are an ingredient of the conferences. What is wanted from the pleadings as adopted and perhaps revised at conference is a narrative of the facts as the parties see them at the time, with offers of proof—mainly designated witnesses and documents—and demands for relief. There is no insistence on niceties of form, and legal argumentation, though strictly out of place, is common in today's pleadings. Amendments, even drastic amendments, of the statements can be made until the end of the case, normally without any penalty for late change. This malleability of the pleadings flows from the realization and expectation that a case may change its content and color as it is repeatedly discussed and as proof is from time to time adduced.

Returning to the conduct of the conferences, we find the presiding judge highly vocal and dominant, the parties themselves often voluble, the lawyers relatively subdued. To understand the judicial attitude and contribution at

conference, we must take account of two related concepts. First, there is the principle *jura novit curia*, the court knows and applies the law without relying on the parties to bring it forward. Second, article 139 of the code, as strengthened in recent years, imposes a duty on all courts to clarify the cause and lead the parties toward full development of their respective positions. Thus with awareness of the law implicit in the case, the court is obliged to discuss it freely with the litigants, and in that light to indicate what will be material to decision. By discussion with counsel and the parties the court completes the picture of the controversy as presented by the litigants, throwing light upon obscurities, correcting misunderstandings, marking out areas of agreement and disagreement. It spurs and guides the parties to any necessary further exploration of facts and theories, and may suggest appropriate allegations, proof offers, and demands. The court, however, is not bound to take over and commandeer the litigation, nor does it have the power to do so in an ultimate sense. To some degree—the power is greater in “family” matters than in ordinary cases—the court may call up evidence and background information and disregard parties’ admissions. The calling of experts is basically a matter for the court. But, in general, allegations, proof offers, and demands can be made only by the parties and so in the last analysis major control of the cause-materials remains with them. Nevertheless, as the parties are likely to follow the court’s suggestions, we have here a significant potential in the court which imparts a special quality to the procedure; and this is so despite the fact that clarification and leading are hardly noticeable in simpler cases where the lawyers seem to be providing competent representation. The role of the court not only at conference but throughout the proceedings is envisioned as being both directive and protective. The court as vigorous chairman is to move the case along at a good pace, stirring the parties to action on their own behalf, exercising its limited *sua sponte* powers where necessary, conscious of a duty to strive for the right solution of the controversy regardless of faults of advocacy.

Conferences propel the lawsuit. Most dates are set by the court in open session. It acts in discretion with due regard to the convenience of the parties: few “iron” time provisions are laid down in the code, and the parties cannot control the pace by stipulation. When discussions disclose ripe questions of law, a time will be set for decision. If they show up disputed issues of fact, there will be an order and a time set for proof-taking.

To understand German proof-taking, we have first to ask what investigation of the facts a German lawyer customarily makes. He consults his client and his client’s papers. But he has substantially no coercive means of “discovering” material for the purpose of preparing his proof offers or readying himself for proof-taking. Moreover he is by no means at liberty to go out and talk informally with prospective witnesses. He is hobbled by the principle that he is to avoid all suspicion of influencing those who may be later called to give evidence in court. I shall not attempt to mark the exact boundaries of this

inhibition or to dredge up the possible evasive contrivances. I shall simply say that German lawyers are not prime movers with respect to the facts. The régime just described does make for unrehearsed witnesses. It begins to explain why a party in German litigation is not charged with any "proprietaryship" over the witnesses whom he has nominated and neither "vouches" for them nor is "bound" by their testimony.

The court draws up the order for prooftaking, the *Beweisbeschluss*, from the nominations set out in the pleadings as they may have been revised at conference. Prooftaking need not be concentrated at a single session, and is in fact not often so concentrated. Accordingly the court may pick and choose what it wants to hear at particular sessions. It can take proof in any order—evidence on a defense ahead of evidence on the main case, even evidence on the negative of an issue ahead of the affirmative.

Witnesses are sequestered, kept out of the courtroom until called. The court asks the witness to state what he knows about the proof theme on which he has been summoned. When the witness has done that in narrative without undue interruption, the court interrogates him, and this is the principal interrogation. Counsel put supplemental questions. Lawyers' participation is likely to be meager. If a lawyer puts too many questions he is implying that the court does not know its business, and that is a dubious tactic. A full stenographic transcript is not kept. Instead the court dictates a summary of the witness' testimony for the minutes which is then read back and perhaps corrected.

German law has few rules excluding relevant evidence. In general relevant evidence is admissible and when admitted is freely evaluated: thus there is no bar to the admission of hearsay. But a few qualifications must be made. German law recognizes a series of privileges. It is somewhat irresolute in compelling production in court of various kinds of documentary proof. Testimony will be received from the parties themselves only in particular circumstances defined by law, and in no event may a party be compelled to testify. Party-testimony is viewed as a kind of last resort. This raises a quiddity, for parties are regularly heard in conference, nominally for purposes of clarification, not proof. I say "nominally" because German law tends to blur the line between evidence *stricto sensu* and other happenings in the courtroom.

Prooftaking is succeeded by conference, conference by prooftaking, and so on to the end of the regular proceedings in the first-instance court; and now we naturally ask, are there any shortcuts, any special devices for closing a case out promptly when it appears that there is overwhelming strength on one side and corresponding weakness on the other? The answer is no. The German system relies on the succession of conferences and prooftakings to show up strength or weakness with reasonable dispatch. Nor is there much in the way of stage-preclusion, that is, rules intended to discourage delaying afterthoughts by requiring that particular offers or objections be made at fixed points

in the proceeding on pain of being otherwise lost to the party. The German action is not segmented into clear-cut stages—recall how pleadings may be thrown in late in the day—and it has in general a quality of “wholeness” or unity. But we do need to say here that the German system makes interestingly brisk provision for handling defaults; and we should also call attention to certain special speed-up devices: “dunning” proceedings, *Mahnverfahren*, available for “collection” cases and carried on regardless of amount in the inferior one-judge court; and “documentary-process,” *Urkundenprozess*, used chiefly in suits on commercial paper, with proof initially limited to documents and party-testimony.

We come now to appellate review. The most notable fact about it is that on appeal to the court of second instance from final judgment, or from the important type of intermediate judgment which determines liability but leaves damages to be ascertained, the parties are entitled to a redoing of the case. The record made below, so far as it is thought to be free of error, stands as part of the proceedings, but the parties may add new proofs and invoke new legal theories, and the conduct of the cause is quite similar to that in the court below. Remember that article 139 on clarification and leading, with related duties and powers, continues to apply. The final court of review hears “revisions” on questions of law. As to matters of substance as distinguished from procedure, the court is not confined to the grounds urged by counsel. It seems a mark of the reality of the principle *jura novit curia* that this national court, dealing with a very large number of revisions coming up from the lower courts administered by the states, the *Länder*, is served by a bar limited by law to less than a score of lawyers.

The German court system is manned by a quite sizeable number of judges. They are career men, appointed on the basis of government examinations, modestly paid, of good but not exalted social prestige, looking primarily to ministerial departments of justice for advancement. In normal times men customarily enter into judicial service at an early age, generally without substantial experience in practice. Judges have traditionally been chided for *Lebensfremdheit*, undue detachment from the rough-and-tumble of life. We have caught a hint of their paternalistic role in the court procedure. This is not far distant from, indeed it comprises, an element of the bureaucratic. Working, many of them, in collegial courts whose judgments, stiffly authoritative in style, disclose neither individual authorship nor individual dissent, German judges live rather anonymous lives. And they are desk-bound through a large part of their working time, for files must be read in preparation for court sessions, and most decisions in actions large and small must be compendiously written up.

As to the German lawyers, I must avoid leaving the impression that their contribution to litigation is unimportant, or that their attitude is flaccid. Despite the court’s capacity for active interposition, the frame of the case is made by

the lawyers and there is room for contentious striving. Still the procedural system we have outlined does not make for notably vigorous performance by counsel. Moreover the education of lawyers tends against their full identification with clients as combatants: a significant part of their post-University required training is as apprentice-judges. Most important, we must notice some economic facts. Lawyers' fees for litigation, generally corresponding with statutory scales fixed in relation to the amount in controversy, are low.

Court costs are also fixed by statute in relation to the amount in suit, so that a litigant is on the one hand prompted to moderate his demand for judgment, and can on the other hand make a reasonably accurate advance estimate of the expense of litigation. Taking all elements of expense into consideration, German litigation is cheap by comparison with the American brand. But on the threshold a German litigant must conjure with the fact that if as plaintiff or defendant he turns out loser in the lawsuit, he will have to reimburse his opponent's expenses—counsel fees and court costs at the statutory rates together with ordinary disbursements. Let us note here that contingent-fee arrangements—agreements for *quota litis*—are proscribed in German practice. A comprehensive system of state-provided legal aid aims to enable not only downright paupers but any citizens of insufficient means to prosecute or defend civil cases upon a plausible showing of a prospect of success.

Lastly I must respond to the nervous question which any American lawyer would surely want to ask: Does the German system get over its court business without undue delay? German court statistics—at least those publicly available and not held in subterranean tunnels by the ministries—are curiously sparse; but these figures combine with the opinion of German lawyers familiar with the scene to indicate that the courts, although handling a very considerable volume of cases, are disposing of their calendars with fair speed. However, the court of final review—the *Bundesgerichtshof* sitting in Karlsruhe, successor to the famous *Reichsgericht* which used to reside in Leipzig—has had a hard time in recent years overcoming a serious backlog.

II.

The nutshell is now fully packed. To vary the figure of speech, I have sought to do a rough charcoal sketch of the German process which might prepare for a modulated painting in oil. I have had to omit many necessary qualifications.¹ At some points I have perhaps let the ideal overweigh the real; I have not stopped to say that in Germany as with us procedural forms are in practice sometimes utterly debased. I am no doubt led by prior acquaintance with American procedure to some distorted or false ideas about the German.

1. A more detailed account is given in Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 Harv. L. Rev. 1193, 1443 (1958).

The present lecture is an outgrowth of comparative work in German and American civil procedure which I am pursuing jointly with my colleague Professor Arthur T. von Mehren.

As Holmes remarked about a foreign legal system, "When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others. . . . But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books."² Yet I think one observation can be made with confidence about the German process: it differs materially from the American, differs not merely in particulars but in general features. Let your mind range backward over my account of German procedure and contrast for the two systems the modes of determining and allocating expenses of litigation; the character and functions of the lawyers and of the judges; the concept of appeal; the approach to facts and proof; the pleadings; the central motor power of the process as a whole. Our short journey through the German system may well make us wary of joining hands with those amiable scholars who like to conclude, even over great apparent odds, that legal institutions in the Western world are in essence really the same.

We can agree that if analysis is carried on at a sufficiently high level of abstraction, all processes for rational decisions of disputes by governmental authority will be seen to have certain broad similarities. The logic and fundamental decencies of controversy tend to impose uniformities. We must grant, too, that the professed ultimate aims of most if not all modern procedural systems are much alike. Surely the German jurist would say that his system aims at careful consideration of law and fact, resoluteness, speed, economy, and impartiality in handling cases: aims shortly stated in the American Federal Rules, as well as in the legislation proposed for New York, as "the just, speedy, and inexpensive determination" of every action. It will indeed be one of the fascinating tasks of comparative scholarship to show how procedural systems announcing similar goals came to develop their divergent procedural institutions.

"Very deep is the well of the past," said Thomas Mann; and he asked, "Should we not call it bottomless?" Let Mann's riddling question stand, and consider the course of the intertwined English and American procedural history since the turn of the nineteenth century. Recall the scene upon which Jeremy Bentham and Lord Brougham erupted; the issues to which David Dudley Field's New York Code of 1848 and the English legislation of the 1870's responded; in recent memory, the challenges presented to Charles E. Clark and his colleagues when they set about formulating the Federal Civil Rules of 1938. Examining German procedural history, the must-do's, can't-do's, and lesser compulsions and inhibitions which have channelled the development of German procedural institutions, we shall find few real counterparts to the Anglo-American story.

German scholarship has provided us only with bits and pieces of the political, social, and intellectual forces that produced the modern code. It is,

2. *Diaz v. Gonzalez*, 261 U.S. 102, 106 (1923).

however, plain that the men who met in the 1870's under the leadership of the astute Hannoverian lawyer, Adolf Leonhardt, to frame a uniform procedural code for all of Germany, were executors of the half-formed designs of the liberals of 1848, and were responding to battle cries and slogans of that and indeed of a previous era which in the course of time had become irreducible popular demands.

The Emperor Napoleon had brought to conquered German states and principalities a new system for the administration of justice fathered by French revolutionary thought. After the final departure of Napoleon, the movement for *deutsche Rechtseinheit*, German legal unity, a phase of larger pressures for German political unification, took up standards in one way or another associated which the French incursion. Thus we hear great outcries for equality of citizens in the legal process, which meant the abolition of patrimonial jurisdiction and of special access of favored classes to particular courts. We hear demands for independence of the courts in the double sense of separation of the judicial function from the executive and of protection of judges from arbitrary interference with status and tenure. There is widespread agitation for a jury in criminal cases. Finally the slogans of "orality" and "publicity" are set loose in the land.

By contrast with the so-called "common" procedure then prevailing in German territory, a secretive, written, stiff procedure, the French system, the code de procédure civile of 1806, had proclaimed itself as open, oral, flexible, informal. The French mode introduced in the Prussian Rhineland held on for well over a half-century: resistance of this province to the Prussianization of its law is a long tale of odd surprises involving some of the great names of German legal science, including Savigny. French procedure caught the liberal imagination and brought forth a rationalizing German literature centering upon the idea that the parties in litigation should confront each other in free debate in the sight and hearing of the court, and the further idea that the court process should be open to the view of the parties and the public. The important writings of Anselm von Feuerbach, although seeking to avoid reproaches of Francophilism, elevated these notions almost to the rank of natural rights. Over a long period of time German liberals could point to the Rhineland as proof that French transplants could survive on native soil. Emotive power was added to the reform program for civil procedure by linkage with forces urging vital changes in criminal procedure, and all these demands took on messianic coloring as part and parcel of the revolutionary struggle of 1848. In 1849 the abortive constitution written by the National Assembly in the Paulskirche at Frankfurt adopted orality and publicity as central features of court process. In the same year an attempt to pacify opinion in Hannover by a somewhat liberalized code on the lines of the "common" procedure collapsed entirely. In 1850 Hannover adopted a code of civil procedure blending French ideas—some of them as transformed in a Swiss cantonal code for Geneva—with the

older German, but essentially preferring the French. This Hanoverian reform proved an immediate success, and from this point onwards the programmatic demands of the liberals could not be gainsaid despite the temporary general failure of the 1848 movement. The complicated deliberations of the 1860's and 1870's leading to the code of 1877 could hardly move outside the limits fixed by public acceptance of erstwhile liberal dogmas. In a large sense it was true that France, defeated on the battlefields, had conquered in the law books. Bismarck implicitly referred to the same phenomenon when he said that the code was Hanover's revenge for its defeat and amalgamation by Prussia in 1866, for it was Leonhardt who had written the Frenchified Hanoverian code of 1850, became Prussian minister of justice after the absorption of Hanover, and survived to influence the new all-German code.

This is part of the background of the *Mündlichkeit*, the orality of German procedure exemplified by the conference method, and serves to explain the strong, one may say the emotional, attachment of the German system to this basic idea. The code-makers, however, had to translate the sloganeers' old appeal for an oral procedure into precise and viable modes, and this they did by careful ratiocination, by a variety of compromises, by blending practices drawn from the several parts of Germany with the French model as that had itself been altered in German hands.

The enthusiasts of 1848 would perhaps have been not entirely satisfied with the code of 1877 and might be less so with the present procedure. Thus the place accorded in the code to written statements of position might have disappointed at least the more extreme champions of orality, and we have seen that the conference no longer comprises free recapitulation of positions. In the vision of the 1848 reformers, the oral, open clash of the litigants pursuing their competing self-interests was relied on both to propel and shape the proceedings. The reformers accepted that the court would have some duty of elucidation, but they were against state tutelage in the form of the paternalistic judge. Experience since 1877, however, showed that the parties themselves would not give proper propulsion to the lawsuit, and control in this respect has gradually passed to the judge. The directive-protective role of the judge at conference as well as in other phases of the procedure, the bureaucratic tinge of the lawsuit, result from a cumulation of forces, some of them going back to the early days of the Hohenzollern dynasty. Under Frederick William I and Frederick the Great, the minister Samuel von Cocceji improved the quality of the Prussian judiciary but at the cost of leading the judges into the bureaucratic hierarchy. German judges have never since escaped bureaucratic involvement. As the late Piero Calamandrei said of the Italian judge, "Two qualities that appear incompatible are thus united in the same person—the constitutional independence of the function and the administrative dependence of the functionary."³ It is indeed a major concern of German procedural re-

3. Calamandrei, *Procedure and Democracy* 40 (1956).

form today to cure the dilemma by removing judges from the general class of administrative officialdom. The administration of justice was seen by the Prussians as only another state social service; this view combined with royal distrust of the attorney class to give Prussia in 1793 and for about a half-century thereafter a procedural code which sought, although in the end vainly, to go almost the whole way in committing the management of the civil lawsuit to the judges as civil servants, and correspondingly to eliminate the attorneys as champions of the parties. Although German scholars have sometimes discounted the importance of this Prussian development, it has, I think, left its mark on German procedure. In the latter part of the nineteenth and in the early years of the twentieth century, a stream of thought emanating from Austria, more specifically from the great Austrian proceduralist Franz Klein, gave measured justification for the proposition that the state should strive to equalize opportunity in court proceedings, which were to be viewed as a *Massenerscheinung*, a mass-phenomenon, having important social purposes and consequences. Playing upon the German background, these ideas led to the strengthening of article 139 and to other vital alterations of the German code.

So we can see that large historical forces including the movement of general ideas in a given society may determine some of the main themes of a procedural system. Scholars who accept this proposition as applied to the substantive law have sometimes been prone to ignore or minimize it in the procedural field, have confined attention too closely to particular contemporaneous dissatisfactions as the determinants of specific procedural changes. But if large historical pressures may be significant for procedural development, it is also true that certain elections made by a system under no such grand impulses—even elections of a technical character made more or less unwittingly—may have almost equally decisive effect by setting up pervasive, interlocking, interdependent relationships throughout the process.

Obedience to the master idea of orality did not necessarily call for an unsegmented system. On the contrary Leonhardt himself seems to have believed that an open, oral procedure would become diffuse unless accompanied and controlled by some sharp stage division. The issue was not foreclosed by political battlecries old or new. It seems rather to have been viewed as a technical and prudential matter. Thus scholars debated the pros and cons of the *Beweisinterlokut*, an order which would definitely separate a pleading stage from a proof stage and provide a clear pattern for the balance of the proceeding. In the end this device was rejected. Among the considerations was this, that so important an order would deserve to be subject to immediate review, but so rampant an opportunity for interlocutory appeal would threaten delay. As the system has worked out, there is a minimum of stage division or preclusion, and prooftaking occurs on the installment plan interwoven with conferences.

Now see how this feature determines and intermeshes with others. Stag-

gered proof-taking, which allows for afterthoughts, relieves the pressure to articulate fixed and precise issues in advance of receiving proof in order to prevent "surprise." There is little anxiety about the pleadings and small room for devices to trim and correct them. So also "discovery" mechanisms ahead of the display of proof in court, again directed to preventing surprise, can hardly be felt as an urgent need in the German system. Lawyers can get along with limited informal access to prospective witnesses. Incidentally, expense of investigation is not a large figure on the litigation budget. These are a few obvious examples of how episodic proof-taking ramifies its effects further and still further through the German procedure.

With us in this country jury trial must be carried out as a single continuous drama, for a jury cannot be assembled, dismissed and reconvened over a period of time. We tend toward concentrated trial even when the judge sits alone, perhaps by magnetic attraction to jury trial as the historic centerpiece of civil procedure, perhaps because the system puts a high value on the trier's fresh impression of live proof, perhaps for other reasons. Hence the opposing sides must appear in court knowing the precise issues and fully armed and prepared to meet them. To these ends we have our pleadings and amendments and motions, our discovery devices, our pretrial conference. Concentrated trial forces accommodations in many rules and practices and has no doubt profoundly affected the character and role of the American lawyer and judge.

Decisive elections within a system bring on their characteristic dilemmas and problems. To speak again of episodic as against concentrated proof-taking, the former raises the specter of undue protraction of the case and this insistent problem has prompted a series of German experiments with sanctions for delay, stronger motor power in the court, use of single-judge proceedings to prepare the case so that it can then be brought to a conclusion in one or a few sessions before the full bench. But single-judge proceedings work against true "collegiality" (itself curiously connected in German thought with orality); they also offend against the principle of "immediacy," the notion that judges who have power of final decision should get a direct rather than a second-hand impression of the cause-materials. With us, in actions at law the pleadings were early relied on almost exclusively for defining issues, and this they did very imperfectly. Facilities for discovery were meager. Yet jury trial must be carried off without interruption. Bentham rightly said that trial in these circumstances must intrinsically lead to unjust decision, for upon trial the case would often shape up differently than had been anticipated—yet there would be no opportunity to search out additional facts or examine the implications of theories now newly found relevant. With diminished faith in pleadings and corrective motions, rights to discovery have been enlarged. The pretrial conference has been added. American code-makers have combined these devices in varying ways in an effort to attain just the right mixture; recently they have begun to flirt with the idea of using masters to energize the whole pretrial

process. The current New York proposal attempts its own adjustment of the basic elements, pleadings, discovery, and pretrial conference: it puts somewhat greater stress on pleadings than has been lately fashionable, and makes a carefully calculated effort after much historic failure to elicit informing and helpful initial statements of position from the parties. Elaborate mechanisms for perfecting definition of issues and laying bare the facts to prepare for trial create dangers of excessive delay and expense, although concomitantly opening up chances for disposition without trial; and we retain devices to avoid trial where possible. It is in all events made doubly clear as we compare episodic with concentrated proof-taking that adherence to one or the other mode affects the code-maker's range of maneuver.

Probing further into attitudes toward facts and proof, do we not find on the American side a striking concern with exhausting sources of evidence and squeezing the last drop of advantage out of the pulp of multitudinous details? Facts are today often thrice canvassed at heavy expense: by informal methods, again by official discovery devices, and again at the trial proper. Pretrial sifting of the facts may improve the chance for settlement or other disposition without trial; it minimizes surprise at some risk of taking the fresh bloom off the testimony if the matter should reach trial. Although pretrial investigation is loose and far-ranging, the trial itself, faithful to its tough adversary spirit, perhaps responsive to the supposed needs of the jury as inexperienced, once-in-a-life-time triers, proceeds according to a code duello of exclusionary rules of evidence, with litigants "bound" by "their" witnesses. Examination and cross-examination, minutely recorded, pursue detail and test credibility with relentless assiduity.

In many respects German practice turns the tables. Proof-taking in court is notably untrammelled by tight rules of evidence: the triers are professionals, the adversary spirit is muffled. To be sure a restrictive attitude persists toward party-testimony. On a superficial view this attitude seems to be traceable to a cynical estimate of the amount of truth-telling that can be expected from those interested in the stakes. Continental writers sometimes relate it to a desire to preserve the individual's dignity. As we have seen, the restriction is in practice substantially overcome by interrogation of parties at conference; and I should perhaps add that it does not go so far as to prevent blood tests of the parties. The rules as to party-testimony thus hardly confound the generalization that proof-taking is "free." On the other hand the search for facts is neither broad nor vigorous. We have spoken of the limited access of lawyers to prospective witnesses out-of-court. It is true that the episodic movement of the case affords opportunity to the litigant—led by the court or stirred by hints in the testimony—to search for and offer additional proof whose existence or pertinence was unknown to him at the start; and there is still a further chance to enlarge the proofs on appeal. But episodic proof-taking, while providing room for something on the order of American discovery, is not

thought of in that way. So the tendency is to bar "fishing" exercises at proof-takings, that is, to disallow questions to witnesses designed merely to uncover possible sources of proof. We may surely conclude that fact investigation in the German system does not in practice attain anywhere near the strength of the American.

The German method of taking testimony itself strikes an American lawyer as lamentably imprecise. Remember that the initial and principal interrogation of witnesses is conducted by the court which at least in the early stages of litigation will not have a comprehensive idea of the facts. Recording testimony in paraphrase is well calculated to bleach out color and blur detail. Some evidence may be received by the deciding plural bench only at relay from the single-judge acting as representative of the court. Impressions of the evidence are dulled by the very process of receiving it in installments over a period of time.

If the Germans are more casual than we are about the facts, if they are content to get a kind of generalized or synoptic rather than meticulous perception of the events in suit, if, as I believe, prooftaking as a whole has a subsidiary place in the German system, then we are led to speculations about the relation of procedural forms to the style of the substantive law. Is a fully codified substantive-law system of the civil-law type congenial to a pattern of fact-finding which would be felt to be inadequate to the needs of a common-law system? Is it significant for procedural development that primary reference in the one system is to the generalizations of the substantive code, not the case decisions, while the other system grows by matching case with case? Or are we in this country simply paying too much in time, effort, and money to pursue the finer lineaments of truth which must in any event elude us? I pass over specific attitudes toward problems of forensic psychology, such as the question of the value attached to oral as against documentary evidence, and I stop short of the pons asinorum of "national character."

To sum up: I have touched upon certain of the forces which have bent the German system of civil procedure into its characteristic patterns and forms and I have posed some comparisons between the German and American procedure. Historical exegesis has a natural place in the comparative inquiry if only because one cannot meaningfully juxtapose systems which one does not reasonably well understand; it gives us, besides, a sense of the grip of particular institutions upon a society and so of their susceptibility to change. Side-by-side examination of systems puts in clearer light the crucial elections which they have severally made. Again comparison invites thought about the interactions of procedure with the rest of the legal cosmos, and frames cogent questions of ultimate purpose and value.

III.

Let me now dwell upon some applications of the comparative study of procedural systems. If, as I have tried to show, comparison whets understanding of what is central to a procedural style, helps to locate the linchpins of a

procedural machine, it can tell the reformer where and how he must strike if he is to produce truly significant results. Similarly, comparison shows up in peculiarly lurid colors the uselessness, or worse, the danger of altering particular procedural devices which hang upon other mechanisms that are left unchanged. A large number of procedural reforms attempted in various German states in the early and mid-1800's suffered from this fault, and therefore failed. The story of American procedural reform is not free of like failures.

Possibilities of lifting pieces from a foreign system and incorporating them in the domestic must be approached with a sense of the interdependencies, the syndromes, so to speak, within the system *a quo* and the system *ad quem*. This is not to say that it is no use trying to import mechanisms for domestic use unless the foreign system is brought over entire. For some procedural devices can stand up pretty well in isolation from the rest of the system. I put as possible examples the special "dunning" and documentary processes successfully employed in many cases in Germany. Another example which may make the point is service by mail, a traditional usage in Germany and elsewhere, much admired by Bentham. This has in fact been progressively adopted in our country, although its original parentage may not always have been recognized. Professor Weinstein recently reexamined this device and gives it some scope in his proposal for New York. A conversation with Professor Homburger this past summer brought up an interesting example which may lie on just the other side of the line. Consider the feasibility of introducing here the German practice of having witnesses give their testimony in narrative, followed by interrogation by the court; this to be followed in turn by interrogation in our conventional way by counsel for both sides. This may seem a simple change that could be commended on various imaginable grounds, but I would ask you to reflect on whether it could be effectively or safely engrafted on our present system without other profound changes.

I turn to another facet of the comparative enterprise. It seems to me a matter of capital importance for the uses of comparative study that we in this country have been gradually mitigating the extremes of our inherited procedural system. In this endeavor we usually and naturally seek to appeal where possible to models half-buried in our past: this is sound reformer's strategy. Yet unmistakably we are moving along certain lines already familiar to foreign procedures; and I make the simple suggestion that we could perhaps profit by consulting the analogous foreign models and experiences directly and explicitly.

The pretrial conference is becoming a staple of American procedure: I note that it is made mandatory in most classes of cases under the New York proposal. Champions of the pretrial conference used to remind us of the oral pleading of the yearbook period, but that hoary analogy was perhaps less instructive than *mündliche Verhandlung* as to which the Germans have a long accumulated experience. Proposals for pretrial masters suggest the model of

the German single-judge although perhaps less cogently than that of the English High Court Master. (But a brief for the study of foreign systems should be taken to include the English, which now departs markedly from our own.) When the Federal Rules put the motion for failure to state a claim into connection with the motion for summary judgment, when Professor Weinstein introduces flexible devices for "accelerated judgment" directing attention not merely to naked questions of law disclosed by the pleadings but to the evidence available to support the allegations, we are reminded both of the style of German pleadings and of their place in the German pattern. Federal Rule 42 and parallel provisions of the New York proposal permitting the judge to order separate trial of claims and issues, the recent rules of the Federal court for the Northern District of Illinois looking to trial of the issue of liability distinct from the trial of damages, call up German practice which extends further to require the court to arrange proof-taking in the most expeditious way.

Clearly the judge's directive interest in and power over the conduct of the lawsuit is on the increase in this country. Here one of the propagandist appeals, if we may call them such without offense, has been to the picture of the American judge as he is supposed to have been before Jacksonian ideas sapped his strength; but again foreign modes offer interesting analogies. Our recent codes and rules not only expressly allow the judge to act *sua sponte* or in discretion on many particular occasions; by laying down general precepts and avoiding detailed prescriptions they implicitly invite discretionary control by the judge. A run through the New York proposal is revealing on these matters. Or examine the *Handbook of Recommended Procedures for the Trial of Protracted Cases* recently issued as a report of a study group of the Judicial Conference of the United States: this envisages very considerable judicial activity which is, however, all brought within the lee of general canons of the Federal Rules.

Directive power in the court is closely linked with protective responsibility and this too is being somewhat heightened in our own system. The protective sense is readily called into action where a party appears without counsel or is handicapped by inefficient representation or lack of funds, and it is interesting to think here of the growth of small claims procedures in various American states and of the fact that the present strengthened text of article 139 of the German code was anticipated by a similar precept specially applicable to German courts of inferior jurisdiction. At the other extreme of cases involving questions of high public importance, one sees examples of American courts not at all content to let the parties present such facts and proffer such points of law as they will. Our common law while relying generally and no doubt wisely on party presentation, does sing antiphonal strains, which you can hear plainly enough if you read authorities one way and the other on courts noticing on appeal points not taken below, or on courts calling witnesses not offered by the parties.

Are we not also in the midst of a disenchantment with various exclusionary rules of evidence. Note as an instance the disposition of the "dead-man's" problem made in the New York proposal. Some of the Federal appellate courts have indeed openly invited District Judges when sitting without juries to wink at the exclusionary rules short of the privileges. There is increasing dissatisfaction with the conception of party-proprietorship over witnesses, and I have even heard a murmuring against lawyers' unconfined *ex parte* resort to sources of proof which must engender suspicion of "coaching." A general unease with our established methods of handling expert testimony is surely carrying us nearer the German position. The now famous New York experiment with "impartial medical testimony" reflects this unease although it is a response to other dissatisfactions and problems as well.

I am not here urging the adoption in this country of the whole or any part of the German system. I am suggesting the value of a cosmopolitan knowledge of procedural arrangements as an aid to the improvement of our own. In the same sense I suggest that in trying to assess the practical operation of our procedural system *tout entier*, as an uninhibited court administrator might do, it is at least interesting and possibly instructive to take a perch outside our system and to keep a different system in the corner of our eye.

Our major courts have relatively few judges. Using standard procedures they can handle at best only a small volume of those elaborate and time-consuming contests called trials—especially time-consuming if they are jury trials. Excessive delay on the calendars is therefore a constant menace. In metropolitan centers the whole apparatus is regularly threatened with emergency if the percentage of cases actually going to trial should perchance be fractionally increased. The mine run of cases involve disputed issues of fact and therefore cannot be disposed of ahead of trial by the shortcuts which the system makes available. A prospect of inordinate delay on the calendars exerts a pressure on litigants to settle, and the system seeks to persuade them to do so as a means of fending off a burden of trials which it would find insupportable. Sometimes the pressures mount to an unwholesome pitch. Meanwhile the preparations and skirmishes before trial if seriously pursued entail expense which will be added to if trial is finally unavoidable. We have inadequate data on the costs and economics of litigation—I am glad to see that scholarly attention is being increasingly drawn to these matters—but expenses appear to run high and consequential litigation tends to be prohibitive for persons of moderate means except as the dubious institution of the contingent fee, or insurance, itself expensive, may come in to help them as plaintiffs or defendants. In theory, and no doubt oftentimes in practice as well, successful prosecution of a civil action will not result in a full recovery because the major expenses of litigation must be borne by the party without reimbursement; for the same reason defense can never be fully successful in a financial sense.

Any capsulated statement of such large phenomena must distort and ex-

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aggerate, but allowing all plausible discounts the situation in this country is not altogether happy. The elements of the German position are different, although again assessment is embarrassed by the unavailability of information. To be sure the impulsion to settlement can be even fiercer with the Germans than with us. But having a large complement of judges which can be rather easily expanded to accord with needs, the Germans have an initial advantage over us in meeting problems of delay in the courts. Delay when it occurs in German courts of first instance is less obvious and therefore perhaps less irksome than American delay, for it does not generally consist in the courts' inability to reach cases but rather in a protraction of the courts' handling of cases through a long series of short *Termine* or sessions. The fees of German lawyers are low, reflecting the fact that their activities in litigation are less strenuous; or perhaps we should say that fees are held low by the statutory tariffs and this together with other features of the system affects the scope of lawyers' activities. State-provided legal aid contrasts sharply with our generally meager provision for public assistance to poor persons in civil litigation, our privately organized legal aid, and our contingent fee practice. German rules governing reimbursement of litigation expenses—the basic doctrine of “loser pays”—highlight neuralgic questions in our own system. As Professor Weinstein forthrightly says, “our costs practice is an historical footnote rather than a defensible system.”⁴ Very large issues, notably that of public access to the courts, are certainly involved. I note that the New York proposal seeks at several points to penalize abuse of procedural forms by casting the expense including counsel fees on the guilty party. Similar provisions appear in the German code but courts seem to shy away from applying them. Franz Klein once took somewhat quixotic exception to the device because it implied that anything goes provided the party is prepared to pay for it.

Our troubles in the matter of delay and related evils of course center in our immense flood of accident cases. It would require a separate lecture to begin to bring together the strands of law and practice relevant to the German handling of this kind of litigation. Many factors converge that would probably make the problem less troublesome for German courts than for ours even if Germany had a comparable number of vehicles on the roads and a corresponding volume of accidents. The fact that judgments are limited fairly closely to definite items of damage must itself encourage out-of-court settlement. The in-court process is facilitated by the fact that thorough police files and records of criminal proceedings frequently give clear definition to the basic facts of the civil actions; there are no lay triers; expert testimony is largely under court aegis; prooftaking on the existence of liability can be separated from that on damages with a saving of time if there is a negative finding as to liability. An interesting feature of the law, which has from time to time attracted attention

4. Weinstein, Proposed Revision of New York Civil Practice, 60 Colum. L. Rev. 50, 79 (1960).

in this country, is that judgment for personal injuries resulting in lessened earning capacity can take the form of an "annuity" rather than a lump sum. One need not subscribe to German methods in accident cases to believe that they would be an interesting subject for sustained comparative investigation.⁵

Empirical and analytic work now going forward at various places in this country may in time enable us to put a halter on the beast of delay in American courts if not to tame him altogether. The highly suggestive study conducted by the Chicago University Law School on the Supreme Court of New York County⁶ has given us a measure of the problem which at least averts despair. Pioneer work has been done at Columbia toward solving the old puzzle of identifying in advance the cases which will prove "durable" if left to ordinary ministrations.⁷ Already we can suspect that the standard "remedies" for delay, for example, the A.B.A.'s "Ten Cures for Court Congestion," ranging from the pretrial conference to court reorganization, need much scientific refinement: thus the familiar assumption that use of the pretrial conference "across the board" tends to relieve court congestion has turned out to be questionable: we shall perhaps know more about this when the Columbia project completes its work in New Jersey. Anyway fallible guesswork is being corrected by detached thought and rugged experimentation, and this is to the good. Beyond those scientific wonders and horrors foreseen by Justice Bernard Botein in his 1960 Cardozo Lecture⁸ as having a possible bearing on law, there may lie the *deus ex machina* of a fool-proof safe means of mass transportation—and delay in the courts may turn out to be as antiquated as a knee-length lady's bathing suit. Perhaps our newly inspired economists will venture to include justice along with education and housing in their welfare programs, and solve delay and other problems by the proper expenditure of more money.

For the present we stay with the point that our principal courts have the look of huffing and puffing to take few cases the whole route, while over the scene there hangs a pall of excessive delay, heavy expense, settlements artificially induced. Our system appears to work with expensive and brittle tools to do a meticulous job on the particular case, but runs into trouble when it faces the need for mass output. If the German system confronts this need with a greater equanimity it is in part because it grinds the particular case less exceedingly fine.

Constituted and manned more or less as it now is, our court system will continue to have decidedly limited capacities for effective work satisfactory to the litigants and compatible with the larger claims of society. What classes

5. Cf. Kalven, Zeisel & Buchholz, *Delay in the Courts*, App. D (1959) (remarks on Austrian methods).

6. *Op. cit. supra* note 5.

7. Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 *Colum. L. Rev.* 1115 (1959).

8. Botein, *The Future of the Judicial Process: Challenge and Response*, 15 *The Record* 152 (1960).

of cases should it undertake to handle? Here enters a tangle of factors, among them the symbolic importance of judicial process, the commitment of the process not only to the right decision of the individual case but to the progressive development of the law, the available alternative means of managing disputes removed from judicial process. Appraisal of substantive rules is of course necessarily implicated. Fifty years ago Mr. Moorfield Storey, giving the Storrs Lectures at Yale on the subject of *The Reform of Legal Procedure*, argued vehemently that industrial accidents and accidents to passengers on street railways should be removed from the courts and handled by other means. Coming to the claims of non-passengers, he said, "they are comparatively few, and for the present may be left to the Courts, for I would not take all the bread out of your expectant mouths."⁹ Like Mr. Storey, I am addressing an audience of lawyers and law students, and I have a similar reluctance to deprive you of a means of sustenance. Yet much of Mr. Storey's old argument applies to large classes of accident cases which swell the court calendars today. It is a sardonic reflection, and yet not a complete answer to the argument, that were these cases now to be removed from the courts, we might face a serious problem of what to do with surplus judges, if not surplus practitioners.

But if, all things considered, one or another class of business now in the courts ought to go elsewhere, some business that has taken flight from the courts should perhaps be brought back. I am by no means certain that the movement of commercial cases to private arbitration ought to be encouraged by the broad permissive legislation that is being written into the statute books. In this expression of doubt I follow the Master of the Rolls, Lord Evershed, who was talking some years ago of the English situation.¹⁰ At least we can agree in rejecting the view that parties to a controversy have a natural right to decide for themselves that it be settled by any peaceful process of their own choosing. It is significant for the present theme of our discourse that when Justice Charles D. Breitel, in a forceful paper, examines how the old staples of litigation can be tempted back into the courts, he concludes that "the need is for informal and speedy summary proceedings as we have them already in the courts, plus the use, borrowing from the administrative agency, of court management of the case from start to finish, even as to the enforcement of the judgement, and the use of speedy, inexpensive and direct modes of proof."¹¹ Without discounting the value of the domestic models to which Justice Breitel refers, I suggest that he could find nourishment for his ideas in foreign examples.

Still considering the proper utilization of limited resources—and still insisting that the problem is not merely that of delay—we must ask whether

9. Storey, *The Reform of Legal Procedure* 85 (1911).

10. Evershed, *The Influence and Importance of Practice and Procedure in the Supreme Court* (1953).

11. Breitel, *The Quandary in Litigation*, 25 Mo. L. Rev. 225, 235 (1960).

an institution so consuming of time and effort as the jury ought to be perpetuated on its historic lines in civil causes. We might conclude with all due caution that it could be eliminated with positive advantage in the kind of case where the legal rules do not appeal to general community standards of justifiable and unjustifiable conduct as they exist at the particular time; and all the more so where the further factor exists that technical knowledge or experience is required for thorough understanding of the case, or it is important that decision upon recurring fact-patterns shall be predictable and regular. Although at the moment no candidate for the New York legislature or Congress would think it prudent to run for office on a platform of limiting the constitutional jury-right, the question is, I think, coming more and more to be submissible to reasoned public debate.

Reflecting on the rate of change in life about us, we cannot be astonished that important changes are taking place in the nature and quality of the disputes that the courts are being called on to settle. Justice Botein has noted some of these changes, and he foresees others. He urges us to anticipate these developments, to run alongside or ahead of them rather than to be dragged along feet forward. This preachment applies as much to procedural as to substantive regulation. What procedural accommodations ought to be made to meet those myriad "personal problem" cases to which Mrs. Maxine Boord Virtue has been calling urgent attention, cases which threaten to transform metropolitan courts into "general rehabilitative clinics"?¹² The danger here is less that of delayed than of perfunctory disposition of cases. What are the implications for procedure in Lord Radcliffe's recent reference to the increasing tyranny of groups over their members in our pluralistic society?¹³ Professor Thomas A. Cowan senses the emergence of new problems in the assertion of rights by outsiders against groups and by groups against outsiders.¹⁴

Movements in society which at present hardly register on the most delicate seismographs may in time overwhelm our procedural forms and call for fundamental reconstruction. At an earlier stage they may make limited claims for special treatment, for the engrafting of special procedures upon our unitary system of adjudication. The great advantages of a single, unified mode of court procedure have been perceived by the German and Anglo-American theorists alike, but it is important to appreciate what is meant by the concept. When our forms of action at law with their differing internal procedures were abolished, when the procedural cleavage between law and equity was obliterated and all court procedure was brought together in a common system, the goal was not absolute procedural uniformity. It would have been silly to enact that a bankruptcy must go forward exactly like an action of slander, it would

12. Virtue, *The Two Faces of Janus: Delay in Metropolitan Trial Courts*, 328 *The Annals* 125, 133 (1960).

13. Radcliffe, *The Law and Its Compass* (Julius Rosenthal Foundation Lectures for 1960).

14. Cowan, *Group Interests*, 44 *Va. L. Rev.* 331 (1958).

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have been at least awkward to require a matrimonial case to be treated exactly like an action on a promissory note. The object was rather that the court process should be single except as significant differences in the nature of the cases called for differentiation in their procedural management, and a burden was cast on those who asserted a need for variations from the accepted general mode. The objection to the old procedural differences among the law categories and between law and equity, as Bowen and Maitland and others well understood, could not be put on the mere fact of these differences but rather on the lack of functional justification for them. This point needs to be recalled lest the rational basis of the unitary procedure be lost to view and the concept become a mere fetish. In both the German and modern American procedures we find a sound resistance to the undue proliferation of special forms. We find also—a point already suggested—judicial accommodation to particular needs through the use of discretion under procedural canons broadly stated. A certain amount of accommodation of this latter sort is probably encouraged in Germany by the regular practice of setting up court chambers to deal exclusively with particular classes of cases—accidents, rent claims, and so on.

For alterations of procedure which the future may invite or compel, Germany will look, as it has traditionally done, to the hard process of legislation, and for internal administration of the courts it will rely, as it has done in the past, on the departmental ministries of justice working with the court presidents who deal in turn with the presiding judges of court chambers. This ministerial oversight contributes, as I have suggested, to the bureaucratic orientation of German judges; we in this country are finding in the professional court administrator or administrative office working under court control an institution more congenial to our conception of judicial independence. Judicial rule-making on the new American style has marked advantages over legislation simpliciter as an instrument for the progressive development of procedure, and especially when it is supported by continuing active study by a body outside the court. These advantages are well known, but I would stress a potentiality of rule-making that has not been sufficiently exploited, and that is its use for frankly experimental purposes. Justice Brennan recently spoke to this point, suggesting in particular that local rules by the Federal District Courts can serve as experimental forerunners of general rules.¹⁵ To be sure, all lawmaking should be thought of as experimental, but procedural rules promulgated by courts lend themselves peculiarly well to experimental technique. Surely it will not do to refuse the trial-and-error method on the ground, which is unhappily correct, that it is often hard to trace effects back to causes in the complex, multi-factored social field. The possibility of significant rule-making by German courts on anything like the American pattern seems quite remote, probably entirely excluded, in part because of Germany's allegiance to legisla-

15. Brennan, J. dissenting in *Miner v. Atlass*, 363 U.S. 641, 652, 662 (1960).

tive codification à la continentale, in part because of the structure of their courts and the status of their judges. At first sight, indeed, judicial rule-making seems to make against our own image of the judge as interpreter, not maker of laws; but the addition of a rule-making function in the adjective field goes down well provided legislative claims to ultimate power are not rudely shaken. In retrospect it seems very clear that the New Jersey Supreme Court went too far in banishing the legislature altogether from the field of procedure.¹⁶ But I am inclined to think that those who now envisage a rule-making power in New York that would stop short of superseding existing statutes do not go far enough. The objection is somewhat mitigated but to my mind not wholly overcome by the fact that the new system would start out by embodying most of the procedure in rules capable of being superseded by later rules. Perhaps the peculiar New York tradition makes it wise for the reformer to tread lightly here. Justice Halpern suggests as much in a recent writing,¹⁷ and I would be content to rely on his perspicacity.

I suggest that the rule-making power supplies us with a powerful instrument, absent in Germany and other civil-law countries, for the continuing betterment of procedure; and to this I want to add that there is a tendency in current American legal thought which should contribute to the same end. This is a tendency to concentrate on what Professor Fuller, with Benthamite ingenuity in word construction, has called "eunomics," "the science, theory or study of good order and workable arrangements,"¹⁸ and hence, I take it, of procedure in the large sense of the word. My revered teacher Morris R. Cohen spoke of "the tendency of all modern scientific and philosophic thought . . . to weaken the distinction between substance and attribute . . . and to emphasize the importance of method, process, or procedure."¹⁹ In the law it is perhaps a feeling of helplessness about major substantive solutions that leads scholars to dwell on adjective structures. We see turbulences and strifes arising in society for which we have no solutions that promise to be durable, and so we try to set up neutral mechanisms by which the contending parties may be brought to adjustments however temporary these may turn out to be. The United Nations has been serving a like purpose on a larger stage. Looking about my own law school, I find a strong involvement in process, in the assessment of the strengths and weaknesses of particular methods of reaching adjustments up and down the line of private and governmental activity. There is a similar concern among lawyers generally.

16. Kaplan & Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of Winberry v. Salisbury*, 65 Harv. L. Rev. 234 (1951); Pound, *Procedure Under Rules of Court in New Jersey*, 66 Harv. L. Rev. 28 (1952); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. of Pa. L. Rev. 1 (1958).

17. Halpern, *Book Review*, 34 St. John's L. Rev. 385 (1960).

18. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. Leg. Ed. 457, 477 (1954).

19. Cohen, *Law and the Social Order* 128 (1933).

IV.

I have spent much of your time putting the German by the side of the American procedural system, but I have expounded no general methodology of systematic comparison—an exercise de rigueur for comparativists. I shall beg off on the ground that I am not an accredited member of the comparative-law fraternity. A sortie by such an amateur as myself into this jurisprudential matter would be out of place at your school, which has nurtured the distinguished comparativists, Professors Lenhoff and Laufer. Let me venture the thought, however, that an eclectic approach mixed with a kind of naive receptivity to the foreign and the strange may serve reasonably well in lieu of a fixed philosophy of comparison. The Germans themselves have been much interested in measuring systems according to standards such as orality, party-presentation, and the like. Such standards have their uses as a check-list for observation. That the standards are themselves redolent of German procedural history does not necessarily deprive them of general utility. I suppose, too, that some sort of "functional" attitude toward comparison is almost inevitable for the legal mind in this quarter of the twentieth century. But functional analysis can be carried out at various levels of discourse. Thus one can postulate initial "notice-giving" to the defendant as a function of procedural systems and inquire about the particular means provided by the several systems to carry out this function. Or one can postulate larger and more elevated functions. Professor Ernst Rabel said: "Every comparison . . . needs a common denominator, a *tertium comparationis*. For me in these fifty years past, this has always been the social purpose of the rules and the service of the concepts to this purpose."²⁰ This formulation by Rabel leaves to choice the level of inquiry, and I imagine that what is ultimately wanted is interpenetration of studies at various levels, always holding in mind, for reasons already sufficiently stated, that rules and devices are to be seen not as detached entities but as organic parts of going systems.

To conclude: we said earlier that the systems we have been examining profess similar aims. Fundamentally the systems seek to promote the use of reason in the process of adjudication. But this purpose does not delimit a single, narrow road to its attainment, for there are a number of plausible ways of going about garnering, presenting, and considering proofs and reasoned arguments so that substantive norms may be cogently applied to the resolution of disputes. Moreover the aim of reasoned decision must be held in balance with a host of other aims including speed and economy. Each system can thus be viewed as a vector of considerations: the considerations are similar but the values assigned to them in the systems differ, the vectors differ. For example, the American system exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge. The

20. Rabel, in *Assn. of Am. Law Schools, Summarized Proc. of Inst. in Teaching of International and Comparative Law* 111 (1948).

German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal. Vigorous counsel will search out the facts and law fully and carefully; the clash between them will bring out the true points at issue; the judge will come to a sounder decision if he has not sought to advise the litigants and been thus obliged to carry successive opposing briefs. So the American system argues. But adversary contention can obscure rather than clarify if left unchecked; it tends toward expense; it makes against equality of opportunity before the tribunal. So the German system retorts. True, the elements of each system have been determined in some measure by historical stresses and accidents, not by deliberate decision based on analysis. But they are still submissible to assessment in terms of postulated aims, and such an exercise is valuable because the systems are capable of some degree of deliberate choice. In the end the *mélange* of rules and habits which together make up a procedural system somehow accords with the larger patterns of the society which the system serves, and it is in this sense that Calamandrei spoke of a procedural system reflecting the society in which it is found as a drop of water reflects the sky.

Comparative study has been urged in the past on the high ground that it was a means to the discovery of a *ius naturale*, a Natural Law, a law corresponding to "an ideal fitness of things," matched to the good life whose shape was itself uniquely fixed by the invariant characteristics of man and his unchangeable predicament in the universe. One can reject this high ground and still find some modest values in the comparative undertaking. Do not men of law customarily accept one rule as against the other, one mode as against the next, by tracing out imaginatively the probable consequences of the alternative courses, then judging, "These consequences we think good, those not good," in the light of purposes felt or perceived. Knowledge of foreign systems can reveal a plurality of possible courses, assist in plotting probable results, and refine understanding of objectives.

I venture to say that the humanistic impulse which has inspired the best comparative work would have engaged the sympathetic interest of Mr. James McCormick Mitchell, in whose name this lecture has been given.