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The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments

Whenever new laws are framed it is imperative that they should be consonant with the institutions of the state to which they are destined.[1]

Inspiration for procedural reform is increasingly sought in the legal thesaurus of foreign countries. In their search for new solutions, lawyers are prone to focus almost exclusively on normative aspects of foreign arrangements, trying to ascertain whether they hold promise of advantages over domestic law. But this understandable *déformation professionelle* is not without its costs: the success of most procedural innovation depends less than lawyers like to think on the excellence of rules. More than in the private law domain, perhaps, the meaning and impact of procedural regulation turn on external conditions — most directly on the institutional context in which justice is administered in a particular country.[2] If imported rules are combined with native ones in disregard of this context, unintended consequences are likely to follow in living law. And while some of these consequences can turn out to be a pleasant surprise, others can be very disappointing.

Those contemplating to combine common law and civil law approaches to factfinding should be especially sensitive to the potential costs of normative shortcuts to procedural reform; institutional differences between the two Western legal families capable of affecting the factfinding style are quite considerable. In criminal procedure, a few good lessons have already been learned about problems that arise when factfinding arrangements from one family are incorporated into the institutional milieu of the other. Here experience has shown how easily an imported evidentiary doctrine, or practice, alters its character in interaction with the new environment.[3] Even textually identi-

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1. Giambattista Vico, *On the Study Methods of Our Time* 65 (Elio Gianturco transl. 1965).

2. I do not mean to disparage the contribution of the entire cultural ecosystem in establishing the meaning of rules. But this contribution is less palpable than that of institutions which are specifically designed to operate in the administration of justice.

3. A classic example is the misfortunes of the transplanted English criminal jury on the Continent. The reaction to reforms introduced by the new Italian Code of Criminal Procedure furnish another, more recent illustration.

cal rules acquire a different meaning and produce different consequences in the changed institutional setting. The music of the law changes, so to speak, when the musical instruments and the players are no longer the same.

In civil procedure, the mixing of factfinding arrangements has been urged somewhat less frequently,[4] despite the fact that the contrast between the continental and Anglo-American institutional context is here somewhat reduced: continental civil litigation contains pronounced "adversarial" features. Nevertheless, important differences of procedural ecology remain, and their importance for the success of evidentiary transplants should not be ignored. Among the many factors responsible for the contrast between the Anglo-American and continental factfinding style, three stand out sharply in importance: the different court organization, the varying temporal organization of proceedings, and the unequal allocation of procedural control between the court and the parties.[5] Mainly responsible for the contrast, these three factors are the most likely suspects for imposing constraints on the transplantation of evidentiary arrangements across the two great families of Western procedure.

The influence of the first factor on evidence law is widely appreciated: the relation between Anglo-American admissibility rules and the jury trial is regularly invoked in explaining the distinctive character of common law evidence. Since the risks of evidentiary transplants undertaken in ignorance of this factor are thus relatively minor, I shall refrain from commenting on them.[6] The impact of the second contextual factor — the different temporal organization of proceedings — has also often been observed. Some commentators have referred to the opposition between "continuous" common law factfinding and "episodic" continental proof-taking as "the grand discriminant" that sets the two families of civil procedure apart.[7] It is true that the prerequisites for introduction of the concentrated style in continental justice and the episodic in common law procedure have been insufficiently explored.[8] But because some experience with

4. This is not to say that there were no mutual borrowings. Thus, for example, the widely influential Austrian reforms that introduced a version of party examination to the Continent were openly borrowed from England. See Pekelis, "Legal Techniques and Political Ideologies," 41 *Mich. L. Rev.* 665, 679 (1943). More recent and interesting mixtures of common law and continental arrangements exist in Japan.

5. Although historically intertwined, these factors are analytically distinct.

6. The perils of such transplantation also recede because the civil jury entitlement seems to be weakening in most Anglo-American countries. England, the country of the jury's origin, has almost completely abolished the civil jury in the 1930's. See *Administration of Justice (Miscellaneous) Provisions Act.*

7. Kaplan, "An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure," 69 *Mich. L. Rev.* 821, 841 (1971).

8. As an example, observe a neglected condition for the introduction of concentrated trials of the Anglo-American genre into continental civil justice. If trials are to continue to be exclusive suppliers of information to the court, they must be thoroughly

these difficulties has already been acquired,[9] I shall leave the impact of this factor on evidentiary transplants to one side here as well.

What remains for consideration, then, is the third factor — the unequal allocation of responsibility for procedural action between the court and the parties. The unforeseen effects on the factfinding style of tinkering with this factor seem to me most in need of elucidation, and the remarks that follow will be directed solely to them.

I. Control Over Factfinding Action

Before examining these effects, however, a quick reconnaissance is in order to map the differences between Anglo-American and continental procedure in allocating control over factfinding. These differences reach the high point in criminal procedure: while the continental criminal judge takes the lion's share of factfinding activity, in Anglo-American lands procedural action is to a much greater extent in the hands of the lawyers for the prosecution and the defense. But this difference, quite dramatic in criminal cases, is greatly reduced in civil litigation. The main reason is the curtailment of the continental judge's mastery over the life of the civil action — including its factfinding component. This curtailment deserves a closer look, because it is neglected in comparative procedure.[10]

To begin with, the monopoly power of continental civil parties to frame factual issues imposes more serious limits on the court's independent investigative activity than do the parameters of prosecutorial charges in criminal matters. It is considered axiomatic that the civil judge should not be permitted to extend his factual inquiries beyond party allegations. He is also bound by their stipulations and admissions — even if he has reasons to doubt that facts underlying these "agreements" really exist. But even in regard to facts alleged by and in issue between the parties, the continental civil judge is not entirely free to pursue factual inquiries on his own: his

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prepared. One possibility for continental systems to consider is to follow native criminal procedure and entrust an official agency with the performance of preparatory tasks. Another possibility is to charge lawyers for the parties with these tasks. But this second alternative calls for changes in the work habits and remuneration patterns of continental trial attorneys. They must become habituated to detective work to a greater degree than at present. They must also be prepared to concentrate for a substantial time on a single case, instead of working simultaneously for several clients.

9. On experiments in Germany with the so-called Stuttgart Model, see Rudolf Schlesinger et al., *Comparative Law* 438-40 (5th ed. 1988).

10. In what follows I talk about continental civil procedure as if it were a single system. Even under the Roman-canon *ius commune*, this was not the case, however: internal differences existed among continental jurisdictions, including unequal conceptions of what precisely pertains to the *officium judicis*. These internal differences are far greater today. Even so, for the sake of contrast with common law jurisdictions (themselves subject to internal variation in the degree of judicial activism), one can still usefully talk about "continental" approaches to procedural control.

proof initiative is in most jurisdictions seriously circumscribed. He cannot call fact-witnesses *motu proprio*, for example, and documents submitted to him are often accorded a conclusory probative effect — irrespective of what he might think about the relation of the facts stated in these documents to the real state of the world.[11] Even his powers of witness interrogation can be laced with constraints. In most civil law countries, the parties state propositions of fact about which they want witnesses to be examined, and the judge is restricted to asking only questions relating to these propositions.[12]

These strictures against independent judicial inquiries are in themselves capable of deflating the inquisitorial impulse of the continental civil judge. But a further diminution of his factfinding energy results from systemic barriers erected against the collection of evidence and the gathering of information. Generally speaking, continental legal systems manifest a far greater sensitivity in civil than in criminal procedure to the protection of values that complicate the search for the truth and inevitably reduce the completness of the data-base for the decision. In many countries of continental Europe, for example, testimonial privileges are much more encompassing than any known in the common law orbit.[13] Witnesses are under no obligation to engage in factual inquiries in prepararation for their courtroom testimony.[14] Comparatively striking also is the fact that continental jurisdictions are more reluctant to use the civil party as an informational resource than is the case with common law countries. In most continental jurisdictions, a litigant's statement is not a recognized means of proof of his allegations. In others, judges are expected to order formal interrogations of a party only as a means of last resort — if other evidence appears insufficient.[15]

The reluctance of continental civil procedure to employ information supplied by persons with interest in the cause of action is explained in historical terms — that is, as a precaution against spurious information and perjury temptation. But ever since testimo-

11. An example are "authentic acts," such as those produced by the continental notariate.

12. Illustrations of this mode of interrogation that are still valid can be found in Mauro Cappelletti & Joseph Perillo, *Civil Procedure in Italy* 223 (1965).

13. In jurisdictions that follow the example of Austrian and German legislation, a witness can refuse to testify if testimony could dishonor him or a person with whom the witness stands in a close personal relationship. Testimony can also be refused if it is likely to cause direct pecuniary damage to the witness or a person close to him. For details of these and other privileges in Germany, see Leo Rosenberg & Karl Heinz Schwab, *Zivilprozessrecht* 716-19 (13th ed. 1981).

14. For Germany, see Schlosser, "Internationale Rechtshilfe und rechtsstaatlicher Schutz der Beweispersonen," 94 *Zeitschrift für Zivilprozess* 369, 386 (1981).

15. For a general survey, see Jolowicz, "Fact-Finding: A Comparative Perspective," in D. L. Carey Miller & Paul R. Beaumont, *The Option of Litigating in Europe* 133, 138-39 (1993). On the "subsidiarity" of party testimony in Germany, see *Rosenberg & Schwab*, supra n.13, at 738-39.

nial disqualifications for self-interest were abolished on the criminal side of the docket, this old rationale no longer rings true. A more plausible explanation now is that in private disputes — ordinary civil lawsuits are perceived as such — the state should use its power to coerce information from citizens sparingly. The balancing of truth-discovery interests against privacy, human dignity and similar values is thought to mandate a considerable degree of tolerance — almost an insouciance, to common law eyes — for the incompletness of evidentiary material. This tolerance is revealed prominently in the still prevailing absence of the principle that the disputing litigants should disclose to each other the circumstances relevant to the case: inter-party discovery is quite undeveloped.[16] But whatever the causes of the reduced "inquisitiveness" of the civil process may be, the reduction induces judges to be less than energetic in seeking the truth. They seldom make use of their powers to dig for information even in those few jurisdictions in which the court is broadly authorized to take "investigative measures" whenever it feels insufficiently informed.[17]

Pari passu with the reduction of the court's factfinding activity, "adversary" polarities may make themselves felt in continental civil procedure. Although witnesses are considered "shared" or "common" to both litigants, they are in fact more readily associated with one or the other side than is the case with the court's witnesses in criminal actions. Burden of proof questions assume a greater importance than in unilateral official inquiries, so central to continental criminal justice: each civil party bears probative risks in relation to clearly defined issues, and the distribution of probative burdens is not blurred by the additional "burden" assumed by the judge when he conducts his independent factual inquiry. As a result, the rudiments of two opposing evidentiary "cases" in the Anglo-American sense can be discerned in civil lawsuits. In some of its aspects, civil factfinding comes closer to the Anglo-American style, in which the court supervises rather than participates in proof-taking activity.

All that has just been said must not obscure important residual differences between the continental and Anglo-American civil procedure in regard to the allocation of procedural tasks.[18] In most continental jurisdictions, the involvment of the judge in proof-taking exceeds that of his common law confrère. The former retains the mo-

16. See *Rudolf Schlesinger et al.*, supra n. 9, at 426. A comparative study of the problem is that of Angelo Dondi, *Effettivita dei Provvedimenti Instruttori del Giudice Civile* (1985). On reform proposals for member states of the European Union, see Kerameus, "Procedural Harmonization in Europe," 43 *Am. J. Comp. L.* 401, 414-15 (1995).

17. For France, see *Schlesinger*, id. 426 n. 32; *Jolowicz*, supra n. 14, at 143.

18. Note that I am neglecting here differences stemming from different court organization and the contrast between episodic and concentrated proceedings.

nopoly of witness' examination, even if his powers of interrogation are circumscribed. He also decides whether a party should be called for interrogation, and he appoints the experts and frames questions to be addressed by them. Yet this greater judicial involvement in proof-taking — where it exists[19] — is not the critical feature that sets the two families of civil procedure apart on the dimension now under investigation.

Critical in this regard is the different role of litigants' counsel. In Anglo-American procedure, lawyers routinely engage in investigative and information-gathering activities. At least some of these activities are backed by the court's coercive powers. On the Continent, by contrast, counsel have few contacts with potential witnesses, and conduct almost no investigations of the facts of their client's case. Absent encompassing inter-party discovery, they mainly rely on information supplied by their client to propose means of proof to the court. And when it comes to court hearings, counsel are not traditionally entrusted with developing testimony through direct- and cross-examination. From the common law perspective, of course, this creates an odd situation. Those procedural protagonists who could be motivated to act as zealous diggers for information are accorded no comprehensive factfinding responsibility, while the protagonist who tends to monopolize many factfinding tasks — the judge — is not really very energetic, or resolute in his probing. His exercise of his near-monopoly power to develop evidence seems lazy.

II. Combining Factfinding Approaches

With these residual differences regarding the allocation of procedural control in mind, let us turn to problems that arise when evidentiary arrangements from Anglo-American and continental systems are mixed. I shall illustrate these problems on the example that is most often discussed in connection with evidentiary transplants between common law and civil law systems — the mode of developing evidence in court. In continental systems, an amalgam of civil law and common law approaches can be achieved by charging litigants' counsel with the initial and primary responsibility for the examination of witnesses and the development of other evidence. In Anglo-American systems, the amalgam can be produced by having the judge assume the primary role in the examination of witnesses and other

19. As already suggested, a discrepancy can be identified in several continental countries between the formal judicial authority to look into the facts and the actual judicial factfinding activity. The French Code of Civil Procedure, for example, authorizes the civil judge to order a *mesure d'instruction* whenever he finds the submitted material insufficient. In practice, however, even the *juge de la mise en état* rarely does so, and important factual inquiries are often "referred" to experts. See Beardsley, "Proof of Fact in French Civil Procedure," 34 *Am. J. Comp. L.* 459, 477-85 (1986).

proof-taking activity.[20] But the effect of both mixtures cannot be limited to changes in proof-taking technique. On the contrary, both are likely to provoke far-ranging consequences in evidence law and on the administration of justice generally.

To get a sense of these consequences, let us examine first a scenario in which a continental country switches to the lawyer-dominated mode of developing evidence of the Anglo-American variety.

1. *Enhancing the role of continental counsel.* Of the many repercussions of this reform, a shadowy one concerns subtle changes in the attitude to means of proof. Contrary to what is often thought, this attitude is not exactly alike in systems where evidence-gathering is in the hands of litigants' counsel and in systems where evidence-gathering is a judicial responsibility. In each system, the attitude constitutes an engrained habit of procedural participants — a habit that cannot be altered overnight in response to the lawgiver's fiat. Prudent reformers must therefore include inertia in their calculations. After the alien mode of developing evidence has been introduced, old attitudes to evidence are likely to linger, causing dislocations and a measure of disorientation in factfinding practice. A word, then, on these divergent attitudes to means of proof.

Where partisan counsel search for the sources of information, prepare witnesses for courtroom testimony, and interrogate them in a manner that best advances their client's interest, evidence tends to be associated with one or the other party. Neutral (non-partisan) sources of information do not fit easily into this scheme: all too often, witnesses are perceived as members of a forensic adversary team. It is thus no accident that common law systems retained for a long time the proprietary concept of evidence — a concept, that is, according to which witnesses "belong" to the party who calls them to the stand. It is also no accident that traces of this old concept still survive: when factfinding activities are conducted by counsel for the two adversaries, a bi-polar tension field is generated in which little or no undistributed middle remains.[21]

In officialized continental systems, by contrast, the mediating impact of the court's activity leaves more room for a neutral (non-partisan) understanding of means of proof. According to a long-standing view, after a litigant has offered a witness to the court, he is treated as "common" to both sides. Technicalities aside, it is, in fact, easier than in common law procedure to disassociate the means of proof from the party who offers them to the court. In other words,

20. Observe that the merely *supplemental* judicial interrogation is — within varying limits — in accord with the present forensic protocol of common law procedural systems. The same is true for the merely *supplemental* role of counsel's interrogation in a number of continental countries.

21. For some vestiges of the proprietary concept, see Newark, "The Hostile Witness and the Adversary Process," 1988 *Crim. L. Rev.* 441, 450-54.

"neutral" sources of information can more easily be imagined than in common law trials.[22]

Entailed in these discordant perceptions are disparate views on the adequate manner and the proper degree of testing informational sources. Where witnesses are prepared and examined by partisan counsel, it becomes more important than in officialized factfinding systems that both counsel be present in the course of interrogation. The opponent of evidence must be accorded an immediate opportunity to challenge information elicited by the adversary: after impressions of the one-sided use of informational sources have settled, it becomes difficult to dislodge these impressions from the adjudicator's mind. Testimony that is not subjected to immediate challenge seems seriously defective and potentially inadmissible.

Perceptions are different in factfinding systems where witnesses are not prepared by lawyers who put them on the stand and subject them to direct examination. A litigant's insistence on immediate challenge to information ingested in the legal process appears here as a symptom of excessive "contentiousness". This applies to other types of evidence as well. Litigants are permitted to submit documentary evidence by attaching it to the pleadings, or placing it in the court's dossier in some other informal way. The judge is then free to leaf through this material in the privacy of his chambers.[23] In contrast to the situation in common law systems, factfinding activity does not presuppose that procedural participants always be at the same place at the same time. The so-called "principle of contradiction," *audi et alteram partem,* suffices as a safeguard of procedural fairness: it is enough to give each party an opportunity to contradict the factual material produced by the adversary at *some time* in the course of proceedings.

A further implication of the competitive proof-taking method is that evidence is tested more forcefully than is thought necessary in officialized factfinding systems. Since witnesses called by one litigant appear to the other side as members of the former's team, the challenge to their testimony cannot be expected to be mild, focusing mainly on gaps and possible inconsistencies. Instead, testing easily escalates into a general assault on the witness' trustworthiness. This habit explains why observers from Anglo-American countries are struck by the absence of elaborate means of challenging witness' credibility in continental civil proceedings.[24] So important indeed to

22. Admittedly, this applies with greater force to criminal than civil cases. See infra n. 25.

23. This means, of course, that the episodic continental hearings (unlike the common law trial) are not the exclusive arena for providing factual information to the court.

24. See, e.g., Kaplan, von Mehren & Schaefer, "Phases of German Civil Procedure," 71 *Harv. L. Rev.* 1193, 1236 (1958).

common law lawyers is the opportunity for the vigorous attack on evidence, that testimony obtained from a witness on direct examination can in some circumstances be rejected when and if he becomes unavailable for cross-examination. Lawyers accustomed to officially-controlled factfinding methods find this practice hard to understand.

A further likely consequence of incorporating a competitive proof-taking method in civil law systems is the emergence of strong pressures to expand the factfinding role of litigants' counsel *prior* to actual proof-taking in court. If this escapes the attention of most devotees of direct- and cross-examination in civil law countries, it is because they are often exclusively preoccupied with formal procedural action in the courtroom. But a lawyer-orchestrated system of proof-taking cannot be effective without allowing counsel to contact and interview potential witnesses. Counsel must obtain at least some idea about the substance of what their witnesses will say on direct examination. Planning trial strategy without this information is practically impossible in the volatile atmosphere of one-shot trials, and very difficult even in the more relaxed climate of episodic proceedings. Even a minimal degree of witness preparation can hardly be avoided. It seems only fair, for example, that counsel inform his witness about the likely challenges to his credibility on cross-examination.

Yet all this involvement with potential witnesses runs counter to the continental tradition of proper attorney behavior. Despite sporadic stirrings of change in this regard, contacts with witnesses are still treated on the Continent as close to attempts to pollute the court's informational sources. In many jurisdictions, such contacts are also a serious breach of legal ethics. Perhaps more ominously, if they come to the court's attention, the standard judicial reaction is to discount the weight of the resulting testimony. Considering that witnesses are generally treated with some distrust in continental civil litigation, these additional credibility discounts could undermine the probative impact of oral testimony.[25]

If continental counsel were to be made effective in developing evidence, they would have to be accorded greater powers then they presently have to obtain information from each other and from third parties in advance of actual proof-taking. Given the limited powers that are currently at their disposal, it is difficult to imagine how they could adequately prepare their evidentiary "cases" in court. But even

25. Among the many reasons for the distrust of witnesses in continental civil litigation, a prominent one deserves a word. Unlike the situation in criminal proceedure, witnesses are not interrogated against the background of statements obtained from them by law enforcement officials soon after the event to which their testimony relates. Since their stories are thus not frozen early on, they can engage in fabrications more easily than witnesses in criminal matters. However, while litigants' counsel are seldom involved with witnesses, the litigants themselves can "wine and dine" them. *Qui mieux abreuve, mieux preuve.*

if this empowerment of counsel did not include the invasive methods of discovery developed in the United States, reforms in this direction are not easy to reconcile with accepted notions of the extent to which the official apparatus of justice can delegate the performance of formal procedural acts to members of a private profession.[26] One would also have to reconsider the current continental practice whereby all information elicited by a party from his opponent, or from a third person, automatically becomes part of the court's dossier. Since this information may be damaging to the party who asked for it, the practice discourages attorneys from using whatever power they possess to request factual material.

More remote ripple-effects of importing adversary evidence-gathering in continental civil procedure can easily be anticipated. An illustration is the impact of the importation on continental testimonial privileges.[27] Recall that witnesses can in many continental countries refuse to answer questions potentially capable of incriminating their close relatives, dishonoring them, or exposing the witness to financial loss. Informed of such sweeping exemptions from testimonial duties, Anglo-American lawyers wonder whether the largesse of continental law can be maintained without serious harm to the interests of justice. In fact, the largesse can be afforded at little cost: witnesses invoke their privileges not nearly as often as Anglo-American observers think in extrapolating from their behavior expectations. One of the principal reasons for the relative paucity of invocation is the paucity of interactions with litigants' lawyers: the latter are seldom in position to inform a witness, long before his testimony is taken in court, that he can take advantage of his privilege. However, if contacts between lawyers and witnesses became more frequent and routine, and the pains of hostile cross-examination more widely known, the use of privileges would greatly increase.

Another submerged effect of party-controlled proof-taking would be a change in the quantity of factual material assembled in litigation. As things presently stand, one of the advantages of continental civil procedure over its rivals is said to be the waste-reducing capacity.[28] In advance of each evidentiary hearing, the parties must show why specified facts need to be proven, and why information expected from the means of proof offered is relevant. The judge is then in posi-

26. Notoriously alien to continental sensibilities is the power of American attorneys to take depositions in private settings, with little direct judicial supervision. But even some English arrangements are strange to the continental convention. An example is the order allowing a party (under some circumstances) to enter the adversary's premises and take possession of documents. Anton Piller v. Manufacturing Processes Ltd., [1976] Ch. 55.

27. I alluded earlier to their expansive character. Supra n. 13.

28. See, e.g., Gerber, "Extraterritorial discovery and the Conflict of Procedural Systems," 34 *Am. J. Comp. L.*, 745,768 (1986); Langbein, "The German Advantage in Civil Procedure," 52 *U. Chi. L. Rev.* 823, 830, 844-45 (1985).

tion to focus the inquiry and calibrate its depth. *Frustra probatur quod probatum non relevat.* The interests of justice are not seen to require the gathering of a great mass of information under somewhat vague standards of relevancy. But if continental counsel were put in charge of directing factual inquiries, they would also acquire more control over what needs to be proven and how. The limits of relevancy would expand, if only to encompass information needed now for the purpose of impeachment — a purpose given greater prominence because of the closer alignment of witnesses with the parties.

I need not go on suggesting further repercussions of the incorporation of the Anglo-American proof-taking method into continental practice. It has become apparent, I hope, that the success of this transplantation depends on additional, wide-ranging changes in evidence law and in the work-habits of both continental courts and the continental legal profession.

2. *Activating the Anglo-American Judge.* The other way of combining common law and continental factfinding methods would be to involve the Anglo-American judge in the examination of witnesses and other forms of proof-taking to a greater extent than is presently the case. It is true that the precise limits of legitimate judicial involvement with the examination of evidence have never been clearly defined. They vary from context to context and are not identical in all common law jurisdictions.[29] As far as the civil trial is concerned, however, a clear departure from the current protocol would be to have the judge assume the initial responsibility for the examination of witnesses, and permit opposing counsel to "cross-examine" only after the judge has completed his examination.[30] Such a reform, sporadically suggested as a desirable innovation,[31] would amount to the importation of one variant of the continental method of examining witnesses into common law trials.

Yet, no matter how momentous this reform appears at first blush, it would fail to put an end to the decisive role partisan counsel play in the tapping of informational sources. Without further changes, the reform would only make the examination of evidence

29. In trial preparation, for example, Anglo-American judges can be quite aggressive in suggesting lines of inquiry and otherwise injecting themselves into the conduct of factfinding. They most approximate continental judges when performing factfinding tasks in the sentencing phase of the criminal process: not only do they rely on evidence contained in an official dossier, but they also become (if need be) insistent interrogators.

30. This can be gathered from what judges themselves tell us about the limits of their factfinding activity in civil trials. See the sample of authority in Schlesinger et al., supra n. 9, 434. See also the opinion of Lord Denning in Jones v. National Coal Board, [1957] 2 QB 55, 64.

31. See, e.g., Alshuler, "Mediation with a Mugger," 99 *Harv. L. Rev.* 1808, 1847-48 (1986); Kötz, "The Reform of the Adversary Process," 48 *U. Chi. L. Rev.* 478, 483 (1981); Maechling Jr., "Borrowing from Europe's Civil Law Tradition," 74 *A.B.A.J.* 59, 63 (1991).

less efficient than it is under present arrangements. And to remove these inefficiencies, a substantial transformation of the procedural environment would have to be contemplated.

The easiest way to demonstrate the need for this transformation is to remind the reader that the interrogation process — to be effective — requires the questioner to be familiar with the subject matter of inquiry. As things presently stand, however, the Anglo-American judge knows very little about the facts of the case in which he is sitting. If the current situation continued, his questioning would seldom elicit more than a thin narrative account from a witness. Counsel, who are aware of information available from the witness, would soon take over, and resume their dominant role in the interrogation process. The "thin" initial questioning from the bench would only bedevil their planning for orderly and clear presentation of evidence. A measure of repetition and confusion would most likely result. The enforcement of the present regime of rules of admissibility would also become more difficult: the freer narrative generated by broad questions from the bench would inject far more inadmissible material into the case than the now prevailing technique of narrow questions put by counsel.[32]

To be sure, the effectiveness of the initial bench examination could be improved by requiring litigants' counsel to give summaries of expected testimony to the judge. But even after this additional innovation, counsel would still know more about the facts of the case than the judge. The judge, only partially informed and innocent of details, could hardly be blamed for pursuing lines of inquiry which fully informed counsel have explored and abandoned as inappropriate.[33] His insufficient familiarity with the facts would manifest itself in a variety of other ways as well, turning him often into a blind and blundering intruder[34] into proof-taking prepared by the pre-trial investigators — the litigants' counsel. And while questioning from the bench would still leave much to be desired, the interrogation strategies of counsel could easily be thrown out of kilter. To make judicial questioning more effective, further steps in the direction of continental factfinding methods would have to be contemplated. One possible step would be to make an information-rich dossier available to the judge, so that he could adequately prepare for his augmented factfinding role.

32. Narrow questions provide clues as to whether something inadmissible is coming, making it possible for lawyers to object before the witness has spoken. After the inadmissible information is imparted, of course, the law's mandate that it be disregarded is unlikely to be effective.

33. See Frankel, "The Search for Truth: An Umpireal View," 123 *U. Pa. L. Rev.* 1031, 1042 (1975). For a perceptive analysis of problems that initial judicial interrogations would create in criminal procedure, see Van Kessel, "Adversary Excesses in the American Criminal Trial," 67 *Notre Dame L. Rev.* 403, 524-26 (1992).

34. I borrow this phrase from Frankel, id.

But such a step would seriously strain the traditional common law understanding of judicial impartiality. This understanding grew up against the background of a competitive factfinding process — a process, that is, in which it is risky for a third party to intervene in the forensic contest without appearing to offer assistance to one or the other litigant. In fact, judicial questioning may secure an advantage to a litigant which his lawyer could not have obtained, and which the other litigant cannot neutralize.[35] In continental systems, by contrast, bench examinations are not perceived as dangerous to judicial impartiality. This is because the polarities generated by the participation of lawyers in evidence-gathering are less pronounced. As we have seen, witnesses are "common" to both sides, and their aggressive interrogation from the bench is not viewed as help to one or the other party. But if common law countries were to acquire these views, the presently dominant role of counsel in readying the case for trial would have to be abandoned.

Nor is this all. At least in those common law jurisdictions that still use the civil jury, the enhanced role of the judge in proof-taking would also be vulnerable to criticism on the ground that it reveals the judicial assessment of the trustworthiness of evidence to impressionable amateur adjudicators.[36] Moreover, a prudent reformer should not overlook the impact of a properly organized system of bench examination on the trial judge's work-load. It is interesting to note in this regard that the number of judges in most civil law countries is much greater than in Anglo-American countries. This is no coincidence. Continental trial judges have much more work to do, and their preparation for the their factfinding role accounts for much of this difference.

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What conclusions can be drawn from these remarks? Reducing the disparities of factfinding arrangements in the two Western families of civil procedure may well be desirable, provided, of course, that our world is coming together rather than flying apart in the twilight of this century. The impetus to seek inspiration for reform beyond national borders should also be greeted with understanding and sympathy; since dissatisfaction with existing procedures is so widespread.

Yet reformers beware! The transplantation of factfinding arrangements between common law and civil law systems would give rise to serious strains in the recipient justice system. The interaction between the contemplated transplant and the new environment must

35. The available literature on this point is thoughtfuly discussed in John Jackson & Sean Doran, *Judge without the Jury,* 64-65, 99-104, passim (1995).

36. This argument is often advanced in the United States.

be carefully studied, and the question must always be considered whether the recipient culture is prepared — or can be readied — to live with the wider effects of contemplated reform. As the examples of changes in the proof-taking method demonstrate, these wider effects cannot easily be contained: various elements of factfinding activity are too closely intertwined. In seeking inspiration for change, it is perhaps natural for lawyers to go browsing in a foreign law boutique. But it is an illusion to think that this is a boutique in which one is always free to purchase some items and reject others. An arrangement stemming from a partial purchase — a legal pastiche — can produce a far less satisfactory factfinding result in practice than under either continental or Anglo-American evidentiary arrangements in their unadulterated form.