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Judges as Guardian Angels: The German Practice of Hints and Feedback

Robert W. Emerson

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Judges as Guardian Angels: The German Practice of Hints and Feedback

Robert W. Emerson *

ABSTRACT

The German practice of Richterliche Hinweispflicht is a judicial duty to give hints and feedback. In a very proactive position, the German judge asks questions of the parties designed to clarify and sharpen the key facts and issues and to give the parties a chance to correct matters that may be grounds for disposition. German judges also must ensure that the parties understand all matters that could affect the outcome of the case. In effect, the German judge's roles may be viewed as civil servant, teacher, and activist, rather than as umpire and overseer, as in the United States.

American civil jurisprudence would benefit from this German concept of the judiciary's role. Judicial participation could increase without resistance in four areas of the U.S. system: the pretrial conference, the pretrial scheduling order for discovery, the use of special masters, and the calling and questioning of witnesses. Under the American approach, although the judiciary has the right to take a more active role in proceedings, most judges fail to exercise this power other than for, perhaps, complex litigation. For example, American judges are given discretionary authority to call a pretrial conference where they can take action with respect to numerous aspects of a case. If the rules of civil procedure were amended to make mandatory both pretrial conferences and the consideration of certain topics, the American system would function more fairly and efficiently, like the German system. American judges could also increase their involvement by facilitating detailed discussions of settlement agreements for all civil cases.

Recommendations must account for the difficulties inherent in extracting any procedural rule from a foreign system and trying to import it into another unique, complex system. Implementing a recommendation can be most successfully

* J.D., Harvard Law School; Huber Hurst Professor of Business Law, Univ. of Florida.

undertaken when two cultures are similar enough to be harmonized. A German legal system typically described as inquisitorial seems completely at odds with the American adversarial system and its legal history. However, recent German reforms and changes to the U.S. Federal Rules of Civil Procedure have brought closer these two systems. Both countries seek to recognize due process rights and to avoid situations where litigants will be surprised about a verdict. Additionally, American courts have moved closer to their European counterparts in the past decade by adopting a heightened pleading standard, comparable to the standards imposed by the American Law Institute ("ALI") and UNIDROIT.

Many potential obstacles to implementation relate to judicial workload, to the legal profession's distaste for increased judicial participation, and to the judiciary's limited view of its role. These obstacles could be overcome through the increased use of special masters and magistrates and the continued use of contingency fees. Any move toward increased judicial involvement must be made cautiously in a system so fundamentally and stubbornly adversarial as is the American civil trial process. Still, such reforms can and should be pursued.

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I. INTRODUCTION

A. *The Problem*

Many jurisprudents have criticized the American system of litigation as being too complex, costly, and inefficient.¹ Some critics

1. See, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 4 (1949) ("American lawyers, in the past decades, have, with marked effectiveness, spent much time in improving many legal rules. But the legal profession has done next to nothing about the problem of fact-finding."); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) [hereinafter Langbein, *German Advantage*] (discussing the shortcomings present in America's lawyer-dominated system); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298-1303 (1978) (discussing the purposes of discovery, including its goals of promoting justice while

blame this inefficiency on the passive nature of the American judiciary, which functions as more of an umpire than a coach and, thus, leaves the parties mostly to their own devices until the trial commences.² The American judge—with the exception of complex litigation³—interferes very little in the pretrial process. The American process instead allows the parties and their counsel to determine the scope of discovery, gather and exchange evidence, and interview witnesses using their own discretion and (for the most part) schedule.

In the absence of judicial management, the adversarial pretrial process can become protracted and extremely expensive. Although some scholars find value in the American system because of the adversarial process,⁴ many see predominantly lawyer-controlled procedure as a hindrance to truth seeking.⁵ Furthermore, while Americans are proud that their system gives parties their “day in court,”⁶ the adversarial system tends to be slow and expensive. In fact, these flaws may lead to opposing forces or at least some variation from the usual, adversarial approach: “the more committed a legal system becomes to adversarial procedure, the more likely it is to embrace parallel non-adversarial alternatives” as means to settle the dispute, such as arbitration, mediation, or, in criminal law, plea bargaining.⁷ Moreover, adversarial methods involving discovery or expert testimony are often used “as weapons for wearing down the other side” and “often

reducing the impact of “adversary forces in the trial preparation stage of litigation”); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (exploring some of the problems associated with the adversarial system).

2. See, e.g., Langbein, *German Advantage*, *supra* note 1, at 826 (contrasting the German and American systems).

3. See RICHARD L. MARCUS ET AL., *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 3–5 (5th ed. 2010).

4. See Jeffrey S. Parker, *Comparative Civil Procedure and Transnational “Harmonization.” A Law-and-Economics Perspective* (George Mason Law & Econ. Research Paper No. 09-03, 2009), available at <http://ssrn.com/abstract=1325013> (last visited Mar. 7, 2015) [<http://perma.cc/GE53-U6JB>] (archived Mar. 7, 2015).

5. The focus of legal procedure appears to be conflict resolution, not truth determination. See, e.g., Robert A. Kagan, *American and European Ways of Law: Six Entrenched Differences*, in *EUROPEAN WAYS OF LAW: TOWARDS A EUROPEAN SOCIOLOGY OF LAW* 41, 45–46 (Volkmar Gessner & David Nelken eds., 2007) [hereinafter *EUROPEAN WAYS OF LAW*] (“Interest groups in the US, consequently, more often use courts as an alternative political forum for seeking policy goals”—further noting that “American civic, economic and political life is more deeply pervaded by legal conflict and by political controversy about regulations, judicial decisions, judicial selection and legal processes.”).

6. Antoine Garapon, *La Place Paradoxale de la Culture Juridique Américaine dans la Mondialisation*, in *EUROPEAN WAYS OF LAW*, *supra* note 5, at 71, 73–74 (noting a “faith in procedure” among Americans and American jurists: “*qu’une dialectique de la procédure correctement réglée est la garantie la plus sûre pour la production d’un résultat vrai, juste et bon*”—“a logical argument for correctly regulated procedure is that it is the surest guarantee to produce a result that is true, just and good”).

7. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1188 (2005).

bear little relationship to their supposed purpose of truth-seeking.”⁸ Using the adversarial method strategically often results in the success of the party who has the most resources—to both mire down the process with multiple motions for production and pay for experts willing to testify in their favor.⁹ These shortcomings indicate that the U.S. system could be better served by incorporating some aspects of the German inquisitorial system—specifically, the duty of judges to give hints and feedback.

Indeed, donning the inquisitor’s robes would not be so radical an approach. Although this history is often overlooked, the American legal system already has embraced inquisitorial procedure.¹⁰ In 1802, Congress enacted legislation stating that “[i]n all suits in equity, it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions.”¹¹ At that time, courts of equity procured witness testimony before court-appointed officers outside of the courtroom.¹² As court procedure developed, the American system came to be seen as wholly adversarial and the inquisitorial roots of the courts of equity were lost. Consider Judge Douglas Ginsburg’s 2003 statement during oral argument that “a judicial officer with investigative responsibilities . . . [is,] dare we say, [a] French approach.”¹³ This statement suggests what many in the legal field believe: “that the very concept of an investigatory judicial role is positively un-American.”¹⁴ However, as described above, as late as the nineteenth century, American courts of equity used a significantly inquisitorial form of process.¹⁵

B. A Solution

This Article will explore the German practice of *Richterliche Hinweispflicht*—the judicial obligation to give hints and feedback—in two areas. First, it will look at how the American judiciary does, to some extent, engage in this practice. Second, it will explore how this

8. *Id.* at 1189.

9. *See id.*

10. *See* Robert W. Emerson, *The French Huissier as a Model for U.S. Civil Procedure Reform*, 43 U. MICH. J.L. REFORM 1043, 1048–49 (2010); Kessler, *supra* note 7, at 1183, 1274–75.

11. Kessler, *supra* note 7, at 1205 (quoting An Act to Amend the Judicial System of the United States, ch. 31, § 25, 2 Stat. 156, 166 (1802)).

12. *See id.*

13. *Id.* at 1183 (quoting Transcript of Proceedings at 25–26, *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (No. 02-5374)).

14. *Id.*

15. *Id.*; *see also* Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT’L & COMP. L. REV. 3, 9–16 (2003) (discussing “managerial judging,” including the typical American critiques of that concept—e.g., constraint of lawyers, interference with the adversarial system, and unnecessary empowerment of judges).

duty could be further incorporated into American civil procedure to make civil litigation more efficient and less costly. In general, the study of comparative procedure, by challenging and defending concepts and issues in America's procedural process, allows for a better understanding of U.S. procedures as well as those of other countries. Only after understanding the complexities, strengths, and weaknesses of each system may America use the knowledge to consider reforming its own system, adopting new models, or simply broadening its perspectives.¹⁶

Richterliche Hinweispflicht, which is codified in § 139 of the German Code of Civil Procedure (*Zivilprozeßordnung* [ZPO]), is an obligation on the part of the judge to ask questions of the parties. This duty is designed to clarify and sharpen the key facts and issues in a case and give the parties an opportunity to correct matters that may be grounds for disposition.¹⁷ The duty also obliges German judges, while in this role of professor, to instruct lawyers and litigants alike and ensure that the parties understand all matters that could affect the outcome of that case.¹⁸ The judge also controls and conducts the proceedings so as to safeguard the unity of law in the system as a whole.¹⁹

There are four areas of American civil procedure in which this kind of judicial participation might be increased with minimal resistance: the pretrial conference, the pretrial scheduling order as to discovery, the use of special masters, and the calling and questioning of witnesses. This Article's recommendations address the difficulties inherent in extracting any procedural rule from a foreign system and attempting to import it into another unique, complex, and potentially resistant system. Any move toward increased judicial interference must be made cautiously in a system as fundamentally and stubbornly adversarial as the American civil trial process.²⁰

Areas of civil procedure are most readily harmonized when two cultures are similar, their legal "systems strive for a similar balance of underlying policies[,] and . . . the areas are sufficiently disconnected from other facets of procedure that their modification will not unduly

16. See generally Scott Dodson, *Review Essay: The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133 (2008) (reviewing OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* (2007)).

17. See PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 166–68 (2004) (citing *ZIVILPROZESSORDNUNG* [ZPO] [CODE OF CIVIL PROCEDURE] § 139 (Ger.) [hereinafter ZPO]); HOWARD D. FISHER, *THE GERMAN LEGAL SYSTEM & LEGAL LANGUAGE* 98 (2d ed. 1999).

18. See NIGEL FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 139–40, 147 (4th ed. 2010) (citing ZPO, *supra* note 17, §§ 136, 139).

19. See *id.* at 140.

20. See Kevin N. Clermont, *Why Comparative Civil Procedure?*, *Foreword to KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW*, at ix, xii (2003) (“[A]ny such [move] must be limited in scope and sensitive to context.”); Dodson, *supra* note 16, at 143.

disrupt other parts of the procedural system.”²¹ At first blush, the German inquisitorial system and the American adversarial system seem at odds. However, there are similarities in specific rules. This Article looks to American rules and procedure that resemble German processes and suggests ways that these practices could be strengthened in order to increase efficient justice.

II. JUDGES AS GUARDIAN ANGELS: *HINWEISPFLICHT*

A. *Some Background on the German Legal System*

Germany is a civil law system, rather than a common law system such as America.²² Since a successful reform movement in the late nineteenth century, the German legal system has been dominated by codes and legislation.²³ Because judicial decisions other than those made by the Federal Constitutional Court are not considered a source of law in Germany,²⁴ judges are not bound by precedent or a body of case law.²⁵ In theory, German judges are to apply, rather than create, law and are strictly bound to decide cases in deference to codified law.²⁶ However, because young judges’ performances are evaluated by their superiors (more tenured judges), there is a tendency for judges to rely on precedent to avoid having their decisions reversed at a higher level—therefore receiving good “reviews” of their performance.²⁷ Nonetheless, many cases involve factual circumstances under which

21. Dodson, *supra* note 16, at 143.

22. *See id.* at 137; MURRAY & STÜRNER, *supra* note 17, at 3.

23. *See* FOSTER & SULE, *supra* note 18, at 29–35, 47. Codes and legislation had already dominated on a “state” level; however, after unification in 1871, the legal basis (the Civil Law) was unified nationally.

24. The exception is that the constitutional court’s decisions (e.g., voiding a law) have the force of law themselves. ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFG] [FEDERAL CONSTITUTIONAL COURT], art. 31(2) (Ger.).

In Germany, it is traditionally said that, “[c]ase law of the courts (*la jurisprudence*) is not a binding, but merely an influential source of law.” JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 25 (2008). In other words, “[s]trictly speaking, [judicial decisions] never create legal rules. Their role is always understood to be the application of pre-existing statutes or customs,” *id.* (quoting R. DAVID, FRENCH LAW 170 (1972)), “[b]ut this does not create binding precedents in the common law sense.” *Id.* at 27. However, in practice “the judges are clearly seen as having significant authority and not just as the bureaucratic implementers of rules established by the legislator. . . . [T]he courts are explicitly guardians of the law, but also have scope to develop the law by laying down principles to govern cases where legal enactments are unclear or leave gaps.” *Id.* at 26–27.

25. *See* FOSTER & SULE, *supra* note 18, at 6, 53–55.

26. *See id.* at 6, 53.

27. *See* Ronald J. Allen, *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities*, 82 NW. U. L. REV. 705, 755–56 (1988).

straightforward application of the law becomes difficult; consequently, judges must engage in some degree of interpretation and creativity.²⁸

The judiciary in Germany is a career wholly separate from that of the attorney.²⁹ Those entering the judiciary receive special judicial training and education,³⁰ as is the practice in other civil law nations such as France.³¹ German judges, though highly respected, do not enjoy the same level of public veneration as American judges for many reasons: they are more numerous; they start younger; they do some of the "grunt work" that American judges leave to other civil servants; and, most importantly, they are not considered creators of law.³² In line with the inquisitorial nature of German judicial proceedings, judges conduct most of the witness interrogations in civil litigation.³³ The parties' attorneys may ask follow-up questions of a witness after the judge has finished his or her examination in order to object to the judge's summation of the witness's testimony, comment on the court-appointed expert's report, or offer other experts to challenge the opinion of the court-appointed expert.³⁴ German judges also create the record of the case by periodically dictating summaries of events into the record.³⁵ They are able to take on these more labor-intensive tasks because there are more judges per capita than in any other state in the world,³⁶ and because they have probationary and associate judges to assist them.³⁷

28. See FOSTER & SULE, *supra* note 18, at 6–7 (noting that German courts still need to interpret the law, so there remains room for judicial creativity).

29. There may be a rare, but notable exception. Even though the *Volljurist* has a separate career, the German system does seem to conceive of the *Volljurist* as one who can fill role of judge, attorney, and academic. See MURRAY & STÜRNER, *supra* note 17, at 68. Still, there apparently is little crossover between the different legal professions. See *id.*

30. See *id.* at 7–9, 89–97.

31. France has a similar system of judicial education: after graduating with their Masters Degree in Law, aspiring judges must pass a highly selective application process (250 seats per year) to enter the *Ecole Nationale de la Magistrature* (National School of Magistrature). BELL ET AL., *supra* note 24, at 64–65. After completion of a thirty-one-month program, they are appointed as judges in jurisdictions according to their rank in the final exam. *Id.*

32. See FOSTER & SULE, *supra* note 18, at 6–7.

33. See Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 63 (2003). The summary must be approved by the parties. *Id.* at 64.

34. See John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 989 (1990).

35. Langbein, *German Advantage*, *supra* note 1, at 828 (citing Hein Kötz, *Civil Litigation and the Public Interest*, 1 CIV. JUST. Q. 237, 240 (1982)).

36. This is true even at the European level; while the German Judicial System has 24.7 professional judges per 100,000 inhabitants (20,395 professional judges total), its French neighbor only has 10.1 professional judges per 100,000 inhabitants (6,278 professional judges total). See EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS 78 (2006).

37. See *id.* at 9; see also FOSTER & SULE, *supra* note 18, at 104–06. In some kinds of proceedings, lay persons participate instead as judges. The chamber for commercial

In Germany, there are no juries in civil trials, eliminating the need for a concentrated trial.³⁸ In America, litigation is conducted in stages leading up to a single trial that is concentrated into an uninterrupted period of days or weeks. In theory, the trial needs to be concentrated because it is staged for a jury.³⁹ All stages of litigation prior to the trial are for the purpose of preparing for the trial.⁴⁰ However, as mentioned earlier, the vast majority of cases in the United States settle or are disposed of prior to trial.⁴¹ This means that a jury trial is more of a threat or a bargaining chip than an impending reality. The Seventh Amendment right to a jury trial⁴² remains theoretically intact but has been eroded in practice by systems of resolving disputes that steer parties away from expensive jury trials. Because of the high number of cases that settle out of court and the large number of parties that consent to a bench trial, the U.S. system may be closer than initially apparent to the German system of no jury trials for civil disputes.⁴³

Interestingly, the German and U.S. systems seem to have switched roles over time. As mentioned above, U.S. civil procedure has historically had an inquisitorial component in the courts of equity, while early German civil procedure was much more like the contemporary U.S. party-controlled system.⁴⁴ In early German law, parties were left to decide the context of the pleadings and the time of submissions.⁴⁵ Thus, like in the United States, parties had a great deal of control over the length of legal proceedings. However, because this practice led to very long proceedings, the principle of party control

matters at a Landgericht, for example, consists of one career judge and two merchants, all of whom have the same voting power and can question witnesses. See MURRAY & STÜRNER, *supra* note 17, at 51–52.

38. See *id.* at 8.

39. See Kötz, *supra* note 33, at 72 (“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.”).

40. See ARTHUR TAYLOR VON MEHREN & PETER L. MURRAY, *LAW IN THE UNITED STATES* 169 (2d ed. 2007).

41. For example, of the 98,786 tort cases that were terminated in U.S. district courts during fiscal years 2002 and 2003, 1,647 or approximately 2 percent were decided by a bench or jury trial. *Tort, Contract, and Real Property Trials*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=451> (last visited Mar. 7, 2015) [<http://perma.cc/PCH3-8HNA>] (archived Mar. 7, 2015). During 2005, judges decided approximately 32 percent (8,543) of the nearly 27,000 civil trials disposed of by state courts of general jurisdiction nationwide. *Id.*

42. U.S. CONST. amend. VII.

43. See JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL-LAW SYSTEM* 27 (1995) (“While some specialized courts involve lay people in the court’s decision-making process, such ‘lay judges’ are not usually chosen on the basis of their impartiality, as are common-law jurors. Lay judges are generally selected on the basis of experience in the subject matter of the court (e.g., labor law), or as representatives of a particular interest group (e.g., unions or management). Unlike common-law jurors, lay judges usually serve for a continuing term instead of only a single case.”).

44. See FOSTER & SULE, *supra* note 18, at 137–38.

45. See *id.* at 138.

(*Grundsatz der Parteiherrschaft*) is “now more generally restricted by a greater responsibility imposed on the court to conduct proceedings.”⁴⁶

Until 2007, the parties in American procedure were not required to make specific factual allegations during the pleadings phase, but only had to put each other on notice of the basic claims and defenses they would seek to prove at trial.⁴⁷ Then, during the discovery and disclosure phases of the litigation, parties gathered and exchanged documentary and testimonial evidence they would later use to support and prove their claims at trial.⁴⁸ The nature of the pleadings stage has recently changed, as evidenced by the 2007 U.S. Supreme Court decision regarding antitrust conspiracy claims in *Bell Atlantic Corp. v. Twombly*,⁴⁹ which replaced a liberal pleadings standard (in existence since 1957) with a fact-pleading standard.⁵⁰ *Twombly* was followed by the 2009 decision *Ashcroft v. Iqbal*,⁵¹ which extended *Twombly* beyond the realm of antitrust and imposed a “plausibility” standard for fact-based pleading under Federal Rule of Civil Procedure 8(a)(2). With these two decisions, American courts have moved closer to their European counterparts. In fact, these decisions may make it more likely that the United States will accept the ALI/UNIDROIT proposed pleading standard, which reads, “[i]n the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations.”⁵²

In Germany, cases can be tried in a series of hearings.⁵³ Intensive pretrial preparation is not necessary. If it becomes clear that additional proof is needed on a particular matter, the parties can simply schedule an additional hearing to adjudicate the sufficiency of the evidence.⁵⁴ The parties initiate the case by pleading the facts with specificity and going into detail about the events that gave rise to the legal claims.⁵⁵ From there, the case proceeds with a series of hearings and

46. *Id.* at 139–40.

47. *See* FED. R. CIV. P. 8(a)–(e).

48. *See* FED. R. CIV. P. 26(a), (b), (e).

49. 550 U.S. 544 (2007).

50. *See id.* at 570 (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

51. 556 U.S. 662 (2009).

52. Scott Dodson, *The Changing Shape of Federal Civil Pretrial Practice: Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 469 (2010) (quoting ALI/UNIDROIT Principles of Transnational Civil Procedure princ. 11.3 (2006)).

53. Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1 (1997) (citing ZPO § 275).

54. *Id.* (citing ZPO, *supra* note 17, §§ 368, 370). If it were clear from the outset that they would need that proof and carelessly neglected to mention it, then they might be punished by preclusion rules, in order to streamline the proceeding. *See id.* §§ 282, 296.

55. *See* MURRAY & STÜRNER, *supra* note 17, at 198.

adjournments as more information is needed or requested.⁵⁶ Because of the recent U.S. decisions mentioned above, the civil suit in the United States must be pled with specificity or run the risk of a dismissal.⁵⁷ In contrast, although the pleading standard is higher and based on fact-pleading in Germany, the judge has more authority to gather the facts necessary to decide the claim because of the more inquisitorial nature of the process.⁵⁸ The German judge, as fact-gatherer, may proceed with the facts and issues in a case in a way that disposes of them in a certain order, thus giving the court more power to shape the case and understand the facts before making a decision.

B. ZPO § 139: Richterliche Hinweispflicht

1. Background of ZPO § 139

ZPO § 139 provides as follows:

- (1) The court must, to the extent necessary, discuss with the parties the facts and issues in dispute from a factual and legal perspective. It must cause the parties to explain themselves promptly and completely as to all material facts, particularly in order to supplement insufficient data as to relevant facts, to designate means of proof, and to set forth pertinent claims.⁵⁹

56. See FOSTER & SULE, *supra* note 18, at 144–48.

57. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Twombly* requires a two-part inquiry for deciding motions to dismiss a claim. *Twombly* and *Iqbal* are troubling in this regard because they seem to be inconsistent with Rule 8, which does not, by its terms, require fact pleading. A court could grant a Rule 12(b)(6) motion to dismiss for failure to state a claim if an allegation is not “well pleaded” (e.g., merely conclusory) or if, assuming the truth of the well-pleaded factual allegations, the court determines that the allegations do not plausibly show an entitlement to relief under the applicable law. Heightened pleading is required in federal court only for matters that Rule 9(b) or a statute requires be pled with more specific detail, and courts lack the power to require heightened pleading on their own initiative.

58. See Interview with Burkhard Hess, Professor of Law and Director, Institute for Foreign and International Private and Procedural Law, Univ. of Heidelberg, Germany (Nov. 10, 2011) [hereinafter Interview with Burkhard Hess] (on file with author). In Germany, the responsibility for fact development is divided between the parties and the court. The principle of party control of facts and the means of proof (*Verhandlungsmaxime*) applies to the party while the principle of investigation by the court (*Untersuchungsgrundsatz*) applies to the court. The parties delineate the sources of factual proof for the issues while the judge is responsible for clarifying and ascertaining the facts. See MURRAY & STÜRNER, *supra* note 17, at 158–59. “[A] party’s basic responsibility to found all of its contentions with credible facts is somewhat mitigated by the judge’s obligation to give the parties a chance to clarify unclear facts and factual assertions.” *Id.* at 161.

59. “Das Gericht hat das Sach- und Streitverhältnis, soweit erforderlich, mit den Parteien nach der tatsächlichen und rechtlichen Seite zu erörtern und Fragen zu stellen. Es hat dahin zu wirken, dass die Parteien sich rechtzeitig und vollständig über alle erheblichen Tatsachen erklären, insbesondere ungenügende Angaben zu den geltend gemachten Tatsachen ergänzen, die Beweismittel bezeichnen und die sachdienlichen Anträge stellen.” ZPO, *supra* note 17, § 139(1).

(2) The court may base its decision on an aspect that a party has apparently ignored or considered insignificant only if the aspect does not concern an ancillary claim, and the court has given hints and feedback regarding that aspect and given an opportunity to address it. The same applies for an aspect that the court assesses differently than both parties.⁶⁰

(3) The court must call attention to its concerns as to those points which the court takes into account *ex officio*.⁶¹

(4) Hints and feedback made according to this rule are to be given and documented on record as early as possible. The fact that hints and feedback were given may be proved only by reference to the content of the record. Only evidence of forgery may contradict the record.⁶²

(5) If an immediate response by a party to judicial hints and feedback is not possible, then the court should, upon that party's request, determine a period of time in which the party can respond in a written statement.⁶³

Section 139 of the ZPO codifies the duty of the German judge to ask questions of the parties and provide hints and feedback.⁶⁴ This

60. "Auf einen Gesichtspunkt, den eine Partei erkennbar übersehen oder für unerheblich gehalten hat, darf das Gericht, soweit nicht nur eine Nebenforderung betroffen ist, seine Entscheidung nur stützen, wenn es darauf hingewiesen und Gelegenheit zur Äußerung dazu gegeben hat. Dasselbe gilt für einen Gesichtspunkt, den das Gericht anders beurteilt als beide Parteien." *Id.* § 139(2).

61. "Das Gericht hat auf die Bedenken aufmerksam zu machen, die hinsichtlich der von Amts wegen zu berücksichtigenden Punkte bestehen." *Id.* § 139(3). For example, a German judge is allowed to dismiss a case on his own motion for failure to satisfy a prerequisite to suit; thus, a judge who found that a party had failed to satisfy a prerequisite could not dismiss the suit based on that failure unless the judge had first called the party's attention to the failure and given the party an opportunity to correct it. The American Federal Rules of Civil Procedure allow the court to act on its own motion in a number of circumstances as long as it gives to each party reasonable notice of the impending action and an opportunity to show cause why the court should or should not take such action. For example, an American federal judge may, on his or her own motion, dismiss for failure to serve a defendant, FED. R. CIV. P. 4(m); impose sanctions, FED. R. CIV. P. 11(c); order a pretrial conference for a number of enumerated purposes, FED. R. CIV. P. 16(a); in exceptional circumstances, notice errors to which a party has not taken exception, FED. R. CIV. P. 51(d)(2); and demand a statement of whether the parties want a jury trial, FED. R. CIV. P. 81(c)(3)(A).

62. "Hinweise nach dieser Vorschrift sind so früh wie möglich zu erteilen und aktenkundig zu machen. Ihre Erteilung kann nur durch den Inhalt der Akten bewiesen werden. Gegen den Inhalt der Akten ist nur der Nachweis der Fälschung zulässig." ZPO, *supra* note 17, § 139(4).

63. "Ist einer Partei eine sofortige Erklärung zu einem gerichtlichen Hinweis nicht möglich, so soll auf ihren Antrag das Gericht eine Frist bestimmen, in der sie die Erklärung in einem Schriftsatz nachbringen kann." *Id.* § 139(5). The requirement to allow parties adequate time to respond to hints and feedback has been interpreted as part of the constitutional right to be heard. MURRAY & STÜRNER, *supra* note 17, at 171. A party's response should be prompt enough to allow time for written comments, oral argument, and, if necessary, additional assertions of fact and proffers of evidence. *Id.*

64. Acceptable forms of hints and feedback include an oral statement at a hearing, a question to a party or counsel at a hearing, a procedural order, or a summary of a proposed decision. Prohibited forms include *ex parte* communications unless all parties are notified thereof. *See id.* at 174. Whatever form it takes, the hint or feedback

duty is known as *Hinweispflicht*, literally the “obligation to give hints and feedback.”⁶⁵ *Hinweispflicht* is the principal judicial obligation in German civil procedure and is considered “the Magna Carta of the ZPO.”⁶⁶ Although the German system was historically party controlled, the judicial duty to give hints and feedback has a long history of application and came from the Austrian legislative body, which standardized the duty in 1796.⁶⁷ The first mention in Germany of joint judicial responsibility came with the Code of Civil Procedure on 30 January 1877 (CPO).⁶⁸ This duty was born out of the interplay between several German principles of public policy.⁶⁹ On the one hand, the state (and by extension, its judges) has certain duties toward citizens that require it to assume some control over litigation: first, a social responsibility to provide substantial justice;⁷⁰ second, a duty to satisfy every litigant’s constitutional right to be heard;⁷¹ third, “a positive

must be calculated to put a party on notice of exactly what is missing. A question like, “Was anything else said?” would be too vague. See ADOLPH BAUMBACH ET AL., *ZIVILPROZESSORDNUNG: MIT GERICHTSVERFASSUNGSGESETZ UND ANDEREN NEBENGESETZEN* 257 (1980).

65. MURRAY & STÜRNER, *supra* note 17, at 166–67. “Warnnung” equals a negative “Hinweis.” See Interview with Burkhard Hess, *supra* note 58.

66. See BAUMBACH ET AL., *supra* note 64, at 256.

67. See Andreas Piekenbrock, *Umfang und Bedeutung der richterlichen Hinweispflicht*, 19 N.J.W. 1360, 1361 (1999).

68. See EGBERT PETERS, *RICHTERLICHE HINWEISPFLICHTEN UND BEWEISINITIATIVEN IM ZIVILPROZESS 1* (J.C.B. Mohr & Paul Siebeck eds., 1983).

69. Even though it does not technically have an obligation equivalent to *Hinweispflicht*, French Law provides similar standards which are set forth in the preliminary provisions of the *Code de Procédure Civile*, titled “Guiding Principles for Trial:” “The judge supervises the proper progress of the proceeding; he has the authority to define the time-limits and order the necessary measures.” CODE DE PROCÉDURE CIVILE [C.P.C.], art. 3 (Fr.). “The judge must rule upon all what is claimed and only upon what is claimed.” *Id.* art. 5. “The judge may not base his decision on facts not in the debate. Among the facts mentioned in the debate, the judge may even take into consideration such facts that the parties have not expressly relied upon to support their claims.” *Id.* art. 7. “The judge may invite the parties to provide factual [and legal] explanations that he deems necessary for the resolution of the dispute.” *Id.* arts. 8, 13. “The judge has the authority to order sua sponte any legally appropriate investigation measures.” *Id.* art. 10. “In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle. In his decision, the judge may take into consideration grounds, explanations and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner. He shall not base his decision on legal arguments that he has raised sua sponte without having first invited the parties to comment thereon.” *Id.* art. 16.

70. See MURRAY & STÜRNER, *supra* note 17, at 177.

71. See FOSTER & SULE, *supra* note 18, at 271 (citing GRUNDGESETZ: ANSPRUCH AUF RECHTLICHES GEHÖR [GG] [BASIC LAW: RIGHT TO BE HEARD], art. 103 (Ger.), which provides that courts must give the parties to litigation sufficient opportunity to comment on the procedure). The right to be heard underlies *Hinweispflicht* in that it prohibits a judgment based on any ground on which a party has not had the opportunity to comment or respond. *Hinweispflicht* requires that the judge give hints and feedback on any such proposed ground for disposition before judgment is entered, unless the ground has already been raised by counsel or is so commonplace that the affected party can be expected to have been on notice of it. See MURRAY & STÜRNER, *supra* note 17, at 189.

responsibility to ascertain and clarify the facts related to a particular event or circumstance";⁷² and fourth, a duty to structure court proceedings so as to reach the quickest and fairest result possible.⁷³ On the other hand, the parties to litigation retain a certain amount of control and responsibility themselves, as a result of two principles: first, that the parties to a lawsuit must have ultimate control over the scope and nature of the litigation;⁷⁴ and second, that the parties must have ultimate control over and responsibility for their own facts and means of proof.⁷⁵

The practical purpose of *Hinweispflicht* is to "avoid surprise and promote fair and just determination of the suit."⁷⁶ The parties should not come away astonished from a judgment that was made without sufficient factual knowledge or based on an unforeseeable formality.⁷⁷ The parties are entitled to a speedy and efficient resolution, and *Hinweispflicht* serves that purpose well. But, above all, the parties are

72. *Id.* at 159. The principle that the court is responsible for investigation is called the *Untersuchungsmaxime*. It underlies much of criminal procedure and also *Hinweispflicht*. *Id.*

73. *Id.* at 165 (citing ZPO, *supra* note 17, §§ 272(1), 273). Efficiency is a primary goal of German civil procedure in general and of *Hinweispflicht* in particular. It is for the sake of accuracy and efficiency that German judges are given a greater role in the fact-finding process. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 110 (2007).

74. The principle of party control over the scope and nature of litigation is known as the *Dispositionsmaxime* or the *Parteiprinzip*. The parties have the right to choose and define the claims they submit to the court. Pursuant to ZPO § 139, the court may require the parties to clarify their claims and may suggest addition of a related claim but may not require the addition or omission of any claim. See MURRAY & STÜRNER, *supra* note 17, at 5, 156, 158.

75. The principle of party control over the proof and facts is known as the *Verhandlungsmaxime*, which requires the court "to confine its consideration to facts from those sources which have been brought forward or identified by the parties." The parties identify their own facts and means of proof, and then it becomes the court's responsibility to elicit and evaluate that proof. See *id.* at 158, 161. While this principle still holds true today, recent reforms have increased the scope of exceptions: under §§ 142, 143, 144, 273 II No.2, 448 the court *can* take evidence on its own account in certain cases, but—unlike in administrative courts, where the *Untersuchungsgrundsatz* applies—is not *obliged* to do so. Cf. OTHMAR JAUERNIG & BURKHARD HESS, ZIVILPROZESSRECHT § 25.15 (2011).

76. JAUERNIG & HESS, *supra* note 75, at 166. Likewise, "[t]he Federal Rules of Civil Procedure are designed to avoid surprise and thus to facilitate a proper ruling on the merits of each case." *Shell Oil Co. v. Kendall Constr. Co.*, 615 F.2d 698, 701 (5th Cir. 1980). To what extent the Federal Rules of Civil Procedure accomplish this is debatable. See, e.g., James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 114 PENN. ST. L. REV. 469 (2009) (comparing the American and German systems). However, methods such as continuances attempt to ensure that the court is able to mitigate surprise. See FED. R. CIV. P. 15, 56.

77. BAUMBACH ET AL., *supra* note 64, at 256.

entitled to a *correct* decision;⁷⁸ the judge must do everything within the law to bring about a factually correct decision.⁷⁹

2. Other Sections of the ZPO That Set Forth *Hinweispflicht*

Hinweispflicht applies in all phases of a case—not only the pleadings phase—and relates to all judicial action.⁸⁰ ZPO §§ 279(3) and 285 provide that, before entering a decision in a case, a judge must discuss with parties the evidence and the conclusions he or she has drawn.⁸¹ ZPO § 279(3) states: “After the taking of evidence, the court must again discuss with the parties the facts and issues in dispute and, to the extent possible, the outcome of the taking of evidence.”⁸² ZPO § 278(3) requires the court to discuss legal and factual issues with both parties and, if necessary, ask questions before supporting a legal viewpoint.⁸³ However, this provision is only violated when no party brings the legal viewpoint to the court and the judge does not make his or her view known.⁸⁴ This serves, in general, to ensure due process of law⁸⁵ and the rule of law principle. ZPO § 285 provides:

- (1) The parties will discuss in oral argument the outcome of the evidentiary proceedings with regard to the merits of the claims raised.
- (2) If the taking of evidence did not take place before the court that decides on the merits of the case, the parties must inform the court about the outcome of the evidentiary proceedings.⁸⁶

78. See *id.*; Interview with Thomas Lundmark, Professor of Law, Univ. of Muenster, Germany (Nov. 9, 2011) [hereinafter Interview with Thomas Lundmark] (on file with author).

79. BAUMBACH ET AL., *supra* note 64, at 256.

80. See MURRAY & STÜRNER, *supra* note 17, at 169.

81. *Id.* at 168.

82. “*Im Anschluss an die Beweisaufnahme hat das Gericht erneut den Sach- und Streitstand und, soweit bereits möglich, das Ergebnis der Beweisaufnahme mit den Parteien zu erörtern.*” ZPO, *supra* note 17, § 279(3).

83. See Giesela Rühl, *Preparing Germany for the 21st Century: The Reform of the Code of Civil Procedure*, 6 GERMAN L.J. 909, 915 (2005); Piekenbrock, *supra* note 67, at 1360.

84. See Piekenbrock, *supra* note 67, at 1360.

85. Article 103(1) of the Constitution states, “In court, everyone has a right to be heard.” “*Vor Gericht hat jedermann Anspruch auf rechtliches Gehör.*” GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. 1, art. 103(1) (Ger.).

86. “(1) *Über das Ergebnis der Beweisaufnahme haben die Parteien unter Darlegung des Streitverhältnisses zu verhandeln.* (2) *Ist die Beweisaufnahme nicht vor dem Prozessgericht erfolgt, so haben die Parteien ihr Ergebnis auf Grund der Beweisverhandlungen vorzutragen.*” ZPO, *supra* note 17, § 285.

C. *The Scope of Hinweispflicht in German Law*

1. ZPO § 139(1)

Pursuant to ZPO § 139(1), the judge must do as follows: (1) initiate a discussion with the parties (or their lawyers) of the relevant factual and legal issues of the case; (2) raise questions designed to clarify ambiguous or unclear factual assertions and to simplify the issues; and (3) cause the parties to (a) declare their positions as to all material facts, (b) supplement insufficient references to relevant facts (explain points which need explaining), (c) designate means of proof, and (d) set forth claims based on facts asserted.⁸⁷ The judge is obligated to suggest corrections to any inexact or irresolute assertions and to stimulate further fact assertions if necessary.⁸⁸ Problems with the complaint that unequivocally call for hints and feedback include an incorrect party designation, a contradiction between the complaint and the contract if a contract is involved, an insufficiently substantiated claim for a refund, and a claim for damages caused by delay where the plaintiff should instead have sought regular damages plus interest.⁸⁹ If the judge warns the plaintiff as to some factual insufficiency in the plaintiff's case and the plaintiff fails to substantiate or otherwise adequately respond to the warning, then the court may reject the complaint through a decision on the merits.⁹⁰ Hints and feedback are also appropriate when a party (a) fails to request taking of proof on a disputed factual issue, (b) fails to name a source of proof, or (c) offers a source of proof that is legally insufficient.⁹¹ In such a case, the judge must call the defect to the attention of the party offering the proof and give that party an opportunity to comment on or correct the defect.⁹²

2. ZPO § 139(2)

Under ZPO § 139(2), hints and feedback are appropriate if parties have omitted a dispositive point of law or fact, or if the judge has an inclination about some aspect of the case that does not conform with the point of view of one or both parties.⁹³ For example, in a contract case, a judge interpreting the contract differently than the parties

87. See MURRAY & STÜRNER, *supra* note 17, at 167; FISHER, *supra* note 17.

88. See BAUMBACH ET AL., *supra* note 64, at 256.

89. See *id.* at 257.

90. See *id.* at 256; Interview with Arne Alberts, Center for Eur. Private Law, Univ. of Muenster, Germany (Nov. 9, 2011) [hereinafter Interview with Arne Alberts] (on file with author).

91. See MURRAY & STÜRNER, *supra* note 17, at 173.

92. See *id.*; Interview with Burkhard Hess, *supra* note 58; Interview with Thomas Lundmark, *supra* note 78.

93. See MURRAY & STÜRNER, *supra* note 17, at 167–68, 170 (quoting the statute and discussing its effect on a judge's duty); BAUMBACH ET AL., *supra* note 64, at 258.

must tell the parties how his or her interpretation differs from theirs.⁹⁴ If the judge begins to draw an altered or new evaluation from the facts, formulates a new legal concept, or intends to rely on case law neither party has brought up, the judge must give the parties an opportunity to adjust themselves to the judge's new perspective.⁹⁵ Likewise, if the parties draw completely different conclusions from witness testimony than the judge, or witness testimony deviates from the expressly stated assertions of the parties, the judge must discuss the issue with the parties.⁹⁶ In this way, *Hinweispflicht* prevents the court from surprising parties with an assessment of the facts and legal evaluation they could not have foreseen. Sometimes the judge cannot see a party's solid case because the party—due to oversight, misunderstanding of the law, or incomplete investigation—failed to present certain crucial facts that would change the evaluation.⁹⁷ Occasionally, hints and feedback will draw out those crucial facts immediately; other times, hints and feedback will stimulate further investigation that reveals additional facts that the party did not even know before.⁹⁸

3. ZPO § 139(3)

Pursuant to ZPO § 139(3), hints and feedback are always appropriate when their subject is a matter the court is considering raising on its own motion. Before the court raises a matter on its own motion, the judge must first warn the parties about his or her concerns and give them a chance to address those concerns.⁹⁹ For example, if the plaintiff has failed to satisfy a prerequisite to suit (e.g., the complaint is defective as to jurisdiction, venue, or capacity of the parties), the judge must give the plaintiff a chance to correct the complaint before dismissing the case on his or her own motion.¹⁰⁰ This way, the court avoids a time-consuming and unnecessary dismissal and re-filing of the suit.¹⁰¹ *Hinweispflicht* has also been interpreted as requiring a judge to steer parties toward settlement.¹⁰² Thus, it is appropriate at all

94. See BAUMBACH ET AL., *supra* note 64, at 258.

95. See *id.*; see also MURRAY & STÜRNER, *supra* note 17, at 170.

96. See BAUMBACH ET AL., *supra* note 64, at 258; Interview with Marcus Mack, Inst. for Foreign & Int'l Private & Procedural Law, Univ. of Heidelberg, Germany (Nov. 11, 2011) (on file with author) [hereinafter Interview with Marcus Mack].

97. See MURRAY & STÜRNER, *supra* note 17, at 171; Interview with Burkhard Hess, *supra* note 58; Interview with Thomas Lundmark, *supra* note 78.

98. See MURRAY & STÜRNER, *supra* note 17, at 170; Interview with Burkhard Hess, *supra* note 58; Interview with Marcus Mack, *supra* note 96.

99. See ZPO, *supra* note 17, § 139(3).

100. See MURRAY & STÜRNER, *supra* note 17, at 12, 171.

101. See *id.*

102. See MURRAY & STÜRNER, *supra* note 17, at 175. The duty of the judge to work toward a settlement comes from § 278(1). Of course, the court can and does use hints and feedback for that aim according to § 139. See *infra* Part II.D.

stages of the litigation “for a judge to propose a particular settlement based on her then view of the case.”¹⁰³

A judge need not call attention to a basis for disposition if it has been mentioned in the pleadings or briefs of any party or if the basis for disposition is that the defendant defaulted by failing to answer the complaint at all.¹⁰⁴ The judge is not required to repeatedly mention the same omission or defect or to call attention to any defect to which the opposing party has already called attention.¹⁰⁵ On remand, there is no duty to question issues the judge pointed out in the first instance.¹⁰⁶

Sometimes the line between required or permissible judicial assistance and prohibited judicial interference is not a clear one. A judge is definitely not allowed to suggest that a party ask for more money or add another claim, or call attention to an impending statute of limitations bar.¹⁰⁷ Beyond those clear prohibitions, the judge must exercise discretion to keep from overstepping his or her bounds and giving an unfair advantage to one party.¹⁰⁸ It is disputed whether the judge is required to suggest potential sources of additional proof, such as calling another identified witness to testify on a particular disputed point.¹⁰⁹ The court must avoid every appearance of partiality; therefore, it may not put any one party at an unfair advantage over another.¹¹⁰

The judge “must advise each player on the best available move. . . . The judge can interpret the parties’ positions, but should not incite them to fundamentally new activities.”¹¹¹ If the parties’

103. MURRAY & STÜRNER, *supra* note 17, at 13; *see also* Brandon L. Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 41, 42 (David Klein & Gregory Mitchell eds., 2010) (considering motivational and behavioral heterogeneity in Supreme Court decision making).

104. *See* MURRAY & STÜRNER, *supra* note 17, at 170; BAUMBACH ET AL., *supra* note 64, at 256.

105. *See* MURRAY & STÜRNER, *supra* note 17, at 169.

106. *See* BAUMBACH ET AL., *supra* note 64, at 256.

107. *See id.*; MURRAY & STÜRNER, *supra* note 17, at 172. Professor Hess reports that he witnessed personally a case where the judges (in a case with “a very arrogant plaintiff”) repeatedly asked the lawyer for the defendant whether he was sure that he had not forgotten an objection. Finally, the lawyer said, “just to be safe, I also raise the objection that the relevant statute of limitations has run.” The judges never said “statute of limitations,” but the result was the same. Interview with Burkhard Hess, *supra* note 58. That also works with less known objections although one needs a better lawyer to figure those out. *Id.* (Of course, were he really good, the lawyer would have seen it at once, anyway.) Professor Hess opines that German judges are especially happy to help out if one side has a lawyer and the other side does not. *Id.*

108. *See* MURRAY & STÜRNER, *supra* note 17, at 176–77 (commenting on the delicate balance between assistance and impartiality).

109. *See id.* at 176; Interview with Marcus Mack, *supra* note 96.

110. *See* BAUMBACH ET AL., *supra* note 64. Indeed, under Article VI of the Peruvian Code of Civil Procedure, the judge may similarly have to help out the “weaker party” according to the principle of “socialización.” *See* Interview with Burkhard Hess, *supra* note 58.

111. MURRAY & STÜRNER, *supra* note 17, at 176–77.

pleadings, briefs, and explanations are completely clear and pertinent, then hints and feedback are inappropriate.¹¹² The court must exercise restraint; its task is to lead the parties to appropriate claims and not to lead one party to its best arguments.¹¹³ Judges who do so expose themselves to reversal on appeal due to bias.¹¹⁴ The court does not have a right to give legal advice.¹¹⁵ In general, a judge will not encourage a party to raise waivable objections, either procedural or formal.¹¹⁶ Likewise, a judge will not typically lead a defendant to raise an optional defense, even if it may be in the defendant's best interest.¹¹⁷ However, once a party has raised objections or defenses, the duty to give hints and feedback seems to attach.¹¹⁸

D. Claims, Material Examination, the Law of Evidence, and Appeals in Germany

According to case law of the German Federal Constitutional Court, the duty to give hints and feedback can go so far as to include a recommendation that the petitioner abandon his or her principal claim.¹¹⁹ However, this has remained the exception in a civil process controlled by the principle of party disposition (*Dispositionsmaxime*), where parties can freely dispose of the matter in dispute and are responsible for creating their case.¹²⁰ The court basically limits itself to establishing the complainant's expressed cause of action—that is, helping position the relevant claims and clarifying the contents of the complaint.¹²¹

In the area of material examination, the court may not reject a claim as inconclusive for the following reasons without warning the petitioner beforehand and allowing the opportunity to respond within

112. See BAUMBACH ET AL., *supra* note 64.

113. See *id.*

114. See *id.*

115. See *id.*; Interview with Burkhard Hess, *supra* note 58; Interview with Marcus Mack, *supra* note 96.

116. See Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1227–28 (1958).

117. See *id.*

118. See *id.* The situation may arise similarly to the duty to speak in American law. That is, non-disclosure typically constitutes misrepresentation once a subject has been broached; at that point, certainly half-truths are insufficient. See RESTATEMENT (SECOND) OF TORTS § 551(2)(b)–(c) (1977) (stating that each party to a business transaction must “exercise reasonable care to disclose to the other [party] before the transaction is consummated . . . matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading” and that each such party must disclose “subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so”).

119. See Piekenbrock, *supra* note 67.

120. See *id.*

121. See *id.* Interview with Thomas Lundmark, *supra* note 78.

a reasonable period of time: the statement of the facts is unsubstantiated, or the claimant is not actively legitimate or not materially authorized.¹²² If a claim is in need of elaboration, the duty to give hints and feedback may apply.¹²³ However, the duty is inapplicable when the claim is without substance. The defining line between the two categories of claims (needing elaboration or without substance) is imprecise.¹²⁴

The duty to give hints and feedback also plays a comprehensive role in the law of evidence.¹²⁵ The court must point out when a pleading or brief that is declared recorded is inadvertently not attached.¹²⁶ The court also has a duty to warn parties when the court finds the production of circumstantial evidence inadequate.¹²⁷ Similarly, the duty applies when a party has overlooked an identifiable need of proof or if the documented material of a witness's testimony in an earlier proceeding is contradictory.¹²⁸ Another example of when the court must give hints and feedback is when the court does not want to move forward with witness testimony because the court is missing a concrete pleading on the issue.¹²⁹ In a case where the court is held back because of production of evidence, it is fundamentally required to give feedback and set a deadline for the production according to ZPO § 356.¹³⁰ In certain situations, such as when the filed documents reveal others who have relevant knowledge, the court is obliged to suggest specific people as witnesses.¹³¹

A judge's failure to give hints and feedback can become a procedural basis for appeal in cases that are not clear cut.¹³² Appellants must show what they would have done differently had the judge called an error to their attention, and that this action would have affected the outcome of the case.¹³³ If the violation of ZPO § 139 affects a fundamental right, there may be an appellate reproach.¹³⁴

122. See Piekenbrock, *supra* note 67, at 1361–62.

123. See *id.* at 1362.

124. See *id.*; Interview with Burkhard Hess, *supra* note 58; Interview with Marcus Mack, *supra* note 96.

125. See Piekenbrock, *supra* note 67, at 1362.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*; Interview with Burkhard Hess, *supra* note 58.

131. See Piekenbrock, *supra* note 67, at 1361–62.

132. See MURRAY & STÜRNER, *supra* note 17, at 167.

133. See *id.* at 176.

134. An appellate reproach of the lower court might follow if, for example, the lower court has overlooked a response or offer of proof which would have considerably healed the error, or failed to announce the application of foreign law. See BAUMBACH ET AL., *supra* note 64, at 256.

E. Hinweispflicht and Legal Representation

Section 139 does not relieve parties or their lawyers of the need to substantiate their assertions, but it does protect them from the consequences of glaring errors by requiring the judge to call attention to such errors.¹³⁵ Section 139 allows counsel for the parties to concentrate initially on only the most important issues instead of trying to foresee every possible contingency.¹³⁶ American lawyers' initial pleadings tend to include every claim on which, and every party against whom, their clients might conceivably be able to recover, as well as every affirmative defense that might conceivably be applicable. This excess of caution is due to the fact that American courts may perfunctorily dismiss a plaintiff's lawsuit for failure to state in the complaint a claim upon which relief may be granted,¹³⁷ and the fact that certain defenses may become unavailable if defendants fail to include them in their responsive pleadings.¹³⁸ In Germany, judges are charged with spotting the missing elements of a claim or missing defenses and alerting the parties accordingly.¹³⁹ Thus, it is not so crucial that a lawyer throw every conceivable claim or defense into the pleadings in an effort to preserve one claim or defense that may ultimately be relevant.

However, a German judge has no duty to relieve parties of the consequences of incompetent or grossly negligent counsel.¹⁴⁰ The requirement is only to provide hints and feedback sufficient to avoid serious miscarriages of justice.¹⁴¹ If an attorney does not respond at all to obviously important hints and feedback—as opposed to a somewhat unclear response—there is no duty to question further.¹⁴²

There is dispute as to whether *Hinweispflicht* is more stringent when a party is not represented by counsel.¹⁴³ In fact, there has been a long-standing question as to whether the lawyer's representation of a party discharges the court's duty to give hints and feedback to some

135. See *id.*; Interview with Marcus Mack, *supra* note 96; see also Astrid Stadler & Wolfgang Hau, *The Law of Civil Procedure*, in INTRODUCTION TO GERMAN LAW 365, 370 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005) (explaining how a judge treads a thin line, balancing a duty to provide direction while avoiding trying to help any party win its case).

136. See BAUMBACH ET AL., *supra* note 64, at 172.

137. See FED. R. CIV. P. 12(b)(6).

138. See FED. R. CIV. P. 12(h)(1).

139. See MURRAY & STÜRNER, *supra* note 17, at 170 (citing ZPO § 139(2)).

140. See *id.* at 173. It should be noted that judges are required to initiate clarification if counsel misunderstood the law or a preceding hint of the court. See *id.* at 170 (citing, *inter alia*, Bundesgerichtshof [BGH] [Federal Court of Justice], 127 BGHZ 254 (260), 1994 (Ger.); 52 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1264, 1999 (Ger.)).

141. See *id.* at 175.

142. See BAUMBACH ET AL., *supra* note 64, at 257.

143. See MURRAY & STÜRNER, *supra* note 17, at 175; PETERS, *supra* note 68, at 141–43 (1983).

extent.¹⁴⁴ Although it is generally believed that the duty to give hints and feedback when a party is represented by counsel is unnecessary, recent case law suggests that the duty still adheres to represented parties.¹⁴⁵ In recent years, an increasing number of high court decisions have affirmed the duty to give hints and feedback even when a party was represented by counsel and the subject matter of the omitted hints and feedback was in a grey area (e.g., cases involving amendments to the complaint and missing requests for relief to the disadvantage of the defendant to a counteraction; motions to clarify co-defendants; missing notices of compensation; statutes of limitation; the limitation of inheritances; and requests for further offers of proof after unsuccessful proof).¹⁴⁶ Some scholars have argued that, when the parties are represented by counsel, judges should not have their decisions subject to reversal on appeal for failure to give hints and feedback because a policy requiring judges to give hints and feedback to lawyers would let lawyers “off the hook” and weaken the profession in the long run.¹⁴⁷ Egbert Peters argues that *Hinweispflicht* could never become a “charter for [a] lawyer’s negligence and failure,” because when the judge intervenes it is to cause the parties and their lawyers to bring forward *more* information, and the lawyer must respond to hints and feedback if he wants to win the case.¹⁴⁸

III. INCORPORATING JUDICIAL HINTS AND FEEDBACK INTO AMERICAN CIVIL PROCEDURE

A. *The Advantage of Judicial Participation in Civil Law Cases*

In civil litigation, there are several compelling instances where a judge should take an active role in the proceedings, some of which have played out in the American judicial system. In the last several decades, the American system has seen examples of the judiciary moving toward taking on greater responsibility, especially in complex litigation. From the 1980s Agent Orange settlement,¹⁴⁹ to the more recent Microsoft

144. See Piekenbrock, *supra* note 67, at 1362.

145. See *id.*

146. See PETERS, *supra* note 68, at 141; Interview with Burkhard Hess, *supra* note 58; Interview with Marcus Mack, *supra* note 96.

147. See PETERS, *supra* note 68, at 144.

148. *Id.*

149. See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 351 (1986) (discussing Judge Weinstein’s role in moving forward the previously stalled Agent Orange case).

case,¹⁵⁰ to rule revisions that empower judges,¹⁵¹ there are examples of active judicial participation throughout American law.

In the Agent Orange case, Judge Weinstein openly encouraged settlement by using the procedural tools at his disposal. He stated that one of the reasons he certified the case as a class action was to put pressure on the defendant and the federal government to settle.¹⁵² When Judge Weinstein took over the litigation, early negotiations had failed and the case had been stalled for many months.¹⁵³ The first thing he did was set a firm trial date, which applied pressure to the parties to conduct discovery in a timely fashion or, in this case, settle quickly.¹⁵⁴ He then revealed to the parties how he planned “to rule on a number of important and complex legal issues, such as choice-of-law and governmental immunity.”¹⁵⁵ He hired a consultant, paid for by the defense, to develop a settlement strategy plan, and appointed three special masters for settlement.¹⁵⁶ During intensive settlement negotiations, the court preserved its control by not allowing the parties to meet face-to-face until after the terms had been defined.¹⁵⁷ Also during negotiations, the court emphasized different things to each side. The court and its special masters reminded plaintiffs of the weakness of the causation evidence, the novelty of certain questions of law, the risk of a favorable decision being reversed on appeal, the risk of losing everything by rejecting the settlement, and the cost of continued litigation.¹⁵⁸ The court emphasized to the defendants the pro-plaintiff sympathies of the local jury and the reputational damage that comes from protracted litigation.¹⁵⁹ In this way, the court utilized its authority in a complex civil case to drive a just outcome that was efficient and acceptable to both parties.

Some twenty years later in the Microsoft litigation, Judge Kollar-Kotelly took a different approach to settling a megacase.¹⁶⁰ She believed that she needed to stay out of the negotiating process in case

150. See Eric D. Green, *The Role of the Judge in the Twenty-First Century: Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. Rev. 1171, 1182–83 (2006) (discussing Judge Kollar-Kotelly’s use of a scheduling order to encourage settlement).

151. See, e.g., FED. R. CIV. P. 16(b) (encouraging greater judicial participation through the pre-trial conference process, as well as the discovery process for electronically stored information).

152. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 323 (1986) (discussing the growing trend of judges openly encouraging settlement).

153. See Schuck, *supra* note 149, at 343–44.

154. See *id.* at 344.

155. *Id.*

156. See *id.*

157. See *id.* at 345. That would likely not be possible under the German rules of procedure. See Interview with Burkhard Hess, *supra* note 58.

158. See Schuck, *supra* note 149, at 346.

159. See *id.*

160. See Green, *supra* note 150, at 1190.

the suit went to trial. Judge Kollar-Kotelly believed that the best way to resolve the case was first to let the parties attempt mediation directly; then, only if negotiations were unsuccessful, she would appoint a mediator. Her approach involved four steps on a “tightrope”:

- (a) permitting a period of direct negotiation, (b) appointing a mediator when negotiations failed to produce a settlement, (c) encouraging the mediation effort and monitoring its progress, and (d) remaining completely separate and apart from any of the substantive negotiation and mediation efforts.¹⁶¹

Although the Federal Rules of Civil Procedure allow judges in some instances to take an active role in litigation, the German Civil Code places much more responsibility on judges, especially through the duty to give hints and feedback found in ZPO § 139. The examination of German and U.S. civil procedure concerning the duty to give hints and feedback allows one to see potential areas where the American system could benefit from a different approach to the role of judges.

B. Potential Convergence

In the 1980s, when Langbein’s much discussed article, *The German Advantage in Civil Procedure*, was published, the German and U.S. systems of civil procedure may have had little in common. However, after the German reforms of 2001 and the changes in the U.S. Federal Rules of Civil Procedure (“FRCP”), there are some intersections and similarities that may make incorporation of *Hinweispflicht* more palatable. As Professor Dodson notes in his review essay, *The Challenge of Comparative Civil Procedure*, “[t]he world is collapsing and procedure is converging, even in areas of American exceptionalism and even for aspects that are fundamentally interconnected to the system as a whole.”¹⁶²

It is important to keep in mind that German goals for its system are closely related to American goals. The divergences in the two systems become a matter of prioritization of values. Both the United States and Germany design their civil procedure systems in an attempt to avoid surprise.¹⁶³ In addition, both countries recognize due process rights to notice and a hearing.¹⁶⁴ These rights “serve three distinct

161. *Id.* Professor Green concludes that the Microsoft case exemplifies “the classic paradigm of total separation of court-appointed mediation from the adjudication of the case,” with “no active judicial involvement in the actual settlement process.”

162. Dodson, *supra* note 16, at 143–44.

163. See *supra* note 76; see also Interview with Thomas Lundmark, *supra* note 78.

164. See U.S. CONST. amends. V, XIV (providing that no person shall be deprived of life, liberty, or property without due process of law). GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I, art. 2, guarantees substantive and procedural due process through the broad interpretation of the right to free development of personality, as well as the equality clause of Article 3(1) which is interpreted as guaranteeing due process. See David P.

functions: a positive, political function designed to engage the litigant qua citizen in an important governmental institution for deciding rights; a negative, state-checking function designed to deter arbitrary state action; and a truth-seeking function, designed to ensure that the parties convey relevant information to the court.”¹⁶⁵ In the United States, the positive, political function takes precedence. The U.S. system favors a due process function that allows the parties to control procedure and thereby the litigation.¹⁶⁶ In Germany, the priority is on the truth-seeking function of due process.¹⁶⁷ Because of the divergent priorities, the German system embraces more of an inquisitorial approach while the U.S. system embraces an adversarial approach. With a slight intellectual shift, the U.S. system could balance these priorities by embracing some aspects of an inquisitorial approach.

One area where U.S. law is converging with German law is the involvement of judges in pro se litigation. The duty to give hints and feedback in Germany is perhaps more pronounced in pro se litigation. In the lower courts in Germany (*Amtsgericht*), the parties are not required to retain representation.¹⁶⁸ In these cases, “the proceedings are likely to be more informal and the judge inclined to lend a stronger helping hand than when the parties are professionally represented.”¹⁶⁹ Likewise, in the United States, there is an example of judges in the Ninth Circuit taking a leading role in pro se litigation. Through a series of cases during the 1980s and 1990s, the Ninth Circuit instructed district courts that they must:

play a more proactive role in protecting pro se litigant interests by requiring them to provide a copy of Rule 56 to an unrepresented party facing a motion for summary judgment;¹⁷⁰ notify a pro se litigant of the implications of transferring a motion to dismiss into one for summary judgment;¹⁷¹ provide a pro se plaintiff with notice of the deficiencies of a defective complaint when dismissing with leave to amend so that the plaintiff knows how to fix it;¹⁷² explain to a pro se litigant the implications of consenting to a proceeding before a magistrate judge;¹⁷³ notify a pro se litigant of the implications of failing to disclose a witness

Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 352–72 (discussing due process under the German constitution).

165. Kessler, *supra* note 7, at 1185.

166. *See id.* at 1215.

167. *See id.* at 1185.

168. *See* Benjamin Kaplan et al., *supra* note 116, at 1198–99.

169. *Id.* (footnote omitted).

170. Dodson, *supra* note 16, at 148 (citing *Rand v. Roland*, 154 F.3d 952 (9th Cir. 1998) (en banc)).

171. *Id.* (citing *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995)).

172. *Id.* (citing *Noll v. Carlson*, 809 F.2d 1446, 1448–49 (9th Cir. 1987), *superseded by statute*, Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, *as recognized in Lopez v. Smith*, 160 F.3d 567, 571 (9th Cir. 1998)).

173. *Id.* (citing *Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911, 915–16 (9th Cir. 2003)).

in a timely fashion;¹⁷⁴ and consider a pro se plaintiff's competence prior to dismissing a complaint with prejudice.¹⁷⁵

Another example of convergence between U.S. and German law is the trend toward a more active judiciary in complex litigation.¹⁷⁶ In complex cases, the American managerial judge looks a good deal like the inquisitorial judge in civil law countries like Germany;¹⁷⁷ as in Germany, these judges are key to a state process geared toward providing material justice, with the "truly neutral" judge often the one who achieves material justice through proactive case supervision.¹⁷⁸ Indeed, although it is not binding, the *Manual for Complex Litigation* encourages more active judicial involvement and is the primary source of reference for complex litigation.¹⁷⁹ At class certification or settlement hearings in complex litigation, judges sometimes question witnesses.¹⁸⁰ As Dodson notes, "[t]hese two instances mirror a larger, though more subtle, trend over the last quarter century—that American judges in general are becoming more engaged, proactive, and hands-on, perhaps facilitated by recent changes to rules that give them more discretionary power to do so."¹⁸¹ Within this context, the German duty to provide hints and feedback may be incorporated into some aspects of judicial process. Below, this Article explores how the U.S. system may be able to integrate this German duty in the pretrial conference by recommending witnesses and facilitating settlement.

At the outset, it is important to differentiate between this Article's proposals and the concept of managerial judging, which is often portrayed as the court acting on its whim to steer complex cases a certain way.¹⁸² The key to the concept of *Hinweispflicht* in the German system is that it also pertains to fact finding.¹⁸³ By empowering the judge in certain key areas, the opportunity for partisan lawyering is reduced and the probability of salient facts coming to light earlier, or in the case at all, is increased.¹⁸⁴

174. *Id.* at 149 (citing *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 845–46 (9th Cir. 2004)).

175. *Id.* (citing *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989)).

176. *See id.*

177. *See* Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 12–13 (2001) (examining areas of complex civil litigation in which American and civil law have begun to converge).

178. *See* MURRAY & STÜRNER, *supra* note 17, at 177.

179. *See* Mullenix, *supra* note 177, at 14 (discussing the *Manual's* role).

180. *See id.* at 19.

181. Dodson, *supra* note 16, at 149 (footnote omitted).

182. *See* Bradley Bryan, *Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question*, 11 TULSA J. COMP. & INT'L L. 521, 529 (2004).

183. *See id.*

184. *See id.* Exercising his powers, or at least having the potential to exercise them, may give the judge power to distinguish between an acceptably zealous attorney and an unreasonable, unethical "hired gun."

C. *The Pretrial Conference*

Federal Rule of Civil Procedure 16 gives American judges the discretionary authority to call a pretrial conference in order to establish a certain level of control over the case. Rule 16 makes discretionary many of the actions that ZPO § 139 makes binding. Rule 16(c)(2) provides that, at the pretrial conference, the judge may consider and take action with respect to:

- (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
- (B) amending the pleadings if necessary or desirable;
- (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
- (D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;
- ...
- (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
- ...
- (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
- ...
- (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.¹⁸⁵

Pursuant to FRCP 16, American judges already have the statutory authority to assume a certain amount of control over litigation and give the parties direction regarding the formulation and simplification of the issues, if they choose to do so.¹⁸⁶ Recently, the pretrial conference has become a standard practice in federal courts. Thus, the challenge of dealing with procedure generally, beyond Rule 16 pretrial conferences, is not how to give American judges the power to give hints and feedback, but how to make them want to do so.¹⁸⁷

185. FED. R. CIV. P. 16(c)(2); see Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1288 (2010) (“[W]hat distinguishes the judge as manager from the judge as arbiter of disputes is the nature and purpose of that involvement. In the interest of moving a case along more expeditiously, the managerial judge imposes early deadlines, enters orders limiting use of discovery devices and time for pretrial developments, and uses the many tools at his disposal to try and push the parties toward settlement.”). One can argue that there is judicial efficiency in either approach.

186. See generally FED. R. CIV. P. 16 (providing for pretrial conferences, scheduling, and management).

187. See Reitz, *supra* note 34, at 992–93.

More could be done to encourage judges and lawyers to utilize fully the pretrial conference. One possible course of action is to amend FRCP 16 to make pretrial conferences mandatory in all cases and to transform the permissible "Subjects for Consideration at Pretrial Conferences" into mandatory topics for discussion at the conference.¹⁸⁸ However, the Advisory Committee Notes to Rule 16 indicate that this possibility has already been considered and rejected.¹⁸⁹ The Advisory Committee explains that there is empirical evidence showing that judicial intervention early in a case makes the case proceed more efficiently and with less cost and delay, and "that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process."¹⁹⁰ In response to this evidence, Rule 16 was amended in 1983 to make pretrial scheduling orders mandatory in all federal civil cases.¹⁹¹ But pretrial conferences remain voluntary. The Advisory Committee Notes indicate that pretrial conferences were not made mandatory because in "simple, run-of-the-mill cases," attorneys find pretrial requirements burdensome and unnecessary.¹⁹² In small cases, "over-administration leads to a series of mini-trials that result in a waste of an attorney's time and needless expense to a client."¹⁹³ Critics of pretrial conferences have complained that no real analysis is done at the conferences and that at such an early stage in the proceedings, attorneys often have not even formulated all the issues yet.¹⁹⁴ However, the Advisory Committee encourages pretrial conferences in complex or protracted cases because such cases may

188. See Thornburg, *supra* note 185, at 1322. In terms of dealing with what she calls "managerial judges," Professor Thornburg's article suggests: "The least controlling, but possibly most feasible, alternative is to revise the official training given to trial judges, such as judicial seminars and the CLMM [Civil Litigation Management Manual], so that they provide less cheerleading and more guidance with respect to trial management." *Id.*

189. See FED. R. CIV. P. 16 advisory committee's note to 1993 amendment.

190. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment (citing 6 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1522 (1971); STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17 (1977)).

191. See *id.* The scheduling order must set time limits on joinder, amendments, completion of discovery, and the filing of motions. See FED. R. CIV. P. 16(b)(3)(A). It also may change when disclosures are to occur and the extent of discovery (including of electronically stored information), while setting pretrial conference and trial dates as well as adopting any agreements of the parties about privilege or attorney work-product. See FED. R. CIV. P. 16(b)(3)(B).

192. FED. R. CIV. P. 16 advisory committee's note to 1983 amendment.

193. *Id.* (citing Milton Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1974)).

194. See *id.*

become “mired in discovery” without early judicial guidance.¹⁹⁵ A comparable rule, with some of the same concerns, is found in France.¹⁹⁶

D. *Judicial Authority to Manage Witness Testimony*

Hinweispflicht has been interpreted by some to authorize judges to suggest that parties call additional fact witnesses where more evidence is needed to substantiate a claim.¹⁹⁷ German judges are required to question fact witnesses selected by the parties but are not permitted to call fact witnesses themselves.¹⁹⁸ Federal district court judges in the United States have greater authority than German judges in this respect: Rule 614 of the Federal Rules of Evidence permits American judges to call and question fact witnesses on their own motion.¹⁹⁹ The Advisory Committee Notes indicate that this Rule is justified because it does not threaten the parties’ right to cross-examine as usual, and because it avoids two problems that typically arise when the adversaries call and examine their own witnesses.²⁰⁰ The first problem it avoids is the tendency of the jury to associate the witnesses called with the party calling them,²⁰¹ which is undesirable when a fact witness is an unsavory character who just happens to have important information. The second problem avoided is one of subjectivity; the Advisory Committee observes that “the judge is not imprisoned within the case as made by the parties,”²⁰² and thus presumably the judge is in a better position than the parties to know

195. *Id.*

196. In France, NCPC article 144 provides that “inquiries may be ordered when the judge is not supplied with sufficient material to determine the matter.” CODE DE PROCÉDURE CIVILE [C.P.C.], art. 144 (Fr.). While the parties may request a judge to order such a measure, he may also do so *sua sponte*. *See id.* art. 143. However, according to NCPC article 146, an “inquiry on a fact may be ordered only if the party who pleads it does not have sufficient material to prove it. In no case may a preparatory inquiry be ordered for the sake of making up a party’s deficiency in presenting evidence.” *Id.* art. 146. Any order made must be as simple and inexpensively as possible. *See id.* art. 147 (Fr.). But, in deciding whether or which measure to order, the judge has a “sovereign power of assessment” as to their appropriateness. *See BELL ET AL.*, *supra* note 24, at 103.

197. *See ZPO*, *supra* note 17, § 139(1)–(2); MURRAY & STÜRNER, *supra* note 17, at 173.

198. *See Reitz*, *supra* note 34, at 992. By way of comparison, according to NCPC article 218, a French “judge who carries out the investigation may, *sua sponte* or at the request of the parties, summon or hear any person whose hearing deems to him useful for the manifestation of the truth.” CODE DE PROCÉDURE CIVILE [C.P.C.], art. 218 (Fr.). If a party wishes a witness to be summoned, that party must explain what evidence she hopes to obtain from the witness. In either case, the judge decides whether or not to call a witness as a matter of his “sovereign power of assessment,” though it is subject to the rule that where a witness has given evidence on a particular issue, the other side is entitled to have a counter-witness. BELL ET AL., *supra* note 24, at 105.

199. *See* FED. R. EVID. 614(a), (b).

200. *See* FED. R. EVID. 614 advisory committee’s note on proposed rules.

201. *See id.*

202. *Id.*

and decide what kind of additional testimonial evidence the fact finder needs to hear to make a determination of the case.

Given that American judges already have the power to call witnesses themselves, it would not exceed an American judge's existing authority to suggest to a party that the party call another witness of the party's *own* choosing to testify on a particular matter. Again, the problem is getting American judges to exercise the authority they already have. As discussed in Part V below, this means that the American system must adopt appropriate incentives to exercise that authority.

Federal Rule of Evidence 702 is another example of American judicial discretion. American judges must scrutinize an expert's "technical or specialized knowledge" prior to admitting expert testimony. Ever since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²⁰³ judges have had wide discretion to admit or reject expert testimony. Now, "the trial judge has to decide: 'Is this good science?'"²⁰⁴ In contrast, before *Daubert*, the judge looked to other scientists' works to determine validity. After *Daubert*, judges must exercise their own independent judgment to determine the reliability of the science.²⁰⁵ In fact, the factors given by the U.S. Supreme Court in *Daubert* to determine when expert testimony is allowed have been interpreted by some courts to restrain expert testimony and by others to readily admit such testimony.²⁰⁶ As Professor D. Michael Risinger noted, "[t]he day after the Court decided *Daubert*, the *Washington Post* characterized it as a victory for those who wanted expertise more easily admitted, while the *New York Times* characterized it as a victory for those who wanted more expertise rejected."²⁰⁷

E. Judicial Responsibility to Facilitate Settlement

A component of *Hinweispflicht* is the obligation to facilitate settlement in civil litigation. Pursuant to 28 U.S.C. § 652(a)²⁰⁸ and

203. 509 U.S. 579 (1993).

204. G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 948 (1996).

205. See *Daubert*, 509 U.S. at 592 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact or issue. . . . We are confident that federal judges possess the capacity to undertake this review." (footnotes omitted)).

206. See D. Michael Risinger, *Defining the "Task at Hand": Non-Science Forensic Science After Kumho Tire Co. v. Carmichael*, 57 WASH. & LEE L. REV. 767, 768 (2000).

207. *Id.*

208. 28 U.S.C. § 652(a) provides:

Consideration of alternative dispute resolution in appropriate cases. . . . Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an

Federal Rule of Civil Procedure 16,²⁰⁹ American federal district court judges in general civil cases are required only to bring up the possibility of alternative dispute resolution (ADR) as a means to settlement. District court judges have the discretionary authority to compel parties to participate in mediation or certain other kinds of ADR, but they of course have no control over how successful the ADR will be.²¹⁰ In Germany, judges are allowed to make specific suggestions about the details of a proposed settlement agreement and to opine whether either party would benefit from settling rather than risking

alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

209. FED. R. CIV. P. 16 provides in pertinent part:

(c) Attendance and Matters for Consideration at a Pretrial Conference.

....

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

....

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

....

(f) Sanctions.

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

Id.; see also AM. BAR ASS'N, THE FRANCHISE AND DEALERSHIP TERMINATION HANDBOOK 106 (2d ed. 2012) (citing *Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000) (imposing sanctions on a defendant who violated a court order to mediate, made pursuant to FED. R. CIV. P. 16, by failing to submit requisite memorandum to mediator in advance and failing to have corporate representative attend the mediation)).

210. One example of how strongly courts defer to arbitration is the recent U.S. Supreme Court decision *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), where the Court held that the parties were required to arbitrate whether the employee's agreement was unconscionable. Under the Federal Arbitration Act, if a party challenges the enforceability of the particular delegation clause then the district court can consider the challenge, but where the party challenges the entire agreement, the challenge goes to arbitration. See *id.* at 67–76.

an adverse judgment at trial.²¹¹ In the United States, the task of making such suggestions has been delegated to the mediator.²¹²

In some cases, a trial judge may take a managerial stance that resembles the German system. For instance, in a tort case, if a judge is experienced with personal injury cases and has enough information about the parties' settlement negotiations, then the judge might believe that plaintiff's counsel is not acting in the plaintiff's best interest by holding out for a settlement amount that is unrealistic.²¹³ Especially if counsel is inexperienced or inadequate, the judge may intervene—for instance, by mentioning in open court other similar cases that settled.²¹⁴ This could have the effect of putting the client on notice and thereby exerting pressure on the plaintiff's representation to settle.²¹⁵ In fact, as E. Donald Elliott noted in his 1986 article, *Managerial Judging and the Evolution of Procedure*, "judges are just beginning to acknowledge openly that 'encouraging' settlement is one of the governing principles behind their managerial choices."²¹⁶ Especially in complex litigation, judicial management is "superimpose[d] upon our lawyer-driven procedure."²¹⁷ More and more frequently, judges are involved "in identifying issues, promoting settlement, and sequencing investigation."²¹⁸ A relevant example is the role Judge Weinstein took in the Agent Orange case of 1984.²¹⁹ As Peter Schuck noted in *The Role of Judges in Settling Complex Cases: The Agent Orange Example*:

Typically, the judge enjoys some discretion with respect to defining the outcome-relevant facts and law. If the manner in which the judge will exercise that discretion is important to the outcome, and if the parties'

211. See MURRAY & STÜRNER, *supra* note 17, at 13.

212. In France, NCPC article 21 expressly provides that "to conciliate the parties is part of the mandate of the judge." CODE DE PROCÉDURE CIVILE [C.P.C.], art. 21 (Fr.). "Parties may reconcile, on their own initiative or upon that of the judge, throughout the proceeding." *Id.* art. 127. "The conciliation must be attempted, unless otherwise provided, at the place and the time that the judge deems favourable." *Id.* art. 128. The judge's attempt of conciliation may either come from his own initiative, at the Parties' request, or from a special statute making it mandatory in certain matters (e.g., divorce). The attempt of conciliation may be handled either by the judge himself or by a court-accredited conciliator (i.e., not a magistrate). If an agreement is reached, the parties may record their assent in the form of a "recorded agreement" upon which the judge may confer binding force. Parties can also ask the judge to "approve" their agreement, which he is not bound to do and will only do so after reviewing the lawfulness and the opportunity of the agreement. If the judge approves the agreement, his decision has force of a judicial decision. Melina Douchy-Oudot & Julie Joly-Hurard, *Médiation et Conciliation*, in *REPertoire DE PROCEDURE CIVILE* 23 (Anne Raymond-Greze ed., 2013).

213. See Elliott, *supra* note 152, at 332.

214. See *id.*

215. See *id.*; Interview with Marcus Mack, *supra* note 96.

216. Elliott, *supra* note 152.

217. John H. Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763, 764 (1988) [hereinafter Langbein, *Trashing*].

218. *Id.*

219. See generally Schuck, *supra* note 149 (discussing the opinion).

estimates of how it will be exercised are sufficiently divergent, they may not be able to negotiate a settlement on their own. A judge who informs the parties of the likely result of these discretionary decisions can, by helping the parties' estimates to converge, strongly influence their choice between litigation and settlement.²²⁰

Class action litigation is the only realm of the American system where the level of judicial involvement in the details of settlement comes close to the German system.²²¹ Pursuant to Federal Rule of Civil Procedure 23(e), a district court judge assigned to a class action must approve any settlement that would bind the class members. The parties must disclose to the judge not only the express terms of the proposed settlement, but also "any agreement made in connection with the settlement," including "related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others."²²² The judge must review all terms, details, and agreements disclosed by the parties, hold a hearing to discuss the proposed settlement with the parties, and make a finding that the proposed settlement is fair, reasonable, and adequate.²²³ Except under very particular circumstances,²²⁴ the judge has authority under Rule 23(e)(3) to refuse approval of a settlement. The purpose of the judge's enhanced authority over settlement in class actions is to protect the interests of class members who have not participated in the litigation other than to elect class member status.²²⁵

District judges' facilitation of and detailed involvement in class action settlements resembles the activity of German judges in general civil cases. Extending the authority of American judges to review and discuss details of proposed settlements with parties from the class action realm to the realm of general civil cases would introduce an aspect of *Hinweispflicht* into American civil litigation. Professor John Langbein, in *The German Advantage in Civil Procedure*,²²⁶ argued in

220. *Id.* at 349.

221. Class actions do not exist in Germany, but the heightened level of judicial involvement in American class actions is similar to that in regular civil suits in Germany. The only thing in Germany that approximates a class action is a kind of mass civil case that can only be filed in connection with capital market transactions. But even that is dramatically different from a U.S. class action because the named plaintiffs are never allowed to bring suit on behalf of unnamed plaintiffs. It is more of a collective lawsuit than a class action. The act which allows the mass capital market transaction cases expired in November 2010. See BUNDESMINISTERIUM, THE GERMAN "CAPITAL MARKETS MODEL CASE ACT," available at <http://www.bmj.bund.de/media/archive/1056.pdf>.

222. FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

223. See FED. R. CIV. P. 23(e)(2).

224. The judge may not refuse to approve settlement if the class is certified pursuant to Rule 23(b)(3), the first opportunity to elect exclusion has expired, and class members would be allowed to elect exclusion from the settlement once approved. See FED. R. CIV. P. 23 advisory committee's note to 2003 amendment.

225. See *id.*

226. Langbein, *German Advantage*, *supra* note 1.

1985 that this already happens to some extent in ordinary litigation. He discussed how the complex litigation techniques “enshrined in the *Manual for Complex Litigation* have seeped into the federal procedure for ordinary litigation” and look “‘proto-Germanic’ in the eyes of the comparative lawyer.”²²⁷ However, this move might be met with the same kind of resistance from attorneys that John Reitz predicted with respect to judicial interference in fact finding.²²⁸ One attorney gave the following opinion on this proposed movement:

[I]f a judge recommended that my client settle for \$1,000, I would be afraid that even if we prevailed, the judge would limit my client’s award to \$1,000. I would not want that same judge to have the power to decide the case. I’ve heard some old school stories about judges bringing counsel into chambers and sitting them down and saying, “You need to settle this case.” But that’s the old way. That’s the old school. Now, settlement has been delegated to the mediator. We do put a high premium on settlement, but the mediator does that job now. That’s why mediation is on the up-and-up. The role of mediation has risen to the forefront. We do want some third party out there with some authority to bring about a settlement. But if the mediator also had the authority to decide the case, he would be too powerful. There would be too much power to put pressure on the weaker party. Evaluative mediators, who are sometimes former judges, can say: if you were before me, I’d rule against you. I would want to hear that, I want to know that information, but I wouldn’t want it coming from the judge.²²⁹

For *Hinweispflicht* to be successfully integrated into the American system, reformists would have to find a way to appease the resisters.

IV. PROBLEMS WITH INCORPORATING *HINWEISPF LICHT* INTO AMERICAN CIVIL PROCEDURE

A. *General Problems*

Some comparative law scholars have foreseen difficulties with trying to integrate aspects of German civil procedure into the American system. Many of these reservations were formulated and expressed in response to a controversial article written by John Langbein in which he suggested the American civil justice system had much to learn from

227. Langbein, *Trashing*, *supra* note 217, at 765 (defending the author’s original article, *The German Advantage in Civil Procedure*).

228. See Reitz, *supra* note 34, at 1004–05 (“[T]he danger of unwarranted state intrusion through a crusading trial judge is probably reduced to acceptable levels in our present system because trial judges have no institutional responsibility to carry out discovery and no ability to create the conflict between discovery and privacy rights. They can only decide conflicts brought to them. The passive, umpire-like status of the state official thus appears to be the chief protection in our system against unhealthy state intrusion into private interests. Adoption of the German system of judge-led witness examination would sacrifice that protection.”).

229. Interview with Charles Wachter, Partner, Holland & Knight LLP, in Tampa, Fla. (July 1, 2010).

its German counterpart.²³⁰ Langbein bemoaned the American system for “its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial,” and for “the wastefulness and complexity of our division into pretrial and trial procedure . . . and the truth-defeating distortions incident to our system of partisan preparation and production of witnesses . . . and experts.”²³¹ He suggested these evils would be mitigated if Americans adopted the German practice of making judges responsible for fact gathering.²³²

Langbein pointed out that in Germany it is the judge, rather than the adversaries, who gathers evidence, examines fact witnesses, calls and examines expert witnesses, determines the sequence of witness examination, and creates the case record.²³³ He argued that a judge who knows the facts as well as the parties is in a better position to recommend settlement or to encourage the parties to abandon weak claims, thereby shortening the case and avoiding needless expenditures of time and money.²³⁴ Because German judges are free to hear the case issue by issue rather than hear one party’s entire case followed by the other party’s entire case, the German judge may reach a central, dispositive issue much more quickly than the American judge.²³⁵ Langbein wrote that judicial control over witness examination is preferable to adversary control because adversarial attorneys control the questions they ask on direct examination and can coach their witnesses to answer those questions in a particular way, which inevitably sways testimony and defeats the truth.²³⁶ Langbein did not make any concrete recommendations as to how to implement changes in the American system, but he did note a trend toward increased judicial management in civil litigation, which to him indicated that the change he desired was possible.²³⁷

B. *Procedural Rules Are Too Interconnected to Copy*

In response to Langbein’s article, many scholars have warned that procedural rules are too interconnected with other rules—the substance—of that legal regime to uproot those local procedures and successfully replant them elsewhere. Indeed, every procedural rule is not just connected to other rules within a specific system, but to the

230. FOSTER & SULE, *supra* note 18, at 145.

231. Langbein, *German Advantage*, *supra* note 1, at 823, 825.

232. *See id.* at 824.

233. *See id.* at 827–28.

234. *See id.* at 831–32.

235. *See id.*; Interview with Reiner Schulze, Professor of German and European Civil Law, Dir., Ctr. for European Private Law, Univ. of Muenster, Germany (Nov. 9, 2011) [hereinafter Interview with Reiner Schulze] (on file with author).

236. *See* Langbein, *German Advantage*, *supra* note 1, at 833–34.

237. *See id.* at 858.

particular values of the culture that employs the rule; this makes legal procedure by nature resistant to change.²³⁸ Importing foreign procedural rules to the American system is particularly difficult because the American system, with its proliferation of judge-made law and reliance on juries, is strikingly different from the civil law systems of Europe,²³⁹ and Americans are protective of that difference.²⁴⁰ However, as this Article discussed above, many of the powers of the German judge that are incorporated into ZPO § 139 are also available to American judges. To that end, the Federal Rules of Civil Procedure coupled with the trend toward managerial judging, especially in complex litigation, provides evidence that, despite the differences in the two systems, the United States may be able to further incorporate the duty to give hints and feedback into its procedures.

C. Inefficiency Can Be Valuable

Professor Samuel R. Gross responded to Langbein's criticism of American inefficiency by stating that inefficiency is sometimes desirable when it serves a protective function. In too efficient of a judicial system, it would be dangerous to continue allowing judges to perform certain valuable functions like determining public policy. Allowing judges to make "activist" judgments quickly, decisively, and with less interference from counsel would vest the judiciary with too

238. See Dodson, *supra* note 16, at 140 (presenting the pros and cons of studying comparative law); see also Bryan, *supra* note 182, at 542 ("There is a practical difficulty in using comparative example across the gulf that divides Anglo-American from Continental procedure.").

239. The modern trend among European Laws of Civil Procedure is oriented toward more standardization, under the pressure of two increasingly influential legal systems: the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on November 4, 1950. On the one hand, "Article 6(1) par. 1 of the Convention provides that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal.' This rule transcends the distinction between Romano-Germanic and common law approaches to the trial, which it regroups around the same principles by conferring on the general public a right to a fair trial with which all rules of procedure, including civil procedure, must comply." Loïc Cadiet & Soraya Amrani-Mekki, *Civil Procedure*, in INTRODUCTION TO FRENCH LAW 330 (George A. Bermann & Etienne Picard eds., 2008). Additionally, "[t]he civil procedure laws of . . . countries parties to the European Convention of Human Rights, [are] thus evaluated on an ongoing basis in consideration of the requirements of a fair trial." *Id.* On the other hand, "civil procedure is becoming 'Europeanized' under the influence of EU regulations which are gradually coming to cover important segments of civil procedure[.]" such as "the gathering of evidence in civil and commercial matters" and "the service of judicial and extra judicial documents." *Id.* at 331; see also 2001 O.J. (L 174) 1 (addressing "cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters"); 2000 O.J. (L 160) 39 (addressing "the service in the Member States of judicial and extrajudicial documents in civil or commercial matters").

240. See Dodson, *supra* note 16, at 140-43 (discussing the specific barriers in place for comparative procedure in America).

much unchecked power.²⁴¹ Thus, if Americans value the law-making capacity of their judges, they should be wary of too efficient a legal system.²⁴²

D. Attorneys Are More Skilled at Fact Finding

Professor Gillian K. Hadfield²⁴³ wrote that attorneys are better at fact finding than judges could ever be because they have incentives to understand and respond to the details of their clients' businesses and relationships. Lawyers care about reaching a rule of law that will be meaningful and effective in their clients' real-world situations, not rules that will be ignored because they are cut off from reality and wrongheaded.²⁴⁴ Attorneys differ from judges in this sense because:

Practical experience comes from observing the impact of particular rules in particular settings, discussing strategies and constraints with clients, being educated about an industry on behalf of a litigant seeking to enforce or avoid legal liability, and consulting experts who are paid to analyze data, interview people, or construct models.²⁴⁵

Judges cannot get that kind of experience, and thus, without some kind of guidance from attorneys, will make rules that "are either so unpredictable as to lose their identity as rules or so wrongheaded from a practical perspective that they will be routinely ignored."²⁴⁶

However, the alleged superiority of attorneys over judges concerning fact finding may not be a persuasive argument against the incorporation of *Hinweispflicht*. There are several such counterarguments. First, lack of judicial experience is an insufficient rationale because in the United States—unlike in Germany—judges are usually appointed after several years of practice as lawyers in good standing. It is precisely because they earned considerable experience as lawyers that judges are able to evaluate the strengths and weaknesses of a case, identify the relevant factual and legal elements, and accordingly determine which ones should be enhanced.

Furthermore, even if it were tangible, this alleged superiority should not be seen as a deterrent to the admission of a "judge-made" fact finding. On the contrary, the involvement of the judge in addition

241. See Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 752 (1987).

242. This criticism may be valid because of the difference in how judges are viewed or trained. A counterargument against "activist" American judges is that they create new *legal* rules. The judges are not accused of being activists in the sense of trying to find out the facts in a particular case.

243. See Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401, 411 (2007).

244. See *id.*

245. *Id.*

246. *Id.*

to—but not instead of—the involvement of the attorneys would be a supplementary force, dedicated to the discovery of the truth.²⁴⁷ In addressing this matter, one should keep in mind that the purpose of justice—especially institutional justice—is not merely to keep score in a legal battle between private parties, but to discover the objective truth and decide accordingly. In other words, fact finding by attorneys and judges would not be mutually exclusive, but rather complementary.²⁴⁸

E. *The Current Legal Hierarchy Will Resist*

Professor John Reitz wrote that the reform sought by Langbein is bound to encounter resistance from private interests, attorneys, and judges themselves.²⁴⁹ American litigation practices have spawned entire industries, such as court reporting firms, professional expert witnesses, paralegals, technical litigation support companies, and document and data collection companies. These industries exist to assist attorneys in their efforts to gather and present facts, and if that role were transferred to the judge, many people would be out of work. Those people are bound to resist such a change. Attorneys would resist because suddenly many of their hard-won skills would become useless, and because many of them (especially young associates who manage the more tedious aspects of discovery) would become redundant. Attorneys would have less work to do, because discovery is the longest and most labor-intensive phase of litigation. They could no longer charge fees as high as are currently acceptable,²⁵⁰ and attorneys are bound to resist anything that threatens their fees.²⁵¹ In addition, Reitz argued that the American people themselves might reject the increased judicial power to direct compulsory discovery as an undesirable state

247. Indeed, it could be especially beneficial for leveling the playing field in cases of financial disparity between the parties. A judge's involvement cancels the advantage of being the richest fact finder.

248. See Piekenbrock, *supra* note 67, at 1361–70 (discussing several ways in which the German judge's role cannot simply replace the role of counsel and certainly cannot simply favor one side over the other).

249. See Reitz, *supra* note 34, at 994–95.

250. See *id.* at 995.

251. It could be argued that provisions within several Model Rules of Professional Conduct, and the American Bar Association opinions concerning those rules, make this resistance very clear. See, e.g., MODEL RULES OF PROF'L CONDUCT 1.5, 5.3–5.7 (providing six rules on fees, nonlawyer assistance, the lawyer's professional independence, unauthorized practice of law, multijurisdictional practice of law, restrictions on rights to practice, and law-related services); ABA CTR. FOR PROF'L RESPONSIBILITY, ETHICS OPINIONS (2013), available at http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html [http://perma.cc/FXU6-KHWP] (archived Mar. 8, 2015).

intrusion into their privacy.²⁵² This criticism appears to be misguided, however.²⁵³

Reitz also argued that the American judiciary would have to triple in number to meet the labor demands of a German-style court, and even if enough new judges could be trained, hired, and paid, existing judges might resist the change in status that their new role brings about.²⁵⁴ American judges simply do not think of themselves as managers or civil servants. Procedural rules already exist that give American judges the power to control fact finding and other aspects of litigation, but judges typically do not exercise that power.²⁵⁵ As Reitz wrote, “[i]t is simply not in their job description, as far as the legal culture is concerned.”²⁵⁶

Reitz was also concerned that a change in the judicial role might actively injure the American civil justice system. He argued that if a judge took over questioning of witnesses, the judge’s manner of questioning might reveal his or her bias and thereby unfairly influence the jury.²⁵⁷ If judges were given this greater power over cases, they would have to be subject to stricter review and their positions made terminable for offenses, in order to prevent corruption.²⁵⁸ Reitz also wrote that forcing a judge to become engaged in the discovery process would likely lead to even more delay than exists now.²⁵⁹ For the reasons listed above, he believed attorneys would resist giving up their high degree of control over discovery by fighting more extensive judicial involvement that would mean, at the very least,²⁶⁰ the addition of one more person for scheduling matters and copying on all correspondence.²⁶¹ Reitz concluded that public dissatisfaction with the American legal system is not so strong that Langbein’s proposed

252. See Reitz, *supra* note 34, at 1004.

253. Can one honestly argue that a judge’s “intrusion” into the parties’ privacy would be less desirable than the unchecked one by the other party’s counsel and its private investigators? On the contrary, the judge’s involvement would probably appear somewhat “sunder” because unbiased and led by higher standards, such as due process, public service, and the effectiveness of justice.

254. See *id.* at 992–93, 997.

255. See Emerson, *supra* note 10, at 1112, 1115–16 (noting that the special master’s authority to act expanded under the 2003 amendments to the Federal Rules of Civil Procedure, amendments which also “dramatically diminished the procedural hurdles to appointing a master” and that American judges often remain reluctant to act, as “the new potential of the special master has not been fully explored”); see also *infra* Part V (examining the use of special masters and magistrates).

256. Reitz, *supra* note 34, at 992.

257. See *id.* at 996.

258. See *id.* at 999. If the powers are justifiable, however, these checks on the authorities seem reasonable.

259. See *id.* at 1005–06.

260. That is, without even getting to the matter of judicial *power*.

261. See Reitz, *supra* note 34, at 1005–06. Judges, though, already have strong, ultimate potential control over the discovery process, albeit often as long as the parties remain content, without actual judicial intervention.

reform could overcome the cultural and practical forces of resistance it would encounter.²⁶²

In Germany, where judicial decisions do not technically “create” law, judges are empowered to examine witnesses and ask any question they deem necessary in their quest for discovering the truth. Paradoxically, in the United States, where judicial decisions create “law” that becomes generally applicable, judges in their law-making capacity are dependent upon the goodwill and quality of attorneys who are necessarily biased in their examination of witnesses. Is, therefore, the fear of this alleged “judicial dictatorship” really rational? Where is the potential harm in having judges ask not all the questions, but only supplementary questions that the parties’ counsels had skipped? If there is a risk of having too much information, is it not overcome by the actual risk of having too little information? Intelligent dialogue between the court and counsel leads to a better quality of judicial product overall.²⁶³ From the German perspective, the court could potentially get the wrong slant on a case because it made an incorrect inference or misperceived a fact.²⁶⁴ Allowing the parties and their lawyers to understand the court’s viewpoint gives the parties a chance to rectify any misconceptions before they become erroneous judicial decisions.²⁶⁵

Finally, the alleged risk of corruption that would be induced by increasing judicial power to examine witnesses does not seem relevant. Beyond implying that German judges are more likely to be corrupted than American ones, Reitz’s argument seems pointless in the debate as to whether judges should be allowed to examine witnesses.²⁶⁶ In other words, the concern over the need for efficient anticorruption measures is not only rational, but also paramount; it is simply irrelevant in the debate over whether or not to allow witness examination by judges.

262. See *id.* at 1007–09; Langbein, *German Advantage*, *supra* note 1, at 824 (“German experience shows that we would do better if we were greatly to restrict the adversaries’ role in fact-gathering.”).

263. MURRAY & STÜRNER, *supra* note 17, at 170.

264. *Id.* at 171.

265. *Id.* The education of German lawyers and parties is an important purpose of the judge’s hints and feedback (*Hinweispflicht*). See Interview with Arne Alberts, *supra* note 90; Interview with Burkhard Hess, *supra* note 58; Interview with Thomas Lundmark, *supra* note 78; Interview with Marcus Mack, *supra* note 96; Interview with Michael Martinek, Professor of Law and Director, Inst. for European Law, Univ. of the Saarland, Germany (June 13, 2011) (on file with author) [hereinafter Interview with Michael Martinek]; Interview with Reiner Schulze, *supra* note 235.

266. Indeed, either the risk of corruption already exists (e.g., due to the mode of designation of the judges)—which is per se unacceptable in a democratic country governed by the rule of law and should therefore be fixed—or the anticorruption mechanisms already in place are deemed efficient and therefore capable of handling this new prerogative.

V. AVOIDING OBSTACLES TO REFORM

A. Roadblocks to Reform

There are bound to be impediments to introducing *Hinweispflicht* into American civil procedure. One obstacle would be understaffing. The United States has roughly one-third as many judges per capita as does Germany,²⁶⁷ and without additional staffing, existing judges probably could not handle the added workload that would result from heightened involvement in each case. Another hindrance would be resistance from attorneys who see their work being usurped if judges become more involved in litigation. A third complication would be the way American judges think of themselves and their role: American judges consider themselves detached umpires and are reluctant to even use the statutory authority they already have to get deeply involved in litigation. The following are suggestions to surmount these obstacles.

B. Use of Special Masters and Magistrate Judges as a Potential Solution to the Problem of Understaffing

The American judiciary is currently understaffed to perform the additional work that would be required by *Hinweispflicht*. Many American judges are overextended as it is and therefore often do not actively participate in cases until they go to trial.²⁶⁸ John Reitz argued that German judges are able to bear the additional workload that results from heightened pretrial participation only because there are so many more judges per capita in Germany than in the United States.²⁶⁹ The use of special masters and magistrates could be a way to get around the problem of staffing.

Federal Rule of Civil Procedure 53 gives American federal district court judges the authority to appoint a master to perform any duties to which the litigants consent.²⁷⁰ In particular, masters may handle pretrial and post-trial matters that judges cannot address in a timely manner,²⁷¹ and masters may conduct evidentiary hearings during

267. Reitz, *supra* note 34, at 997; see also *infra* text accompanying note 269 (comparing the number of judges per capita).

268. See Reitz, *supra* note 34, at 992 (“Under the calendaring system of some courts, a case is not even assigned to a judge until the day of trial.”).

269. See *id.* at 997 (“First, there is the matter of numbers: we simply do not have enough judges to staff a German-style court. Langbein himself notes that the German system uses more judges and fewer attorneys per person because ‘their civil procedure assigns to the judiciary much of the workload that we leave to private counsel.’ Just how many more judges we would need is debatable, but it seems likely that it would require at least a tripling of our current numbers because Germany has roughly three times as many judges per unit of population as the United States.” (internal citations omitted)).

270. See FED. R. CIV. P. 53(a)(1)(A).

271. See FED. R. CIV. P. 53(a)(1)(C).

which they may compel, take, and record evidence.²⁷² Thus, if a judge were too busy with a full trial and hearing docket to attend pretrial meetings or write extra pretrial orders giving hints and feedback to the parties in any one case, that judge could, with the consent of the parties, appoint a special master to do so in his or her stead. However, such a solution would impose an additional financial burden on the parties, since special masters are paid by the parties rather than by the court.²⁷³

The appointment of magistrate judges instead of special masters would place the financial burden on the government rather than the parties because magistrates are compensated by the court. Federal Rule of Civil Procedure 72 gives American federal district court judges the authority to refer to a magistrate, without the consent of the parties, any pretrial matter for resolution.²⁷⁴ Magistrates have the authority to enter binding orders on nondispositive matters;²⁷⁵ on dispositive matters, they have the authority to make recommendations on the record to the district court judge for disposition of the matter, including proposed findings of fact.²⁷⁶ In the cases of dispositive and nondispositive matters, parties have the right to make timely written objections to the order or recommendation of a magistrate.²⁷⁷ Those objections must be considered by the district judge in his or her decision to preserve, modify, or set aside the magistrate's findings.²⁷⁸ The Advisory Committee Notes to Rule 72 indicate that the rule does not restrict "experimentation" by district courts in referring matters other than typical pretrial matters to magistrates.²⁷⁹ Federal Rule of Civil Procedure 73 permits magistrates to conduct any trial, hearing, or other proceeding (other than a hearing on contempt²⁸⁰) so long as all parties to the litigation consent to the magistrate's jurisdiction.²⁸¹

FRCP 72 and 73 give district judges wide discretion to refer to magistrates work that their own schedules cannot accommodate. These rules might allow a magistrate to oversee the pretrial phase of a case with more involvement and attention than a district judge with a packed trial and hearing docket.²⁸² District judges would give

272. See FED. R. CIV. P. 53(c)(1)(C).

273. See FED. R. CIV. P. 53(g)(2).

274. See FED. R. CIV. P. 72.

275. See FED. R. CIV. P. 72(a).

276. See FED. R. CIV. P. 72(b)(1).

277. FED. R. CIV. P. 72(b)(2).

278. FED. R. CIV. P. 72(b)(3).

279. FED. R. CIV. P. 72(a) advisory committee's note to 1983 amendment.

280. See FED. R. CIV. P. 73 advisory committee's note to 1983 amendment.

281. See FED. R. CIV. P. 73(a)-(b).

282. In France, if, at the outcome of the first appearance of the Parties before him, the President of the Court considers that further work is necessary before the case can be decided on its merits, he will send it to one of his colleagues, the *juge de la mise en état* for Pre-Trial proceedings. In recent years, the powers of the *juge de la mise en état* have been extended so as to allow him to fulfill an "active" control in the preparation of

magistrates the authority to hold pretrial hearings and write the pretrial orders necessary to communicate hints and feedback to the parties. One potential obstacle to the use of magistrates is that, if hints and feedback became standard practice, the need for magistrates would increase and the burden of their compensation would be borne by the government. The increase in spending would likely meet resistance, as any increase in spending tends to do.

C. Use of Contingency Fees as a Potential Solution to the Problem of Lawyer Resistance

Critic John Reitz predicted that American lawyers, who are protective of their livelihood and the reputation of their profession, would strongly resist any reform in which judges would usurp part of the lawyer's traditional role in litigation.²⁸³ When asked whether he would appreciate increased judicial involvement or authority in litigation, long-time civil trial lawyer Charles Wachter answered as follows:

No, because I value my job. I like being able to make a living doing the work that's been delegated to lawyers under this particular division of labor. I get a pride of craftsmanship from doing my job well and from having that kind of authority. The judge gives over tremendous authority to the lawyers, he leaves it to the wisdom of the lawyers and the clients to decide what they need to prove their case. And that comes out of the point of view in this country that people should resolve their own disputes. It's actually a good way to encourage people to solve things between themselves . . . Also, there's the fear that, what if this judge is smarter than my opponent and brings something to his attention that he wouldn't have thought of on his own? . . . I don't particularly like it when judges ask questions—it takes me off my game and creates a wild card.²⁸⁴

The presence in the United States of the contingency fee option, which does not exist in Germany, might keep American lawyers more actively engaged and better compensated than German lawyers even in the face of enhanced judicial participation, thus preventing *Hinweispflicht* reform from being perceived as a usurpation of the

a case. These powers include a power to hear the parties in order to try to reach a full or partial settlement, even *sua sponte*. He has the authority to order the service, receipt and production of documents. The Pre-trial judge may also invite the attorneys to respond to grounds on which they have not pleaded and to provide factual and legal explanations necessary for the resolution of the dispute. The *juge de la mise en état* is in charge of setting the schedule for the procedure, deciding on procedural incidents and, above all, supervising the loyal conduct of the procedure. See CODE DE PROCEDURE CIVILE [C.P.C.], arts. 763–781 (Fr.); BELL ET AL., *supra* note 24, at 99.

283. Reitz wrote that lawyers have a “clear stake in the way the current American legal culture defines the ideal roles for judges and for attorneys.” What would be at stake for lawyers is their “enormous pride and investment in the skills of witness investigation, cross-examination, and expert witness selection.” Reitz, *supra* note 34, at 994–95.

284. Interview with Charles Wachter, *supra* note 229.

lawyer's work. German lawyers are generally considered to take a more passive role in litigation. This passivity stems in part from the fact that German lawyers do not get paid any more or less depending on whether they win or lose.²⁸⁵ In Germany, attorney fees are set according to statute.²⁸⁶ Contingency fees are unlawful in Germany pursuant to the Federal Lawyers' Act.²⁸⁷ German clients have the incentive to win the case because the losing party has to pay the fees of all attorneys involved in the case.²⁸⁸ And of course German lawyers want their clients to win. But for the German lawyer personally, there is no financial incentive to win, except for two still significant factors: (1) a loss may diminish the chances for repeat business from the losing client or new business from others aware of the loss,²⁸⁹ and (2) if the loss is the lawyer's fault (due to the lawyer's negligence), the client may not simply "fire" (decline to retain) the lawyer but also sue him or her

285. Interview with Marcus Mack, *supra* note 96. Of course, in the United States this fee arrangement also tends to be typical with respect to defense lawyers. One might suppose that American defense lawyers would be more apt to oppose additional judicial intervention, given that defendants typically have more resources than plaintiffs. Still, others dispute this assumption of a disparity in resources. Certainly, alternative fee arrangements have become increasingly popular and may make cost-effective counsel more accessible to both sides in a dispute. See Mark A. Robertson, *Marketing Alternative Fee Arrangements*, 37 No. 5 LAW PRAC. 54, Sept.–Oct. 2011, available at http://www.americanbar.org/publications/law_practice_magazine/2011/september_october/alternative_fee_arrangements.html [<http://perma.cc/VV8E-BV7J>] (archived Feb. 8, 2015).

286. This statute, specifically, is the *Rechtsanwaltsvergütungsgesetz (RVG)*, or Law on the Remuneration of Lawyers, in effect since July 1, 2004. Law on the Remuneration of Attorneys of 5 May 2004 (Federal Law Gazette I, pp. 718, 788), last amended by Article 5, para. 7 of the Act of 10 October 2013 (Federal Law Gazette I p. 3799), available at http://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.html [<http://perma.cc/MWH5-X2CR>] (archived Feb. 8, 2015).

287. "Agreements under which remuneration or the amount of fees depend on the outcome of the case or on the success of the [lawyer's] work (no win, no fee) or under which the [lawyer] keeps a part of the award made by the court as a fee (quota litis) are not permitted." BUNDESRECHTSANWALTSORDNUNG [BRAO] [FEDERAL LAWYERS' ACT], § 49b(2) (Ger.). While "negotiated" fees are possible in some circumstances, attorneys may not charge below the statutory amount, and the attorney must provide "substantial reasons" (*wesentliche Gründe* – RVG § 4(a)) for the contingency/performance fee. Interview with Marcus Mack, *supra* note 96; Christian Duve, *Success-Fees in Germany*, in *LITIGATION IN ENGLAND AND GERMANY* 217, 226–29 (Peter Gottwald ed., 2010) (noting seven specific requirements for "success fees" to be possible, such as an attorney-client fee agreement for a reasonable amount, defining success, and needed to ensure efficient legal protection, with a notice as to the alternative remuneration possibilities). Further, the attorney may not delegate court costs, administrative costs, or the like. Interview with Marcus Mack, *supra* note 96. Even though the contingency fee is possible, its use is infrequent, and many of the concerns present in the American system appear mitigated as a result. *Id.*

288. See ZPO, *supra* note 17, § 91(1) ("The party that has not prevailed in the dispute is to bear the costs of the legal dispute."); MURRAY & STÜRNER, *supra* note 17, at 341 ("Germany observes the 'loser pays' rules on court costs and attorneys' fees more faithfully than any other modern jurisdiction.").

289. See Interview with Michael Martinek, *supra* note 265.

for damages.²⁹⁰ A loss will generate as much money as a win.²⁹¹ In the United States, when lawyers are working on a contingency basis—absorbing all litigation costs in the hope that they will be reimbursed upon victory—they become extremely motivated to win the case; otherwise attorneys will lose their investments. If they do win, the payout will be a percentage of the client’s award, so it is in their interest not only to win the case but to win by a huge margin. Therefore, attorneys have the incentive to seek out all evidence favorable to their clients.²⁹² As Langbein and Reitz wrote, the American system “aligns responsibility with incentive.”²⁹³ Lawyers are more passive in the German system because lawyers who lack financial incentive also lack incentive to take more responsibility and work harder for their clients. However, in the German system it is not ultimately the job of the judge to relieve parties of the consequences of gross and persistent negligence or lack of competent counsel.²⁹⁴ Although German attorneys may have a more passive role, they still must provide competent representation. Additionally, the range of permissible lawyer conduct in Germany differs from that of lawyers in the United States. For instance, a German lawyer’s role in pretrial discovery is limited to obtaining access to official documents, examining client files, and consulting with the client on how best to

290. See Interview with Burkhard Hess, *supra* note 58.

291. In France, attorneys’ fees are usually set by an agreement with their clients: there is no fixed scale set by statute, “although they must respect a ‘principle of moderation’ on pain of professional discipline. However, an exception is made to this in that [attorneys] may not lawfully set the whole of their fees conditionally on a decision of a court, though a conditional element may supplement a fee calculated on the basis of work done or an hourly rate.” Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques [Law 71-1130 of December 31, 1971 reform of certain judicial professions], art. 10, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396> [<http://perma.cc/Q9WR-ZYWH>] (archived Feb. 9, 2015); BELL ET AL., *supra* note 24, at 114.

292. From the perspective of one expert on German procedure, including comparison with the American system, U.S. lawyers are more likely to be able to manipulate the witnesses or other proof. See Interview with Burkhard Hess, *supra* note 58. However, this is just an argument over degree. Clearly, both German and American lawyers look for all evidence favorable to their clients; and then, within the norms of their profession and the rules for dispute resolution, they attempt to present that evidence in the most favorable light by, for example, questioning witnesses in a manner that should elicit favorable testimony. Without anything more, this does not extrapolate to an incentive to “manipulate” witnesses or other evidence, particularly inasmuch as an American attorney has an ethical duty “not to bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” MODEL RULES OF PROF’L CONDUCT 3.1. In addition, the lawyer has duties of candor (Rule 3.3) and of fairness to opposing parties and counsel (Rule 3.4). *Id.* at 3.3–3.4.

293. See Reitz, *supra* note 34, at 1003; Langbein, *German Advantage*, *supra* note 1, at 848.

294. See Piekenbrock, *supra* note 67, at 1362–63; Interview with Burkhard Hess, *supra* note 58; Interview with Michael Martinek, *supra* note 265.

assemble the facts.²⁹⁵ A German lawyer will not, however—except in rare circumstances—talk to prospective witnesses.²⁹⁶

VI. CONCLUSION

When reviewing *Richterliche Hinweispflicht*, the German concept of the judge as teacher and activist, there are four areas of American civil procedure where similar judicial participation could occur without resistance: the pretrial conference, the pretrial scheduling order for discovery, the use of special masters, and the calling and questioning of witnesses. Any recommendations for even a relatively mild form of legal transplant must account for the difficulties inherent in extracting any procedural rule from a foreign system and trying to import it into another unique, complex system. Any move toward increased judicial involvement must be made cautiously in a system so fundamentally and stubbornly adversarial as the American civil trial process. Nonetheless, with planning, improvements in the American litigation process can be effectuated. For a few, somewhat narrowly defined areas of procedure, the judge may be enlisted in searching for justice and truth, not merely observing how the legal “game” of litigation plays out. A fairer process and more equitable result may be obtained. Just as important, the public may come to see that court procedures genuinely are meant to secure valid, reasonable outcomes.

295. See Kaplan, *supra* note 116, at 1199–1200 (discussing a German lawyer’s range of conduct).

296. See *id.* at 1200 (“In singular cases he may and will talk with prospective witnesses; but by and large he will not feel free to do so.”).