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This Issue is Dedicated to Arthur Taylor von Mehren (1922-2006)

Review Essay

***709** PUTTING AMERICAN PROCEDURAL EXCEPTIONALISM INTO A GLOBALIZED CONTEXT[Richard L. Marcus \[FN1\]](#)

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Ali/Unidroit, *Principles and Rules of Transnational Civil Procedure*, pp. lix, 177 (2006) (Cambridge U. Press)

Neil Andrews, *English Civil Procedure*, pp. cvi, 1073 (2003) (Oxford U. Press)

Carl F. Goodman, *Justice and Civil Procedure in Japan*, pp. xiii, 545 (2004) (Oceania Pub.)

Kuo-Chang Huang, *Introducing Discovery into Civil Law*, pp. xxxii, 406 (2003) (Carolina Acad. Press)

Peter L. Murray & Rolf Sturmer, *German Civil Justice*, pp. xxxix, 670 (2004) (Carolina Acad. Press)

Adrian Zuckerman, *Civil Procedure*, pp. cxv, 999 (2003) (Lexis-Nexis/Butterworths)

American proceduralists have not been comparativists. In large part, this has been due to American exceptionalism. Not only does America conceive itself, often ruefully, as the litigation superpower, [FN1] but it also has a set of procedural characteristics that seem to set it off from almost all of the rest of the world. [FN2] It is almost hackneyed by now to list these characteristics--relaxed pleading, broad discovery, *710 jury trial, limited cost shifting, potentially remarkable awards for pain and suffering or punitive damages, and heavy reliance on private lawyers to enforce public norms, to name several but not all the distinguishing characteristics.

Altogether, these distinctions--and the nasty aroma American litigation seems to elicit in much of the rest of the world--tend to confirm the American proceduralist's view that it is best and sufficient to attend only to American topics. This exceptionalism also reinforces the tendency to view such navel-gazing as appropriate because procedure 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. Few polities are as self-consciously exceptional as the Americans, so that this explanation is a particularly effective deterrent to comparative procedure here.

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. So as a practical rather than academic exercise, comparative perspectives are understandably viewed with suspicion. Unless one can appreciate the full picture of another country's procedural system, one would hesitate to endorse borrowing any particular feature.

On top of all these other reasons there may be a further explanation: Americans are isolated by their ignorance of other languages, and even American scholars find language a challenge when they try to get the comprehensive appreciation they would need to make useful procedural comparisons. Of course, there have been English sources that could provide something like this insight. One need only think of Prof. Damaska's wonderful 1986 book *The Faces of Justice and State Authority*, linking procedural arrangements to the political ordering of the state, [FN3] to recognize that even English speakers have had a rich set of sources (including articles in this journal) to draw upon.

That array of sources has recently been very substantially augmented by the fortuitous and relatively simultaneous publication of six works that together afford even the English-bound American proceduralist such a substantial opportunity to gain the sort of comprehensive familiarity with another country's system that may provide reassurance about borrowing features of another country's procedural arrangements without appreciating how they connect to others not borrowed.

This essay is intended to introduce these new books, not to exhaust their capacity to inform. [FN4] To the contrary, the point is that *711 such thorough studies afford myriad subjects for comparison. Accordingly, this essay will first sketch the picture that emerges of the procedural arrangements presently in place in England, Germany, and Japan, the three countries profiled in four of these works. It then highlights some recurrent themes that occur to the author as peculiarly informative from an American perspective--the role of the judge, the handling of pro se litigants, and ADR. This sketch shows that, despite its exceptional features, American procedure reflects trends in the other three countries. Finally, it will examine the other two books--the UNIDROIT/ALI project on transnational procedure and the Huang book on the need for discovery in civil law systems--as a further framework for reflecting on whether American exceptionalism is an unavoidable feature of American political culture.

I approach this project as an American proceduralist and a neophyte to comparativism, fully aware that 'the comparative enterprise can be treacherous.' [FN5] At the same time, however, I am heartened by the conclusions drawn by a renowned comparativist at the end of a recent conference about procedure:

We learned, first of all, how little we know of other countries' procedural systems. Even those of us who specialize in comparative law came to realize how different were the systems and procedures of litigation in other countries, and therefore how little we knew of what really goes on in the process of translating doctrine into outcome. We learned that the differences were not only between civil law and common law countries, but between France and Italy, England and America, Germany and Switzerland, and even among the cantons of tiny Switzerland. [FN6]

Perhaps, in this instance, even though a little knowledge can be a dangerous thing, these recent volumes provide a sufficiently broad panorama to permit other readers to make profitable use of them.

I. Snapshots of Other Systems

It is a given in comparative inquiry that one must be cautious about considering any feature of a legal system or doctrine in isolation from others that surround it and relate to it. But any legal system is likely to be a complicated and complex thing; getting an adequate picture of its entirety is therefore a challenge.

The four books that focus on specific countries (Andrews, Goodman, Murray & Sturmer, and Zuckerman) provide comprehensive pictures of three functioning procedural systems. Approaching them *712 from the per-

spective of an American proceduralist, I begin with a set of snapshots of these three alternative systems that caught my attention. Others may mine these books for further details on these specific issues, and make use of the wealth of detail on other topics.

As a starting point, it is useful to have in mind the effigies of the common law and civil law procedural systems. In the common law tradition, the adversary system allows and expects parties and lawyers to take the lead in presenting and organizing the case. The judge acts as a neutral umpire during a single continuous trial that serves as the central event in the litigation and is separate from that which precedes it (pretrial) and follows it (appeal). Appeal is limited to questions of trial court legal error, and rules of preclusion are strong. In the civil law system, the inquisitorial approach means that the judge largely controls the development of factual information, perhaps compiled in a dossier, upon which the decision will be based. The decision-making process proceeds through a series of oral hearings, not a ‘trial,’ during which the orientation of the case may change considerably. Broad appellate review of the decisions of the first-level judge is available, and new arguments and possibly new evidence may be raised on appeal. Finality and preclusion are weak. Of course, these effigies have always been overdrawn. For example, one can find an inquisitorial ingredient in traditional American procedure. [FN7] But at least these generalizations provide a starting point.

A. England

For Americans, England surely provides a congenial starting point as the 18th century source of much of the original American procedural architecture. It is striking, then, that English procedure turns out to be very different from American procedure on many key points. The Zuckerman and Andrews books examine the new contemporary procedure from start to finish. [FN8]

American proceduralists know that jury trial for civil cases is almost unknown in England, but it is striking given U.S. enthusiasm for the jury that use of the jury long ago withered away due to lack of interest:

Until 1854, trial by jury was the only form of trial used in any court of common law. During the second half of the century it became possible to opt by consent for a trial by judge alone. By 1883, trial by jury was obtainable as a matter of course only in six causes of action, while in all other cases it had to be specially asked for. In 1918, another cause of action was added to the list of causes for which there remained *713 a right to trial by jury, while in all other cases it was made discretionary, and this legislation was substantially re-enacted in 1933. Jury trial declined because it was not being asked for. The current position is that there is a right to have a trial by jury only for libel, slander, malicious prosecution, false imprisonment and allegations of fraud, subject to the proviso that the court can refuse jury trial if it is of the opinion that ‘the trial requires prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.’ [FN9]

In the U.S., the trend over the same period was in a substantially different direction. The Seventh Amendment to the U.S. Constitution directed that the right to jury trial be ‘preserved’ in ‘suits at common law.’ [FN10] The baseline has been the ‘historical’ test of what was a ‘suit at common law’ in 18th century England. [FN11] If anything, procedural changes such as the adoption of the Federal Rules of Civil Procedure in 1938 expanded the opportunity to demand a jury trial. [FN12] For the American proceduralist, the withering of the jury in England is a striking reminder of our exceptionalism. Equally striking, as addressed below, is the related shift in the manner of trying cases toward ‘trial by affidavit’ in the U.K.

The decline of jury trial is just a footnote to current trends in English procedure; however, the main reason

for publication of the Andrews and Zuckerman books is the advent of pervasive changes to English procedure due to Lord Woolf's reforms. [FN13] These reforms were embodied in the new Civil Procedure Rules (CPR) adopted in 1998. In Zuckerman's words, the CPR 'transformed English civil procedure' by making 'radical departures' leading to a 'new procedural *714 code' (Zuckerman, p. 1). Andrews is even more emphatic, referring to 'Lord Woolf's bulldozers' (Andrews, p. ix). To some extent, these bulldozers consciously followed an American trail; the English embrace of case management owed much to the American experience over the last generation with that technique of handling cases in a common law system. [FN14] But the emerging reality moves beyond the American experience in many ways. A further stimulus to change has been the English incorporation into domestic law of articles 2-12 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights under those articles, including emphasis on access to justice at reasonable cost and with reasonable promptness (See Zuckerman, ch. 2). [FN15]

The overarching principle behind the new arrangement is CPR 1.1, embracing proportionality. [FN16] In the U.S. a similar principle has been enshrined for over two decades in the discovery rules. [FN17] The principle now permeates all aspects of procedure in England. Zuckerman explains that before the adoption of the CPR, too little attention was given the consumption of time and money in the pursuit of the 'perfect' outcome (Zuckerman, p. 5). But Andrews worries that the CPR make a 'forensic gamble' on whether reasonable accuracy can be preserved with the new emphasis on proportionality (Andrews, p. 136).

*715 The new regime kicks in before the formal commencement of litigation; even before filing suit the claimant is to serve a claim on the defendant. This stage is 'no less important than the formal stages' (Andrews, p. 7). The ideal, of course, is that the parties will reach a settlement before suit is even filed. At least, these pre-action protocols may serve to supply information so that particulars regarding the claim are not necessary before the defendant is required to answer (Zuckerman, p. 212). Such a pre-litigation exchange of views has enjoyed occasional popularity in the U.S.; the first President Bush issued an Executive Order directing federal litigators to employ such a strategy. [FN18] It is not clear whether the introduction of this requirement has worked a significant change in England.

From the commencement of formal litigation, the template for each case depends on which litigation 'track' it is assigned to follow using such criteria as amount of damages sought. Unlike the U.S. federal system--in which the timing and other patterns for cases are set individually--the notion is that tailoring a timetable for each case would consume too much time itself (Zuckerman, p. 422). With this predetermined timetable in mind, the court is likely to be less receptive than previously to amendments as the process develops (Andrews, p. 258). Discovery also is likely to be constrained in a way that would look undue to an American litigant (but of course much less so than the fact-gathering permitted in civil law jurisdictions such as Germany and Japan). Besides emphasizing proportionality in determining what discovery is appropriate, the CPR looks to whether the information is 'directly relevant' and leaves the main authority for the amount of disclosure beyond the standard disclosures in the hands of the court (Zuckerman, pp. 464, 467). Nonparties can be required only to produce specific documents, and cannot be required to search for documents fitting a general description (Zuckerman, p. 493). Perhaps most remarkably from an American perspective, the use of expert witnesses is under the complete control of the court, which allows the use of such witnesses only when they will be of real assistance and may even require adverse parties' experts to confer about the issues outside the presence of counsel and the parties (Zuckerman, pp. 616-22).

These pretrial constraints are not so striking, however, as the overt shift in the mode of adjudication itself. 'The adjudicative process begins as soon as the court assumes control over the litigation' *716

(Zuckerman, p. 42). In complex cases, ‘the trial too has changed almost beyond recognition’ because evidence and arguments are presented throughout (Zuckerman, p. 43). As a consequence, the ‘oral continuous narrative flow of a civil trial is now in tatters’ (Andrews, p. 124). Witness statements commonly take the place of direct testimony, and courts may dispense with testimony in chief because they get ‘virtually all’ of the evidence before trial (Zuckerman, pp. 601, 643). With the demise of civil juries, most exclusionary evidence rules have stopped applying, and hearsay evidence is accepted (Zuckerman, pp. 605, 612). Overall, this may seem more like the civil law approach to ‘trial.’

These English developments stray far from the model of trial that continues to prevail in the U.S., but they respond to themes that can be found in this country also. American judges have for some time directed parties in some cases to submit the direct testimony in written form before trial. [FN19] Similarly, the advent of videotaped depositions has offered the possibility of preparing an edited videotape of what would be offered as testimony at trial, and the court could watch the videotape at its convenience. [FN20] Perhaps the videotape idea could apply even to jury trials, enabling the jurors also to view the evidence at their leisure. [FN21] The common law trial might evolve toward the civil law model on both sides of the Atlantic. Much might be lost by such a shift. As Zuckerman notes, ‘the English process of adjudication was much more comprehensible to onlookers than its continental counterparts due to its orality and to its continuous nature’ (Zuckerman, p. 86). Some time ago, I saw similar risks in a possible *717 shift toward increased reliance in the U.S. on trial by surrogate means. [FN22] The English experience may inform American consideration of innovations along this line.

The CPR reforms have also elevated the importance of trial court outcomes by working a ‘far-reaching transformation’ of appeals (Zuckerman, p. 719). Unlike a more aggressive attitude displayed by appellate judges previously, the new approach is ‘confined to a scrutiny of the lower court’s decision’ and ‘kept to the bare minimum compatible with the need to avoid injustice’ (Zuckerman, p. 721). Almost all appeals require the permission of the court.

Finally, the English treatment of costs continues to play a large role in English litigation. Indeed, the costs chapter is the longest of the 26 chapters in Zuckerman’s book, occupying more than ten percent of the entire book. Ironically, the success of the CPR reforms in reducing the costs of litigation may have worsened the problems affecting cost litigation. ‘Satellite litigation about costs is merely a symptom of a long-standing and intractable vice of our litigation system: disproportionately high litigation costs,’ and ‘much of this satellite litigation has been the result of recent reforms’ (Zuckerman, p. 969). ‘Considerable problems and difficulties beset almost every aspect of the costs jurisdiction. It is therefore inevitable that the subject of costs will have to be overhauled yet again.’ (id.) Although attorney fee litigation is a cottage industry in the U.S., its dimensions are nothing like what they are in England.

B. Germany

As England is the historical model for the American civil litigation system, Germany is for many American civil procedure students the model for an alternative to the American ‘adversarial’ approach. For many years, American scholars have focused on Germany as an example of civil law procedure. [FN23] Two decades ago, Professor Langbein asserted provocatively that the German method of fact-gathering by judicial officers was superior to the American one relying on the lawyers. [FN24] Many American civil procedure casebooks have *718 used Germany as the example of an alternative for beginning students to consider. [FN25] But the German system has changed, and the Murray & Sturmer book offers ‘a synthesis and evaluation of the entire German sys-

tem' (p. xx, Foreword by Arthur T. von Mehren). This is an important topic for Americans because the German system has had 'greater influence on civil justice than any other procedural system of the civil law world,' and serves as 'a prototype of modern continental-European civil justice' (p. xxiii). Yet almost all discussions of this system are in German, so that the appearance of this book affords those who cannot read German with a welcome opportunity to become truly familiar with contemporary German procedure. Finally, the book ends with a thoughtful chapter making comparisons to U.S. procedure (ch. 13).

An appropriate starting point is that legal institutions in Germany occupy a central position similar to that in the U.S.: 'In no other country other than perhaps the United States does the Law, with its various accoutrements of legislature, administration, judiciary, and bar occupy a more prominent place and exercise a greater role' (p. 4). But that central role was played out in a very different procedural system. For a time, a vigorous inquisitorial approach prevailed. Parties to litigation in Prussia in the 18th century were represented not by private counsel but by 'justice committees' appointed by the state, and the judge was a representative of a state with an ideology of enlightened despotism (pp. 28, 86). In the 19th century, however, German procedure moved away from a pure inquisitorial approach and procedural doctrine was imported from France (p. 29). The core of the 1877 Procedure Code remains in effect today (p. 31).

The current mode of German procedure is certainly different from contemporary American procedure. 'German civil procedure requires specific fact pleading and does not permit mere notice pleading' (p. 198). For those familiar with American fact pleading, it bears emphasis that the German version is much more exacting.

Complaints are also expected to conform to the general requirements for written pleadings and briefs (Schriftsätze). Included among these is the requirement of designation of the means of proof which would serve to prove the factual assertions in the pleading. Usually the plaintiff will comply with the recommendation by appending*719 to each significant factual assertion in the complaint a kind of citation to the kind and source of proof which the plaintiff expects will factually back up the assertion. Where the anticipated means of proof is a document and the document is in the possession of the pleader, the original or a copy of the relevant portions are to be physically attached to the complaint. Where the expected source of the proof is witness testimony, the citation should include the names and addresses of the witnesses expected to testify to the facts asserted (pp. 197-98). [FN26]

Based on this specific and solid foundation, the case proceeds into an information-exchange period the authors tell us is 'in many respects similar' to Anglo-American discovery, including an exchange of all documents on which the parties will rely (p. 239). The scope of relevance is, however, narrower, but there may be some further production of documents (pp. 241; 242). All this information exchange is carried out under the supervision of the judge rather than depending on party-initiated unilateral activity. Throughout this process, the German judge will also offer 'hints and feedback' about the case; even when the parties are represented by counsel the judges are to interact directly with them, without intermediation by a lawyer, during oral hearings (p. 163). But this activity is not 'an expression of inquisitorial responsibility for determining the truth' so much as an effort to assist the parties to resolve their dispute according to law (p. 167). Nonetheless, 'the competent professional judge is the core element of the German system of civil justice' (p. 583).

*720 The 'heart of a German civil lawsuit' is the oral plenary hearing (p. 249). The presentation of evidence is adversarial; the court does not act primarily to further the inquiry except to provide some hints for the parties. The judge does not try to relieve them of the problems that result if they are not alert to these hints. The hearing

will emphasize written more than oral evidence; oral evidence from the parties themselves is particularly suspect. And there has been no prior deposition of the witnesses, although the lawyers may have interacted informally and privately with them. The judge, who is professionally trained, has a responsibility to prepare a detailed decision. Appellate review may occur ‘at almost any stage of the proceedings,’ and can involve consideration of facts not brought before the lower court (p. 367). And preclusion is considerably narrower than would be true in all or most American jurisdictions (p. 357).

C. Japan

The Goodman book sets out a panorama of Japan's civil procedure from the perspective of an American. [FN27] The book begins with an historical overview that is important to understanding the present reality: Until Japan was ‘opened’ by force by Perry in 1868, it had for centuries been sealed from the outside world and lacked what we would call a modern legal system, instead following a Chinese model with more emphasis on ethics and relationships than law and contract (p. 13). The Tokugawa shogunate limited litigation to disputes between people of the same social class, and exhibited a bias against it (p. 18). There were no lawyers, although there were magistrates responsible for resolving litigated matters.

Against this background, the first formal ‘courts’ in Japan were consular courts established by other powers to resolve disputes involving westerners. During the last third of the 19th century, the Meiji oligarchs transformed Japanese adjudication using a western model. Although at first there was consideration of a French model for civil procedure, eventually the German model was selected, and ‘the Code of Civil Procedure was virtually a Japanese translation of the German Code’ (p. 67). Thus, from the outset of the modern era civil procedure in Japan was an import, not organically developed in the country. The importation continued; when Germany changed its procedures in the mid 1920s, Japan followed suit (p. 68). After World War II, however, an American overlay was imposed on top of this Germanic structure, with greater emphasis on adversary procedures. In his book on discovery, Huang says that ‘Japanese civil procedure is heavily influenced by both German and U.S. civil procedure, and is very receptive to two fundamentally different ways of thinking’ (Huang, p. xxx).

***721** Like the German system, before 1945 the Japanese system stressed an inquisitorial approach:

Since the responsibility for clarifying issues was a responsibility of the judge and since the judge was also responsible for reaching a correct decision in the matter, the process was judge centered. Judges could on their own call witnesses and could question witnesses before the parties were permitted to examine. The parties did not have ultimate responsibility for either fact gathering and fact production or for legal contention presentation. As the judge was responsible for arriving at a ‘correct’ decision, these matters were part of the court's responsibility (Goodman, p. 68).

This judge-centered cast resulted in large measure from the vast gulf in status between judges and lawyers. Judges were trained specially for their jobs, and lawyers were not eligible for appointment to the judiciary. Judges had high status, while lawyers had low status. Indeed, it has been said that Japanese ‘lawyers in the old days were just as dependent on the judge's paternalistic guidance in the conduct of litigation as a lay litigant was.’ [FN28]

After 1945, the Americans tried to inject adversarial techniques into the Japanese litigation scene, but ‘[t]he Occupation effort to change the balance of power in the courtroom between judges and lawyers was not successful’ (p. 184). In particular, legal education in Japan remained as in the past; ‘Japanese lawyers, while the brightest of the brightest, are not trained to be adversary system advocates Lack of courtroom skills combined

with the inability to obtain evidence doomed the effort to create an adversary type system' (p. 180).

The pleading approach 'emulates the German law practice'; the complaint must provide detailed factual allegations and identify the supporting evidence (pp. 271, 257-58). The court will review the complaint sua sponte and may dismiss it if it is found wanting (p. 273). Only after the court has determined that the complaint meets the requirements and sets a date for the first oral hearing will the summons and complaint be served on the defendant (p. 277). 'Before there is an adverse party to the litigation, the court begins: a) its role of examining into the legal and factual merits of the case--clarifying the case; b) its paternalistic role--advising the plaintiff of changes that may need to be made to the Complaint and c) its inquisition role by dismissing an inadequate Complaint even before any such request has been made' (p. 273).

The Japanese judge no longer has the authority to call witnesses sua sponte, but only if the parties request. As part of its 'clarification' endeavor, however, the court may point the parties toward the witnesses it believes important, and once a party requests a witness *722 the court may examine that witness (p. 506). By and large there is no discovery, although in 1996 a rudimentary interrogatory procedure was introduced (p. 283). But there is no sanction to enforce this procedure, which 'fatally flaws' it (p. 285). Since there is a possibility of getting a judge to order a party to produce documents, however, this 'discovery' process could be used to identify the existence of documents and witnesses. The fact that this has not happened seems to result from the novelty of the process: 'As a practical matter Japanese lawyers do not use inquiries to achieve the same objectives as American lawyers' (p. 286). [\[FN29\]](#)

The Japanese 'trial' 'in no way resembles the American trial' (p. 289). Instead, it consists of a series of meetings between the parties and the judge during which the issues are discussed and narrowed, and factual claims and evidence are also discussed. Japan in 1996 followed a German lead in trying to condense the 'trial' phase but there still is no concentrated trial in Japan (p. 290). Moreover, once the complaint is found satisfactory there seems to be no effort to narrow the issues involved in the case; '[i]n Japan the Code is quite specific in permitting the parties to amend the pleadings during the course of the Oral Argument stage of the case' (pp. 319-20). 'Japanese judges seeking to do substantive justice in a case are not likely to preclude a party from raising issues of fact or law when such issues might be significant in arriving at the correct . . . decision' (p. 294). Thus, a further change in 2003 sought to move toward an American scheduling order model to prompt faster processing of cases. Although there has been an effort since the 1920s to make the trial more concentrated, '[a]t each turn the system has systematically rejected the concentrated model and fallen back to the familiar original German law model of the activist judge taking the necessary time or the necessary number of sessions to lead the attorneys and/or parties to the evidence and witnesses' (p. 317). After the initial judgment is entered, the first level 'appeal' is in essence a continuation of the trial; new evidence and arguments may be presented for the first time on appeal (p. 429). Eventually preclusion applies only to the matters actually decided (p. 420).

II. Familiar Themes

For this American, the opportunity to survey the development of these other procedural systems points up a number of themes important to American procedure that comparative study might very constructively illuminate. These books will afford other American proceduralists the opportunity to pursue additional themes.

*723 A. The Role of the Judge

The different roles of judges have supposedly been a central distinction between common law and civil law systems. But for a generation, American federal judges have increasingly interceded in litigation and supervised the preparation of cases for trial. Among academics, that activity has excited much interest. Initially, it was seen as the avatar as a new form of litigation, [FN30] but it was soon questioned as undermining the impartiality of judges inviting an undesirable sort of ‘judicial activism.’ [FN31] Whether or not this critique sought to ‘preserve the laissez-faire character of the adversarial system,’ [FN32] it surely was posited on an image of the traditional adversary system judge different from that of another ‘inquisitorial’ system.

Examining the role of judges in other systems provides a very informative contrast to the American debate, and largely reinforces the differences between the ‘adversarial’ and ‘inquisitorial’ systems while also showing that the trend elsewhere is toward some harmonization of judicial roles in various western systems. The range of attitudes is nonetheless still considerable.

For Americans, the German model is sometimes seen as the prototype of an ‘inquisitorial’ attitude. Although the Japanese version of the German system seemed once to fit that image, [FN33] the modern German system is not as aggressive as conceived by some Americans. Nonetheless, the German system is considerably more activist than the current American one. Thus, the German judge does not have an inquisitorial responsibility to determine the truth, and need not try to save the parties from the consequences of deficient litigation (Murray & Sturmer, pp. 166-70). The parties control the issues presented for decision and select the evidence to be considered. The judge's role is enhanced compared to that of an American judge, however. The complaint ‘is first directed to the Court, and secondly to the opposing party,’ (id., p. 194) and the judge has ‘responsibility to undertake a certain amount of positive activity during the proceedings in the interest of insuring a fair and just outcome’ (id., p. 155). More strikingly, ‘German judges are authorized and required to interact directly with the parties themselves, without intermediation by a lawyer, at all oral hearings,’ and functioning solely as an umpire may fail to satisfy the judge's responsibilities (id., pp. 164, 176).

The Japanese judge appears to remain more vigorous yet. ‘The paternalistic judge of prewar Japan--a major target of the Occupation reform--has become the paternalistic judge of modern Japan’ (Goodman, p. 215). As a result, the judge may tell the lawyers what ***724** they should be doing and micromanage the case, sometimes taking actions the lawyers regard as infringing on the attorney-client relationship. Somewhat curiously, however, the Japanese judge does not have the power to sanction disobedience, while an American judge has a well-stocked arsenal of sanctions should litigants or lawyers resist her orders.

Overall, then, both the German and Japanese systems appear to embrace qualitatively more control by the judge than the American one. 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. ‘Japan is a German law influenced legal system with roots that grow deep in soil fertilized with respect for officialdom and government bureaucracy’ (id., p. 132). But active judicial involvement in the merits of cases is considerably more troubling than judicial scheduling of litigation events. [FN34]

The introduction of active judicial management into the English system looks considerably less troubling than the reported practices of the German and Japanese ones. Nonetheless, reflecting their adversarial system background, Andrews and Zuckerman are wary. Andrews notes that English procedure has ‘moved closer to the procedure of civil legal systems,’ and begins by quoting an eminent English procedural scholar who opined that the English ‘prefer that the conduct of their civil disputes should be under the control of the lawyers of their own choice rather than managed by judges, however eminent and independent, who are not answerable to them’

(Andrews, pp. 34, 121). He finds that the CPR's decision to make judicial management a 'keystone' of the overall strategy to be 'a radical break with the past' (Andrews, pp. 37, 338). Zuckerman agrees that the CPR accomplished a 'radical departure' by transferring control from the parties to the court, which is transformed from being reactive to being proactive (Zuckerman, pp. 1, 34). Andrews adds that '[t]here is a danger that procedural judges will exercise their powers in a capricious, inconsistent and unpredictable fashion' (Andrews, p. 343).

Nonetheless, the early English returns do not support the misgivings of the American critics even though the commentators are sensitive to the same concerns. Zuckerman concludes that 'case management has not fundamentally altered the adversarial nature of civil procedure,' and that setting time limits leave parties in control of the content of the litigation (Zuckerman, pp. 352, 354). Andrews similarly acknowledges that he 'has come around to the view . . . that case-management appears to be working effectively and to be a salutary reform' (Andrews, p. 344).

***725 B. Handling Pro Se Litigants**

Some say that an important measure of a society is the way in which it treats its most vulnerable, and by that standard one could say that U.S. procedure does not fare too well because it is designed for represented parties. Admittedly, several well-known precedents were set in cases involving unrepresented litigants. [FN35] In the 21st century, American litigants litigate without lawyers increasingly frequently, a trend that has even caught the attention of the general media. [FN36] Some may choose to represent themselves for personal or ideological reasons, but most do so because they cannot afford professional representation. In family court, unrepresented litigants are very frequent, but pro se litigation is hardly confined to that setting. The federal courts (which do not have family law cases) also face larger numbers of pro se litigants. For example, in the Ninth Circuit, nearly one-third of all civil filings in 2002 were pro se cases, and in one district in that circuit over 50 percent of civil filings are pro se. [FN37]

Because the American system is not set up for pro se litigants, the American response has been patchy. One response is to provide lawyers for those who cannot find or afford them. The federal government made a considerable effort to do so with governmentally-supported legal services that were introduced in the 1960s and have been curtailed since the 1980s. Another response is to offer instruction in litigation for pro se litigants as one of the services provided by courts. Some states have made considerable efforts in this direction. [FN38] Yet another is for local courts to encourage lawyers to take cases on a pro *726 bono basis, at least once judges have determined that representation seems warranted. Altogether, these efforts have not prevented the rise in frequency of pro se litigation.

As an alternative, American courts have started in some instances to try to adapt the American adversary system to the needs of pro se litigants. Taking the Ninth Circuit as illustrative of this trend, one finds cases saying that prisoner pro se litigants be notified of the requirements of a motion for summary judgment under Rule 56 when the other side made one, [FN39] and debates about whether this activity compromises the impartiality of the court:

[P]ro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record. Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses himself as legal representative should be treated no differently . . .

Imposing an obligation to give notice of Rule 56's evidentiary standards would also invite an undesirable,

open-ended participation by the court in the summary judgment process. It is not sensible for the court to tell laymen that they must file an ‘affidavit’ without at the same time explaining what an affidavit is; that, in turn, impels a rudimentary outline of the rules of evidence To give that advice would entail the district court’s becoming a player in the adversary process rather than remaining its referee. [FN40]

In the same vein, the Ninth Circuit has held that the district court has special duties to notify a pro se litigant of the significance of its decision to convert a motion to dismiss into a motion for summary judgment; [FN41] that it must provide a prisoner pro se litigant with notice of the deficiencies of a complaint upon dismissing with leave to amend so that the prisoner knows what must be done to cure the defects; [FN42] that a district court must provide tailored notice to a pro se litigant regarding consenting to proceeding before a magistrate *727 judge; [FN43] that a district court must give special notice to a pro se litigant of the manner of excusing failure to disclose a witness at the proper time; [FN44] and that a district court has a responsibility to consider a pro se plaintiff’s competence before dismissing with prejudice. [FN45]

It may be that the Ninth Circuit is unusually aggressive on this subject. [FN46] The Supreme Court has recently observed, while reversing a Ninth Circuit decision requiring the district court to take action to guard the interests of pro se litigants, that ‘[d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants,’ [FN47] but the Ninth Circuit is not unique. [FN48]

Against this background, it is instructive to consider the way other systems handle pro se litigants. Japan’s is the most strikingly different. Recall that, as Japan began to westernize itself, it had no lawyers (Goodman, p. 24). Litigation was discouraged before that time, but it was not forbidden, and of necessity it was conducted in a manner that accommodated pro se litigants. Since then, Japan has limited the number of lawyers admitted to practice, perhaps artificially, partly leading to the result that pro se litigation is still very common. Recent statistics show that in over half the civil cases filed in Japan at least one side is unrepresented (Goodman, p. 233). Coming to the problem from a very different background, Japan has a very different reaction to the one articulated by the U.S. Supreme Court:

If both sides are not represented, the judge would be at limbo unless he actively intervenes in the process in order to guide the lay parties by the clarifications and suggestions. Having realized the reality, the [Japanese] Supreme Court changed its view in the mid-1950s and held that a failure to *728 exercise the clarification power was reversible error. Ever since, the same position has been kept and even strengthened. Today, the clarification as a judge’s duty is a firmly established part of Japanese procedure. [FN49]

Indeed, the judge’s intervention may also affect the behavior of lawyers. [FN50] This judicial commitment to assist the parties is one of the reasons why the U.S. effort after World War II to introduce more control of litigation by attorneys did not succeed--the frequency of pro se litigation prompted continued initiatives from judges (Goodman, p. 184). The prevalence of pro se litigants has also contributed to the failure of the new ‘discovery’ provisions added to the Japanese code in 1996 (id., p. 286).

In Germany, both similar and different ‘solutions’ have emerged. Germany reduces the frequency of pro se litigation by requiring representation by counsel in district court cases (Murray & Sturmer, p. 7). The country also provides legal aid to all who need it to obtain counsel, however, leading to government expenses for such representation second only to those of England and well in excess of U.S. expenditures (id., pp. 117-123). But the appointed attorney is paid only the ‘legal aid’ rate for the representation unless the case is successful, in which case the other side is liable for statutory fees (id., p. 347). At the same time, ‘the judge’s obligation to pro-

mote clarification and give the parties hints and feedback is more stringent when the parties are unrepresented' (id., p. 175). [FN51] In addition, the rules of local courts are designed to facilitate self representation, and a non-attorney consultant is allowed to provide assistance for the pro se litigant (id., pp. 163-64). As a consequence, '[t]he rules of civil procedure as well as the active and engaged role of the German judges make it feasible for clients to appear pro se, which they do in about a third of local court cases' (id., p. 627).

In England, the rapidly rising cost of assured representation has curtailed legal aid; for most claims for money there is no such right *729 (Zuckerman, p. 98). Where this is potentially a right to publicly funded legal services, eligibility depends in part on the claimant's prospects for success in court (id., p. 950). Not surprisingly, the frequency of pro se litigants is increasing (Andrews, p. 224). But one of the fundamental provisions of the new CPR is 'ensuring that the parties are on an equal footing.' [FN52] For this reason, we are told, '[p]rocedure should be fully comprehensible to all anglophone literate adults of ordinary intelligence' (Andrews, p. 117). In addition, a 'McKenzie friend' is permitted to be present to take notes and offer advice to the pro se litigant. (Zuckerman, p. 100) And English courts do handle pro se litigants differently: 'the court is bound to give lay litigants greater leeway and will inevitably tend to apply different standards of compliance' (id., p. 398). But such efforts produce a recognized cost: 'when one considers the extra resources needed for dealing with unrepresented parties in complex cases, one begins to appreciate the reason behind the obligatory need for legal representation in many continental countries' (id.).

In sum, this slice of comparative perspectives shows that the challenges of pro se litigation are universal and the responses relatively similar. [FN53] In significant measure, it also sheds light on the prior discussion of the role of judges.

C. Alternative Dispute Resolution

During the last generation, alternative dispute resolution (ADR) has grown enormously in the U.S. It would be surprising if there were an American law school that did not have multiple course offerings on ADR subjects, and many businesses have been founded to provide private dispute resolution services. Congress has directed all U.S. district courts to provide such services. [FN54] At the same time, the great success of ADR has also prompted much criticism. Some of it is at a very basic level, opposing the entire idea of judicial promotion of settlement as contrary to the purpose for having courts. [FN55] Less aggressively,*730 judicial promotion of settlement is criticized as the most disconcerting aspect of American judicial management of litigation. [FN56] Another prime concern is that by 'privatizing' dispute resolution, the ADR movement may subject parties to unfair procedures or results, or keep secret matters that should be open to the public. [FN57]

That domestic experience provides a backdrop for Americans to consider the way in which other countries handle similar issues. In England, it seems, there is limited judicial promotion of settlement. At the outset, there is a requirement of pre-litigation communication between the parties designed to result in a settlement, but that does not involve the judge in the negotiations. If litigation ensues, settlement promotion is one of the case management objectives the judge is to pursue. But neither Andrews nor Zuckerman appears to regard this as a major part of case management, particularly as compared to the role of costs. CPR 36, like [Federal Rule of Civil Procedure 68](#), introduces a 'powerful system of settlement incentives' by enabling parties to make formal settlement offers that affect cost shifting if rejected (Zuckerman, p. 49). Much more significantly, however, the great importance of cost-shifting in England makes it a tool to encourage settlement even in the absence of such offers; parties who should have settled may be deprived of costs (id., pp. 831-32).

Judicial efforts are more aggressive in Japan. ‘The Japanese judge is an active player in the settlement process’ (Goodman, p. 402). This approach is derived in part from a longstanding attitude of Japanese judges. Conciliation was ‘the model used in Tokugawa Japan’ and is ‘a comforting reflection of the role of Japanese judges in feudal times’ (id., pp. 69, 197). This traditional attitude was reinforced by Japan’s adoption in the late 19th century of a German model for its civil procedure because the Germans regarded settlement as an important ingredient of procedure (id., pp. 196-97). Moreover, ‘the drive to cause the parties to settle returns the Japanese judge back to a time before the introduction of American values in judicial system’ (id., p. 198). Indeed, it may reflect a more pervasive ***731** governmental attitude: ‘Conciliation is the government’s preferred method of resolving disputes’ (id., p. 398). And the judge has powerful levers to prompt settlement, including making known the likely decision, leaving the parties with little to negotiate about except the prospects for reversal on appeal (id., p. 198).

German judges, meanwhile, have long been under a statutory obligation to facilitate settlement (Murray & Sturmer, p. 13). Since 2001, they have been required to hold settlement conferences (id., p. 259). Most German judges ‘place a premium’ on settlement, which has led to a perceived increase in the number of cases resolved by in-court settlements (id., p. 488), although approximately 30 percent of civil lawsuits end in contested judgments (id., p. 315). Judges can require parties to sit face-to-face and state their respective positions, which sometimes is sufficient to prompt a settlement (id., p. 489). The attorney fee varies depending on when a case is settled, which encourages attorneys to work toward settlement (id., pp. 351-52). Most remarkably from the American perspective, the German judicial role is so active as to have supplanted any out-of-court ADR practice; unlike the U.S., there is no market for private ADR services in Germany (id., pp. 246, 496).

As brief survey shows, American judges increasingly resemble Japanese and German judges in their attitudes toward settlement promotion, in a way different from judges in England.

III. Toward Harmonization?

Andrews ends his study of the new English procedural system with an exhortation:

The next generation of lawyers and citizens will take for granted the need for a *jus comunale* for transnational civil procedure, which is available in all corners of the world, from China to Peru and from Wellington to Winnipeg. No longer will it be necessary for an arbitration clause to have been prudently inserted into a transaction for parties to a dispute to take advantage of this shared procedural learning (Andrews, p. 1049).

The other two books on which this essay focuses address harmonization of procedure among different countries instead of expounding the procedure of any one country. The UNIDROIT/ALI Principles undertake to achieve a harmonization of the common law and civil law procedural systems for commercial litigation, [\[FN58\]](#) adopting an overtly accommodating approach that seeks to find or create common ground upon which shared procedural arrangements can be ***732** built. The Huang [\[FN59\]](#) book on discovery takes quite a different tack. Rather than seek a common ground as such, it presents a frontal attack on the absence of discovery in civil law jurisdictions, particularly when coupled with the high standard of proof demanded of plaintiffs in those countries. Whether Huang would be sympathetic to the accommodations proposed by the Principles is uncertain. But it is clear that the U.S. remains an exception to many of the most significant of the UNIDROIT/ALI compromises, and that even Huang’s book does not embrace the more aggressive aspects of American discovery.

The Principles emerged from many years of discussion, initiated by the ALI, with UNIDROIT joining the ef-

fort some years on. The book contains two sections. First are 31 Principles that represent a distillation and harmonization of procedure from various jurisdictions. The concept is that these principles can serve as guides for interpretation (and perhaps for reform) throughout the world. The Principles thus operate at a rather general level. In addition, there is a package of 36 Transnational Rules of Civil Procedure, which could serve as rules for deciding cases when adopted by states. [FN60]

The Principles and the Transnational Rules have received a considerable amount of attention and commentary during the drafting and discussion process. [FN61] There is Commentary to accompany both Principles and Rules, and it elaborates on some of the compromises reached. In essence, both prescribe fact pleading with a requirement to enumerate evidence, as in most civil law and many common law jurisdictions (Principle 11.3; Rules 12.1; 13.4). They also call for exchange of evidence that probably goes beyond that required in most civil law systems. Principle 16.2 thus calls for disclosure of 'relevant, nonprivileged, and reasonably identified evidence,' whether from parties or nonparties, while the comments caution against fishing expeditions (Comment P-16A), and Principle 17.1 calls for sanctions to enforce this disclosure obligation. Rules 20.1.2, 21, 22, and 23 call for initial disclosure of core information, followed by a right to demand production of more and even, if the court so orders, depositions. Parties must supplement their disclosures with after-acquired information. To control this activity, the court is to manage cases 'actively' from the outset (Principle 14.1; Rule 18.1). The mode of trial depends somewhat on the preferences of the jurisdiction; even a jury trial might be handled in accord with this compromise system (Comment R-9C). But it is clear that written materials may often be submitted as evidence. Even without reaching that stage, the court may render judgment akin to summary judgment, having regard for the opportunity*733 to obtain evidence (Rule 19.1.4). Appellate opportunities are left to local practice.

The above very brief summary overlooks many aspects of the project, but identifies the features that bear on most of those described in Part I with regard to England, Germany, and Japan. For Americans, the striking feature is that the U.S. is often singled out as the outlier not accommodated within the harmonized proposal. Regarding pleading [FN62] and discovery, [FN63] the harmonizers made it clear that they were rejecting the U.S. approach while (at least for discovery) opting for a common-law approach that differed considerably from the practice and most civil-law systems. Put differently, it seems that this very impressive collection of collaborators concluded that, so long as one disregards American exceptionalism, one can devise a combined set of procedures that hold promise of satisfying everyone else.

The Huang book adopts a very different orientation, for it seeks change not from the perspective of compromise but in pursuit of principle. [FN64] It is suffused with descriptions of American discovery as an example of how discovery can (and ought to) function. Indeed, one might be tempted to label Huang a discovery enthusiast. He downplays concerns about the cost of discovery (Huang, pp. 103-06), and seems to embrace the debatable idea that having discovery rules may prompt the parties to exchange needed information without formal discovery (id., p. 99). He has even argued that U.S. discovery should be expanded to permit pre-litigation discovery to reduce the filing of unnecessary suits, a notion the American courts have rejected (id., p. 125 n.62).

*734 Given his enthusiasm for discovery, it is not surprising that Huang has little patience with the traditional civil law approach:

To put it bluntly, it is bizarre that while the system tolerates fact-finding based on an information database that is far more insufficient than that of the common law system, it requires the facts to be established by a standard of proof that is far higher than the common law one (id., p. 38).

Besides the paucity of evidence exchange, then, Huang is equally antagonistic toward the stringent civil law

standard of proof, concluding that ‘the common law preponderance-of-the-evidence standard is the optimal standard of proof’ (id., p. 59).

Although Huang's position may seem extreme, it is not and is very well argued. He thoroughly employs economic analysis of the issues presented (id., pp. 84-99). He effectively argues that the lower rate of settlement in civil law jurisdictions (despite the greater effort by judges to foster settlement) results in significant part from the absence of discovery (id., p. 81). He demonstrates that the civil law reliance on the discontinuous trial provides no justification for denying discovery, and that reliance on the judge to gather evidence is likely to be ineffective and, ultimately, expensive as well (id., pp. 66-81).

Huang also relies on the introduction of the modest discovery provisions in Japan in 1996 to prove that his idea would work in civil law systems. Unlike Goodman (who concluded that the 1996 innovation was a failure), Huang evidently reads Japanese, and he offers a much more detailed examination of the origin and operation of the Japanese discovery system (id., chs. III and IV). Yet like Goodman, he appears to acknowledge that the absence of sanctions for failure to produce information has neutered the reforms (id., pp. 192, 204). Although he recognizes that the absence of a sanction ‘was not a product of sloppy legislation but was instead the lawmakers’ intentional choice’ (id., p. 210), Huang hopes that further legislation will finish the job and introduce the sanctions needed to make the new approach work (id., pp. 216-17). This hope may flow more from his enthusiasm for discovery than a realistic forecast of likely further Japanese changes.

Whether Huang is really far from the compromises embodied in the UNIDROIT/ALI Principles is unclear. He is careful to say that he is not arguing for either the U.S. or English model, but ‘an abstract procedural arrangement by which one party is empowered to directly elicit facts or evidence from his opponent or from a third party’ (id., p. 37). And he spends the last 40 percent of his book describing what he would include in such a code (id., chs. V, VI; VII). It may be that the disclosure and discovery provisions of the Principles and Transnational Rules--which may be the features of this compromise procedural system most disagreeable to those from the civil law tradition--would come reasonably close to what he prescribes for civil law discovery. Principle 21.2, moreover, says that the court should find in favor of the party with the burden of proof if it is ‘reasonably *735 convinced,’ which Comment P-21B says is ‘essentially the same’ as the preponderance-of-evidence standard, evidently satisfying his concerns on that score. And Huang raises no objection to the more demanding pleading requirements of the civil law countries, which are at least as demanding of a plaintiff as the pleading requirements of the Principles. Thus Huang's position might favor adoption of the Principles’ compromise.

In sum, we may be left with American exceptionalism as the major obstacle to harmonization along the lines set out in the Principles. Already, as the survey of some recurrent problems in Part II above suggests, various jurisdictions (including the U.S.) may be moving toward similar procedures in response to internal stimuli. Perhaps the Principles can also prompt further change toward harmonization in the U.S. There surely are examples of external stimuli that have considerable weight. In the U.S., the Federal Rules of Civil Procedure apply only in federal courts but more than half the states have copied them, perhaps to ensure that the practice is the same in the state and federal courts in that state. In Europe, the European Convention on Human Rights has begun to exert an influence on procedural issues; Zuckerman devotes a chapter to its effects (Zuckerman, ch. 2). In an era of globalization, such internal and external stimuli might strengthen the impulse to bridge considerable gaps in practice.

The obstacle to harmonization most often cited is ‘culture.’ [\[FN65\]](#) Yet ‘culture’ describes a very broad ar-

ray of things; even if Hollywood is spreading American 'culture' throughout the world, that is probably not the sort of cultural factor that one considers in contemplating procedural harmonization. Similarly, the effort to export democratic 'culture' seems not to bear heavily on these issues; democracy appears to have taken hold in both the common law and the civil law world without immediate effects on civil procedure. And American 'individualism' seems a weak factor in procedure, particularly in light of the fact that the class action, hardly a bastion of individualism, is a prominent ingredient of contemporary American procedure.

If 'culture' ties in to history and the organic growth of a society, it seems a weak explanation for some procedural differences developments. For example, it is surprising that the English system should be so different from the American since it would seem to share major 'cultural' influences. Yet, while the U.S. continues to honor the jury trial as the sine qua non of its procedural theory, [FN66] the English have *736 long since lost interest in it. [FN67] Given the closeness of cultural ties between the U.S. and England, particularly in relation to the right to jury trial (our Seventh Amendment 'preserves' essentially what was provided in England), one must be cautious about how 'culture' of that sort controls procedure. Similarly, it is odd that Japan was able to import and impose German procedure. Perhaps the answer is that '[t]he civil law procedure system was 'comfortable' to the Meiji oligarchs because it had many attributes in common to the immature legal system being developed in Tokugawa Japan' (Goodman, p. 166). Similarly, we are told that despite efforts to promote a concentrated trial in Japan, the Japanese system has 'fallen back on the familiar original German model' (id., p. 317). Perhaps culture is the explanation; in a society dominated by a bureaucratic state, civil law procedure may be congenial.

The relevant focus is much more particularly on political culture, the role of law, and specifically of litigation. One addressing American exceptionalism is tempted to start with the popularized view of Americans as uniquely litigation prone. But a generation ago careful researchers showed that the vast majority of disputes in the U.S. never reach litigation. [FN68] The opposite extreme might be Japan; Goodman's book points up the longstanding official opposition to litigation. But even in Japan there are reports that litigation is becoming more frequent. For example, a Japanese law school announces in its 2005 Prospectus that 'Japanese have come to rely on legal procedure to settle their disputes as much as the Americans.' [FN69] A New York Times article reported in late 2004 that 'Japanese discover the art of the lawsuit.' [FN70] Meanwhile, Europeans are said to be flocking to U.S. courts because suits here are easier to file and more lucrative. [FN71] The distinctive American penchant for litigation, to the extent it ever really existed, may not be so distinctive any more. And other litigation features thought to reflect the peculiar American enthusiasm for litigation may find a following elsewhere. For example, there are reports*737 that the class action, which the Financial Times called the 'quintessential U.S. legal device,' may be emulated in several European countries. [FN72]

Damaska's *The Faces of Justice and State Authority* linked procedural arrangements to the orientation of the state. He posited two basic orientations--the 'reactive state,' interested principally in resolution of conflict, and the 'activist state,' committed to policy implementation through its court system. From that dichotomy, Damaska constructed what might be called idealized procedural arrangements. The reactive state would be expected to emphasize litigant autonomy and give great latitude to first-instance judicial officials, with strong rules of preclusion to ensure that cases that were resolved stayed resolved, and limited review by higher courts. The policy implementing state would downplay the authority of first-instance courts, permitting parties to raise new matters later, and generally heighten the authority of judges to control the direction and disposition of cases.

Initially, this perspective does not seem helpful, for all of the nations mentioned in this essay would fit into the 'reactive state' mold. Indeed, with the fall of the Soviet Union, the list of 'activist states' may have declined considerably. Yet various features of the civil law system, particularly the greater involvement of its judges in

preparation of the case, easy appellate review, weak preclusion rules, and receptivity to addition of issues and evidence late in the proceeding, even after appeal, seem to fit the idealized activist state procedure. Yet Huang finds in the actual civil law practice the antithesis of the activist state: ‘The reduced accuracy of adjudication, coupled with the unfair treatment faced by the party with the burden of proof . . . threatens the system’s ability to effectively enforce substantive rules and their underlying public policies’ (Huang, p. 101).

Huang’s concern focuses on what seems the truly important aspect of American litigation culture, the extent to which it can be said it gives effect to what Damaska might call ‘activist state’ objectives of policy implementation, but in a peculiarly American way. Professor Kagan has labelled this phenomenon ‘adversarial legalism,’ and explained that this American phenomenon results from the combination of two powerful aspects of the contemporary American polity:

American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a political culture (or set of popular political attitudes) that expects and demands comprehensive governmental protection from serious harm, injustice, and environmental dangers--hence a powerful activist government--and second, a set of governmental structures that reflect mistrust*738 of concentrated power and hence that limit and fragment political and governmental authority.

Adversarial legalism helps resolve the tension. In a ‘weak,’ structurally fragmented state, lawsuits and courts provide ‘nonpolitical,’ nonstatist mechanisms through which individuals can demand high standards of justice from government. Lawsuits and courts empower interest groups to prod the government to implement ambitious public policies. It is only a slight oversimplification to say that in the United States lawyers, legal rights, judges and lawsuits are the functional equivalent of a the large central bureaucracies that dominant governance in high tax, activist welfare states. [FN73]

Although the UNIDROIT/ALI project seeks to accommodate the jury trial, its embrace of stricter pleading standards and less aggressive discovery provisions are flashpoints in view of this cultural aspect of American litigation, which distinguishes the U.S. from most or all of the rest of the world. Both the book on Germany and the book on Japan recognize that distinction. [FN74] Significant weakening of the linkage between pleading and discovery would erode private enforcement. Until and unless these concerns can be accommodated, it is unlikely that harmonization including the U.S. can be accomplished.

Nonetheless, it may be that over time American exceptionalism of this sort can be relaxed. Indeed, these private enforcement features of American procedure seem to be rather recent innovations. The term ‘private attorney general’ was first coined only in the 1940s, [FN75] and the relaxed pleading and broad discovery that would be the flashpoint of harmonization in the U.S. were also introduced around that time in the 1938 Federal Rules of Civil Procedure. But they are deeply embedded. To take a recent and striking example, a bill proposed in the Illinois legislature proposed to deal with problems of sex trafficking by allowing prostitutes to sue their pimps. [FN76] For most of the world, that would probably be a very remarkable*739 concept, but in this country it was plausible enough to pursue in the legislature; dislodging the private attorney general might require a very substantial cultural shift in the country. [FN77]

Similarly, it may be that the American devotion to relaxed pleading and broad discovery is overdone. The Private Securities Litigation Act of 1995, for example, significantly upgraded the pleading requirements for such suits and forbade discovery until after the plaintiff had survived a motion to dismiss. [FN78] This Act has affected but not destroyed securities litigation; although fewer cases survive motions to dismiss, the settlement

value of those cases is much higher than before the legislation. [FN79] So it may be that there is some room for consideration of changes like those endorsed by the UNIDROIT/ALI project in light of this recent experience, particularly if it could be coupled with assurances of truly active attention by a supervising judge and suitable consideration of the potential fruits of discovery, as the project directs.

Despite Andrews' exhortation (quoted at the beginning of Part III), American exceptionalism is likely to remain an obstacle to a *jus comunale* for procedure along the UNIDROIT/ALI lines.

IV. Conclusion

A decade ago, Prof. Langbein gloomily concluded in the pages of this Journal that '[t]he study of comparative procedure in the United States has little following in academic, and virtually no audience in the courts or in legal policy circles.' [FN80] In the decade since then, little *740 has happened to change that assessment. But recurrent concerns in this country about failings of American litigation could kindle an interest. It is striking to think that 'the German legal profession is at a high point of public esteem' (Murray & Sturmer, p. 88). Certainly few, if any, would say the same of American lawyers. Whether civil procedure can make a difference of such moment is debatable, but for Americans, the German situation suggests that perhaps they should try to learn more about the procedure employed elsewhere.

These books provide a very good start, and any American proceduralist who reads them will be rewarded. At least in academia, more attention to the procedures of the rest of the world might begin to flourish in a way it has not heretofore. And in the U.S. it would seem that academic interest has more promise of making an impact than in other places. In England, we are told, procedure is 'barely on the curricular map except in a handful of universities' (Andrews, p. 23). In continental Europe, procedure's profile is reportedly even lower. [FN81] In American law schools, civil procedure is universally a mandatory first-year subject, and has been for well over a century. [FN82] The problem in the U.S. is that comparative procedure is barely on the map. This may change. Whether an academic interest will translate to a move to modify our present system is impossible to know, but at least it would be a start down a road that could lead in that direction. At the same time, one who contemplates revision must give suitable deference to the American marriage of relaxed pleading and broad discovery to achieve private enforcement of rights. Some features of American exceptionalism are likely to persist no matter how much academics may clamor to join the rest of the world.

[FNal]. Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law. I am indebted to Vince Moyer of the Hastings Library for locating sources for this essay.

[FN1]. See Richard Marcus, *Malaise of the Litigation Superpower*, in *Civil Justice in Crisis* 71 (Adrian Zuckerman ed., 1999).

[FN2]. I am not the first to use the term American exceptionalism in this regard. See, e.g., Oscar Chase, *American 'Exceptionalism' and Comparative Procedure*, 50 Am. J. Comp. L. 277 (2002).

[FN3]. Mirjan Damaska, *The Faces of Justice and State Authority* (1986).

[FN4]. It does not attempt to exhaust the supply of recent books on comparative procedure. See also Rachel Mulheron, *The Class Action in Common Law Legal Systems* (2004) (surveying class action rules in a variety of

common law countries); *European Traditions in Civil Procedure* (C. H. Van Rhee ed., 2005) (pursuing the harmonization debate by exploring main trends in the development of civil procedure during the last two centuries in Europe); *The Reforms of Civil Procedure in Comparative Perspective* (Nicolo Trocker & Vincenzo Varano eds., 2005) (collecting essays on procedural reform in many countries).

[FN5]. Stephen Burbank & Linda Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 Am. J. Comp. L. 675, 675 (1997).

[FN6]. Andreas Lowenfeld, *Concluding Remarks*, 45 Am. J. Comp. L. 939, 939 (1997).

[FN7]. See Amalia Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell L. Rev. 1181 (2005).

[FN8]. Besides chronicling what is new, these books contain extended and very learned discussions of matters of ongoing concern. For example, see Andrews' discussion of setoff practices (Andrews, pp. 266-83) and Zuckerman's mini-treatise on interim remedies (Zuckerman, ch. 9).

[FN9]. Zuckerman, p. 357 n.15, quoting Michael Zander, *Cases and Materials on the English System* 417 (1999) (emphasis added). Andrews tells a similar story. See Andrews, pp. 775-76.

[FN10]. U.S. Const., 7th Amendment.

[FN11]. For discussion of this analysis, see, e.g., Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973).

[FN12]. See, e.g., *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959) (holding that the sequence of decision cannot be arranged so that 'equitable issues' are decided first if they might be preclusive with regard to a common law claim on which there is a right to a jury trial); *Ross v. Bernhard*, 396 U.S. 733 (1970) (holding that although a derivative action could only be asserted at equity there was a right to jury trial after the merger of law and equity accomplished by the Federal Rules of Civil Procedure even though under 'older procedures, now discarded, a court of equity could properly try the legal claims of a corporation presented in a derivative action'). There has arguably been a growing acceptance of judicial latitude in deciding in a given case that a jury trial is not warranted under the procedure formerly known as directed verdict. See, e.g., *Galloway v. United States*, 319 U.S. 1077 (1943) (Court upholds directed verdict procedure introduced by the Federal Rules despite an objection that it is unconstitutional because there was no precise analogue before adoption of the Seventh Amendment guaranteeing a right to jury trial).

[FN13]. Lord Woolf's reforms were initially explored in *Access to Justice: Interim Report* (1995), a remarkable survey of English procedure. For an examination of the ideas in the interim report, see *Reform of Civil Procedure* (A. A. S. Zuckerman & R. Cranston, eds., 1995). There followed *Access to Justice Final Report* (1996).

[FN14]. For discussion of these issues, see Richard Marcus, *Deja Vu All Over Again? An American Reaction to the Woolf Report*, in *Reform of Civil Procedure*, supra note 13, at 219.

[FN15]. Zuckerman explains the role of this overlay of European rights as counteracting the prior tendency to permit litigants to delay litigation:

The court's responsibility to respect litigants' rights to adjudication within a reasonable time has a far-reaching consequence with regard to the court's power to excuse litigant-induced delay.... [I]t is the court's duty

to ensure that the failure of a litigant to perform his process obligations does not hold up the process and does not thwart the opponent's right to a resolution within a reasonable time. Therefore, it may be argued that where a court is asked by a defaulting litigant to allow late compliance with a process requirement, it should not grant an extension if this would infringe the non-defaulting party's right to adjudication within a reasonable time (Zuckerman, p. 14).

[FN16]. CPR 1.1(2), in particular, says that 'dealing with a case justly requires, so far as practicable':

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate:
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[FN17]. See [Fed. R. Civ. P. 26\(b\)\(2\)](#) (directing the court to limit discovery because it is 'unreasonably cumulative or duplicative' or the burden or expense of the proposed discovery outweighs its likely benefit).

[FN18]. See [Exec. Order No. 12,778](#), 57 C.F.R. 3640 (1991). § 1(a) of that Order directed all litigation counsel representing federal agencies as follows:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

[Executive Order 12,778](#) was superseded by [Executive Order No. 12,988](#), which retained the provisions of § 1(a) of [Executive Order 12,778](#). See [Exec. Order No. 12,988](#), 61 C.F.R. 4729 (1996).

[FN19]. For an argument in favor of this technique from U.S. District Judges, see Charles Richey, A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial, 72 Geo. L.J. 73 (1983); Gus Solomon, Techniques for Shortening Trials, 65 F.R.D. 489 (1975). In [Kuntz v. Sea Eagle Diving Adventures Corp.](#), 199 F.R.D. 665 (D. Haw. 2001), the judge held that plaintiff could be required to submit direct testimony in declaration form three days before the beginning of trial as part of the court's 'reasonable control over the mode and order of interrogating witnesses.'

[FN20]. See Charles Richey, [Rule 16 Revisited: Reflections For the Benefit of Bench and Bar](#), 139 F.R.D. 525 (1992), Judge Richey described his innovative process as follows:

In one recent medical malpractice case, I ordered, with the agreement of the parties, that all testimony can be taken on videotape. I then directed the parties ... to file proposed findings and fact and conclusions of law, and to direct me, in their submissions, to the most crucial portions of the testimony taken. After the videotapes and requisite documents are submitted, I will view the videotapes and then hear oral argument from the parties. In this way, the parties can have a resolution of their case much sooner than if they were forced to await a date on my overcrowded trial calendar.

Id. at 535.

[FN21]. Without using videotapes, in [Stine v. Marathon Oil Co.](#), 976 F.2d 254 (5th Cir. 1992), a judge directed that excerpts of depositions be provided to jurors rather than being read to them in open court, so that they could read it on their own time. The appellate court held that this ‘evidence to go’ or ‘take-out evidence’ technique was improper because there was a risk the jurors would not do their homework; it was enough to ask them to pay attention during their days in court and too much to expect them to do additional work overnight.

[FN22]. See Richard Marcus, [Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure](#), 50 U. Pitt. L. Rev. 725 (1989):

Live trials convey texture and intensity in a way that written materials probably cannot. As reading a play is a far different experience from seeing the play performed, so is reading a trial transcript qualitatively different from actually observing the trial. The written version would seem bloodless by contrast to a live version. Even a videotaped presentation of evidence would often lack significant emotive elements that live presentation offers; movies and television are not the same as legitimate theater. Here demeanor evidence--the array of sensory impressions about a person that are available to the decider who observes the live in-court trial--could make a difference in a way that matters.

Id. at 762-63.

[FN23]. The leading early example was Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, [Phases of German Civil Procedure](#), 71 Harv. L. Rev. 1193 (1958).

[FN24]. John Langbein, [The German Advantage in Civil Procedure](#), 52 U. Chi. L. Rev. 823 (1985). For a strong disagreement, see Ronald Allen, Stefan Kock, Kurt Riechenberg & D. Toby Rosen, [The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship](#), 82 Nw. L. Rev. 705 (1988).

[FN25]. Kevin Clermont has prepared a thorough compilation of treatments of German procedure in American casebooks which he has shared with me and from which I borrow here: Richard Field, Benjamin Kaplan & Kevin Clermont, [Materials for a Basic Course in Civil Procedure](#) 314-21 (8th ed. 2003); Owen Fiss & Judith Resnik, [Adjudication and Its Alternatives: An Introduction to Procedure](#) 755-64 (2003); Richard Freer & Wendy Perdue, [Civil Procedure: Cases, Materials, and Questions](#) 877-89 (4th ed. 2005); Geoffrey Hazard, Colin Tait, William Fletcher & Stephen Bundy, [Cases and Materials on Pleading and Procedure: State and Federal](#) 881-84 (9th ed. 2005); Richard Marcus, Martin Redish & Edward Sherman, [Civil Procedure: A Modern Approach](#) 13-15 (4th ed. 2005); Thomas Rowe, Suzanna Sherry & Jay Tidmarsh, [Civil Procedure](#) 5-8 (2004).

[FN26]. The relative stringency of the pleading requirements may be illustrated by the following description of the required specificity for pleading a claim arising from an automobile accident:

1. specific allegations of precisely how and why the accident occurred,
2. an identified source of proof for each allegation,
3. the amounts of damage set forth with precision,
4. attached copies of bills, police and medical reports, and even photographs to support the allegations (p. 198).

This detail can be contrasted with [Form 9 to the Federal Rules of Civil Procedure](#), which deems sufficient for the following (in addition to a first paragraph alleging grounds for the court's jurisdiction):

2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant

negligently drove a motor vehicle against plaintiff who was then crossing said highway.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

The Supreme Court still adverts to [Form 9](#) as an example of the simplicity of pleading in American federal courts. See [Swierkiewicz v. Sorema, S.A., 534 U.S. 506, 513 n.4 \(2002\)](#). ‘German civil procedure requires specific fact pleading and does not permit notice pleading’ (p. 198). For discussion of the American struggle to deal with these problems, see Richard Marcus, [The Puzzling Persistence of Pleading Practice](#), 76 *Texas L. Rev.* 1749 (1998); Richard Marcus, [The Revival of Fact Pleading Under the Federal Rules of Civil Procedure](#), 86 *Colum. L. Rev.* 433 (1986).

[FN27]. It appears that the author draws only from sources in English, but he has extensive experience teaching at Hiroshima University as a professor of Anglo-American law. He is also the author of *The Rule of Law in Japan: A Comparative Analysis* (2001). Huang evidently draws on Japanese language sources for his study of discovery reforms in Japan. See Huang, chs. III and IV.

[FN28]. Yasuhei Taniguchi, *Japan's Recent Civil Procedure Reform: Its Seeming Success and Left Problems*, in *The Reforms of Civil Procedure in Comparative Perspective*, supra note 4, at 91, 112.

[FN29]. As noted in Part III below, Huang makes much of the 1996 Japanese innovations in his book urging the introduction of discovery into civil law systems, but he recognizes that the absence of effective sanctions hobbles this innovation.

[FN30]. See [Abram Chayes, The Role of the Judge in Public Law Litigation](#), 89 *Harv. L. Rev.* 1281 (1976) (arguing that in the new world of ‘public law’ litigation ‘[t]he judge is the dominant figure in organizing and guiding the case’).

[FN31]. Judith Resnik, [Managerial Judges](#), 96 *Harv. L. Rev.* 374 (1982).

[FN32]. Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 *Rutgers L. Rev.* 253, 265 (1985).

[FN33]. See Goodman, p. 68, quoted in Part I.C. supra.

[FN34]. See Richard Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 *Hast. Int'l & Compar. L. Rev.* 3 (2003) (arguing that regulation of timing poses minor threats of infringing needed lawyer latitude); Richard Marcus, *Discretion Über Alles?*, in *Discretionary Power of the Judge: Limits and Control* 453 (Marcel Storme & Burkard Hess eds., 2003); Richard Marcus, [Slouching Toward Discretion](#), 78 *Notre Dame L. Rev.* 1561 (2003) (same).

[FN35]. Leading civil procedure examples are [Dioguardi v. Durning](#), 139 F.2d 774 (2d Cir. 1944) (finding dismissal of pro se plaintiff's complaint on the pleadings improper); [Arnstein v. Porter](#), 154 F.2d 464 (2d Cir. 1946) (holding that the district court erred in granting summary judgment against pro se plaintiff).

[FN36]. For example, an article in the Wall Street Journal reported:

‘The recent surge in self-represented litigation is unprecedented and shows no signs of abating,’ the Conference of State Court Administrators said in a report in 2000. The increase has led some courts to begin

programs to help such litigants, and law firms are experimenting with performing discrete tasks without full representation

The legal profession is divided about the trend, some arguing that these litigants ought to have the same access to the courts as those who can afford to hire a lawyer. Others rue the presence of these novices in the courtroom, arguing they clog busy court dockets because of their unfamiliarity with the rules.

Kara Scannel, *In Phoenix Court, Sales Rep Battles Aventis on Her Own*, Wall St. J., Aug. 9, 2005, at 1.

[FN37]. See Final Report of the Ninth Circuit Judicial Council Task Force on Self-Represented Litigants 7 (2005). The district in question is the Eastern District of California, in which many prisons are located, so that there is a large supply of prisoner pro se suits.

[FN38]. See Judicial Council of California, Fact Sheet for Self-Represented Litigants (Feb. 2005) (discussing a variety of programs available in the California state courts for pro se litigants); Judicial Council of California, Statewide Action Plan for Serving Self-Represented Litigants (2004) (detailing multiple sources provided by California state courts for pro se litigants, including ‘self-help centers’ that are ‘a core function of the trial courts’).

[FN39]. *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc). The appellate court held that the district judge did not have to give notice, and that doing so could be an assigned task of the opposing party. Some of the judges felt that the same requirement should be applied to non-prisoner pro se litigants. A dissenting judge objected that ‘[w]e are not supposed to be advocates for a class of litigants, and it is hard to help pro ses very much without being unfair to their adversaries.’ *Id.* at 968.

[FN40]. *Jacobsen v. Filler*, 790 F.2d 1362, 1364-66 (9th Cir. 1986). A dissenting judge disagreed that the impartiality of the court would be compromised, adding that ‘[i]n assuring that notice is given a pro se litigant of the requirements of summary judgment procedure, the court merely redresses a categorical disparity between the parties’ abilities to obtain a just resolution of their dispute.’ *Id.* at 1369.

[FN41]. *Lucas v. Department of Corrections*, 66 F.3d 245 (9th Cir. 1995).

[FN42]. *Noll v. Carlson*, 809 F.2d 1226 (9th Cir. 1987). The court added that ‘[w]e are nevertheless mindful that courts should not have to serve as advocates for pro se litigants. A statement of deficiencies need not provide great detail or require district courts to act as legal advisors to pro se plaintiffs.’ *Id.* at 1448.

[FN43]. *Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911 (9th Cir. 1003).

[FN44]. *Fonseca v. Sysco Food Services*, 374 F.3d 840 (9th Cir. 2004).

[FN45]. *Krain v. Smallwood*, 880 F.2d 1119 (9th Cir. 1989).

[FN46]. It is surely not the only federal court to direct that judicial responsibilities be adjusted to accommodate pro se litigants. For example, the U.S. District Court for the Eastern District of New York in 2001 appointed a new magistrate judge with a special mandate to oversee the court’s pro se docket:

[U]nder supervision of the new magistrate judge, the pro se staff attorneys will screen all pro se civil filings and propose sua sponte dismissal orders to the assigned judge prior to the issuance of a summons. They will also routinely draft orders in cases that are insufficiently pleaded but not appropriate for sua sponte dismissal, generally directing the litigant to amend the complaint. In addition, the pro se staff will provide proced-

ural advice to individuals seeking to file claims or litigating their claims before the court, through such activities as answering questions about civil procedure and making forms and instructions available for pleadings and motions.

Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 *Notre Dame J. of Law, Ethics, and Public Policy* (2002).

[FN47]. *Plier v. Ford*, 124 S.Ct. 2441, 2446 (2004).

[FN48]. See, e.g., *Irby v. New York City Transit Auth.*, 262 F.3d 412 (2d Cir. 2001) (holding that ‘the moving party [on a summary judgment motion] should routinely provide a pro se party with notice of the requirements of Rule 56’).

[FN49]. Taniguchi, *supra* note 28, at 94. Goodman offers a similar observation: ‘Judges saw it as their role (both in cases where parties were not represented by counsel and cases where they were represented) to protect the clients or parties before them’. Goodman, p. 69.

[FN50]. Professor Taniguchi explains as follows:

[L]awyers in the old days were just as dependent on the judge's paternalistic guidance in the conduct of litigation as a lay litigant was Lawyers behaved like a lay litigant because it was certainly an easy-going way and a lawyer could but blame the judge if he lost a case. Under such a condition, the difference between a lawyer litigation and a lay pro se litigation would be minimal, if any.

Taniguchi, *supra* note 28, at 112.

[FN51]. The Huang book (also reviewed in this essay) raises questions about whether this activity is reliably as helpful to pro se litigants as one might prefer. Thus, although noting that the judge's duty of clarification is said to be the Magna Carta of German civil procedure (Huang, p. 29 n.92), the author is doubtful it works that way nowadays (*Id.*, p. 34 n.109). Huang notes as well that ‘the judge's clarification does function well to rescue a financially disadvantaged party who has no access to an attorney, or an unfortunate party who hires a bad or sloppy lawyer.’ (*Id.*, p. 34.)

[FN52]. See *supra* note 16 (quoting CPR 1.1(2)(a)).

[FN53]. A somewhat different theme in U.S. procedure might be useful for some pro se litigants--‘simplified’ procedures for certain cases. The impulse is prompted by the notion that the full-dress treatment for ordinary litigation is unnecessary and cumbersome in a significant proportion of civil cases. For the U.S. federal courts, one suggestion has been to adopt a small claims calendar. See William Schwarzer, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 *Judicature* 221 (1995). The possibility of adopting rules for some sort of simplified procedure has been discussed by the Advisory Committee on Civil Rules of the Judicial Conference of the United States, the body that originates proposals to amend the Federal Rules of Civil Procedure. See Edward Cooper, *Simplified Rules of Federal Procedure?*, 100 *Mich. L. Rev.* 1794 (2002); Agenda, Advisory Committee on Civil Rules, Oct. 16-17, 2000, at Tab 5 (‘Report and Panel Discussion of ‘Simplified Procedures’ Proposal’).

[FN54]. Alternative Dispute Resolution Act of 1998, P.L. 105-31, 112 Stat. 2993 (1998), codified at 28 U.S.C. §§ 651-58.

[FN55]. The classic statement of this position is Owen Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984). But Professor Fiss seems to have a distinctive view of the purpose for courts: ‘To my mind courts exist to give

meaning to our public values, not to resolve disputes.’ As to disputes that do not involve ‘public values,’ he suggests that having public courts resolve them is ‘an extravagant use of public resources, and thus it seems quite appropriate for those disputes to be handled not by courts, but by arbitrators.’ Owen Fiss, [Foreword: The Forms of Justice](#), 93 Harv. L. Rev. 1, 29-30 (1979).

[FN56]. See Jonathan Molot, [An Old Judicial Role for a New Litigation Era](#), 113 Yale L.J. 27, 43-44 (2003):

The most controversial of all judicial management tools--the judicial settlement conference--is the one that strays the furthest from the judiciary's traditional adjudicative role. When a judge calls parties into his or her chambers to urge a settlement, his or her actions bear almost no resemblance to the traditional judicial role. Parties do not file motions to trigger, or prevent, judicial intervention. There are no legal standards to govern judicial conduct in settlement negotiations. And there generally is no appellate review either of the judge's tactics or the judge's views regarding the merits of the case.

[FN57]. See, e.g., Jean Sternlight, [Mandatory Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial](#), 16 Ohio St. J. Disp. Res. 669 (2001); Harry Edwards, [Alternative Dispute Resolution: Panacea or Anathema](#), 99 Harv. L. Rev. 668 (1986); Fiss, [Against Settlement](#), *supra* note 55.

[FN58]. The UNIDROIT/ALI proposals do not attempt to prescribe a procedure for non-commercial disputes. For the U.S., this limitation excludes huge areas of very important litigation such as personal injury, mass tort, and employment discrimination litigation. For that reason, it removes serious obstacles to acceptance of the proposals in the U.S. At the same time, the exclusion recognizes that harmonization would only be a partial thing.

[FN59]. Huang is Associate Professor in the Department of Law at the National University of Kaohsiung in Taiwan. He holds a J.S.D. from Cornell Law School, and the book was his dissertation for that degree.

[FN60]. Only the Principles, and not the Rules, were formally adopted by the UNIDROIT and the ALI.

[FN61]. An example is an entire issue of the Uniform Law Review devoted to a symposium about them. See [Harmonising Transnational Civil Procedure: The ALI/UNIDROIT Principles and Rules](#), 6 Unif. L. Rev. 735-1156 (2001).

[FN62]. See Comment R-12A:

Rule 12.1 requires the plaintiff to state the facts upon which the claim is based. Rule 12.3 calls for particularity of statement, such as that required in most civil-law and most common-law jurisdictions. In contrast, some American systems, notably those embodying the ‘notice pleading’ as under the Federal Rules of Civil Procedure, permit very general allegations.

[FN63]. Comments R-22C and D explain:

The philosophy expressed in Rule 21 and 22 is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure is specified and limited, as in Rules 21 and 22. However, within those specifications disclosure is generally a matter of right.

Discovery under prevailing United States procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that ‘appears reasonably calculated to lead to the discovery of admissible evidence.’ This broad discovery is often criticized as responsible for the increasing costs of the administration of justice.

[FN64]. This is not to suggest that the UNIDROIT/ALI project lacked principle, but that its orientation was to

find grounds of accommodation. Huang starts from principle and from that elaborates the manifold failings he finds in the civil law system. It may well be that these criticisms about the civil law attitude toward discovery would prompt those in civil law systems to be receptive to the discovery compromises offered by the UNIDROIT/ALI project, and it is likely that the framers of that project had in mind concerns similar to those articulated by Huang as they fashioned their compromise procedural code.

[FN65]. For example, both the UNIDROIT/ALI Principles and Huang cite this concern. The Introduction to the Principles observes that ‘harmonization has been impeded by the assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation among legal systems.’ Huang similarly says that ‘[t]he most important lesson I find in the study of comparative civil procedure is that procedural law should be socially constructed and defined, with an eye on the need and culture of a particular society’ (Huang, p. xxvii).

[FN66]. Of course, the number of actual jury trials has declined to a point that makes this reverence for jury trial seem to focus on the very exceptional rather than the ordinary case. A lawyers' group recently reported on the ‘vanishing trial’ and quoted a federal district judge who said that, as a result, ‘The American Jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic.’ Ad Hoc Committee on the Future of the Civil Trial, American College of Trial Lawyers, The ‘[Vanishing Trial](#)’: The College, the Profession, the Civil Justice System, 226 F.R.D. 414, 416 (2005).

[FN67]. See *supra* text accompanying note 9.

[FN68]. Richard Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *Law & Soc'y Rev.* 525, 544 (1981) (describing the frequency of litigation in connection with different types of disputes).

[FN69]. Osaka University Prospectus 79 (2005). See also Tom Ginsburg & Glenn Hoetker, The [Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation](#), 35 *J. Legal Stud.* 31 (2006) (attempting to explain the rapid increase in civil litigation in Japan during the 1990s).

[FN70]. Todd Zaun, *Japanese Discover the Art of the Lawsuit*, N.Y. Times, Dec. 3, 2004, at W1 (reporting that ‘Japanese companies are dropping their aversion to litigation and heading to court to protect their patents.’).

[FN71]. See Mary Jacoby, *For the Tort Bar, a New Client Base: European Investors*, Wall St. J., Sept. 2, 2005, at A1 (describing the successes American lawyers have had hunting for clients in Europe to sue in the U.S.).

[FN72]. See Vikki Tait & Bob Sherwood, *Class Actions Cross the Atlantic*, Finan. Times, June 16, 2005, at 9 (describing legislative consideration of adopting class actions procedures in Sweden, Germany, France, and the Netherlands); Brian Carney, *Class Action ... a la Francaise*, Wall St. J., Feb. 14, 2005, at A19.

[FN73]. Robert Kagan, *Adversarial Legalism* 15-16 (2001).

[FN74]. See Goodman, p. 224 (‘Whereas in the United States one major function of the judicial system is to enforce the law, in Japan law enforcement is seen as an executive/bureaucratic function and not a judicial function.’); Murray & Sturmer, pp. 578-79 (‘enforcement of private rights against private litigants did not achieve the same significance in Europe as in the United States [T]he differing emphases in civil justice in Europe and the United States directly reflect the somewhat different roles of the state itself in the European and American

social orders.').

[FN75]. See [Associated Indus. of N.Y. v. Ickes](#), 134 F.2d 694, 704 (2d Cir. 1943) (introducing term); see also Jeremy Rabkin, *The Secret Life of the Private Attorney General*, 61 Law & Contemp. Probl. 179 (1998) (examining the history of the term).

[FN76]. See Predator Accountability Act, HB1299, 94th Ill. Gen. Assembly. This bill was first filed on Feb. 9, 2005, and passed the Illinois House by a virtually unanimous vote on April 5, 2005. As of this writing, it has not been adopted by the State of Illinois. Section 15 of the proposed legislation provides a cause of action to '[a]n individual subjected to the sex trade ' against any person who recruited the plaintiff to enter the sex trade. Section 20 authorizes recovery of compensatory damages and of defendant's profits from sex trade activity. Section 25 says that the fact that the plaintiff consented to engage in acts of the sex trade is not a defense to a claim under the Act.

Illinois has also strengthened public enforcement of rules prohibiting the sex trade. On June 7, 2005, the Governor of Illinois signed HB1469, which fortified criminal provisions regarding sex trafficking activity. See Press Release, Office of the Governor, State of Illinois, June 7, 2005.

[FN77]. See, e.g., William Rubenstein, On [What a 'Private Attorney General' is--and Why it Matters](#), 57 Vand. L. Rev. 2129 (2004) (exploring the variety of ways in which Americans have employed the private attorney general).

[FN78]. See 15 U.S.C. § 78u-4(b).

[FN79]. See Michael Tu, *Trial's Rewards Starting to Outweigh Its Risks*, Nat. L.J., Oct. 10, 2005, at S19 (reporting that '[e]conomists have consistently reported increasing trends in settlement amounts since the enactment of the PSLRA and more dramatic increases within the past two years.').; Laura Simmons & Ellen Ryan, *Post-Reform Act Securities Settlements (Updated Through December 2004)* (2005) (reporting that 2004 set a record in total settlement value and average settlement value). This effect was predicted shortly after the Act was adopted:

Though lax pleading requirements made the nuisance value of a suit much more difficult to address through pretrial motions, it must also be understood that the Reform Act's heightened pleading standard credentials suits that survive pretrial motions so that [they] will have a greater settlement value than such suits had on average before the Reform Act.

James Cox, [Making Securities Fraud Class Actions Virtuous](#), 39 Ariz. L. Rev. 497, 520 (1997).

[FN80]. John Langbein, *The Influence of Comparative Procedure in the United States*, 43 Am. J. Comp. L. 545, 545 (1995).

[FN81]. Professor Kessler reports as follows:

From the perspective of the European civil-law tradition, Anglo-American legal culture is distinctively preoccupied with procedure. In sharp contrast to American law schools, which treat the study of procedure as a fundamental component of legal education, continental European law faculties deem procedure to be of negligible interest and focus instead on conveying abstract principles of substantive law.

Amalia D. Kessler, [Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial](#), 90 Cornell L. Rev. 1181, 1211 (2005).

[FN82]. Bruce Kimball, *Students' Choices and Experience During the Transition to Competitive Academic*

Achievement at Harvard Law School, 1876-1882, 55 J. Legal Ed. 163, 172 (2005) (listing first-year courses including civil procedure for 1876-77 academic year at Harvard Law School); see also Bruce Kimball & Pedro Reyes, The 'First Modern Civil Procedure Course,' as Taught by C.C. Langdell, 1870-78, 47 Am. J. Legal Hist. (2005).

53 Am. J. Comp. L. 709

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