

CIVIL JUSTICE SYSTEMS IN EUROPE AND THE UNITED STATES

HEIN KÖTZ*

I. INTRODUCTION

Allow me first to say what an honor it is to be invited to present Duke's first Herbert L. Bernstein Memorial Lecture. Herbert's death at the Law School a little more than a year ago was a great shock not only to the Duke Law School community but also to the many friends he had in Germany. I knew him for nearly 40 years, and I am very grateful indeed for this opportunity to pay tribute to him and his contribution to the law and legal education.

When Dean Bartlett agreed to the topic of my lecture she must have realised that letting a foreign lawyer touch upon American civil procedure would be a hazardous affair. Not only is a foreign lawyer who ventures into this field bound sooner or later to fall into error, but also he will expect you to forgive him and kindly put him right when he does so. Not only is he apt to rush in where local angels fear to tread, but also courtesy may require you to call his views original and refreshing when they are heretical or bizarre. There is one countervailing argument supporting the choice of my subject, however, and that is that it was very dear to Herbert's heart. He and I discussed it on many occasions, and while we both felt that comparing the machinery of civil justice in the common law and the civil law was a most challenging and interesting undertaking, we also agreed that it was a subject fraught with greater risks of fundamental misunderstanding of foreign law than those which beset the comparative endeavours in substantive law.¹

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* Dean, Bucerius Law School. Professor Kötz delivered the inaugural Herbert L. Bernstein Memorial Lecture on September 10, 2002, at Duke University School of Law. A friend and colleague of Professor Bernstein, Professor Kötz is co-author of KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (3rd ed. transl. TONY WEIR 1998). Before becoming Dean of Bucerius, the first private law school in Germany, Professor Kötz was director of the Max Planck Institute for Foreign and International Private Law in Hamburg, Germany.

1. Herbert L. Bernstein, *Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems*, 21 U. CAL. DAVIS 587 (1988).

Our shared interest in the comparison of civil justice systems goes back to the early 1960s when both Herbert and I were graduate students at the University of Michigan Law School. All graduate students with a European Law background were given an introductory course on American Law. Procedure was an important subject of this course, and adversariness was held up to us as the hallmark of the American procedural system. The introductory course itself followed the adversary model in that we were asked to read Roscoe Pound's celebrated article on the "Causes of Popular Dissatisfaction with the Administration of Justice" with its sharp attack on the excesses of the adversary system.² We were told that Jerome Frank had described the American mode of trials as being based on what he called the "fight theory", a theory which in his view "derives from the origin of trials as substitutes for private out-of-court brawls" and "frequently . . . blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it."³ At the time, however, this had no great impact on us. We were enthralled to watch lawyer-dominated civil and criminal trials at the Ann Arbor Circuit Court on closed-circuit television in a viewing room at the Law School. We also enjoyed the moot court cases with their colourful and dramatic confrontation between partisan student advocates, and any lingering doubts about the attractions of adversariness were dispelled by reading Earl Stanley Gardner, Raymond Chandler and Robert Traver's novel entitled *Anatomy of a Murder*.⁴

For those of us who remained in contact with American law, however, a gradual process of disenchantment set in. Like most readers of Robert Traver's novel we were delighted by the defendant's acquittal on the basis of a successful plea of impaired mental capacity. But the not-guilty verdict was based on facts supplied by the defendant only after his lawyer had impressed upon him what type of fact would constitute that defence. Can it be right to allow or even require a lawyer to arm his client for effective perjury? There were other questions we asked. It is all very well to say that cross-examination is, in the words of John Wigmore, "the greatest legal engine ever invented for the discovery of truth" and that it is a most ef-

2. Roscoe Pound, *Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

3. See Jerome Frank, *Courts on Trial: Myth and Reality*, in AMERICAN JUSTICE 80 – 90 (1949).

4. ROBERT TRAVER, *ANATOMY OF A MURDER* (1958).

fective weapon to test dishonest witnesses and ferret out the truth.⁵ But isn't it a weapon equally lethal to heroes and villains? There is no doubt that all procedural systems aim at an intelligent inquiry into all the practically available evidence in order to ascertain, as near as may be, the truth about the facts. But suppose a business man were to decide whether or not to build a new plant: Would he think of obtaining the needed information by subjecting his informants to the experience of standing as a witness at a common law trial? Is there no more business-like method to unearth the relevant facts?

II. CIVIL PROCEDURE IN GERMANY

It is indeed a routine business meeting an American lawyer will believe he is attending when he is led into a German courtroom.⁶ What is most likely to strike him is the fact that mainly the court conducts the interrogation of witnesses.⁷ It is the court that will ask for the witness's name, age, occupation, and residence.⁸ It is the court that will then invite the witness to narrate, without undue interruption, what he knows about the matter on which he has been called. After the witness has given his story in his or her own words the court will ask questions designed to test, clarify, and amplify it. It is then the turn of counsel for the parties to formulate pertinent questions. But in an ordinary case there is relatively little questioning by counsel for the parties, at least by common law standards. One reason is that the judge will normally have covered the ground. Another reason is that for counsel to examine at length after the court seemingly has exhausted the witness might appear to imply that the court does not know its business, which is a dubious tactic. There is no cross-examination in the sense of the common law, nor is there a full steno-

5. JOHN H. WIGMORE, EVIDENCE § 1387, at 29 (3d ed. 1940).

6. For more detailed information in English on the German civil justice system, see the seminal study by Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958), now over 40 years old but fundamentally accurate. Comparative articles based on this study are Benjamin Kaplan, *Civil Procedure – Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409 (1960); William B. Fisch, *Recent Developments in West German Civil Procedure*, 6 HASTINGS INT'L & COMP. L. REV. 221 (1983); Arthur T. von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609 (1988). See also David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 748–69 (1986).

7. Michael Bohlander, *The German Advantage Revisited: An Inside View of German Civil Procedure in The Nineties*, 13 TUL. EUR. & CIV. L.F. 25, 43 (1998).

8. Kaplan, von Mehren & Schaefer, *supra* note 6, at 1234-35.

graphic transcript of the testimony. Instead, the judge himself pauses from time to time to dictate a summary of what the witness has said so far.⁹ At the close of testimony the clerk will read back the dictated summary in full, and either witness or counsel may suggest improvements in the wording. If the exact phrasing of a particular part of the testimony is believed to be of critical importance, counsel may insist on having it set down verbatim in the minutes.

A similar system is used with respect to expert witnesses. Suppose a case requires an expert's evidence, for example an action for damages brought by a patient against his physician on the ground of the defendant's failure to use ordinary care in his treatment. In Germany, as indeed in most Continental countries, the expert will be selected and appointed by the court after consultation with the parties.¹⁰ It is the court that will conduct his examination, and it is the court that will advance the expert's fees eventually to be borne by the losing party.¹¹ In the common law it is up to the parties, or rather their lawyers, to find suitable experts who will then be examined and cross-examined in the same way as ordinary witnesses. I have served both as a court-appointed expert on foreign law in cases pending before a German court, and as party-selected expert witness on German law in litigation before the High Court in London, and I assure you that there are substantial differences between the two roles. As a court-appointed expert you are an ally and partner of the court. You assist the court to the best of your ability in reaching a correct result, and it is with the court that your duty of loyalty lies. What struck me most in my role as party-selected expert witness in the English cases was not the experience of being examined and cross-examined, but the difficulty to resist the subtle temptation to join your client's team, to take your client's side, to conceal doubts, to overstate the strong and downplay the weak aspects of his case and to dampen any scruples you might have by reminding yourself that the other side will select and instruct another expert witness and that, when the dust has settled, the truth will triumph.

9. John Langbein, *The German Advantage In Civil Procedure*, 52 U. CHI. L. REV. 823, 828 (1985) [hereinafter *German Advantage*].

10. *Id.* at 835-41.

11. For a detailed and accurate description of the process of selecting, instructing and examining experts in Germany, see *id.* Much of what follows on the characteristic features of German civil procedure is based on this brilliant article. See also Bohlander, *supra* note 7, at 41-43.

The examination of witnesses in the Continental style may not be free from certain risks. One might say, for example, that the technique of inviting the witness to tell his story in narrative form and without undue interruption provides an incentive, in the interest of presenting a conclusive, logically coherent, and convincing story, to fill in gaps by half-truths or fiction. There is also a danger that the judge, in acting as chief-examiner of the witnesses, may sooner or later appear to favour one side over the other. By putting questions to the witness, in the words of Lord Denning, he “drops the mantle of the judge, and assumes the robe of an advocate.”¹² In general, however, a competent judge in questioning witnesses knows how to play his cards close to his chest. If he pursued one line of questioning with undue vigour or in some other way revealed his evaluation of the testimony this would at any rate have no influence on a jury as the sole trier of facts because there are no civil juries on the Continent, and not even in the United Kingdom. As to counsel, they may ask follow-up questions as an antidote against unfair or incompetent questioning by the judge.¹³

On the other hand, under the Continental system there is no need, as in common law jurisdictions, to prepare the prospective witness for counsel’s questions during the examination-in-chief and cross-examination.¹⁴ Consequently, the “coaching” or “sandpapering” of witnesses is not a problem. Indeed, German lawyers will generally be reluctant to engage in extensive out-of-court contact with prospective witnesses.¹⁵ A canon of professional ethics promulgated by the German Bar Association in 1973 provided that out-of-court contact with witnesses was advisable only when special circumstances justified it and was at any rate limited to clarifying what the witness would be able to say.¹⁶ This rule was dropped when new provisions

12. *Jones v. National Coal Board*, [1957] 2 Q.B. 55, 63.

13. Bohlander, *supra* note 7, at 43.

14. Langbein, *German Advantage*, *supra* note 9, at 835-37.

15. Kaplan, von Mehren, Schaefer, *supra* note 6, at 1200-01.

16. Section 6, entitled Questioning and Advising of Witnesses, provides as follows:

(1) The lawyer may question persons out of court who might be considered witnesses if this is necessary with a view to the obligation to provide for clarification of facts, advice or representation. (2) The lawyer may inform these persons as regards their rights and duties as well as give advice to them. (3) The lawyer is allowed to establish a record of such questioning and to have the person sign a declaration. Such a record may be used by the lawyer in order to confront the witness with these statements in a judicial or administrative proceeding. However, the lawyer may present the record itself only in exceptional cases to the court or the administrative agency, for example, in those cases where the witness is unable to testify in the pre-trial discovery stage or

on professional ethics were enacted in 1996, probably because there seemed no need for it.¹⁷ After all, it is fairly clear to an attorney that the judge would take a dim view of the reliability of a witness who previously had been closeted for long periods with counsel.

Civil procedure in Germany and in other civil law jurisdictions differs from the American system by making the judge responsible for the selection of expert witnesses, for the examination-in-chief of both fact and expert witnesses, and for creating the record based on those examinations.¹⁸ The judge's conspicuous role in the actual taking of evidence, especially in the taking of witness testimony, has led common lawyers to label Continental civil procedure as "inquisitorial" or "non-adversarial". This is misleading because it conjures up the Spanish Inquisition, Kafka's castle, and bureaucratic omnipotence and has indeed led an English judge to say, in comparing English and Continental procedure, that "our national experience found that justice is more likely to ensue from adversary than from inquisitorial procedures – Inquisition and Star Chamber were decisive, and knowledge of recent totalitarian methods has merely rammed the lesson home."¹⁹ In my view, however, this is not only misleading, but also downright wrong. All arguments generally praising the virtues of the adversarial system of the common law and contrasting them with the vices of the inquisitorial system ascribed to the civil law are misguided and, in Herbert Bernstein's words, "cannot advance, even by an inch, the comparative analysis of German and American civil procedure."²⁰

The truth is that both in the American and Continental civil justice systems, the power to establish the facts on which the judicial decision rests is reserved to the decision-makers, whether the trial judge or jury in the United States, or the court on the Continent.²¹ On the other hand, it is in both systems exclusively for the parties and their lawyers to identify the facts they think will support the claim or defence, to make the appropriate factual allegations, and to nominate

during the proceedings. [. . .] (5) In any event, the appearance of undue influence is to be avoided.

GRUNDSÄTZE DES ANWÄLTlichen STANDESRECHTS, RICHTLINIEN GEMAESS § 177 ABSATZ 2 NR. 2 BUNDESRECHTSANWALTSORDNUNG (BRAO).

17. See new provisions of BRAO available at <http://jurcom5juris.de/bundsrecht/brao/index.html>.

18. Langbein, *German Advantage*, *supra* note 9, at 835-36.

19. D. v. National Society for the Prevention of Cruelty to Children, [1978] A.C. 171, 231.

20. Bernstein, *supra* note 1, at 589-90.

21. von Mehren, *supra* note 6, at 609.

the witnesses and the facts of which they allegedly have knowledge. In the United States, just as on the Continent, the civil courts must work with what they are given, and they must establish the factual basis of their judgments from the materials the parties supply, and no others. Facts not in dispute between the parties are beyond judicial scrutiny, nor can the judge do anything about a fact alleged by one party and not specifically challenged by the opponent. He must take that fact as established and if he believes that the facts presented by the parties are not true he has no power to unearth what he thinks might be the truth by introducing independent evidence. True, this does not apply to criminal procedure. In a criminal case the Continental judge may disregard the defendant's guilty plea or a confession or admission and introduce independent evidence, including witness testimony, to determine what is called the "material truth" (*materielle Wahrheit*). In civil matters, however, the principle of "formal truth" (*formelle Wahrheit*) applies. "Formal truth" is what the court, to the best of its ability, believes to be true having regard to the evidence placed before it by the parties. The court's task is to do, and be seen to be doing, justice between the parties; it is not to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter. Yet provided the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.

It follows that in their own ways both the German and American systems are adversary systems of civil procedure.²² In both systems the lawyers advance partisan positions from first pleadings to final arguments. In both systems the parties and their lawyers investigate and identify in their briefs the facts they think will support their claims and defences. In both systems the court cannot go beyond the parties' factual contentions nor can the court strike out on its own in the search for what it believes might be the real truth.

III. PROCEDURAL CONTRASTS IN COMPARATIVE PERSPECTIVE

To be sure, quite a few features of German civil procedure are in marked contrast to American practises. First there is the judge's

22. Langbein, *German Advantage*, *supra* note 9, at 841-48.

prominent role in the actual taking of witness testimony.²³ This should not be overrated, however, because the judge, even though he serves as the examiner-in-chief of the witnesses, is prohibited from inducing them to testify on facts other than those for which they were named. Another characteristic of German and indeed Continental civil procedure is that no party is allowed to call as many witnesses as he pleases. There is no rule requiring all of plaintiff's witnesses to be heard before the defendant's witnesses, nor is there a compulsion to take proof on all the apparently contested issues at one sitting or to call first the witnesses nominated by the party carrying the burden of proof.

What the parties can do and will do is to nominate witnesses in support of specific factual allegations.²⁴ It is then for the court to make an evidentiary order identifying the witnesses to be heard, describing with some precision the facts on which each witness is to be examined and fixing the order in which they are to be called. In making this evidentiary order the court will consult with the parties who will direct the court's attention to particularly cogent lines of inquiry. However, the final decision rests with the court whose discretion will be guided by a strict standard of relevance as well as by the principle that evidence is to be taken only to the extent and in the order most likely to result in a speedy disposal of the case.

If, for example, witnesses have been nominated for a factual contention, which the judge believes on legal grounds to be immaterial to the party's claim or defence, he will not allow the witness to be called. Nor will he order the examination of a witness in support of a factual allegation, which the judge finds is not really in dispute between the parties or which has not been specifically challenged by the opposition. If the court perceives that there is a matter that is likely to be determinative, it may confine the evidentiary order to that matter and await the results before issuing a further evidentiary order. Suppose that in a seller's action for the price the buyer's defense is, first, that no contract was formed; second, that the goods delivered were defective; and, third, that in any event the seller's claim is barred by the Statute of Limitations. In this situation it is within the judge's discre-

23. *Id.* at 832-35.

24. Ronald J. Allen, Stefan Kock, Kurt Riecherberg & D. Toby Rosen, *The German Advantage in Civil Procedure: A Plea For More Details and Fewer Generalities in Comparative Scholarship*, 32 NW. U. L. REV. 705, 720-21 (1988).

tion to select the defense most likely to lead to a dismissal of the action, and to postpone consideration of the other defences.

In a brilliant, if controversial, article John Langbein characterised the German procedural system as one in which the gathering of the facts was entrusted to, and controlled by, the judge.²⁵ In his view, judicially-dominated fact-gathering is the hallmark of the German system and constitutes the major “German advantage” as compared with the system prevailing in the United States. I am not sure whether it is wholly appropriate to describe the court’s job as that of “gathering the facts”. After all, it is the parties and their lawyers who will investigate the facts, discuss them with their clients, select what will be presented to the court, indicate means of proof, and thus “gather” the factual materials with which the court must work.²⁶ This is why the German system is an adversarial system. However, once the parties have supplied the factual materials and the time has come to investigate the truth of the parties’ allegations, evaluate the evidence, and find the facts on which the decision is to be based, the German judge has fairly strong control over the procedure.²⁷ He may disregard proof offers, which, according to strict criteria of relevance, might safely be overlooked. Nor are there any binding rules on sequence, such as “plaintiff’s case before defendant’s case.” Instead the judge is encouraged to range over the entire case and concentrate the inquiry on those issues most likely to result in an expeditious disposal of the matter. While the court can only call witnesses nominated by the parties, it does exercise discretion as to the order and number of the witnesses and plays a vigorous role in acting as the examiner-in-chief of the witnesses.

John Langbein’s attack on American civil procedure and his praise for the German counterpart have stirred up a lively debate in this country.²⁸ Some critics accept that strengthening the court’s role

25. Langbein, *German Advantage*, *supra* note 9.

26. Allen, Kock, Reichenberg & Rosen, *supra* note 24 at 722-26.

27. *Id.* at 727.

28. See Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987); Allen, Kock, Reichenberg & Rosen, *supra* note 26. See also Langbein’s reply: John Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763 (1988) and the rebuttal: Ronald Allen, *Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988). For a thoughtful critical reaction to Langbein’s article, see John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990). I found this article most helpful for the following discussion, although perhaps not always in a direction that John Reitz would have preferred.

in the evidentiary process would save time and money, reduce the wastefulness and complexity of pre-trial and trial procedure, and cut down on the distortions inherent in the system of partisan preparation and production of witnesses and experts.²⁹ They argue, nevertheless, that such a move would be incompatible with the traditional roles of lawyers and judges in this country and fly in the face of significant and ineradicable features of American legal culture.³⁰ On the one hand, John Langbein has rightly admonished us not “to allow the cry of ‘cultural differences’ to become the universal apologetic that permanently sheathes the status quo against criticism based upon comparative example.”³¹ On the other hand, cultural differences do explain something of why institutional and procedural differences arise in different legal systems and why transplanting legal institutions from one society to another may be more difficult in one case than in another. The important question is what weight to attach to this factor for present purposes. John Langbein’s answer is: “Not much.”³²

But this is surely a point on which reasonable people may differ. The possibility of transplanting legal institutions is indeed one of the most controversial topics of comparative law.³³ It is also a topic much ventilated these days in Europe. We are currently embarking in Europe on a process of unifying the contract law of the Member States.³⁴ Although work on a Uniform European Code of Contract Law has not yet received the official blessing of the European Commission, the academic debate on what is surely the largest current comparative law enterprise in Europe is intense. In this debate, a small but articulate minority holds the view that each of the European nations is the product of a unique legal, political, and social history and that each nation’s social and political values and goals are so

29. Gross, *supra* note 28, at 752-56.

30. Oscar G. Chase, *Legal Process and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1, 7-9 (1997).

31. Langbein, *German Advantage*, *supra* note 9, at 855; *see also* John Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT’L & COMP. L. 41 (1997) [hereinafter *Cultural Chauvinism*].

32. Langbein, *Cultural Chauvinism*, *supra* note 31, at 48-49.

33. *See, e.g.*, ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Alan Watson, *Legal Transplants and Law Reform*, 92 LAW Q. REV. 79 (1976). *See also* the debate between Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) and Eric Stein, *Uses, Misuses – and Nonuses of Comparative Law*, 72 NW. L. REV. 198 (1977).

34. *See* Law Reform Projects, European Contract Law, available at <http://www.jura.uni-freiburg.de/ipr1/reform.html>.

different that the unification of law in Europe, like the merger of the French, English and German languages, is a barren and pointless exercise and indeed a chimera.³⁵

I do not share this view. There is today what Oliver Wendell Holmes might have called a far-reaching free trade in legal ideas in all that relates to economic activity, trade and transport, banking, and insurance. In these fields, the possibility of transplanting legal institutions and indeed of unifying the law should not be ruled out at the start because of supposed cross-cultural differences. However, we are concerned here not with business-related fields of substantive law, but with procedure. There is much to be said for the view that all rules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country's peculiar features of history, social structure, and political consensus and as such are more resistant to transplantation. "Procedural law is tough law", said Otto Kahn-Freund. Since "all that concerns the technique of legal practice is likely to resist change" he concluded that "comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organization and procedure may lead to frustration and may thus be a misuse of the comparative method."³⁶

Must we accept this as the last word on the matter? Another distinguished comparative lawyer and proceduralist, Arthur von Mehren, reached a different conclusion. While not challenging the view that a procedural system's general structure and principal features express society's social and political values and goals he nevertheless said that "very real differences between first-instance procedural arrangements in the United States, on the one hand, and in France and Germany, on the other, derive much less from differences in social or political values or in institutional, sociological, or psychological assumptions than from the institutional fact of the concentrated or discontinuous nature of the trial."³⁷

35. See, e.g., Pierre Legrand, *Book Review*, 58 MOD. L. REV. 262 (1995); Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT. & COMP. L. Q. 52 (1996); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997).

36. Kahn-Freund, *supra* note 33, at 20.

37. Arthur von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, in: 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART, FESTSCHRIFT FÜR HELMUT COING 361, 362 (München 1982).

One salient characteristic of European civil procedure lies indeed in the fact that it is wholly unfamiliar with, and knows nothing of, the idea of a “trial” as a single, temporally continuous presentation in which all materials are made available to the adjudicator. Instead proceedings in a civil action on the Continent may be described as a series of isolated conferences before the judge, some of which may last only a few minutes, in which written communications between the parties are exchanged and discussed, procedural rulings are made, evidence is introduced and testimony taken until the cause is finally ripe for adjudication.³⁸ Procedure in the common law jurisdictions, on the other hand, has been deeply influenced by the institution of the jury.³⁹ Since a jury cannot be convened, dismissed and recalled from time to time over an extended period, a common-law trial must be staged as a concentrated courtroom drama, a continuous show, running steadily, once begun, toward its conclusion. This in turn entails a separate pre-trial process for the parties enabling them not only to gather the evidence that they may need at trial but also to prevent surprise by informing them of the details of all positions the opponent may advance when the controversy is ultimately presented to the court. This solution requires elaborate pre-trial interrogatory and discovery procedures because once the trial commences, there is no opportunity to go back, search for further information, and present it to the court at some later date.⁴⁰

Clearly, elaborate pre-trial probing of the arguments of fact and law on which the other party proposes to rely provides a solution to the surprise problem. However, this solution is not without its cost. First, it is intrinsically duplicative. Witnesses are prepared, examined, and cross-examined during pre-trial, then prepared, examined, and cross-examined again at trial. Second, it tends to be overbroad. Only rarely can a litigator tell at the beginning precisely what issues and what facts will prove important in the end. Since the judge customarily has little contact with pre-trial investigation, he has no opportunity to signal what information he thinks relevant to his decision. As a result, litigators must strain to investigate and analyse everything that could possibly arise at trial. They tend to leave no stone unturned, provided, of course, as is often the case, that they can charge their fees by the stone. Because of their active role in the pre-trial phase,

38. Langbein, *Cultural Chauvinism*, *supra* note 31, at 42-44.

39. Reitz, *supra* note 28, at 996-97.

40. *Id.* at 1001-07.

lawyers typically have a greater understanding of the case than does the judge when the controversy is presented at the trial. It follows that lawyers run the show at trial and that they frame the issues, question the witnesses, and stage and present even uncontroversial facts as if in a drama. Since the judge comes to the trial with little more understanding of the controversy than he can have from the complaint and other documents filed with the court, he is hardly in a position to act as the examiner-in-chief of the witnesses and to confine the scope of the evidentiary process to those avenues of inquiry he thinks are relevant or most likely to resolve the dispute.

It would seem therefore that the institution of the jury is the cause of the strict segmentation of American procedure into pre-trial and trial compartments, and that this segmentation in turn is the cause for the waste and duplication of lawyer-dominated pre-trial discovery procedures. Strengthening the court's control over the evidentiary process would then be practicable only if the United States followed the example of most, if not all, major common law jurisdictions and abolished the civil jury. In England, trial by jury has almost disappeared from civil litigation except where a person's reputation is at stake, for example where he sues for libel,⁴¹ and the civil jury has also withered to insignificance in Canada⁴² and Australia,⁴³ not because of dissatisfaction with its results, but because of the costs and inefficiencies imposed by it on the civil litigation process. Clearly, abandoning the civil jury or restricting its availability would be a most controversial matter in the United States. Not only is the right to trial by jury enshrined in the Seventh Amendment and in comparable state constitutional guarantees. There is also a substantial body of opinion that both the criminal and the civil jury are worthwhile bulwarks against biased, eccentric or incompetent trial judges and enable the public to take an active part in the administration of both civil and criminal justice.⁴⁴

I do not think, however, that the civil jury is the only or even major villain of the piece. True, it is because of the jury that the trial

41. See generally Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 LAW & CONTEMP. PROBS. 7 (Spring 1999).

42. See William A. Bogart, *Guardian of Civil Rights . . . Medieval Relic: The Civil Jury in Canada*, 62 LAW & CONTEMP. PROBS. 305 (Spring 1999).

43. See Michael Tilbury & Harold Luntz, *Punitive Damages in Australian Law*, 17 LOY. L.A. INT'L & COMP. L.J. 769, 775-76 (1995).

44. *Id.* at 996-97.

must be carried out as a single-episode courtroom drama, and it is because of the trial as a concentrated event that pre-trial discovery procedures are needed to handle the surprise problem. But it seems to me that discovery in the form practised today in the United States goes far beyond the mere prevention of courtroom ambush. Rather, discovery allows a party to search and indeed “fish” for information in opponent’s and non-parties’ hands under a very liberal standard of relevancy requiring only that the search be “reasonably calculated to lead to the discovery of admissible evidence.”⁴⁵ It has been said that it is possible and by no means rare in the United States for a plaintiff to *bring* a lawsuit in order to discover whether he might actually have one. Aggressive discovery in the American style is unknown not only in Continental procedure, but also in English procedure as well. Of course, all procedural systems must balance the importance of truth for the fact-finding process against the need to protect areas of business and personal privacy from unreasonable invasion. But not all systems will strike the same balance between the two goals. It is evident that the breadth of American discovery rules come down more heavily on the side of privacy in civil litigation. Judge Rifkind had a point when he said that “[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.”⁴⁶

Nonetheless, I think an argument can be made for American discovery methods despite the excesses to which they are prone. Consider the type of case in which full-dress discovery proceedings will normally take place. In many of those cases the lawsuit is not only a dispute between private individuals about private rights, but also a grievance about the operation of public policy or the vindication of the public interest. In his famous book *Democracy in America*, Alexis de Tocqueville noted that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁴⁷ This observation seems to have lost none of its pertinence today. If a European lawyer looks at the contemporary legal scene in the United States, he is impressed by the extent to which court litigation, rather than legislation and administrative ac-

45. See FED. R. CIV. P. 26(b)(1).

46. Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976), quoted in Langbein, *German Advantage*, *supra* note 9, at 845.

47. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (1945).

tion, is used as a means to cure defects in the structures and practices of important social institutions. Class actions are a good case in point. By allowing plaintiffs to sue for the aggregated damages suffered by many other similarly situated individuals, the class action provides an effective means of vindicating the rights of groups of people who individually would not have the strength to bring their opponents into court. In this sense, class-action plaintiffs may be viewed as private attorneys-general advancing and protecting substantial public interests. The Supreme Court has described treble damages actions under section 4 of the Clayton Act as “a vital means of enforcing the anti-trust policy of the United States”⁴⁸ and it is not the SEC, but the shareholders’ derivative suit, that the Supreme Court regarded as “the chief regulator of corporate management.”⁴⁹ What surprises the European observer about American product liability litigation is not the preconditions for liability, which are just as strict in Europe as in the United States. What he finds indeed astonishing is the stupendous volume of litigation, the size of awards made to successful claimants, and the fact that it is not uncommon for many thousands of claims to be bundled together and dealt with in a single trial. All developed legal systems must ensure the safety of products in the interest of the consumer. It would seem, however, that Americans, with their traditional mistrust of governmental authority, rely not so much on the initiative of administrators or public prosecutors, but rather on private litigation as the chief regulator of corporate action in the product safety field. If this analysis is correct, a strong case can be made for the view that to the extent to which private litigation serves the vindication of a public interest, the parties must be equipped with robust discovery procedures to ferret out the truth, even at the expense of business or personal privacy. Nor would it seem plausible to put the discovery tools in the hands of judges or parajudicial officials, if only because discovery conducted by a judge or magistrate would not be as thorough as discovery conducted by the parties’ lawyers.

Civil litigation as a means of vindicating the public interest is by far less significant in Europe. Class actions for the recovery of damages suffered by hundreds or thousands of persons are unknown on the Continent. Derivative suits by shareholders, product liability cases and actions based on a violation of the antitrust law are not un-

48. *Perma Life Mufflers Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

49. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547-48 (1949).

usual, but have nowhere attained the dimension, vigour and force that would qualify them as significant checks on corporate behaviour.

It is much harder to argue the case for the American civil justice system where it deals with cases in which the lawsuit is merely a dispute between private individuals about private rights, as, for example, in an ordinary personal injury action. True, the vast majority of all civil matters in the United States do not result in a jury trial, and most are resolved by settlement.⁵⁰ In Germany, too, the great majority of personal injury claims are settled rather than resolved by court decision. However, in both systems the parties are bargaining in the shadow of the law, and the law is very different indeed. In the United States due to the cost and number of attorney hours spent on investigating the case and on pretrial motions, discovery, and trial, the economic pressure to settle is intense. Moreover, the outcome of an American jury trial is less predictable than that of a case tried by a German judge. Let me illustrate this by looking at one important area of the law in which the differences are indeed striking: the law relating to the assessment of damages for personal injuries. Legal doctrine in Germany and the United States does not differ greatly in most such cases. Far more significant are differences in the mode of trial. Because these cases are tried by a judge alone in Germany, and damages are assessed by judges, who give full and detailed reasons, the calculation of damages has become much more regularized, systematic and uniform in Germany while the range of awards in similar cases is very much larger in the American system of trial, almost entirely as a result of the use of juries. Accordingly, the probable range of damages is less predictable in the United States than in Germany. Unpredictability leads to uncertainty, and uncertainty increases the importance of good legal representation, which may be easily available to repeat players like insurance companies but raises concerns about access to justice for the poor and procedural equality of litigants with disparate economic resources.

IV. CONCLUSION

In conclusion I would like to emphasize that what is often overlooked in the literature on comparative civil procedure is that different procedural systems may focus on different categories of cases.

50. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

The typical case at which the German system is aimed involves a comparatively small amount of money, raises no major issue of public policy, and is merely a dispute between private parties about private rights. In such cases it obviously makes sense to give the judge a leading role in the examination of witnesses and wider powers over the evidentiary process, thereby reducing considerably the amount of lawyer effort and cost in exchange for a modest increase in effort and activity on the part of the judge. This is where I think the advantages and the strength of the European procedural systems lie. If there is a desire to reform American civil procedure so as to provide effective justice for the “little guy”, either by making changes within the traditional system or by developing alternative methods of dispute resolution, then the Continental experience may well be a worthwhile object of study.