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The Challenge of Comparative Civil Procedure

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REVIEW ESSAY

THE CHALLENGE OF COMPARATIVE CIVIL PROCEDURE

CIVIL LITIGATION IN COMPARATIVE CONTEXT. By Oscar G. Chase, Helen Hershkoff, Linda Silberman, Yasuhei Taniguchi, Vincenzo Varano & Adrian Zuckerman. 2007. St. Paul, Minn.: West Group. P. 607. \$58.00.

*Scott Dodson**

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INTRODUCTION

As transnationalism grows and becomes more prominent, comparative law is burgeoning. In one area, however, it has met a formidable challenge—civil procedure. At first blush, one might naturally wonder why.

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After all, even wholly within America, the states have managed to provide for the fair and expedient administration of justice in a host of different ways, all while the federal courts impose their own version. California, for example, adheres to the Field Code.¹ Louisiana continues its civil law tradition.² Although about half of the states have modeled their procedures on the Federal Rules of Civil Procedure,³ local practices and customs maintain variation.⁴ Yet, despite their differences, American procedural systems have reached something of a comfortable equilibrium, a balance between intranational harmonization and sovereign individuality. Thus, one might suspect that America, with its federalist model, would be well-equipped to embrace—or at least participate in the conversation about—comparative civil procedure.

That, of course, has not happened. Comparative civil procedure has been slow to find its way into American law school classrooms, legislative offices, and judicial chambers.⁵ For the most part, significant borrowing and harmonization of procedures between U.S. and foreign systems has failed.⁶

Why might that be, and what ought we know in order to better appreciate the values of comparative civil procedure? *Civil Litigation in Comparative Context*⁷ provides some insight. The book is a primer for those who wish to better understand the comparative approaches to civil procedure of various systems—in particular, the important divide between common law jurisdictions and civil law jurisdictions⁸—and the implications of transnational litigation in those systems. It also provides a welcome lens through which to evaluate both the challenge and the promise of comparative civil procedure.

1. See Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 166–67 (2008).

2. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1399–1400 (1986).

3. See *id.* at 1425.

4. See, e.g., Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 929–32 (1996).

5. See *infra* text accompanying notes 52–57.

6. For example, the ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (Cambridge Univ. Press 2006), which attempt to develop harmonized principles for transnational litigation, have not been adopted by the courts of any nation. See OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 574–75 (2007). (That does not diminish the admirable efforts of those who helped draft the Principles, and the fact that a major group thought them worthwhile may suggest that it is just too early to judge their success.) Even those treaties and conventions to which the United States is a signatory are still subject to local interpretations, which may vary widely. See *id.* at 578.

7. OSCAR G. CHASE, HELEN HERSHKOFF, LINDA SILBERMAN, YASUHEI TANIGUCHI, VINCENZO VARANO & ADRIAN ZUCKERMAN, CIVIL LITIGATION IN COMPARATIVE CONTEXT (2007).

8. In an overly simplistic generalization, the common law tradition, derived from England, features adversarial litigation culminating in a trial, whereas the civil law tradition, derived from Rome, features an inquisitorial litigation with a series of hearings. For a detailed exposition of the differences, see generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION (3d ed. 2007).

I. A BRIEF OVERVIEW AND APPRAISAL

A. A Descriptive Account

The authors, luminaries in the field of comparative procedure from the U.S., England, Japan, and continental Europe, provide a wide-ranging and detailed look at comparative civil procedure across several representative jurisdictions, with a primary focus on their home countries. Chapter 1 provides an overview and presents the general themes the reader will encounter over the course of the book.

Chapter 2 begins the specific studies with, appropriately, "The Structure of the Legal Profession," exploring differences in legal education and in the legal profession, how they relate to each other, and what effects they may have on the civil procedure systems in each country. As the authors note, "The legal profession is one of the foundations of every legal system and is essential to its proper functioning."⁹ The authors rightly argue that the legal profession is shaped by the system of legal education, and they spend some time in a comparative analysis of the U.S. (in which legal education is graduate and professional) versus other jurisdictions (in which it is undergraduate and generalized).¹⁰ This chapter also explores differences in the judicial profession, fee structures, and attorney practice. Chapter 3, "Organization of the Courts," follows with a discussion of differences and similarities in the respective judicial systems, structures, and norms, such as a comparative analysis of *stare decisis*.

Chapters 4–10 compare the stages of litigation, including service of process, pleading, discovery, trials (and their analogues), the roles of the judges and attorneys, the existence or absence of a jury, summary judgments, provisional remedies, appeals, aggregated claims and joinder of parties, class actions and aggregated cases, finality and preclusion, and enforcement of judgments. These chapters bring the wide differences between civil law practice and common law practice to light. The section on pleading is particularly useful, given the wide divergence among nations regarding the amount of factual specificity, legal precision, and evidentiary support required. Discovery also has wide differences, and international implications are likely to come up routinely in discovery as more and more foreign-based parties are appearing in U.S. litigation.

Chapter 11 deals with "Transnational Litigation" and the problems (particularly with enforcement) that it raises. Perhaps more practitioner-oriented than the preceding chapters, its inclusion is appropriate to the

9. CHASE ET AL., *supra* note 7, at 51.

10. *Id.* at 51–63. It is worth noting, as the authors do, that, in the last few years, Japan has shifted to a graduate law school education. *See id.* at 93.

authors' goal of enhancing internationalized knowledge for the purpose of transnational litigation.¹¹

Chapter 12, "Harmonization of Civil Procedure: Prospects and Perils," is the focus of my comments later in this Review Essay. It is entirely appropriate to ask, as the authors do, whether harmonization of procedures across national boundaries is even desirable.¹² The authors draw upon excerpts from Professor Geoffrey Miller's economic analysis of harmonization, including his pros—harmonization can break down local barriers to entry, can reduce transaction costs, and can eliminate inefficient quirks—and his cons—harmonization would require learning a new system, removes diversity, and removes options for contracting parties to select. They then pose the \$6 million question: "Whether and how the described differences between American procedure and that prevalent elsewhere can be compromised sufficiently to achieve genuine harmonization."¹³ Insightfully, the authors raise that question not only from the American perspective but also from that of other countries.¹⁴

B. A Critical Assessment

I will have more to say about the questions posed in Chapter 12 later. For now, let me provide a brief appraisal of the book as a whole. As my comments throughout the descriptive account may have foreshadowed, I think the book is a welcome addition to the literature on comparative procedure. Comparative law is a relatively recent discipline in America,¹⁵ and comparative civil procedure studies are particularly rare.¹⁶ This is partially because civil procedure is seen as peculiarly tied to local culture and social

11. See *id.* at 2 ("Finally, and most obviously, there are pragmatic considerations to taking a global approach to civil procedure, stemming from the increasing internationalization of both the law and the legal profession."); see also Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 331-46 (2002) (exploring some practical bases for harmonization of transnational enforcement of judgments).

12. See CHASE ET AL., *supra* note 7, at 562.

13. *Id.* at 568.

14. See *id.* at 569-75 (excerpting Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463 (1998)).

15. See, e.g., David S. Clark, *The Modern Development of American Comparative Law: 1904-1945*, 55 AM. J. COMP. L. 587, 587 (2007) ("Sustained scholarly comparative law activity in the United States began in the early 20th century."). Having said that, there is a strong recent movement to incorporate transnational and comparative study into the law school curriculum, even into required courses. See, e.g., Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 267, 273 (2006) (explaining an objective "to familiarize the vast majority, if not all, students with international, transnational, and comparative law issues").

16. See Antonio Gidi, *Teaching Comparative Civil Procedure*, 56 J. LEGAL EDUC. 502, 502 (2006) (stating that its "pervasive absence" is "well documented").

heritage in a way that resists change and partially because “American proceduralists are among the most parochial in the world.”¹⁷

Civil Litigation in Comparative Context ought to do much to widen the entryway to comparative procedure. The authors have selected a representative choice of principal jurisdictions to compare and contrast with the American system: England, because it is the parent to the U.S. system but has evolved differently in many ways;¹⁸ Germany, because it historically has been the principal civil law system contrasted with the American system;¹⁹ and Japan, because it is an intriguing hybrid with a unique tradition of borrowing and overlay.²⁰

In addition, the scope of coverage is both well chosen and sufficiently detailed. The authors highlight some of the more important features of American exceptionalism in the comparative portions, but they also devote significant space to a comparison of system structure, transnational litigation, and harmonization issues. Their selection of materials is judicious and comprehensive. As a result, they have catered to a broad audience of students, scholars, and practitioners in a way that makes their study readily accessible to all of those targets.

There are, however, a few notable omissions. One yearns, for example, for a deeper comparative analysis of alternative dispute resolution (ADR)²¹ and perhaps more of a mention of punitive damages.²² In addition, the authors might have explored the underappreciated but important distinctions among rulemaking procedures.²³ But, of course, the book is not meant to be an encyclopedia. It is understandable that some topics

17. *Id.*; see also Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524, 530 (2006) (noting “the parochialism that so affects U.S. procedure”); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709 (2005) (“American proceduralists have not been comparativists.”).

18. CHASE ET AL., *supra* note 7, at 3.

19. See, e.g., Marcus, *supra* note 17, at 717–18.

20. CHASE ET AL., *supra* note 7, at 4, 35.

21. ADR is ripe for comparison, both because its U.S. explosion is relatively recent and therefore less entrenched (and more susceptible to modification) than other procedural mechanisms, and also because it is far enough away from trial litigation that it might be tinkered with without some of the high risks of disruption to system coherence that tinkering with the litigation system directly might entail. The authors do discuss settlement in connection with fee-shifting mechanisms of common law systems, and they touch briefly upon ADR in the last two pages of the last section. See *id.* at 24, 597–98. But there is much more to be said about ADR in a comparative context, particularly for international arbitration and for the recognition and enforcement of foreign arbitration awards.

22. The authors do include some discussion of “provisional relief,” which includes orders for achieving a procedural end or regulating the parties’ conduct concerning litigation without deciding the merits, and which includes preliminary or temporary injunctive relief. See *id.* at 18–20, 294–326. Perhaps the authors found other forms of remedies, such as punitive damages, too substantive for purposes of inclusion within comparative civil procedure. Even if that is the case, I think the prospect of high damages, particularly punitive damages, can have profound implications for civil procedure that are worth exploring. See, e.g., *infra* text accompanying notes 80–93.

23. Rick Marcus is one of the few to study the facets of American rulemaking in a comparative context. See, e.g., Marcus, *supra* note 1, at 158.

would have to be shortened or cut to avoid compromising accessibility and to ensure accuracy.²⁴

In all, *Civil Litigation in Comparative Context* gracefully presents the foundational issues for exposure to comparative study and transnational litigation. One only hopes it garners the wide readership that it deserves.

II. WHERE DO WE GO FROM HERE?

As I mentioned above, Chapter 12 of *Civil Litigation in Comparative Context* poses intriguing questions about harmonization. It invites answers but does not attempt to answer them itself, instead leaving deeper exploration for another day. In this Part, I take up the invitation, if only very generally, and provide some ruminations of my own to continue the authors' discussion.

A. *A Discipline of Great Promise . . .*

There is little doubt that comparative law—and even comparative procedure specifically—has the potential to be an important study. There are several potential benefits.

First, and perhaps most modestly, studying alternatives can help us better understand, think critically about, challenge, and defend the particular policies and procedures at home.²⁵ Learning one's own rules and policy values in the context of a comparison with others' deepens understanding of the home rules.²⁶ There may be real value to comparing different procedures for the same underlying balance of policies or even between comparing different balances of policies. As Professor Kevin Clermont has put it, "The aim is better to understand one's own law:"²⁷ both what is distinctive and what is problematic.²⁸

24. In addition, the authors followed the common-sense maxim to "write about what you know." CHASE ET AL., *supra* note 7, at 48–49.

25. See *id.* at 1–2 ("Good reasons favor taking a global approach to the study of civil procedure. For one, it highlights the reality that procedural systems are the product of choice; there is no universal consensus on how best to serve the values of accuracy, fairness, and efficiency, and even on whether these are the values that a procedural system ought to serve. Exposure to the choices made by some other systems will help you to think critically about your own and will present alternatives to consider."); Gevurtz et al., *supra* note 15, at 283 ("Comparative law is often described as providing both a window into other cultures as well as a mirror for one's own."); John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545 (1995) ("Foreign example teaches you about your own system, both by helping you ask important questions, and by suggesting other ways.").

26. See THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE 2* (2006).

27. Kevin M. Clermont, *Why Comparative Civil Procedure?*, Foreword to KUO-CHANG HUANG, *INTRODUCING DISCOVERY INTO CIVIL LAW*, at ix, xvi (2003); see also Clermont, *supra* note 17, at 535 ("On a still more theoretical level, the greatest benefit of studying other procedural systems . . . [might be] the attainment of a deeper understanding of one's own system.").

28. Langbein, *supra* note 25, at 545; see also Clermont, *supra* note 17, at 525 (arguing that com-

Second, exposure to other laws and procedures is increasingly necessary for the practice of law. In an increasingly global world, transnational litigation is becoming more and more common, and the practitioner who does not understand even the basics of comparativism does a disservice to his client.²⁹ Indeed, given the recent propensity of even the United States Supreme Court to look overseas,³⁰ practitioners who lack knowledge of foreign legal principles are at a disadvantage.³¹

Third, and most ambitiously, knowledge and understanding of other systems provides an opportunity to adopt or follow a different model for solving problems that, at least at some level of generality, are similar to the home system.³² On a binational scale, both importation and exportation are possible.³³ On a multinational level, comparative law offers the opportunity for harmonization, a coming together of various independent legal systems into a more coherent and accessible global system.³⁴

Finally, and most provocatively, a comparative study may help bring nations and cultures closer together in a global community even in the

parative law can deepen an understanding of local values and rules, and can illuminate the wisdom of—or need for—reform).

29. See MAIN, *supra* note 26, at 1; Clermont, *supra* note 17, at 525 (arguing that comparative law is necessary for lawyers in today's global marketplace); Gevurtz et al., *supra* note 15, at 283 (arguing that "to be an effective advocate, students must be prepared to deal effectively with foreign systems and foreign lawyers," as well as foreign clients).

30. See, e.g., Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2623–24 (2008) (comparing American punitive damage awards with those of Great Britain, Canada, and Australia, among other jurisdictions, to determine whether a punitive award was excessive under maritime law).

31. See CHASE ET AL., *supra* note 7, at 2 ("Finally, and most obviously, there are pragmatic considerations to taking a global approach to civil procedure, stemming from the increasing internationalization of both the law and the legal profession.").

32. See Peter Gottwald, *Comparative Civil Procedure*, 22 RITSUMEIKAN L. REV. 23, 23 (2005) (Japan) ("In looking [at] what has been done beyond [one's] own borders comparative law offers incentives and a broader scope of models of solving a problem that could be and have been developed within national boundaries. Lawyers of all legal systems of the world are by far more imaginative than [any] one lawyer . . . Comparative law thus may . . . enrich the 'stock of possible solutions', and moreover offer the chance to find better solutions for the particular time and the particular country than by restricting [one's knowledge] to local or national doctrinal disputes.").

33. Quebec, for example, a faithful civil law province, has supplemented its code with Americanized discovery principles. See Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 17 (1996). For more on the value of exporting legal norms, see generally Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

34. I should note that harmonization is not an unabashed good. Good reasons may counsel against harmonization. As Professor Geoffrey Miller has argued, harmonization can increase costs by requiring retraining under a new legal system, diminish diversity and experimentation, and otherwise adversely affect the systems subjected to harmonization. Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 917–18 (1997); see also Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 839 (1997) ("If imported rules are combined with native ones in disregard of [the institutional context in which they lie], unintended consequences are likely to follow in living law."). In addition, to the extent law is tied to culture, changing the law may have unintended consequences for the home culture. See OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 47–71, 138–40 (2005).

absence of harmonization. The very nature of comparative study broadens perspectives and reduces isolationism.³⁵ Exposure to and appreciation of diverse solutions to common problems promotes increased tolerance and respect for other cultures.³⁶ Perhaps even manifesting a willingness to appreciate other solutions can represent a step towards better international relations.³⁷

B. . . . And Discouragement

Despite the potential that comparative law holds, at least three significant barriers, particularly for comparative procedure in America, reduce its efficacy, particularly for the prospects of borrowing and harmonization.

First, procedure is different because of its broad interconnectivity. Procedure often is tied to a legal system's fundamental organizing principles and norms, making it resistant to change and difficult to understand out of context.³⁸ As the authors note, different procedures are built upon each other: discovery and trial procedures are tied to evidentiary rules, notice pleading is tied to liberal discovery, and costs are tied to constitutional doctrines like personal jurisdiction.³⁹ And, "court procedures," one of the authors has stated, "reflect the fundamental values, sensibilities, and beliefs (the 'culture') of the collectivity that employs them."⁴⁰ This interconnectivity often extends deep into the particular social structure.⁴¹ As a

35. See Clermont, *supra* note 17, at 535 ("Comparative study helps overcome the common misconception that the particular procedural rules of one's home jurisdiction are the only rules that would really work.").

36. See Gevurtz et al., *supra* note 15, at 283 ("Increased tolerance, respect, and understanding are among the values that comparativism promotes; that others can do things differently yet still succeed is an important reminder."); see also MAIN, *supra* note 26, at 5.

37. There is foreign resentment to U.S. litigation and its exceptionalist features. Gevurtz et al., *supra* note 15, at 284 (noting "the foreign resentment directed toward U.S. discovery practices"); Marcus, *supra* note 17, at 710 (noting "the nasty aroma American litigation seems to elicit in much of the rest of the world"). A U.S.-initiated movement to explore these differences and appreciate foreign perspectives may help ameliorate that resentment.

38. See Clermont, *supra* note 27, at xi-xii.

39. CHASE ET AL., *supra* note 7, at 5 ("The concentration, orality, and immediacy of procedure, especially at the proof taking stage, are certainly related to the presence of the jury, as well as a passive role for the judge and the markedly adversarial nature of the proceeding."); see also Clermont, *supra* note 27, at xi-xii ("[P]rocedure is a field especially marked by the interrelatedness of its parts and its inseparability from local institutional structure."); Marcus, *supra* note 17, at 710 ("And even if procedure is not entwined with culture, it may consist of pieces that are so interdependent that borrowing some substitutes from others would risk upsetting the whole.").

40. Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002); see also Clermont, *supra* note 27, at xii ("[P]rocedure is surprisingly culture-bound, reflecting the fundamental values, sensibilities, and beliefs of the society.").

41. See Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. (ISSUE 3) 61, 71 (2003) ("There is much to be said for the view that all rules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country's peculiar features of history, social structure, and political consensus and as such are more resistant to transplantation.").

result, comparative procedure is likely to be less useful than most comparative substantive law⁴² and may even be dangerously misleading.⁴³

Second, American procedure is particularly different because of its strong exceptionalism.⁴⁴ That exceptionalism is deeply entrenched both in American legal tradition and systems, and in the larger American culture.⁴⁵ Take, for example, the peculiar and persistent American reverence for the civil jury.⁴⁶ As the authors note, although America inherited civil jury trials from England, England has since “virtually eliminated” them.⁴⁷ Civil juries have also waned to insignificance in other common law countries in Europe, and in Canada and Australia.⁴⁸ And civil law countries have not had civil juries for centuries.⁴⁹ By contrast, the American preference for juries is strong and has deep cultural roots in American egalitarianism and populist self-governance.⁵⁰ Other examples of American procedural exceptionalism include the so-called “American Rule” that parties bear their own costs and attorney’s fees, liberal pleading, liberal (and cost-

42. See O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 20 (1974) (U.K.) (“All that concerns the technique of legal practice is likely to resist change. . . . Comparative law has far greater utility in substantive law than in the law of procedure”); cf. Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1, 2 (1997) (arguing that even if the German model has the better balance, the balance it strikes is fundamentally too authoritarian to be palatable to the American system); John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 988 (1990) (arguing that adopting the Langbeinian proposal could not be done “without changing many other fundamental characteristics of our modern civil procedure”). I am not saying that “culture” is as unchanging and fixed as the laws of physics; culture obviously changes and evolves. But the process is often slow and stubbornly resistant to change. The question is not of possibility, but of practicality and of potential.

43. Marcus, *supra* note 17, at 710 (“[P]rocedure is peculiarly parochial. Procedural characteristics and development may be singularly tied to ‘cultural’ or governmental characteristics of a given nation, so that comparative insights would be of relatively little utility, and perhaps even dangerous.”).

44. See Chase, *supra* note 40, at 280–81; Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1674 (1998) (“The American common-law system, however, has differences from most other common-law systems that are of equally great if not greater significance [than those separating common-law from civil-law systems]. The American system is unique in many respects.”); Marcus, *supra* note 17, at 709.

45. See Chase, *supra* note 40, at 278 (arguing that American procedure, particularly its exceptionalism, reflects the idiosyncrasies of American culture).

46. Although America continues to stand alone with its long tradition of jury preference, it is worth noting that other countries—most notably Japan and South Korea—are beginning to experiment with juries, albeit in criminal cases. See Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT’L & COMP. L. REV. 35, 37 (2006) (reporting that mixed-jury trials will begin for certain criminal offenses in 2009); *South Korea Holds its First-Ever Trial by Jury as Part of Judiciary Reforms*, Assoc. Press (Feb. 12, 2008), <http://www.law.com/jsp/article.jsp?id=1202815246054>.

47. CHASE ET AL., *supra* note 7, at 3; see also ADRIAN A. S. ZUCKERMAN, *CIVIL PROCEDURE* 357 n.15 (2003) (stating that British zeal for civil juries has withered away).

48. See Chase, *supra* note 40, at 289 (“[M]ost of the countries with legal roots in England world [sic] have followed suit [in abandoning the civil jury].”); Kötz, *supra* note 41, at 73.

49. See, e.g., Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 5 (2001); Schlosser, *supra* note 33, at 11; cf. Hazard, *supra* note 44, at 1674 (“No other country routinely uses juries in civil cases.”).

50. See Chase, *supra* note 40, at 289. Of course, the jury has its American detractors, see, e.g., Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210–13 (1985), but they stand against the tide.

ly) discovery, class actions, a disengaged judge, and largely unfettered damage assessments.⁵¹

Third, American proceduralists are notoriously parochial. Comparative procedure in America is rarely studied, taught, or followed.⁵² Incorporation of comparative aspects into the traditional civil procedure course has been cautious.⁵³ That caution, coupled with the incredibly shrinking first-year civil procedure course required by most law schools, means that transnational civil procedure studies are likely to be relegated to an upper-level seminar,⁵⁴ which only a small percentage of students will ultimately take. This parochialism may be due to a historical pattern of legal self-centeredness. By contrast, countries with histories of borrowing, such as Germany⁵⁵ or Japan,⁵⁶ are likely to be far more receptive to borrowing in the future. But whatever the reasons, it is difficult to convince American proceduralists, in general, to take foreign civil procedure seriously as something worth studying, to say nothing of borrowing from.⁵⁷

51. See Marcus, *supra* note 17, at 709–10.

52. See Langbein, *supra* note 25, at 545 (“The study of comparative procedure in the United States has little following in academia, and virtually no audience in the courts or in legal policy circles.”); *id.* at 549 (asserting, in what is probably an overstatement today, that: “If the study of comparative law were to be banned from American law schools tomorrow morning, hardly anyone would notice.”).

53. See, e.g., Clermont, *supra* note 17, at 529 (“I think that the subject of transnational litigation can and should be left in major part to an upper-class course, or perhaps to some new first-year course on transnational law.”); Marcus, *supra* note 17, at 740 (noting that, despite the prevalence of civil procedure courses in American law schools, “comparative procedure is barely on the map”). Of course, there are numerous sources of U.S. law that provide ample opportunity for traditional civil procedure courses to deal with transnational law issues. See, e.g., U.S. CONST. art. III, § 2 (alienage jurisdiction); 28 U.S.C. § 1332 (2000) (same); FED. R. CIV. P. 4(f) & 4(h) (international service of process); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987) (jurisdiction over foreign defendants); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (same); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (forum non conveniens). But these are not really “comparative” aspects—they are international aspects that have been incorporated into purely American procedural law.

54. See Clermont, *supra* note 17, at 525 (“Transnationalism will likely prompt a major shift in the overall law school curriculum, but perhaps not for its civil procedure course.”); see also Gidi, *supra* note 16, at 502 (describing his upper-level comparative civil procedure seminar class). *But see* Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 480 (2006) (urging more pervasive incorporation of comparative studies into the first-year civil procedure course).

55. See Gottwald, *supra* note 32, at 25 (“My own German law is in the end a mixture from old German, Roman, Italian, French, Dutch, English and American influences. And it is not easy to say what is really German in it.”).

56. Japan adopted the 1890 Germanic code virtually verbatim (in Japanese), which was then overlaid by Americanized procedure after WWII. See CHASE ET AL., *supra* note 7, at 36; Marcus, *supra* note 17, at 720.

57. That is not to say that the U.S. has never borrowed foreign civil procedure. In fact, it has done so on occasion, such as in the development of the Field Code. See Marcus, *supra* note 1, at 164. But the U.S. borrowing has been modest at best over its history, and recent major reforms have not focused on borrowing to any substantial degree. In general, ever since borrowing much of the English system at its founding, the U.S. has been fairly isolationist in its procedural development. See *id.* at 163–67.

These barriers⁵⁸ all but foreclose (absent, perhaps, some urgent crisis)⁵⁹ large-scale, rapid changes in American procedure. Even small-scale but rapid changes risk causing intrasystem inconsistency if not made with sensitivity to the web of interconnectedness that procedure draws upon.⁶⁰ As a result, even modest proposals for reform in America have met with strident resistance.⁶¹

C. Some New Areas of Potential

Of course, reform and change are comparative civil procedure's most ambitious goals, not its only ones. The other goals still hold promise, even for American proceduralists. Comparative procedure can teach American proceduralists about their own system, broaden perspectives, and bring nations closer together. It is just a matter of exposure and of making comparative study a priority. No doubt *Civil Litigation in Comparative Context* will be a prime resource for that exposure.

But even the more ambitious goal of harmonization, or reform based on comparative study, has potential. As Professor Clermont has stated, "All this is not to say that transplants are impossible. . . . But any such transplant must be limited in scope and sensitive to context."⁶²

I agree with Professor Clermont. Harmonization and alignment are particularly promising in the short term in those civil procedure areas in which (1) the two cultures are similar; (2) the two systems strive for a similar balance of the underlying policies; and (3) the areas are sufficiently disconnected from other facets of procedure that their modification will not unduly disrupt other parts of the procedural system.⁶³

Admittedly, that is a narrow subset. But it may be getting broader each day. The world is collapsing and procedure is converging, even in

58. There are other barriers, including, for example, the unilingualism prevalent in America that often prevents American proceduralists from accessing and understanding foreign materials. See Marcus, *supra* note 17, at 710 ("Americans are isolated by their ignorance of other languages . . .").

59. See Marcus, *supra* note 1, at 186 (arguing that major American procedural reform generally happens only in response to a crisis).

60. See, e.g., Clermont, *supra* note 27, at xi-xii ("[P]rocedure is a field especially marked by the interrelatedness of its parts and its inseparability from local institutional structure."); Kötz, *supra* note 41, at 73 ("Strengthening the court's control over the evidentiary process would then be practicable only if the United States . . . abolished the civil jury.").

61. For example, the proposal to require more mandatory initial disclosures provoked an unprecedented flood of objections. See Marcus, *supra* note 1, at 172-73. Similarly, the 2000 amendment to limit discovery to anything "relevant to the claim or defense of any party" was decried as "revolutionary" even though it did not make any significant changes in practice. See *id.* at 188-89.

62. Clermont, *supra* note 27, at xii.

63. For example, Professor Clermont has argued that the laws of Japan and the U.S. are not so different when it comes to recognition and enforcement of foreign judgments. See Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT'L L.J. 1, 2 (2004). In addition, one might get more mileage out of a comparative approach across common law systems, such as the United Kingdom, Canada, Australia, New Zealand, and the U.S., to avoid the stark divide between common law and civil law systems.

areas of American exceptionalism and even for aspects that are fundamentally interconnected to the system as a whole. My point is that, even in these difficult areas, American procedure already is making some important, albeit gradual, changes that could lead to harmonization in the long term.⁶⁴ Let me provide a couple of (concededly very generalized) recent examples.⁶⁵

1. Liberal Pleading

Most countries require plaintiffs to provide, in their initial pleadings, substantial factual allegations to support their legal claims and often also evidence to support those factual allegations. German civil procedure, for example, “requires specific fact pleading and does not permit mere notice pleading.”⁶⁶ Japan is similar,⁶⁷ as is Italy.⁶⁸ Even the more liberal French system requires the plaintiff to provide a statement of the facts on which she justifies her claim.⁶⁹

U.S. procedure is far more liberal than any of these.⁷⁰ Rule 8 requires only “a short and plain statement of the claim showing that the pleader is entitled to relief”⁷¹ Traditionally, American procedure has not required fact pleading so long as the complaint provides notice of the claim and relief sought. That stands in stark contrast to those systems that require a statement of facts and even evidence at this early stage.

But perhaps that is changing, at least in discrete areas. The Private Securities Litigation Reform Act of 1995 imposed heightened pleading on

64. In identifying these examples, I do not mean to suggest that I think either the trends or harmonization with other systems are good or bad from a normative perspective. Rather, I merely mean to argue that the path towards harmonization—for those who want it—may be easier because of the trends; the arguments for or against such harmonization are for another time.

65. In addition to the three examples on which I focus, other areas may also show the stirrings of convergence. *See, e.g.*, Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 164–97 (1999) (documenting a modest American retreat from liberal discovery).

66. PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 198 (2004); *see also* Schlosser, *supra* note 33, at 12 (“In Germany, litigation starts with the submission of a written statement to the court. . . . [T]his written statement is a very extensive, detailed and, if it comes from a qualified attorney, very carefully drafted paper. . . . If documentary evidence is available, it will usually be enclosed. Should circumstantial evidence exist, it is also explained to the judge in the statement of claim and may be emphasized by copies of relevant documents and other materials.”).

67. *See* Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 697 (1998) (“[The complaint] requires that ‘the operative fact-basis of the claim’ be specified as well as relevant important indirect facts that relate to the cause of action. Evidence should be itemized and written out according to each point to be proved. . . . The role of the complaint is to disclose all of the important facts and evidence at an early stage as well as to identify the nature of the claim.”).

68. *See* Michele Taruffo, *Civil Procedure and the Path of a Civil Case*, in *INTRODUCTION TO ITALIAN LAW* 166, 166 (Jeffrey S. Lena & Ugo Mattei eds., 2002).

69. *See* Schlosser, *supra* note 33, at 13.

70. *See* CHASE ET AL., *supra* note 7, at 8–9.

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

plaintiffs, requiring them to “state with particularity facts giving rise to a strong inference [of fraudulent intent].”⁷² Similarly, the Supreme Court, just two Terms ago in *Bell Atlantic Corp. v. Twombly*,⁷³ imposed a fact-pleading standard for antitrust conspiracy claims⁷⁴ and eliminated a more liberal general notice pleading standard that had existed since 1957.⁷⁵ Already, *Bell Atlantic* is being applied beyond the antitrust context to require fact pleading for a host of cases.⁷⁶ And other instances of fact-pleading requirements in various pockets of substantive law abound.⁷⁷

These discrete changes do not necessarily reflect a willingness to alter the American pleading system generally. And even these specific changes are still far from the kind of fact-pleading, evidentiary-based system that, for example, Germany has. But they prove that American procedure is not static and irrevocably different.⁷⁸ Indeed, if these isolated trends continue and expand,⁷⁹ then, in time, they may eventually bring America close enough to where transnational harmonization of pleading standards can become a reality.

72. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, tit. 1, § 101(b), 109 Stat. 737, 747 (codified at 15 U.S.C. § 78u-4(b)(2) (2006)).

73. 127 S. Ct. 1955 (2007).

74. See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 138 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (“And, at least for the kinds of costly class action antitrust cases like the one initiated by Twombly, *Bell Atlantic* erects an additional ‘plausibility’ requirement of fact pleading in its place, what I have called ‘notice-plus.’”). Technically, *Bell Atlantic* imposed a “plausibility” standard, not specifically a fact-pleading standard. In practice, however, the two tend to merge, as the Court itself noted. See *Bell Atlantic*, 127 S. Ct. at 1965 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough *fact* to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”) (emphasis added); *id.* at 1965 (“identifying *facts* that are suggestive enough to render a § 1 conspiracy plausible”) (emphasis added).

75. See Dodson, *supra* note 74, at 135 (arguing that the Court “gutted the venerable language from *Conley v. Gibson* that every civil procedure professor and student can recite almost by heart: that ‘a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle [sic] him to relief’” (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957))).

76. See Kendall W. Hannon, Note, *Much Ado About Twombly: A Study on the Impact of Bell Atlantic v. Twombly on Rule 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15 (2008) (concluding that *Bell Atlantic* has been applied to a variety of cases, most prominently civil rights cases).

77. See, e.g., Y2K Act, 15 U.S.C. § 6607 (2006); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1021–59 (2003) (identifying CERCLA, civil rights, conspiracy, copyright, defamation, and RICO claims as requiring fact pleading, at least according to lower courts).

78. For an interesting proposal rejecting the transsubstantive nature of Rule 8 and supporting fact pleading for certain cases in which information asymmetry is not implicated, see Paul J. Stancil, *The Practical Economics of Pleading* (Ill. Law and Econ. Research Paper Series, Paper No. LE08-018, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144850.

79. Cf. Fairman, *supra* note 77, at 1061–62 (arguing that a fact-pleading standard that develops in one pocket tends to spread to other areas).

2. Verdict Constraints

Another area of convergence is in fettering verdicts. Few countries have the same individualized focus—and wide variation—that American damage verdicts do. German judges, for example, must align damage awards with published results in similar cases.⁸⁰ By contrast, American juries and judges may not know (and may not be permitted to know) what was awarded in similar cases.⁸¹ In addition, American deference to verdicts is high.⁸² Consequently, American verdicts are widely viewed as haphazard across similar cases and unusually high, with little or no opportunity for correction.⁸³

Nothing exemplifies this disparity more than a comparative look at punitive damages. Most common law countries significantly constrain punitive damages,⁸⁴ and most civil law countries prohibit them.⁸⁵ Many even will refuse to enforce a foreign judgment for punitive damages.⁸⁶ But in the United States, punitive damages have a long history of acceptance, with far less restrictions.⁸⁷ Most states continue to allow for punitive damages generally,⁸⁸ and juries have broad discretion to fashion the relief they

80. See ANDREW J. MCCLURG ET AL., PRACTICAL GLOBAL TORT LITIGATION 178 (2007).

81. See *id.*

82. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL'Y 231, 233 (2003) ("Unlike economic damages, which have long been subject to relatively robust judicial scrutiny, judges traditionally have left determination of punitive and noneconomic compensatory damages almost exclusively to juries, subject only to review under such amorphous standards as abuse of discretion, passion or prejudice, or 'shocks the conscience.'").

83. See Anthony J. Sebok, *Translating the Immeasurable: Thinking About Pain and Suffering Comparatively*, 55 DEPAUL L. REV. 379, 380 (2006). Whether damages awards actually are haphazard or unusually high is disputed. See, e.g., Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298-99 (2005) ("[H]igh-end punitive damages are rarely awarded, are highly correlated with the plaintiff's injury, are reserved for truly egregious circumstances, and are often scaled back by trial and appellate judges.").

84. See, e.g., *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2623-24 (2008) (reporting that in England and Wales, punitive damages are limited to certain specific actions and are subject to strict, judicially-imposed guidelines); Lord Griffiths et al., *Developments in English Product Liability Law: A Comparison with the American System*, 62 TUL. L. REV. 353, 391-96 (1988) (discussing the English disinclination to award punitives). *But see* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 394-95 (2004) ("The Article finds that, despite the controversy over their appropriateness, punitive damages are widely available in [England, Australia, New Zealand, and Canada].").

85. See 2 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 22.2 (5th ed. 2005) (France, Germany, Austria, and Switzerland); Mullenix, *supra* note 49, at 7.

86. See Clermont, *supra* note 63, at 11-12 & n.26 (Japan); John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT'L L. 507, 514, 518 (2007) (Japan, Italy, and Germany).

87. See *Exxon Shipping*, 128 S. Ct. at 2620-21 (detailing that long history and reporting that America imported them by 1784 and that the states widely accepted them by the middle of the nineteenth century); Gotanda, *supra* note 84, at 421 ("The most widespread use of punitive damages is in the United States . . ."); *id.* at 441 ("The United States has the largest punitive damages awards.").

88. See *Exxon Shipping*, 128 S. Ct. at 2623.

think appropriate in individual cases,⁸⁹ even if those individual results create disparity between similar cases.⁹⁰

But, as with liberal pleading, America's take on relatively unfettered punitive damages assessment is converging with foreign models. Most states now have enacted caps or ratios—or both—to constrain awards of punitive damages.⁹¹ In addition, the Supreme Court recently has aggressively imposed limits on the amount of punitive damages, even for states that do not have such limits.⁹² And, just last Term, the Court undertook a comparative approach to punitive damages looking to other countries to determine punitive damage award norms under U.S. maritime law.⁹³ Thus, the recent trend in American courts is to closely scrutinize jury awards of punitive damages for excessiveness.

That trend, coupled with the Supreme Court's own willingness to look abroad for solutions, suggests that unfettered and individualized damage awards, at least in the context of punitive damages,⁹⁴ may be moving toward the rest of the world.⁹⁵

89. See CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 3 (2002) (“[T]he instructions presented to jurors for the determination of the appropriate punitive damages verdict are extremely vague and employ terms that are largely undefined.”); MCCLURG ET AL., *supra* note 80, at 179; Gotanda, *supra* note 84, at 441 (“[U]nlike some other countries, American courts have not consistently mandated that awards of punitive damages are to be modest in size.”); *cf.* Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885) (“The discretion of the jury in [punitive] cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice.”).

90. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 565–66 & n.8 (1996) (describing two similar cases in which one received a high punitive verdict and the other did not).

91. See *Exxon Shipping*, 128 S. Ct. at 2623. Some states have abolished punitives altogether. See *id.* at 2622.

92. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (imposing limits for excessiveness); *Gore*, 517 U.S. at 574–75 (same). Before the 1990s, the Court had never imposed any limits on a jury's assessment of punitive damages. See Gotanda, *supra* note 84, at 424.

93. See *Exxon Shipping*, 128 S. Ct. at 2623–24 (criticizing the unpredictability of American punitive damage awards compared to Great Britain, Canada, and Australia, among other jurisdictions, and using those comparisons to help justify a rigid 1:1 outer-limit ratio for punitive damages under maritime law).

94. Although I do not mean to make the point in detail, other U.S. trends reflect stricter judicial oversight of damages verdicts even beyond punitive damages. See, e.g., David C. Baldus et al., *Additur/Remittitur Review: An Empirically Based Methodology for the Comparative Review of General Damages Awards for Pain, Suffering, and Loss of Enjoyment of Life*, in REFORMING THE CIVIL JUSTICE SYSTEM 386, 387–92 (Larry Kramer ed., 1996) (stating that some courts have begun to use personal injury compensatory damage awards in similar cases as “precedent” when fashioning remittiturs); DeCamp, *supra* note 82, at 290–97 (arguing that the Supreme Court's recent standards for excessiveness of punitive damages should apply to reviews of noneconomic compensatory damages).

95. See, e.g., *Thompson v. Comm'r of Police of the Metropolis*, [1998] Q.B. 498, 507, 517–18 (A.C.) (U.K.) (instructing lower courts to provide guidance to juries assessing punitive damages, including brackets of reasonable amounts, and suggesting that punitive damages should not exceed three times the amount of compensatory damages).

3. *Involvement of the Judge*

Most civil law systems include a judge that is proactive in managing the case, promoting settlement,⁹⁶ and interrogating witnesses.⁹⁷ German judges, for example, conduct most of the witness examination.⁹⁸ Even common law English judges are more proactive than their American counterparts.⁹⁹

American judges typically have been more distant from the merits, settlement negotiations, and case management, preferring instead to allow the parties to drive the litigation course, discovery, and evidentiary presentation.¹⁰⁰ But, again, that is changing, at least in certain instances.

One such instance is the case with a pro se party.¹⁰¹ The Ninth Circuit, in particular, recently has instructed district courts to 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;¹⁰² notify a pro se litigant of the implications of transferring a motion to dismiss into one for summary judgment;¹⁰³ 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;¹⁰⁴ explain to a pro se litigant the implications of consenting to a proceeding before a magistrate judge;¹⁰⁵ notify a pro se litigant of the implications of

96. CARL F. GOODMAN, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* 402 (2004) (“The Japanese judge is an active player in the settlement process.”); *id.* at 198 (explaining that the judge has tools to encourage settlement, such as signaling the likely decision in advance); MURRAY & STÜRNER, *supra* note 66, at 13 (explaining that German judges have a statutory obligation to facilitate settlement); *id.* at 259 (reporting that German judges are required to hold settlement conferences). The exception, along with America, might be England. See Marcus, *supra* note 17, at 730 (“In England, it seems, there is limited judicial promotion of settlement.”).

97. See Marcus, *supra* note 17, at 723 (“[T]he German system is considerably more activist than the current American one.”); *id.* at 723–24 (“[T]he judge may tell the lawyers what they should be doing and micromanage the case, sometimes taking actions the lawyers regard as infringing on the attorney–client relationship.”); *id.* at 724 (“The practice of ‘hints’ to the parties about their cases, perhaps an obligation of the German and Japanese judge, goes beyond scheduling regulation of litigation conduct and intrudes into the merits of the cases.”).

98. See Kötz, *supra* note 41, at 63.

99. See NEIL ANDREWS, *ENGLISH CIVIL PROCEDURE* 37, 338–40 (2003); ZUCKERMAN, *supra* note 47, at 34.

100. One notable exception is the judge’s gatekeeper role over expert testimony. See FED. R. EVID. 702.

101. See Marcus, *supra* note 17, at 726 (“American courts have started in some instances to try to adapt the American adversary system to the needs of pro se litigants.”).

102. See *Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998) (en banc).

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

104. See *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).

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

failing to disclose a witness in a timely fashion;¹⁰⁶ and consider a pro se plaintiff's competence prior to dismissing a complaint with prejudice.¹⁰⁷

Another such instance is in massive litigation, the increasing complexity of which often forces judges to take a more active role.¹⁰⁸ In such cases, the judge often engages in fact-finding and takes a more active role by, for example, appointing expert witnesses, special masters, and science panels.¹⁰⁹

These 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,¹¹⁰ perhaps facilitated by recent changes to rules that give them more discretionary power to do so.¹¹¹ As John Langbein has argued, this trend away from detached judging is “telling evidence” of the potential for broader change and convergence.¹¹² At the same time, civil law jurisdictions are becoming more open to certain “American” adversarial-based procedures, such as party-driven witness examinations.¹¹³

In short, for whatever reasons, the American system and other modern systems are finding common ground on the question of the role of the judge. Nothing suggests this convergence will not continue, and, if it does, Japan may hold the key, for while it mirrors the civil law paradigm of Germany, it has incorporated the party-based interrogation methods of the United States.¹¹⁴

I confess that I have treated these three areas of convergence—liberal pleading, punitive damages, and the involvement of the judge—at a high level of generality. My point, therefore, is quite modest. I am not arguing that the trends are caused by comparative studies, nor am I arguing that they are part of a broader transformation; rather, I am merely identifying

106. See *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 845–46 (9th Cir. 2004).

107. See *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989).

108. See *Mullenix*, *supra* note 49, at 13 (“[P]articularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge.”).

109. See *id.* at 13–16.

110. See Adrian A.S. Zuckerman, *Court Control and Party Compliance*, in *THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE* 143 (Nicolò Trocker & Vincenzo Varano eds., 2005); Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 *HASTINGS INT’L & COMP. L. REV.* 3, 17–20 (2003); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. CHI. L. REV.* 494 (1986); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982).

111. See, e.g., *FED. R. CIV. P.* 16 (allowing the court to schedule and compel—under threat of sanctions—good faith participation at pretrial conferences and setting forth a range of matters the court can consider at them); *FED. R. CIV. P.* 26(f) (allowing the court to require a discovery plan).

112. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. CHI. L. REV.* 823, 825 (1985); *cf. id.* at 858–66 (arguing that the trend suggests the capacity for greater movement).

113. See Nicolò Trocker & Vincenzo Varano, *Concluding Remarks*, in *THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE*, *supra* note 110, at 243, 244–45.

114. See *CHASE ET AL.*, *supra* note 7, at 36–38.

isolated areas of American exceptionalism that are becoming, well, less exceptional. If these trends continue, they may provide fertile ground for exploring what real value a comparative study may have for the continuing evolution of American civil procedure.

CONCLUSION

Despite its difficulties and obstacles, comparative civil procedure still has promise. Although nations may balance certain factors differently and may be constrained in the short-term by ties to their historical and social cultures, they all share the same general goal of a fair, orderly, expedient, cost-effective, accessible, and just administration of litigation that gives due deference to party autonomy.¹¹⁵ There ought to be great value in the comparison of both the balances struck and the procedures used to maintain those balances. And, there ought to be room for compromise.

The challenge of comparative civil procedure has three parts. The first is being willing to look beyond one's home system to explore other approaches. The second is learning enough about the systems being compared so that the comparison is useful rather than misleading.¹¹⁶ The third is identifying, for purposes of internal reform, mutual harmonization, or exportation, what areas hold the most potential.

Civil Litigation in Comparative Context provides a useful tool for all three. Its accessibility invites the reader into the comparative conversation. Its scope and detail enable the reader to participate in that conversation with thoughtfulness. And, it lends comparative credibility to those areas trending towards convergence.

115. See MAIN, *supra* note 26, at 1 (stating that all systems strive for the fair and efficient administration of substantive law); Kötzt, *supra* note 41, at 63 ("There is no doubt that all procedural systems aim at an intelligent inquiry into all the practically available evidence in order to ascertain, as near as may be, the truth about the facts."); *id.* at 74 ("Of course, all procedural systems must balance the importance of truth for the fact-finding process against the need to protect areas of business and personal privacy from unreasonable invasion.").

116. See Marcus, *supra* note 17, at 711 (arguing that comparing in isolation can be misleading).