Pleading and Access to Civil Procedure: Historical and Comparative Reflections on *Iqbal*, A Day in Court and a Decision According to Law

James R. Maxeiner*

Table of Contents

 This article is an expanded version of a presentation to the panel *Iqbal and the Role of the Courts*, of the Symposium Reflections on *Iqbal*: Discerning Its Rule, Grappling with Its Implications, held at The Dickinson School of Law of the Pennsylvania State University, March 26, 2010.

Abstract

The Maryland Declaration of Rights proclaims "That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land." America's litigation lawyers know that these fine words do not describe the reality of our system of civil justice. Last year the American College of Trial Lawyers pronounced our system a "captive to cost, delay and gamesmanship" and "in serious need of repair." The *Iqbal* decision is an attempt to deal with one of many failings of our system.

Globalization challenges America to construct a system of civil justice that works. Foreign parties find litigating here a "nightmare." So, too, do our own people, but they do not know alternatives. The Report of the American College of Trial Lawyers reminds us that our foreign friends know alternatives that work well; no wonder that they are disappointed here.

This article is based on a forthcoming book that examines from beginning to end, a lawsuit in three countries: the United States, Germany and Korea. The book shows ways that one foreign legal system minimizes costs and delay and promotes decisions according to justice and right. The draft chapters of the book are available online at http://ssrn.com/author=825054.

This article puts pleading in historical and comparative perspectives. It shows how past and present systems of American pleading have failed while the German system succeeds.

.

I. INTRODUCTION

This article is based on a book that is nearing publication. The book is over two hundred pages. It is a comparative introduction to three systems of civil justice—American, German and Korean—presented through a biography of the same lawsuit in three systems.

In this article, I focus on aspects related to the *Iqbal* case. I have four points:

- The *Iqbal* decision confirms the breakdown of contemporary American civil procedure. We know what civil procedure should do, and we know that our civil procedure is not doing it. Civil procedure should facilitate determining rights according to law. It should help courts and parties apply law to facts accurately, fairly, expeditiously and efficiently. This article reflects on three historic American system failures and reports a foreign success story.
- Pleadings can help courts do what we know courts should do: decide a case on the merits, accurately, fairly, expeditiously and efficiently. Pleadings facilitate a day in court when focused on deciding according to law. Pleadings are, however, only part of the process of determining rights and of applying law to facts. They cannot do it all. Their utility is limited by the interdependent nature of determining law and finding facts to apply law to facts.
- The United States has had three principal systems of civil procedure;[1] all three have failed. The United States has used three principal forms of pleading—common law pleading, fact pleading, and notice pleading; all three have proven inadequate. None has achieved both accuracy and expedition; none has managed both fairness and efficiency.

1. In order to keep this article within bounds, I do not address equity procedure, which complemented legal procedure and which I am considering as part of the common law system. Equity procedure contributed substantially to the Federal Rules of Civil Procedure. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005). I justify this simplification on the ground that equity was intended, in most matters, to complement common law procedure to deal with the exceptional rather than the routine, and that it too did not work well. *See* THEODORE SEDGWICK, JR., A STATEMENT OF FACTS IN RELATION TO THE DELAYS AND ARREARS OF BUSINESS IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK, WITH SOME SUGGESTIONS FOR A CHANGE IN ITS ORGANIZATION (1838); CHARLES DICKENS, BLEAK HOUSE (1852).

Although wildly different in what they have required of pleading, all three systems of civil procedure have shared common flaws: they have expected too much of lawyers and not enough of judges. They have allowed issue deciding to substitute for law applying.

- Since 1877 Germany has had only one system of civil procedure; that system has worked well. It has stood the test of time. Its unchallenged and unchanged basic principle is that parties provide facts and courts apply law. *Da mihi factum, dabo tibi jus*. Parties and courts cooperate. Pleading is only the beginning of that cooperation. Pleading leads directly to a day in court. Pleading directs the court down the path to a decision according to law.

One caveat: pleading is only a part of civil procedure. Indeed, that is part of my thesis. This symposium is about the *Iqbal* decision and about pleading. Here, I largely limit myself to pleading. Space does not allow me to consider other aspects of civil justice systems. In my book, I have attempted to deal with systems as wholes.

II. CIVIL PROCEDURE'S CONSTITUTIONAL COMMITMENTS

The essential purpose of civil procedure is the determination of rights and duties among private parties according to law. Determining the rights and duties of parties resolves their disputes. If there were no civil procedure, private parties might use self-help to realize rights and to resolve disputes. The stronger, rather than the righteous, would prevail.[2]

The basic requirements of civil procedure are well known: accurate determinations of right, reached through fair process, without delay, and freely available to everyone, i.e. accurate, fair, expeditious, and efficient.[3] We state these expectations in our state constitutions in what we call "open courts" clauses. Our Founding Fathers declared them in state declarations of rights that they made coincident with our

2. *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1768; 1st Am. ed., Philadelphia, 1772) ("The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited.").

3. Cf. John Leubsdorf, *The Myth of Civil Procedure Reform*, *in* CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 53, 54-55 (A.A.S. Zuckerman, Sergio Chiarloni & Peter Gottwald eds. 1999) (after discussing fairness and asserting radical disagreement among systems about goals, then states: "[b]ypassing for the moment the debate about goals, we might fix on three fairly trite-criteria for appraising a procedural system: the cost of litigation, the time needed to resolve disputes, and the accuracy with which the system finds the facts and applies the law.").

Declaration of Independence. The Maryland Declaration of Rights of 1776, which with only the slightest change is part of the Maryland Constitution today, proclaims: "That every freeman, for any injury done to him in his person, or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."[4] The Pennsylvania Constitution is similar.[5]

A. "The civil justice system is . . . in serious need of repair"[6]

The *Iqbal* decision is a modest—if ineffectual—attempt to fix a system that is, according to a report of the American College of Trial Lawyers, "in serious need of repair."[7] Here, I won't try to convince you of that. If you are a lawyer, you already know it. If you are client, chances are, you have already experienced it. If you are a student, and you have done a litigation internship, you have at least sensed it. If you are a student and have not done a litigation internship, you may still believe the law school myth that the Federal Rules of Civil Procedure of 1938 fixed everything.[8]

They did not. Make no mistake about it: no competent lawyer would claim that the Federal Rules of Civil Procedure attain their stated goal of "the just, speedy, and inexpensive determination of every action and proceeding."[9] It is doubtful that they do that in the majority of cases. They certainly do not do that if one takes into account all the cases that are not brought because the rules are unsatisfactory. Criticisms are legion and come from both the right and from the left, and from both lawyers in the trenches all the way up to Chief Justices of the United States.[10]

4. Art. 17, *Maryland Declaration of Rights of Nov. 3, 1776, in* THE DECISIVE BLOW IS STRUCK, A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTION CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977). The only material difference in the current constitution acknowledges the end of slavery: "man" substitutes for "freeman."

5. PA. CONST. art. 1 § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.").

6. AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2009) [hereinafter "ACTL REPORT"].

7. *Id*.

8. Leubsdorf, *supra* note 3, at 53.

9. FED. R. CIV. P. 1. A German lawyer might reasonably say this if "every" were qualified by "almost." *See* text at note 101 *infra*.

10. *See, e.g.,* Warren E. Burger, *Speech to the American Bar Association* (February 12, 1984), reprinted at *Annual Report on the State of the Judiciary, The State of Justice*,

American civil procedure does not routinely determine rights accurately, through fair process, and without delay. It is not efficient: its costs are not proportionate to matters in controversy. Civil justice is not available to all. Only exceptionally are lawsuits decided on their merits. Only infrequently do they settle without major consideration being given to process costs.[11]

The *Iqbal* decision is a response to that breakdown. It is an attempt to fix a broken system. Those who criticize the *Iqbal* decision should bear in mind the Court's goal of system reform. Critics should not just call for return to some idyllic past where things worked for a class of cases of interest to them. They should offer ideas that contribute to fixing the system, not for some cases, but for all.

B. Taking Advantage of What has been Done by the Civil Law[12]

My purpose is to bring into consideration foreign ideas that can contribute to fixing the system for all cases. I am encouraged that colleagues at that other Pennsylvania law school, earlier in this very year, called upon American scholars to do just that.[13] With that encouragement, and with knowledge that Penn State, thanks to its former Dean and my long time friend and supporter, Louis Del Duca, is in the forefront of international legal studies, I am confident that I do not need to convince this symposium of the benefits of comparative law.

Just in case, however, a few of you, although committed to international legal studies, are skeptical whether comparative study has something to offer in the field of civil procedure, let me reassure you that there is nothing suspect about measuring our procedure against procedure elsewhere in the world. The authors of our systems of

70 A.B.A.J. 62, 66 (April 1984) ("Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people."); Earl Warren, *Foreword*, AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON COURT CONGESTION, TEN CURES FOR COURT CONGESTION 7 (1959) ("Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States.")

11. Some scholars assert that forcing settlements—no matter what the grounds—are beneficial.

12. The French jurist, Pierre LePaulle, who after expressing "his amazement at the ineffective manner in which justice is administered . . . more like a high church ceremony than a business transaction," asked "Why don't you take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human experience?" *Quoted in* Edson R. Sunderland, *Book Review*, 15 A.B.A.J. 35 (1929).

13. Catherine T. Struve, *Foreword, Procedure as Palimpsest*, 158 U. PA. L. REV. 421, 433-34 (2010); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, *passim* (2010).

procedure and of pleading took account of foreign law. Supreme Court Justice Joseph Story, who wrote the first American text on pleading,[14] and who did more than any other person to make an American law,[15] told the bar: "There is no country on earth which has more to gain than ours by the thorough study of foreign jurisprudence . . . . Let us not vainly imagine that we have unlocked and exhausted all the stores of juridical wisdom and policy."[16] David Dudley Field, author of the Field Code, asked: "Why might we not have comparative law, to place the legal systems of different countries and ages side by side, that the lawyer may profit by the history of the world? He is, perhaps, the only man of science who does not look beyond his own commonwealth, and to whom the history of other countries is as a sealed book."[17]

The drafters of the Federal Rules of Civil Procedure of 1938 and of its pleading provisions were aware of foreign counterparts. Judge Charles E. Clark, principal draftsman, wrote admiringly of European pleading practices: "We tend towards the civil law system; we shall probably not reach it for many generations, if at all."[18] Professor Edson R. Sunderland, mastermind of the pretrial provisions including pleading, reminded us that "[l]itigation is merely a means to an end, like transportation, and the same tests should apply to both. No American objects to the use of the Diesel engine because it is of German origin . . . . In every field of human activity outside of the law men are constantly searching for new and better methods, overcoming the barriers of language and forgetting the prejudices of nationality and race."[19]

This article addresses pleading in only one foreign legal aystem, that of Germany. I have chosen Germany because the German system of civil procedure is among the most influential of all systems of civil

14. JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS SUBSEQUENT TO THE DECLARATION (1805).

15. *See* ROSCOE POUND, THE FORMATIVE ERA IN AMERICAN LAW 140-143 (1938).

16. Joseph Story, *Progress of Jurisprudence, Address at the Suffolk Bar on their Anniversary* (September 4, 1821), *reprinted in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 235 (1852). *See also* James Kent, *An Introductory Lecture to a Course of Law Lectures* 15 (1794) *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 936, 945 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

17. David Dudley Field, *Study and Practice of Law*, 14 U.S. MAG & DEM. REV.(1844), *reprinted in* 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 491 (A.P. Sprague ed., 1884). Both Field and Story were in touch with C.F.A. Mittermaier, a European leader in the study of foreign law of the day. Story wrote an article on American law for Mittermaier's journal on foreign law. *See* Felix Frankfurter, *Forward*, 3 AM. J. COMP. L. 1 (1954). I own a set of law reform tracts from the 1840s that Field presented to Mittermaier.

18. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 543 (1925).

19. Edson R. Sunderland, *Current Legal Literature*, 15 A.B.A. J. 35 (1929).

procedure in the world.[20] It is influential, because it works.[21] It works for a country similar to ours in values and economy. Germany is the most populous and most important Member State of the 27-Member European Union.

C. What of American Exceptionalism?[22]

What of American "exceptionalism" in civil justice? Are our goals so similar? Placed in the best light, American exceptionalism means, with respect to procedure, that American civil procedure attempts things that other systems do not, e.g., it makes new law or it promotes social action.[23] Other contributions to this symposium address how the *Iqbal* decision may undercut those goals of civil procedure.

The goals of American exceptionalism are laudable. Whether civil litigation is the optimal way to achieve those goals is beyond the bounds of this article.[24] That there are limits to systemic reform through litigation is well-recognized.[25]

In any case, we need not address that point here. Even the most enthusiastic adherents of American exceptionalism and of instrumental uses of procedure, however, ought to acknowledge that we should expect American civil procedure, while attempting the exceptional, to accomplish the mundane.

Think of civil procedure as a multifunction machine such as you are accustomed to use with computers. Would you buy a combination scanner/printer to do both functions, if it did only one passably well? No. You expect a multi-function device to do multiple functions well.

20. *See generally*, DAS DEUTSCHE ZIVILPROZEßRECHT UND SEINE AUSSTRAHLUNG AUF ANDERE RECHTSORDNUNGEN (Walther J. Habscheid, ed. 1991).

21. *See* text at note 101 *infra*.

22. On "American Exceptionalism in Federal Civil Pleading," see Dodson, *supra* note 13, at 447-55.

23. In its worst light: our peculiar institution.

24. Some American jurists see litigation as a route to law reform better than legislation. *See* Lawrence M. Friedman, *The Litigation Explosion*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 189 (Michael Grossberg & Christopher Tomlins eds., 2008). Commonly they point to the famous decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (disapproving segregation) as an example of law reform through cases. Yet even that triumph of litigation depended on legislation for realization, *e.g.*, The Civil Rights Act of 1964. *See* Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 440 (1999).

25. *See, e.g.*, Joel Stashenko, *Cost of Suit to Improve Defense of the Indigent Raises Concerns*, N.Y.L.J., Mar. 24, 2010, at 1 (reports on review of a motion to dismiss). Judge Robert S. Smith of the New York Court of Appeals questioned the plaintiff's attorney: "Isn't that a problem with systemic failure questions? What you're really doing . . . by upholding the complaint, you've signed a blank check that someone is going to have to fill in later?"

So, too, should our civil procedure. It should decide mundane cases as well as exceptional ones. It should meet or beat minimum standards for civil procedure generally. We turn to those standards shortly.

III. PLEADING AND ACCESS TO CIVIL PROCEDURE

> In the course of administering justice between litigating parties, there are two successive objects,—to ascertain the subject for decision, and to decide.
>
> *Stephen on Pleading* (1824-1921)[26]

Civil procedure is a process for applying law to facts to resolve disputes. Its goal is facilitating decisions according to law. It is the practical implementation of legal reasoning. Pleadings commence that process. Proceedings continue it. Judgments conclude it.[27]

We expect more of civil procedure than accurate outcomes. We have expectations of the process itself. We expect that process will be fair, expeditious and efficient. While we have not previously discussed it in this article, we also expect that an authorized body will reach those decisions. Pleading can contribute to fulfilling these needs of civil procedure.

---

26. This is the first sentence of the leading work in nineteenth century America on civil procedure, HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS; COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW 1 (Philadelphia, Abraham Small, 1824). The first American edition appeared in the year of the first edition in London, 1824. Before the Civil War, there were six subsequent editions by Francis J. Troubat. After the Civil War there were many more editions by different editors, among them one by that icon of the common law, Samuel Williston, in 1895. Other editions included those by Franklin Fiske Heard (1867), Samuel Tyler (multiple editions from 1871 to 1919), and James DeWitt Andrews (multiple editions 1894-1901). It was epitomized in other books.

Only seven years after the last edition of STEPHEN ON PLEADING appeared in 1921, Judge Charles E. Clark, later principal draftsman of the Federal Rules of Civil Procedure of 1938, published the first edition of his own treatise, *Clark* ON CODE PLEADING. It begins similarly: "Before any dispute can be adjusted or decided it is necessary to ascertain the actual points at issue between the disputants." CHARLES C. CLARK, HANDBOOK OF CODE PLEADING 2 (2nd ed. 1947) (1st ed. 1928). When pleading and practice, as topics of study, were merged into civil procedure, the emphasis was lost, but the goal was not forgotten. Fleming James in the first paragraph of his first chapter on pleading in his 1965 text, *Civil Procedure* reminds us of it. In its current 2001 edition it reads: "The issues of fact and of law must be framed clearly enough so that the tribunal knows what to decide." FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 3.1, at 180 (5th ed. 2001).

27. For a discussion in English of German judgments, see James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 114 PENN STATE L. REV. 469 (2009).

A. The Purposes of Pleading and the Needs of Civil Procedure

Historically, American pleadings have served three principal purposes: (1) establishing jurisdiction of the court to consider the controversy; (2) directing proceedings to material issues that the parties dispute; and (3) bounding the controversy.[28]

A successful system of civil procedure requires that the system accomplish all three of these purposes. It does not require, however, that these purposes be accomplished exclusively, or even partly, by pleading. The American system of common law pleading is an example of a system where pleading was intended to accomplish all three purposes. The contemporary system of notice pleading, on the other hand, principally uses pleading to establish jurisdiction; it makes little use of pleadings to direct or bound proceedings. The proposal of the American College of Trial Lawyers to return to fact pleading would restore directing and bounding to pleading.[29] In this article we leave establishing jurisdiction to one side.

Directing proceedings to material issues in dispute was the *raison d'être* of common law pleading. Common law pleading did not merely direct proceedings to material issues in dispute: through pleading the lawyers defined a *single* issue to determine the dispute between their clients. *Stephen on Pleading,* the most popular text on civil procedure in America throughout the nineteenth century, stated pleading's role clearly: "In the course of administering justice between litigating parties, there are two successive objects,—to ascertain the subject for decision, and to decide."[30] At one and the same time, the court decided an issue and applied the law. Of course, the parties' lawyers, by defining the issue, had already done most of the work in applying law to fact.

Deciding what to decide is essential to accurate decisions according to law; deciding what not to consider, *i.e.*, bounding the controversy, is essential to fair, expeditious and efficient decisions. Going off point not only delays final decisions of right, it makes those decisions more costly. Setting bounds to the controversy conserves party resources. Setting

28. *Cf.* Fleming James, Jr., *The Objective and Function of the Complaint: Common Law—Codes—Federal Rules*, 14 VAND. L. REV. 899 (1961); FLEMING JAMES, JR., CIVIL PROCEDURE § 2.2 (1965).

29. ACTL REPORT, *supra* note 6, at 5 ("*The Purpose of Pleadings: Pleadings should notify the opposing party and the court of the factual and legal basis of the pleader's claims or defenses in order to define the issues of fact and law to be adjudicated. They should give the opposing party and the court sufficient information to determine whether the claim or defense is sufficient in law to merit continued litigation. Pleadings should set practical limits on the scope of discovery and trial and should give the court sufficient information to control and supervise the progress of the case to trial or other resolution*.") (emphasis in original).

30. STEPHEN, *supra* note 26.

bounds to the controversy protects parties from surprise. Parties need to prepare their cases only on matters before the court.

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

B. What Law Applying Requires of Civil Procedure

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

Substantive law, as distinguished from procedural law, determines rights and duties abstractly. Civil procedure translates those abstract statements of rights and duties into determinations of rights and duties in individual cases. Its method is legal reasoning. Some form of legal reasoning is universal among modern legal systems.[31]

31. *Accord* FREDERICK SCHAUER, THINKING LIKE A LAWYER, A NEW INTRODUCTION TO LEGAL REASONING 1 (2009). *See, e.g.*, KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING (1996); KARL ENGISCH, EINFÜHRUNG IN DAS JURISTISCHE DENKEN (9th ed. 1997). Dean Vandevelde provides a concise definition of legal reasoning in the United States:

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

KENNETH J. VANDEVELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 2 (1996). Dean Vandevelde's formulation is not the only one found in the United States. Other formulations emphasize legal argument more and law application less. *See, e.g.*, WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT (2002). But Dean Vandevelde's formulation is within the American mainstream. For an English translation of a leading German text, see REINHOLD ZIPPELIUS, INTRODUCTION TO GERMAN LEGAL METHODS (2008).

Legal reasoning relies on syllogisms for application of law.[32] The classic syllogism consists of a major premise, a minor premise and a conclusion. A famous example is: "All men are mortal; Socrates is a man; therefore, Socrates is mortal."[33]

Typically a legal rule consists of more than one element. Each element may itself require application of other rules to determine if the prerequisite is satisfied. Only if all elements are present in a particular case, does the rule apply. American procedure generally has the parties decide which rules apply and to define which elements are in dispute; it has courts only resolve those issues the parties present to them.

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

C. The Limits of Pleading—The Interdependency of Law and Fact

Applying law to facts requires determining law and finding facts. Only then can law be applied to facts to decide cases correctly.

Determining applicable rules and finding material facts are *interdependent* inquiries: until one knows which rules are applicable, one cannot know which facts are material. Until one knows the facts, one cannot know which rules are applicable. Settle the applicable rules too soon, and facts may be overlooked which would change results were other rules applied. Fail to settle the applicable rules soon enough and the process may detour to find facts that are not material under the rules actually applied. This process of going back and forth was identified in

32. VANDEVELDE, *supra* note 31, at 19-20, 67-70.

33. A legal rule typically states that whenever a generally described prerequisite (P) exists, a certain consequence (C) applies. The rule thus takes the form of a syllogism: whenever the rule's prerequisite (P) is realized in a factual situation (F), then the consequence (C) applies. This is the major premise. The minor premise is that this factual situation (F) fulfills the prerequisite (P), that is, F is a case of P. The conclusion then logically follows that for the factual situation F, consequence C applies. Schematically:

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

There is nothing mystical about syllogistic reasoning. Justice Antonin Scalia of the United States Supreme Court and his co-author rhetorician Bryan A. Garner wryly observe that even though we may have never studied logic, all of us use syllogistic reasoning. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 41 (2008).

the first part of the twentieth century, but to this day is only occasionally noted.[34]

Directing process to the material points in dispute and bounding process from going off on unproductive paths are benefits that pleading can deliver. While essential to efficient process, directing and binding procedure are necessarily tentative if procedure is to achieve correct decisions according to law through fair process. It is a truism of lawsuits that no one can predict with certainty what the process will turn up in the way of facts and legal issues. An issue that may not have been apparent at the outset may become central to decision.[35]

The Final Report of the American College of Trial Lawyers recognizes that "it is not always possible to understand complex fact situations in detail at an early stage . . . ."[36] It therefore proposes development of a new summary procedure to deal with issues piecemeal without triggering an automatic right to discovery or trial.[37]

D. Iqbal *and the Limits of Pleading*

The *Iqbal* majority opinion holds that under the Federal Rules of Civil Procedure plaintiffs need to allege in their complaints facts that *plausibly* fulfill the requirements of specific causes of action. Some critics charge that the Court has restored fact pleading without proper

34. *See* JESSE FRANKLIN BRUMBAUGH, LEGAL REASONING AND BRIEFING: LOGIC APPLIED TO THE PREPARATION, TRIAL AND APPEAL OF CASES, WITH ILLUSTRATIVE BRIEFS AND FORMS 364-367 (1917); THOMAS A. MANUET, PRETRIAL 21 (7th ed. 2008) ("This process, going back and forth between investigating the facts and researching the law, is ongoing and is how you will develop your 'theory of the case' . . . ."); OSKAR HARTWIEG & H.A. HESSE, DIE ENTSCHEIDUNG IM ZIVILPROZEß: EIN STUDIENBUCH ÜBER METHODE, RECHTSGEFÜHL UND ROUTINE IN GUTACHTEN UND URTEIL 78-79 (1987) (*Die Lehre vom Pendelblick*); Dieter Stauder with David Llewellyn, *Oskar Hartwieg's Thoughts on the English Legal System, in* INTELLECTUAL PROPERTY IN THE NEW MILLENNIUM: ARTICLES IN HONOUR OF WILLIAM R. CORNISH 47, 51 (D. Vaver and L. Bently 2004); HERBERT SCHÖPF, DIE WECHSELBEZIEHUNG ZWISCHEN SACHVERHALT UND NORMENORDNUNG BEI DER RECHTSANWENDUNG (Diss. Erlangen under Reinhold Zippelius, 1971). Arthur T. von Mehren conceived of this problem in terms of concentration and surprise at trial. *See* Arthur T. von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, 2 EUROPÄISCHES RECHTSDENKENS IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING ZUM 70. GEBURTSTAG 361 *et seq.* (Norbert Horn ed., 1982), relevant parts substantially reproduced in ARTHUR T. VON MEHREN, & PETER L. MURRAY, LAW IN THE UNITED STATES (2nd ed., 2007).

35. *See* Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 114 PENN ST. L. REV. 1191 (2010).

36. ACTL REPORT, *supra* note 6, at 6.

37. *Id.* One of the principal points relied upon to challenge fact pleading by advocates of the Federal Rules was that one could not distinguish between law and fact.

procedures of amendment of the Rules.[38] Others in this Symposium address that issue.[39]

Many scholars have criticized the *Iqbal* decision and its predecessor *Twombly*. Some complain that these decisions deny litigants access to liberal discovery.[40] Some believe that the Court's concern with burdensome discovery is misplaced. Others believe that it prematurely cuts off litigation. They draw parallels to a trilogy of summary judgment decisions from the 1980s (known as the *Celotex* Trilogy)[41] which eased standards for summary judgment. Many feared that these decisions permit courts to decide cases too soon and thereby deny parties their right to jury trial. The parallel is well taken. Common to both is the idea that courts are deciding cases before they are ready for decision on their merits.

Iqbal, *Twombly*, and the Celotex trilogy are attempts to reconcile needs for accuracy and fairness on the one hand, with needs for efficient and free access on the other. Accuracy and fairness demand that courts consider all material issues in dispute between parties; efficient and free access require that the costs of proceedings be proportionate to the matter in controversy.

There is no reason to believe that today's attempts to overcome the problem of the interdependency of law and fact will succeed where past attempts have failed.

IV. THREE AMERICAN SYSTEM FAILURES

All expected too much of lawyers and too little of judges; all relied on courts to decide issues and left lawyers to apply law.

Although the three American systems of civil procedure have had different forms of pleading, all have given lawyers the lead roles in applying law. Lawyers choose which law applies and determine which elements are required for application. They decide whether facts that fulfill those elements are present. Only when lawyers cannot agree on law, fact or application of law to facts, are they to turn to the court. They

38. Some critics charge that the Court has restored fact pleading without proper procedures of amendment of the Rules. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 883-886 (2010).

39. See, e.g., Campbell, *supra* note 35, at 1191.

40. *See* Edward A. Hartnett, *The Changing Shape of Federal Civil Pretrial Practice: Taming* Twombly, *even after* Iqbal, 158 U. PA. L. REV. 473, 474 (2010).

41. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

are to present to the court a single issue (in common law pleading) or multiple issues (in fact and notice pleading) for the court to decide.

Courts consider only the legal claims that the parties present.[42] In common law pleading they could not consider other legal claims; they were bound by the cause of action chosen. In fact pleading and notice pleading, courts cannot easily raise other legal claims. They are supposed to be passive. It is up to the lawyers to identify and dispute issues that arise in applying law to facts. Courts need not concern themselves with whether all elements of a claim are proven so long as the unproven elements are not disputed. If a needed element is disputed and is not shown, they may dismiss the case as unproven without alerting the party.

The three American systems of civil procedure have varied when they have required this issue definition to take place. In common law pleading, it was the goal of the pleading itself. In fact pleading under the codes, issue definition was intended to be subsequent to pleading and before trial,[43] but many judges pushed parties to force issue definition in pleading.[44] In notice pleading as contemplated when originally adopted in 1938 in the Federal Rules, issue definition was to occur in the pretrial phase.[45]

A. Common Law Pleading

Common law pleading required that parties agree to put a single point in issue, of law or of fact, to determine their controversy. The basis of their agreement was the "form of action." The plaintiff had the choice of the form of action. That choice forever determined the subsequent course of the lawsuit. It determined the law that governed the dispute. That law was contained in the form, which set forth the facts that plaintiff had to allege and prove. The form of action further determined the procedures that the court would follow in deciding the case and the remedy that the court could award. Defendant could respond substantively in three basic ways: accept the factual assertions and contest one point where the assertions did not fulfill a specific legal requirement, accept the law asserted and contest the truth of one fact material to application of that law, or accept the law and the truth of the

42. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 168-69 (2007) (Thomas, J., concurring) (upholding partial birth abortion ban although noting validity under commerce clause not raised).

43. GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 193 (2nd ed. 1994).

44. *Cf.* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1753 (1998).

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

facts, but assert a new ground why the court should not find defendant liable ("confession and avoidance"). No matter which course the parties chose, in classic common law pleading they could present only one issue to the court for decision.

Common law pleading made proceedings efficient. There was only one issue. If it was an issue of law, no trial was needed. If it was an issue of fact, trial was a limited affair. The jury did not have to apply law to fact. That was predetermined by the form the plaintiff chose. Thus common law pleading made jury trial possible.[46]

While common law pleading may have been efficient in producing results, it was deficient in deciding cases accurately and justly on the merits. It could not well determine law, find facts or apply law to facts. The substantive law of the forms of action was hopelessly out-of-date. Long before common law pleading was introduced to America, the development of forms of action was ended. There was a limited and unchanging selection. Those that presented themselves in the United States at the end of the eighteenth century were not suitable for the vast commercial developments of the nineteenth. The inadequacy of law led to inadequacy of fact finding. Parties had to fit contemporary facts into obsolete forms. They did this by making fictitious assertions. To do justice between the parties, and to preserve business for themselves, the courts allowed use of fictions.

Even had there been a wider choice of forms to select from, common law pleading could not deal adequately with applying law to fact and the problem of the interdependency of law and fact. By forcing the parties to make one point determinative at an early stage, common law pleading condemned cases not to be decided on the merits, but to be determined on a point that might not be material to their claims of right. The plaintiff might choose one form of action thinking that it was suitable for his or her legal claim, only to discover facts that precluded that claim. Although those facts might support another claim, it was too late. The parties had already defined the issue that would determine the decision.

Attempts were made to ameliorate the harshest effects of common law pleading. In some cases defendants were allowed to plead what was known as "the general issue." In these cases, they were not required to make one point determinative, but could require the plaintiff to prove all elements of his or her case. This approach, however, magnified problems that could already appear where the factual issue was complicated and created new ones in jury instruction. Where the fact to

46. James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 559 (2006).

be proved was not clear, parties might present evidence at trial of matters not foreshadowed by the pleadings, which the other party would not be prepared to meet. What variance between pleading and proof at trial should a party be permitted? And if a party is permitted to plead the general issue, which facts must the jury then find?

By 1847 the inadequacy of common law pleading was plain. Fifty lawyers in New York City led by David Dudley Field appealed to the New York State Legislature "that a radical reform of legal procedure in all its departments is demanded by the interests of justice and by the voice of the people."[47] According to a less charitable critic, common law pleading had become "the fruitful mother of the rankest injustice."[48]

B. Fact Pleading (Also Known as Code Pleading)

In 1848 the New York legislature adopted what came to be known as the Field Code of Civil Procedure. The new code abolished the forms of action and "[a]ll the forms of pleading heretofore existing." It provided that henceforth there would be "but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action."[49] It required that the complaint contain "[a] statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."[50] Hence pleading under the code came to be known as fact pleading as well as code pleading. For the defendant's response, the Field Code created the "answer." It required that the answer contain "[i]n respect to each allegation of the complaint controverted by the defendant, a specific denial thereof, or of any knowledge thereof sufficient to form a belief"[51] as well as "any new matter constituting a defence," which defense it required to be stated in language such as required of the complaint.[52] The Field Code expressly

47. *Memorial of the Members of the Bar in the City of New-York, Relative to Legal Reform 1*, Doc. No. 48, 2 N.Y. ASSEMBLY DOC. (Feb. 9, 1847), *reprinted in* 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 261 (1884).

48. Robert William Wells, *Observations on the Pleadings and Practice of the Courts of Justice of Missouri: and, A Radical Change Therein Recommended*, *in* A LETTER ADDRESSED TO THE "METROPOLITAN" (1847), *substantially reprinted in Law Reform*, 21 U.S. MAG. & DEM. REV. 477, 482, 486 (1847).

49. An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497 [hereinafter NEW YORK CODE], at § 62, page 510.

50. NEW YORK CODE at § 120(2).

51. NEW YORK CODE at § 128(1).

52. NEW YORK CODE at § 128(2).

allowed the defendant to "set forth in his answer, as many grounds of defense as he shall have."[53]

In outward form, Field's code eliminated the danger of premature choice. No longer did plaintiffs have to choose a specific form of action. No longer did defendants have to pick one defense. Yet Field's code was no panacea. It produced problems of its own that are familiar to us to this day. It left determination of the issues in the hands of the lawyers; it made no satisfactory provision for their narrowing. According to the United States Supreme Court, in a case where there were a dozen causes of action, code pleading worked to "destroy the certainty and simplicity of all pleadings and introduce on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice."[54] Proliferation of issues not only multiplied the number of issues that courts had to address but presented many opportunities for surprises at trial, when litigants raised facts that their adversaries had not anticipated or created legal issues that they had not expected.

To reach a manageable number of issues, Field placed hope in truth and party goodwill. Common law pleading had compelled parties to rely on fictions and fictitious claims and in effect encouraged them to make untrue averments. Field's code demanded the actual facts.[55] To discourage unfounded claims and defenses, the parties were to verify on oath the truth of their allegations.[56] According to the New York Commissioners, the parties would be "better acquainted beforehand with the really disputable points, and therefore more able to prepare for and point out to the Court and the jury those which are, and those which are not, disputed."[57]

Code reformers did not rely on party goodwill alone. Advocates of code pleading, foremost among them Field himself, were also advocates of codification of substantive law. Had they been successful in codifying

53. NEW YORK CODE at § 129.

54. McFaul v. Ramsey, 61 U.S. 523, 525 (1858).

55. *E.g.*, NEW YORK CODE § 65, at 511 (abolishing "feigned issues"); *id.* § 91, at 515, (requiring that actions be prosecuted in the name of the real party in interest).

56. REPORT OF THE COMMISSIONERS APPOINTED TO REVISE AND REFORM THE PROCEEDINGS IN THE COURT OF JUSTICE IN THIS COMMONWEALTH (1851), *reprinted in* 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITING 160 (Benjamin R. Curtis, Jr. ed., 1879); NEW YORK CODE § 133, at 523.

57. FIRST REPORT OF THE PRACTICE COMMISSION (Feb. 29, 1848), *extensively excerpted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 262, 274 (A.P. Sprague ed., 1884); *see* Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 146 (1999) ("Field believed that the verification of pleadings would lead to agreement on the truth of facts . . . .").

substantive law, the number of possible causes of action would have been circumscribed and their content better defined. But Field's other codes failed of adoption. The proposed Civil Code three times passed the State Assembly only to be vetoed by the Governor twice and to fail in the Senate once. In the absence of codification, pleading remained difficult.[58]

Lacking causes of action limited and defined in codes of substantive law, code pleading failed to bring litigation down to disputing a few precise points. Courts and lawyers responded in different ways, but both sought simplification of the case. Both of their approaches, however, worked against accurate decisions according to law.

Courts sought to engraft on code pleading the old forms of action. That fit their mindset well. According to the Supreme Court, "[t]he distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts."[59] For their grafting they could rely on the requirement that the complaint include a "statement of facts constituting the cause of action."[60] What constituted a cause of action became the focus of many legal battles at the turn of the twentieth century.[61] Causes of action in complaints were scrutinized for sufficiency; variances in proof at trial were grounds for overturning verdicts.[62] In effect, courts required lawyers to plead not just the facts of their dispute, but their legal consequences. In this view, Frederick William Maitland's famous statement of English law rings true of American as well: "The forms of action we have buried, but they still rule us from their graves."[63]

Lawyers—when they weren't trying to trip up adversaries for not stating a cause of action—tried to avoid the problem of syllogistic law

58. *Cf.* G.T. Bispham, *Law in America, 1776-1876*, 122 N. AM. REV. 154, 185-86 (1876).

> Whether the results of this simplification of procedure have been altogether desirable, may possibly be doubted . . . . [I]n the method of presenting a case for decision by mere statement and answer, there is lost that precise and clear definition of the exact points in dispute which is found when the technical forms of the pleading of the common law are skillfully and carefully applied . . . . [I]t is plain that at some stage or other of a judicial proceeding, immaterial and admitted facts must be eliminated, otherwise the investigation would become hopelessly prolonged and confused . . . .

Id.

59. McFaul v. Ramsey, 61 U.S. 523, 525 (1857).

60. NEW YORK CODE § 120(2), at 521.

61. *See* Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 828 (1924); Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354 (1934)

62. Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006).

63. FREDERICK WILLIAM MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker eds., 1971)

application by turning trials into a contest between two "theories of the case." This approach basically throws syllogisms to the wind and has judge or jury choose between two competing narratives.[64]

In the view of some observers, the cure turned out to be as bad as the disease.[65] By the early twentieth century, at one extreme, code pleading was little better than common law pleading: parties were subjected to premature issue narrowing. At the other extreme, the number of issues was boundless, unknowable, and productive of surprise at trial. In the middle was the theory of the case, which denied applying law to facts.

In 1906 Roscoe Pound, not yet Dean of Harvard Law School, gave law reform a big boost when he addressed the annual meeting of the American Bar Association about the: *The Causes of Popular Dissatisfaction with the Administration of Justice*.[66] That address has been much followed and commemorated. In 1913 Thomas W. Shelton, who for much of his professional life led the fight for what became the Federal Rules of Civil Procedure, charged that the courts had become "the fencing schools of highly-trained pleaders" where justice was subordinated to technicality."[67] In 1936, three decades after Pound presented his address, there was little controversy when the secretary of the Federal Rules drafting committee presented the committee draft with the seemingly provocative question: "What is the matter with present methods of the trial of cases? Every one, I think, will agree that our methods of procedure have three major faults. First, delay; second, expense; third, uncertainty."[68] By then, the bar knew it was true.[69]

64. *See* Edward D'Arcy, *"Theory of the Case"—Wrecker of Law*, 70 CENT. L.J. 294, 295 (1910).

65. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003).

66. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Speech to the American Bar Association (Aug. 26, 1906), *reprinted in* 29 ANNU. REP. A.B.A. 395 (1906). The talk has been the subject of numerous follow-up conferences. *See, e.g.*, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979); *Centennial Reflections on Roscoe Pound's The Causes of Popular Dissatisfaction With The Administration of Justice*, 48 S. TEX. L. REV. 849 (2007); *Conference Of Chief Justices And Conference Of State Court Administrators Annual Meeting July 29-August 2, 2006 Indianapolis, Indiana: The Hundred-Year Run of Roscoe Pound*, 82 IND. L.J. 1153 (2007); *Symposium Issue: A Century Later: Answering Roscoe Pound's Call for Change in the Administration of Justice*, 30 HAMLINE L. REV. 489 (2007). *See also* James R. Maxeiner, *1992: High Time For American Lawyers to Learn From Europe, or Roscoe Pound's 1906 Address Revisited*, 15 FORDHAM INT'L L.J. 1 (1991); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006).

67. Thomas W. Shelton, *The Reform of Judicial Procedure*, 1 VA. L. REV. 89, 90 (1913).

68. William D. Mitchell, *The New Federal Rules of Civil Procedure,* 61 ANNU. REP. A.B.A. 423, 437 (1936).

C. Notice Pleading: The Federal Rules of Civil Procedure of 1938

The Federal Rules made a major change in pleading: they essentially eliminated a role for it in formulating issues.[70] Judge Charles E. Clark, the principal drafter of the Federal Rules, believed that the procedure codes had successfully abolished the forms of action and the separation of law and equity, but had failed in their attempt to substitute fact pleading for common law issue pleading.[71] The reformers had not appreciated, he argued, that the difference between law and fact is one of degree.[72] A pleader often could not know his or her legal theory before the evidence was produced and, if he or she did, would not want to give the theory away.[73] The code concept of cause of action, Clark claimed, had a "long, inglorious, and destructive career," and had "done more damage than ever the forms of action could possibly do."[74] Clark advocated that one should "expect less" of pleading.[75] He proposed abandoning both issue pleading of the common law and fact pleading of the codes and advocated adoption of "notice pleading."

As a result, the Federal Rules "massively deemphasize[ ]" the role of pleadings.[76] In a notice pleading system, the pleading tells the other side the general subject of the controversy and little more; in fact, the Federal Rules require only "a short and plain statement of the claim."[77] The official forms make explicit how little is required. For example, a complaint for goods sold and delivered is sufficient if it states "Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936."[78] Unlike common law pleading, the Federal Rules do not require that parties choose a legal form of action.[79] Unlike code pleading, they do

69. When Professor Rachlinski asks why reform *now*, one might answer that a generation of lawyers must first pass from the scene as was the case in the time between Pound's 1906 address and the Federal Rules' implementation in 1938. For the generation before Pound, fact pleading was the reform. *See* Leubsdorf , *supra* note 3 (noting that the myth of past reform impedes present reform and sarcastically dating the failure of the federal Rules to a 1975 revelation).

70. *Cf*., Marcus, *supra* note 44, at 1749.

71. Clark, *History*, *supra* note 18, at 544.

72. *Id*. at 533-34.

73. Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260 (1926).

74. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 312 (1938).

75. *See* Clark, *History, supra* note 18, at 542.

76. Fairman, *supra* note 65, at 990.

77. FED. R. CIV. P. 8(a)(2).

78. FED. R. CIV. P. Form 5.

79. Fairman, *supra* note 65, at 1001.

not require that parties plead all the elements of a cause of action.[80] The Federal Rules do not normally require that parties even state the facts that support the claims they make.[81]

Just as their code reformer predecessors had, the drafters of the Federal Rules put a great deal of faith in the power of truth and goodwill. According to Professor Edson R. Sunderland, drafter of the pretrial procedures of the Federal Rules, the great weakness of pleading for developing issues of fact for trial was its "total lack of any machinery for testing the factual basis for the pleaders' allegations and denials."[82] Discovery is a means for the parties, prior to trial, to learn the substance of each other's cases. The theory is that once both sides know the full truth, they can either settle the case themselves, or can at least agree on which issues are material to decision. Should the parties be unwilling to agree, where there is no reasonable dispute about the facts, the court may determine those claims upon motion for summary judgment. According to the Supreme Court, the system "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[83]

While discovery is the most used device to accomplish issue narrowing, Clark and Sunderland provided other devices for defining issues some of which were innovations of the time: they regularized judicial review of complaints, pretrial conferences and summary judgments. All of these devices anticipate greater activity on the part of judges, which Sutherland welcomed. He wrote of pretrial conferences that "there is no reason the court should not itself take a hand in the investigation, supplementing the proceedings and the discovery which the parties have obtained, by direct interrogation of counsel or parties in the presence of each other, with a view to eliminating issues through admissions or through the withdrawal of allegations or denials, or by obtaining the consent of the parties to the limitation or simplification of

80. *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 515 (2002); Bennett v. Schmit, 153 F.3d 516, 518 (7th Cir. 1998); Fairman, *supra* note 65, at 1001 n.95 (citing Strong v. David, 297 F.3d 646, 649 (7th Cir. 2002)).

81. Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981, 1988 (2004) ("The common law system almost automatically accomplished the diagnosis: the formal procedures integrated law and fact."). *See* FED. R. CIV. P. 9(b) (stating that pleading requirements for fraud or mistake are higher than mere notice: these claims must be stated with "particularity"). *But see* Fairman, *supra* note 65, at 1064 (questioning, but then essentially affirming the predominance of notice pleading).

82. *Id.*

83. *Swierkiewicz*, 534 U.S. at 512.

proof."[84] Yet none of these devices is mandatory. Sunderland, when asked at a conference why he had not made one such institution mandatory, replied to laughter, that the courts would do as they wanted in any case.[85]

While Clark and Sunderland provided numerous tools to facilitate framing issues, including discovery, pretrial conferences, stipulations, and summary judgment, for seventy years those tools have failed to work. They have failed to work because they are largely in the hands of lawyers. What lawyers cannot agree upon, judges are loath to decide, for fear that they will foreclose parties from proving law or fact that only later is seen to be determinative.

Should we expect lawyers to agree to simplify cases? In many instances, simplifying and expediting decisions is not in "the interests of both lawyers' clients." One party may wish to delay judgment. Even where both parties seek expedition, lawyer agreement is contrary to the mentalité of American advocacy. Professor John S. Beckerman sees "conflicts between discovery's cooperative ideal and the rest of adversarial litigation's aggressively partisan ethic" as a fatal flaw of discovery.[86] Elliott Wilcox, an accomplished litigator strives through stipulations to narrow issues for trial, but despairs that it is not routine in a world where trial lawyers are trained "to think that every issue should be contested, every witness attacked, and every opponent destroyed."[87]

There is irony that one tool provided by the drafters to facilitate determining issues and facilitating trials, namely discovery, has been used, through lawyer control, to extend cases well beyond finding facts to fulfill elements of applicable laws. While many today find those wider uses valuable, and even characteristic of American law, there is no indication that the drafters of the Federal Rules anticipated such uses or the runaway discovery that we know today. Their expectation of pleading seems to have been that of one contemporary commentator who

84. Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 218-219 (1937). Parallels to the German hearing seem apparent. *See* text *infra* at notes 100-101.

85. RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES CLEVELAND, OHIO JULY 21, 22, 23, 1938 (William W. Dawson ed., 1938).

86. John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 585 (2000).

87. Elliott Wilcox, *Sifting the Issues with Stipulations*, TRIAL: J. AM. ASS'N FOR JUSTICE, vol. 44, p. 39 (July 2008) ("Why would two experienced attorneys, who were hoping for completely opposite outcomes, agree to stipulate to much? Because we know the strengths and weaknesses of our cases, we were able to identify the true issues that we needed to focus on. In short, we knew what mattered and, more important, what didn't matter.").

thought that that counsel would make a "conscious effort to frame . . . allegations in accordance with a sound theory of recovery, based upon the facts which he expects later to establish . . . . [T]he complaint will give evidence of being grounded upon legal principles capable of supporting some form of judicial remedy or redress."[88] That same commentator anticipated the *Iqbal* decision:

> Recovery in the end must rest upon some sound theory; judges are only displaying good common sense when they look for it at the outset; nor, in the stress of present-day crowded dockets, can they be blamed for lack of sympathy for a point of view which would label as good legal form a manner of pleading calculated to postpone the determination of fundamental issues until a mass of evidence, adduced without reference to any previously indicated theory, has been pitchforked into the judicial arena.[89]

Iqbal demonstrates the problem, but does not, as other contributors show, provide answers. The German system suggests solutions.

V. ONE CIVIL LAW SUCCESS STORY: PARTY-COURT COOPERATION

Pleading prepares the way to a day in court and leads to decision according to law.[90]

While for two centuries the United States has fretted over three major and many minor approaches to pleading and has flitted wildly from one to another, Germany has stuck with one approach nationally for 130 years. Here we can only outline it in general terms in its specific role. In the forthcoming book we place it in the context of the overall process.

In Germany pleadings help direct proceedings to decisions on the merits. In Germany pleadings help bound proceedings from going off into the immaterial. The key word is ***help***. Pleadings are part of the overall process of applying law to fact. They begin that process; but they do not end it. They do not choose law; they do not define issues.

What pleadings do is prepare the way for the first hearing, the day in court that every German litigant receives. At that first hearing, what

88. 1 PALMER D. EDMUNDS, FEDERAL RULES OF CIVIL PROCEDURE 61 (1938).

89. *Id.*

90. A comprehensive and current English language introduction to current civil procedure by experts in American and German civil procedure is PETER MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE (2004). The leading German language works are LEO ROSENBERG, KARL-HEINZ SCHWAB & PETER GOTTWALD, ZIVILPROZESSRECHT (16th ed., 2004) (17th ed., 2010) and HEINZ THOMAS, HANS PUTZO, KLAUS REICHOLD & RAINER HÜßTEGE, ZIVILPROZESSORDNUNG (27th ed., 2005) (30th ed., 2009). Matters not otherwise cited can be found in these three sources.

court and parties do together is to begin to identify the material issues in dispute. In the proceedings that follow, all parties are given an opportunity to take positions and present evidence on all material elements in dispute identified at that first hearing or in any subsequent proceedings. While the court makes some tentative decisions of disputed material issues, it makes no final decisions of material issues in dispute until the last oral hearing.

A. Cooperative Law Applying

To understand the place of pleadings in German procedure well, it is helpful to understand the respective roles of parties and judges in German civil procedure. Contrary to a misconception widely held in the United States, German civil proceedings are **not** inquisitorial.[91]

The principle that governs German civil procedure is the ancient Roman law maxim: *da mihi factum, dabo tibi jus*. In English, the judge says, give me the facts and I will give you your right. German judges are not allowed to go out looking for facts. They may only measure against the law those facts that parties present. They are not inquisitors; they are facilitators.

Parties must present facts. German judges do know the law against which they measure facts that the parties present. In the cooperative world of German civil procedure, German judges tell the parties which are the facts that parties must present if they are to prevail in their claims of right. That German judges tell the parties what the criteria for judgment are does not turn them into inquisitors. They are every bit as much neutral judges as are their American counterparts.

German civil procedure is cooperative. Cooperation is part of the right to be heard. A "golden rule" of German procedure forbids surprise decisions.[92] The Code of Civil Procedure imposes on judges a duty to elucidate the issues in the case. That rule requires that the court call to the parties' attention any legal rule that it intends to apply. It prohibits

91. In a special section of the forthcoming book, "Day in Court or Inquisition," I argue that it is American discovery that is inquisitorial.

92. Helmut Rüßmann, *Grundregeln der Relationstechnik, available at* http://ruessmann.jura.uni-sb.de/zpo2004/Vorlesung/relationstechnik.htm. Similarly a guiding principle of modern American procedure is: no surprises at trial, no surprise witness and no surprise testimony. David A. Sklansky and Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L. J. 683, 713 (2006). Surprises undercut the right to a fair hearing. How the two systems go about preventing surprises helps understand differences between them. The American rule is directed to lawyers and to surprise at trial. Parties have panoramic discovery so that they may know all that there is to know about the case. If they fail to take advantage of this opportunity, they have only themselves to blame for resulting surprises.

the court from deciding any material and disputed issue without first giving each side an opportunity to address that issue. If the judge fails to elucidate the application of laws to fact fully, the surprised party has ground for appeal. The duty is vigorously enforced by appellate courts. The most material language of the rule is quoted in English translation in the margin.[93]

The Code of Civil Procedure imposes on parties a duty of clarification that complements the judges' duty of elucidation.[94] It requires parties to give declarations concerning facts completely and truthfully. The code provides that an asserted fact is to be treated as admitted if the other party is silent and fails to contest it. It allows only limited circumstances in which a mere denial or a claim of lack of knowledge serves to put a matter in dispute. In most cases parties must explicitly contest the fact asserted, and if the fact asserted is known or could be known to the party, then the party must substantiate its contrary contention with facts known to it. Thus, if in the course of the hearing or already in pleadings, one party admits a fact asserted by the other, there is no need to prove the fact. In relatively short order, the judge can inform the parties of the applicable legal rules and get their agreement on which matters of fact are material to those rules that are in dispute.[95]

Americans are fond of sports analogies in discussing civil procedure. United States Chief Justice John Roberts in his confirmation hearings likened judges to baseball umpires. He said that it is the judge's

93. Zivilprocessordnung [ZPO] [Code of Civil Procedure], § 139, *translated* in MURRAY & STÜRNER, *supra* note 90, at 167-68:

> (1) The court is to discuss with the parties the relevant facts and issues in dispute from a factual and legal perspective to the extent reasonable and to raise questions. It is to cause the parties timely and completely to declare their positions concerning all material facts, especially to supplement insufficient references to the relevant facts, to designate the means of proof, and to set forth claims based on the facts asserted.
>
> (2) The court may base its decision on a claim, other than a minor or auxiliary claim, on a point of fact or law which a party has apparently overlooked or considered insignificant only if the court has called the parties' attention to the point and given opportunity for comment on it. The same provision applies if the court's understanding of a point of fact or law differs from the understanding of both parties.

(paragraphs 3 to 5 are omitted). For a book-length academic treatment of the duty imposed on judges, see ROLF STÜRNER, DIE RICHTERLICHE AUFKLÄRUNGSPFLICHT IM ZIVILPROZESS (1982).

94. For a book-length academic analysis of the parties' duties, see ROLF STÜRNER, DIE AUFKLÄRUNGSPFLICHT DER PARTEIEN DES ZIVILPROZESSES (1976).

95. Maxeiner, *Imagining Judges*, *supra* note 27, at 479-80; Zivilprocessordnung [ZPO] [Code of Civil Procedure], § 138.

job "to call balls and strikes and not to pitch or bat."[96] Baseball is practically unknown in Germany, but there is a sports analogy that Germans might accept. It is not the analogy of the baseball umpire, but of the track & field referee. Referees do not run or jump, but they do direct participants more than do baseball umpires. High jump referees check contestants in for the competition, change the order or location of events, direct contestants where to practice, tell them what they must do, show them where they are to begin their jumps, signal when they may begin, measure how high they have jumped, consider all available evidence available to reach a fair determination that contestants have—within the rules—cleared the bar, check all final measurements, measure and raise the crossbar, inform contestants when they have failed to correctly clear the high bar set, and determine whether they should have another chance to clear the bar.[97]

B. Pleadings Prepare the Way for a Day in Court

A German complaint is a map for resolution of a dispute, but it is not an itinerary. It facilitates travel without constraining it. Only at its outer edges does it set boundaries. This sets it apart from the complaint of classic American common law pleading, which allowed only one destination and only one route to it.

In Germany, as in the United States, a lawsuit is commenced with the service of the complaint on the defendant. In Germany, the complaint is often the most important document before the court.[98] Reflecting that importance, a German lawyer's fee for a case consists of two principal halves: preparation of the case—drawing the complaint—and representation of the client in the hearings that follow.

The complaint sets out the factual basis of the claim, i.e., the concrete set of facts or life events from which the plaintiff claims right to a legal remedy. The complaint may, but need not, state the legal rule on which the right is based. The court knows the law and is expected to consider all legal rules possibly applicable to the facts presented by the plaintiff. The Roman law maxim—give me the facts, I will give you your right (*da mihi factum*, *dabo tibi jus*)—prevails.

96. John Roberts, Opening statement before the Senate Judiciary Committee, http://www.usatoday.com/news/washington/2005-09-12-roberts-fulltext_x.htm (Sept. 12, 2005) (transcribed by CQ Transcriptions: USA TODAY Posted 9/12/2005 4:31 PM).

97. *See* USA TRACK & FIELD, 2009 COMPETITION RULES, Rules 125-127, 142, 148, 180-182.

98. FRANZ-JOSEF RINSCHE, PROZEßTAKTIK: SACHEGERECHTE VERFAHRENSFÜHRUNG DES RECHTSANWALTS 36 (1987). For a book-length practitioner's treatment of the complaint, see EGON SCHNEIDER, DIE KLAGE IM ZIVILPROZESS: TAKTIK, PRAXIS, MUSTER 414-17 (2000).

In Germany, the complaint must be "substantiated." That means that it must state the facts on which it rests as well as identify the evidence to be used to establish those facts. The complaint must state facts so exactly that, based on the information provided, the court could determine that the legal relief sought should be granted, if the allegations are true. The degree of substantiation required for each fact alleged varies. When a fact is not seriously disputed, it can be stated in general terms. When it is disputed, it should be substantiated precisely. Proffering too little support in the initial complaint is ordinarily not fatal, but good practice is to err by substantiating too much rather than too little. In *Iqbal* terms, that is plausibility plus, but with an important difference: the plaintiff establishes plausibility.

If the plaintiff has more than one possible legal claim, the complaint should state facts that satisfy all the requisite elements of each claim. Facts that do not support one of the elements of a possible claim have no place in a complaint.

C. Pleadings Bound Proceedings

In Germany pleadings bound proceedings; the complaint determines the matter in controversy. The matter in controversy is a central concept of German civil procedure. The matter in controversy determines not only the definiteness of the complaint, but also subject matter jurisdiction, personal jurisdiction, joinder of claims and of parties, amendments of the complaint, and effect of the lawsuit for pending and future lawsuits. The matter in controversy is defined in life terms; it is the constellation of facts that are to be judged in the case. It is *not* based on legal characterizations of those facts. Judging the facts is the job of the judge.

In Germany, while the complaint contributes to bounding proceedings, it is not the first line of defense against frivolous lawsuits.[99] The fee system is: losers pay. How much they pay is determined by how much of the amount in controversy winners win. Claim €10,000, but win only €9,000, and one is entitled to reimbursement of only 90% of costs and fees and must pay 10% of the loser's costs and fees. Reimbursable fees are set by schedules that are pegged to the amount in controversy. The fee system discourages making frivolous claims or inflating sound ones. To lower process risks, "claim splitting," that is, suing only for part of the claim, e.g., only one of six missed monthly payments, is common.

99. *Compare* Marcus, *supra* note 44, at 1756.

In Germany, the complaint likewise is not the first line of defense against burdensome discovery. Judicial supervision of evidence taking is. Parties do not have license to take evidence on their own. They must request that the court take evidence. While judges are obligated to be generous in allowing the taking of evidence, they are vigilant in restricting the taking of evidence to material matters in dispute between the parties. Often taking of evidence is not necessary: the pleadings and subsequent admissions by parties permit decision without oral testimony.

In Germany, judges do not have to engage in the kind of personal judgment of complaints that American scholars rightly fear of "plausibility" reviews here. In Germany, judges determine whether a complaint states allegations that fulfill the statutory elements of the law. Whether those allegations are plausible depends not on the imagination and preconception of judges, but whether the plaintiff is able to substantiate its claims with potential evidence that, if true, would prove the fact claimed.

In Germany, the complaint *is* the first line of defense against judges who would range beyond the affairs the parties put to them for decision. The matter in controversy strictly limits the subject matter of the proceedings. The court has no authority to go beyond the matter in controversy, except as parties may appropriately raise additional claims. Were a judge to go off in a direction not within the matter in controversy, the affected party could complain. German judges, however, rarely are tempted to such diversions. Diversions can only cause them trouble. Affected parties can object and appeal to higher courts. German judges are professionals. Were they to divert proceedings to matters not germane to the dispute, their reputations would suffer. Their workloads—already substantial—would increase.

D. From Pleadings to Proceedings: Reviewing Complaints

In Germany, the court—not the plaintiff—serves the complaint. Before the court serves the complaint, the judge reviews the complaint for procedural prerequisites and for substantive soundness. The substantive review corresponds to a Federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, while the procedural review corresponds to the procedural defenses of a Rule 12(b) motion. The big difference from American practice is that a judge conducts the review in every case and before the court serves the complaint.

If the judge finds that a complaint is deficient, on either procedural or substantive grounds, the judge is not to dismiss the complaint immediately, but is to call the deficiency to the attention of the plaintiff

and to request supplementation. If plaintiff fails to cure the deficiency, the judge may take evidence on the point. If still not satisfied, the judge dismisses the complaint. If the judge is satisfied with the complaint as supplemented, the judge has the complaint served. Should the judge dismiss the complaint, the plaintiff may make application for a higher court to determine the issue.

Judicial pre-service review does not preclude the defendant, upon service, from challenging either procedural permissibility or substantive soundness. If the defendant does raise either challenge, the court may hold a hearing on the point. But the defendant must raise the issue immediately upon service.

Dismissal prior to service spares the potential defendant the headache of a lawsuit altogether. It also saves the plaintiff substantial legal fees. Not only does plaintiff not have to pay the potential defendant's legal fee, the plaintiff has incurred only half the usual plaintiff's fee. Moreover, if the dismissal is the fault of the lawyer, the lawyer may forego the fee.

E. Preparing for the (First) Day in Court

Once the court has reviewed the complaint, it begins to plan proceedings to identify material issues in dispute which once resolved will permit it to apply law to facts. That is, it sets in motion the processes of bringing law and fact together to apply law. Essentially what the court does is to identify the legal rules likely applicable in the case and to compare them with the factual allegations and, if necessary, evidence presentations of the parties, to determine whether facts are present that fulfill all the requirements of one or more rules.[100]

Here we are on the borderline between pleadings that initiate proceedings and proceedings that eventually make possible deciding the case. We need to discuss just enough of those proceedings to understand the role of the pleadings.

Coincident with preliminary review of the complaint the judge determines how the case is to proceed further: whether the case will use additional written proceedings or will use a so-called early first hearing. The judge's choice is pragmatic: the judge selects the method that the judge thinks is more likely in this case to be more efficient, *i.e.*, is more likely to simplify and hasten framing of the material and disputed issues. Most German judges prefer early oral hearings in routine, contested cases. A party dissatisfied with the choice may request that the judge use

100. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-30 (1985).

the other method; in that case, the party must state why the other method would be more efficient.

The goal of the preliminary hearing—or of written preliminary proceedings—is to identify the legal rules likely applicable, their constituent elements, and which facts material to their application are in dispute. Determination of which rules are applicable is tentative. While the court directs attention of the parties first to the factual elements of those rules most likely applicable, the parties are not precluded from returning to those rules not first considered should it appear later that they are applicable.

In the preliminary hearing the court calls attention of the parties to those facts material to possibly applicable rules on which the parties do not agree. The court asks the party bearing the burden of proof for that element to present the necessary proof. The court may also alert the other side that at some point, that if the proposing party presents what it needs to, the burden of proof may shift to it. No longer will it be sufficient to challenge the proponent's proof, but it will be necessary to bring its own affirmative evidence. A classic example is product liability. Once a plaintiff makes certain showings, then it is up to the defendant to bring forward evidence that rebuts that showing.

Most features of German civil procedure have their counterparts in American civil procedure; while those counterparts may have different foci or function somewhat differently, parallels are nonetheless clearly recognizable. The German hearing of the parties (*Parteianhörung*), on the other hand, has no counterpart in American civil procedure. A hearing of the parties is required either in the preliminary hearing or as a main hearing following the preliminary written procedures. In the hearing of the parties, the judge discusses the case directly with the parties and their lawyers. These discussions are not evidentiary. They do not constitute taking testimony of the parties. The judge clarifies the contentions of the parties and draws out the material issues in dispute between them. In short, the judge does what historic common law pleadings were supposed to do: ascertain the subject for decision.

The court's clarification of the issues in the oral hearing largely supplants the pleadings as guide to resolution of the dispute. In the oral hearing the court identifies the possibly applicable legal rules, the elements of those rules, which elements are not in dispute, and which elements are contested. The complaint has now fulfilled its guidance function.

Proceedings remain for the court through further hearings and through the taking of testimony to find the material, disputed facts and to test them as found against the applicable rules.

The interdependent nature of determinations of law and findings of fact does not present insurmountable obstacles. Limited only by the matter in controversy itself, the court has little difficulty pivoting from one issue to another as determined law or found facts may require.

The pleadings have played a major role in facilitating the first day in court and leading the court toward a determination of the dispute according to law.

The efficacy of the pleadings is one reason that the German Minister of Justice boldly asserts of law made in Germany:

> The law is predictable, affordable and enforceable. Our legislation balances the various interests in a fair and equitable manner, ensuring just solutions. Everyone has access to justice, independent of their financial means. What's more, thanks to the efficient administration of justice, German courts decide without delay and German court orders will be enforced swiftly. After all, there is no use in having well-considered rules and regulations if the process of applying them proves too lengthy.[101]

VI. CONCLUSIONS

We have seen that for two centuries American pleading has failed to work. It has failed to work because it has left defining issues to adversary lawyers. It has failed to work because it has been unable to overcome the challenge of the interdependent nature of determining law and finding facts.

From the above examination in conclusion I would like to point to three lessons:

(1) Pleading can contribute positively to applying law to facts:

Pleading is a part of an overall process of applying law to facts. That process brings law and facts together. Pleading is not an end in itself. There should be no pleading practice. Pleading should and can facilitate applying law to fact, accurately, fairly, expeditiously, and efficiently.

(2) German pleading and process show how pleading can help through giving a greater role to judges than American pleading has:

101. LAW—MADE IN GERMANY: GLOBAL, EFFEKTIV, KOSTENGÜNSTIG (released October 2008). The brochure is introduced by the Minister of Justice, Brigitte Zypries. It states that it is published by Bundesnotarkammer, the Bundesrechtsanwaltskammer, the Deutscher Anwaltverein, the Deutscher Notarverein and the Deutscher Richterbund. It is available at www.lawmadeingermany.de. It is in parallel German and English texts. Admiration for the German system is long-standing. For example, Roscoe Pound, when criticizing the American system, spoke of the "wonderful mechanism of modern German judicial administration . . . ." Pound, *Causes supra* note 66, at 397.

Give me the facts, I will give you your right, *works*. Parties cooperate with the court to determine whether facts fit the law. German judges are facilitators.

(3) After two centuries it is time to draw on foreign experiences to develop new ways rather than to remain stuck recasting failed old ways.

In 1851 a Massachusetts reform commission contemplated looking abroad for solutions but declined to do so. It saw borrowing from a foreign system of law as something "extremely hazardous and inconvenient."[102] Better, it thought, "to take what we now have . . . and amend and build upon it, not in a foreign style of architecture or with wholly new materials, but, as far as possible, with old materials and after the old fashions . . . ."[103] One hundred and fifty-nine years is more than enough time to try. It's time to look abroad.[104] Is it too audacious to hope that we might follow health care reform with real legal reform?

102. REPORT OF THE COMMISSIONERS APPOINTED TO REVISE AND REFORM THE PROCEEDINGS IN THE COURT OF JUSTICE IN THIS COMMONWEALTH (1851), *reprinted in* 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITING 159 (Benjamin R. Curtis, Jr. ed., 1879)

103. *Id.*

104. *Cf.* RUDOLPH VON JHERING, GEIST DES RÖMISCHEN RECHTS, Part I, 9th ed. 1955, *translated in* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 17 (Tony Weir, trans., Oxford University Press 3rd ed. 1998) ("The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.").