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COMPARATIVE CIVIL PROCEDURE AND TRANSNATIONAL “HARMONIZATION”: A LAW-AND-ECONOMICS PERSPECTIVE

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Economic Analysis of Procedural Law**

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I. Introduction

Comparative law has long been a subject of interest throughout the world. Recent history, commonly claimed to be an era of increasing “globalization,” has enhanced attention to the subject.¹ In American law schools today, the inclusion of “globalization” perspectives, including not only the comparative study of foreign law but also consideration of international and “transnational” problems, is currently in vogue and frequently taught even in basic law courses.²

Of course, comparative analysis has always been part of any scholar’s toolkit. Even when analyzing purely domestic legal problems, it can be instructive to consider how other legal systems have addressed the same or similar problems. Within the United States, there is a long tradition in both scholarship and positive law of “borrowing” from other jurisdictions, especially but not exclusively those within the common-law tradition.³ More generally, both the common law and the civil law are parts of a larger shared intellectual and moral tradition, and so it is natural that they would look to one another in the comparative enterprise.

While traditional comparative legal scholarship appears to have placed more emphasis on

¹ This is not to say, however, that recent history is unique or that the enhanced attention is justified. Each era generates its own information and transportation technologies, but the basic conditions and problems of “globalization” were known to the ancients, who wrote about them, and probably also to prehistoric man, at least from the advent of trade between autonomous clans or communities.

² Thompson/West, the leading publisher of American law school teaching books, publishes a “Global Issues Series” of books designed specifically to add comparative, transnational, and international perspectives to basic law school courses, including one on Civil Procedure, by Main, THOMAS MAIN, GLOBAL ISSUES IN CIVIL PROCEDURE (2006).

³ While much of U.S. law is based upon the inherited tradition of English common law, a number of U.S. states in the South and West originally were colonized by civil-law countries, and today retain aspects of the civil law system. Louisiana remains predominately a civil law system. The two most populous states, California and Texas, were both settled originally as Spanish colonies, and existed as independent nations before being admitted into the United States. Those states, as well as others in the Southwest, retain aspects of the civil law in their state law systems.

Moreover, certain aspects of the U.S. federal system, most notably the co-equal sovereignty of the states within a cooperative union, were a departure from the unitary English legal system. Thus, for example, in developing legal principles for the recognition of sister-state laws and judgments, the Americans looked primarily to Continental law and scholarship. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

substantive law, recent trends show increasing attention to comparative procedural law, and in particular to civil procedure. One recent development of note was the completion in 2006 of a joint project between the American Law Institute⁴ and UNIDROIT⁵ culminating in the issuance of proposed “Principles of Transnational Civil Procedure.”⁶ While this work has substantial descriptive value as a source of comparative analysis of civil procedure, it also has a normative objective, which is to promote the international “harmonization”—in this context, apparently meaning uniformity or near-uniformity⁷—of procedural law.

⁴ The American Law Institute is a private association in the United States, founded in 1923 by a group of American judges, lawyers, and law professors with the objective to “improve the law and the administration of justice,” *Overview*, in *About ALI*, at www.ali.org. The best known of the ALI’s products were the “Restatements” of various legal subjects that have been issued since the 1930’s, proposed model or uniform codes, and a miscellany of other projects. A complete listing of these projects may be downloaded from the ALI’s web site at www.ali.org/index.cfm?fuseaction=projects.main. To its adherents, the ALI’s work is a fine example of American private philanthropy. To its detractors, the ALI’s work is a facilitating device for a law cartel designed to eliminate healthy competition among American jurisdictions on rules of law, to promote rent-seeking behaviors by litigants and judges, or both.

⁵ UNIDROIT is an acronym for the International Institute for the Unification of Private Law, founded in 1926 as an agency of the League of Nations, and composed of member nation-states, under an international agreement dating from 1940, to which there are now approximately 60 acceding states. Over the years, UNIDROIT has issued a variety of publications, ranging from international conventions proposed for adoption by contracting states, through model laws, “principles,” and “guides.” For a listing, see *Adopted Texts*, at www.unidroit.org.

⁶ The final product of the project was published in book form as *ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* (Cambridge University Press: 2006) [Hereinafter cited as “ALI/UNIDROIT Final Report”], which includes both the final texts and supplementary material, such as the prefaces, introductions, and bibliography. The final official text, plus preliminary drafts and other documents relating to the project, may be downloaded from the UNIDROIT web site, www.unidroit.org/english/principles/civilprocedure/s76listofdocs, and may be purchased in hard copy through the ALI web site, in *Publications*, at www.ali.org.

In its earlier stages, the ALI/UNIDROIT project sought to develop both more general “principles” and more specific and concrete “rules” of transnational civil procedure. In the final event, only the “principles” were given formal approval by the sponsoring organizations. However, the proposal Rules of Transnational Civil Procedure were printed in the final report as a “Reporters’ Study” appendix to the approved text, *ALI/UNIDROIT Final Report*, at 99-156.

⁷ The exact meaning may be lost in the English translation, but the use of the term “harmonization” in this sense strikes the Anglophonic ear in a somewhat discordant note, so to speak. In music, “harmony” connotes the combination of differing tones into a pleasing whole.

Both the descriptive and normative aspects of the ALI/UNIDROIT project have a particular bearing on American civil procedure. Descriptively, the project accurately recognizes that existing civil procedure in the United States differs in important ways not only from civil law systems but also from other common law systems.⁸ So, here we have another case of American “exceptionalism.” Perhaps not surprisingly, the normative aspect of the project is to suppress those sources of exceptionalism in the name of “harmonization.”

However, what the ALI/UNIDROIT product lacks is either (1) a thorough examination of why American civil procedure is different, or (2) a developed justification for the goal of “harmonizing” distinctive systems into sameness. The purpose of this paper is to consider these two issues, from a law-and-economics perspective.

These are large subjects, and this relatively brief and general essay cannot provide a definitive analysis. Instead, the aim is to suggest a range of problems that require more careful and thorough consideration. Nor does this paper present a comprehensive critique of the ALI/UNIDROIT product, nor a comprehensive defense of American “exceptionalism” against all comers, and certainly not as a “universal” standard that all should emulate.

However, these limitations do not detract from the central thesis, which is that legal reformers first need to understand deeply the sources and reasons for national differences before undertaking to “harmonize” diversity out of existence. In most fields of human experience, diversity can be a good and productive condition from which everyone benefits. It is not self-evident why diversity in law, and especially in procedural law, should be annihilated. In product markets, we usually consider competitive diversity among producers and productive technologies to be a good thing for consumer welfare. Moreover, we recognize why producers might prefer monopoly even though competition is better for consumers. Why should we believe that law is an exception to these principles?

The emphasis in this paper is on the distinctive aspects of the American civil procedure system, because American procedural “exceptionalism” appears to have been the special target of the ALI/UNIDROIT project’s push for “harmonization.” The objective is to contribute to a better understanding of the American civil procedure system, not only by Europeans and transnational reformers but also, and perhaps more importantly, by Americans themselves. One

In the present context, “harmonization” has a contrasting connotation of conformity or sameness. As explained in the Introduction to the ALI/UNIDROIT final report, both “harmonization” and its close cousin of “approximation” refer to “reducing differences in legal systems, so that the same or similar ‘rules of the game’ apply no matter where the participants may find themselves.” ALI/UNIDROIT Final Report, at 2. That objective is uniformity or near-uniformity; it is unitonal, not harmonious.

⁸ See ALI/UNIDROIT Final Report, at 6-7.

might think that the main pitfall of comparative analysis would be a tendency to view one's own system in a unduly favorable light, whether for reasons of cultural or national chauvinism, or simple familiarity. This effect exists, but it is an obvious problem. The less obvious but equally serious problem is the opposite tendency to romanticize the comparative system exactly because it is different: as the American expression goes, "the grass is always greener on the other side of the fence."

While there is some evidence of the "grass is greener" phenomenon on both sides of the Atlantic, it may be a more serious problem in the United States, especially for civil procedure.⁹ Domestic criticism of the American civil procedure system has been loud and long, and already has led to an erosion of some distinctive characteristics of the system, notably in the balance between party and judge control, pleading standards, and discovery standards. It is not clear that these trends are justified, and they may be moving American civil procedure in precisely the wrong direction.

II. Comparisons of American with Continental Procedure

There is a relatively standard and familiar list of comparative differences between American civil procedure and continental European civil procedure.¹⁰ These differences often are expressed under the rubric of comparing the "common-law system" (sometimes called the "Anglo-American" system) with the "civil-law system," in terms of adjudication. However, once one examines actual functioning systems in particular countries, it becomes clear that these two constructs are something of an abstraction. Neither "common law" nor "civil law" is monolithic in itself. Some differences that seem important in theory are perhaps less important in actual practice. And the common-law and civil-law countries already have borrowed from each other to some extent, or independently developed similarities.

Nevertheless, there remain important differences in civil procedure between the common-law and civil-law legal traditions. Moreover, even within the common-law tradition, American civil procedure now diverges in important ways from civil procedure in Britain and other common-law countries, most notably in the use of juries, provisions for pre-trial discovery, and cost-shifting rules.

A. A Conventional List of Differences, with Some Analysis

The main differences in civil procedure are sometimes summarized as the "adversarial" system (common-law) as compared with the "inquisitorial" or "magisterial" system (civil law). However, these terms are not very adequately descriptive. Most of what is meant by the

⁹ See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

¹⁰ For a brief summary, see ALI/UNIDROIT Final Report, at 5-12.

“adversarial” system is better captured in the idea of “party control,” i.e., that the litigants themselves control certain aspects of the presentation, most notably the development and presentation of evidence, while the judge acts as a relatively passive “umpire” who enforces the rules of evidence and procedure, though the judge may and sometimes does take a supplementary role in the development of the evidence. In contrast, in the civil law system, the judge takes the primary role in developing the evidence in the case, and the litigants play a supplementary role. However, this does not mean that civil law cases are non-adversarial: by definition, the litigants (and their counsel) certainly are “adverse” to one another; that is why there is a lawsuit at all. So, these differences across the systems are mostly a matter of degree or emphasis.

The differing balance of control between the parties and the judge, plus the role of juries and cost-allocation rules, frame the primary differences across civil procedural systems. However, there are also differences in pretrial and trial procedure and rules of evidence, the training and selection of judges, and (arguably) in the sources of law used for decision.

1. Party versus Judge Control. In civil law systems, the first-instance judge takes the primary responsibility for developing the facts of the case, including the examination of witnesses and production of documents. The parties may, and usually do, make suggestions of what witnesses and documents should be summoned, and usually are permitted to pose supplemental questions to the witnesses. The theory seems to be that the judge, as a neutral and detached state official with specialized training, will fairly and thoroughly develop the “truth” of the matter, without wasting time and effort in “adversarial” posturing.

In contrast, the “adversarial” system places the primary responsibility for the development and presentation of the evidence in the hands of the litigants, usually meaning their advocates, who are not expected to be neutral. The judge’s role primarily is to police the advocates’ presentations for compliance with the law of evidence, and in general to permit a fair opportunity for both sides to present their case. The most “adversarial” aspect of the system is a strong norm that each side is permitted to “cross-examine” the witnesses presented by the opposing party, and similarly to attack other forms of evidence, in an effort to discredit the opposing case.¹¹ The judge also is entitled to question witnesses or order the production of documents *sua sponte*, but these powers are infrequently exercised.

¹¹ The comments by Wigmore, the great American theorist on trial procedure and evidence, indicate the central importance placed on cross-examination in the United States. According to Wigmore, cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth,” and, “[i]f we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.” 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367, at 32 (Chadbourn rev. 1974).

In the adversarial system, the parties' control over evidentiary presentation is strongly connected with certain other aspects of the system discussed below, notably the use of jury trial, the law of evidence, and the provision of pre-trial "discovery."

While aspects of party versus judge control in form may extend to ascertaining applicable legal principles, this may or may not produce a significant functional difference in practice.

2. *The Expertise and Selection of First-Instance Judges.* Most comparative sources emphasize the differences in the professional background and training of judges across the systems. In most civil law systems, judges are professionally trained to be judges and generally spend their professional life as judges rather than practicing lawyers. In common law systems, most judges are trained as lawyers, and typically are selected from the practicing bar. In the United States, there are no professional schools of "judging," and the selection of judges, though influenced by professional stature and qualification, ultimately is political. At the federal level, judges are appointed by the President, subject to the approval of the Senate.¹² In the states, the majority of higher-court judges are appointed in a similar manner, but a substantial minority are elected, and first-instance judges predominantly are elected.¹³ While there is no universal requirement that U.S. judges even be lawyers, nearly all are lawyers, but they have a varied legal background, as either practicing lawyers or legal academics or government officials, or sometimes all three, before reaching the bench.

In civil law systems, the professional training and career path of judges is linked with the factor of judge versus party control.

3. *Division of decisional authority within and among courts; jury trial.* It is usually said that civil law systems involve more searching review of facts by the second-instance (appellate) court than in common law systems. As applied to the United States, this is a bit of an oversimplification. The scope of factual review on appeal varies among jurisdictions within the United States, and depends importantly on whether a jury is used in the first-instance court. Under generally-prevailing American law, jury trial is not universally provided in civil cases, and different jurisdictions have different standards governing both the scope of jury trial on first instance and the scope of review of jury verdicts on appeal.¹⁴ Even in cases where jury trial is

¹² U.S. CONST. art. II § 2.

¹³ For a recent national survey of state court organization and judicial selection in the United States, see U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *State Court Organization 2004* (August 2006), available at www.ojp.usdoj.gov/bjs .

¹⁴ In the U.S., the right to jury trial in civil cases is guaranteed by the federal constitution only in *federal* cases, and then only in certain types of civil cases. U.S. CONST. amd. VII. The U.S. states are perfectly free to abolish civil juries entirely, though none has done so. In most

available as of right, it is not uncommon for the right to be waived by the parties. However, where jury trial is used, it generally produces a more deferential standard of review, as the theory is that juries function as the presumptive decision maker on facts, as distinguished from law, which is reviewed de novo by appellate courts. Furthermore, jury trial in civil cases is highly favored in most U.S. jurisdictions. Outside of the United States, even in other common-law countries, jury trial generally is not used in civil cases.

4. *Use of case decisions as primary sources of law.* One of the significant jurisprudential differences between civil law and common-law systems is captured in the term “common law” itself, which connotes the feature that previous judicial decisions are considered as primary sources of law, whereas the jurisprudential theory of civil-law systems is that positive law is only the statutory or code provisions, of which previous decisions are merely interpretation. Whether this difference in jurisprudential theory has a significant functional effect on civil procedure is a debated question. In many civil law jurisdictions today, there is extensive use of previous cases, among other sources, to assist in judicial decision making. However, there is an argument that the common-law judge’s role as a law-declaring official, and deference to advocates and juries in fact-finding, has an effect on both the types of judges that are selected and their professional focus as judges. There is also another significant implication related to party versus judge control, which is that the common-law judge’s freedom to reformulate controlling legal doctrine enhances the significance of party control in both the trial and pre-trial stages.

5. *“Ordinary” versus specialized courts.* In most U.S. jurisdictions, all types of cases are either begun in or eventually reviewed in the same set of “generalist” courts. At the U.S. federal level, there is no specialized court of last resort, and only one of thirteen intermediate appellate courts has a specialized jurisdiction.¹⁵ Among the few other specialized courts, all have inferior and limited jurisdiction, which in some instances is concurrent with or subject to review in the general courts.¹⁶ The most important category of specialized “courts” in the United States are actually administrative agencies exercising quasi-adjudicative authority, but these decisions also are subject to appellate review in ordinary courts. The states follow a largely similar pattern,

states, the right to jury trial is guaranteed by the state’s own constitution, but there is considerable variation in both the scope of the first-instance right and the standards of appellate review.

¹⁵ At the intermediate appellate level, the U.S. federal system has one topically specialized court—the Federal Circuit—which hears specified types of appeals involving intellectual property or certain governmental matters. *See* 28 U.S.C. § 1295. The jurisdiction of all twelve other courts of appeals is primarily geographic. *See* 28 U.S.C. § 41.

¹⁶ In the U.S. federal system, the specialized courts, apart from the Federal Circuit, are all categorized as “non-Article III” courts, meaning that their judges do not hold direct Presidential appointments with life tenure, and so are not federal “courts” strictly speaking, but are more akin to administrative agencies. These include the Court of Federal Claims, the Tax Court, and the bankruptcy courts, as well as military courts.

though as usual there is a wide range of diversity among states: states tend to have more specialized courts (e.g., criminal, probate, family, juvenile, or traffic), but nearly all are of inferior jurisdiction and their decisions are often tried de novo in superior courts.¹⁷ All state courts of last resort in civil cases have general jurisdiction; only 2 of the 48 states have any specialized court of last resort, and both of those (in Oklahoma and Texas) are confined to criminal appeals. There are no “constitutional courts” in the United States; all constitutional issues are litigated in the ordinary courts. Most civil law systems make more extensive use of specialized courts, and have constitutional courts considering cases referred from other state bodies.

6. *Pre-trial and trial procedure; discovery, pleading, and the law of evidence.*

Common-law procedure is characterized by a culminating “trial” hearing in which all of the evidence is presented seriatim to the trier of fact. Usually, this is preceded by a series of “pretrial” proceedings, which may include both conferences and preliminary hearings before the judge and discovery proceedings carried out largely by the parties without judicial intervention. Historically, the use of a culminating trial phase is associated with the use of juries as triers of fact. However, the practice also is followed in the relatively common “bench” trials (those in which the judge acts as both trier of fact and trier of law, because the right to jury trial is inapplicable or waived by the parties), with only slight deviations.

Characteristically in civil law procedure, there is no culminating trial as such; the first-instance proceedings traditionally were carried out in numerous separate sessions before the judge. However, there appears to be some modern trend toward a more concentrated final hearing in civil-law systems.¹⁸

In American procedure, the use of expansive pretrial “discovery” is connected with the culminating trial in several ways. First, as supplemented by relatively liberal standards of initial pleading, the discovery phase provides the opportunity to obtain evidence (from opposing parties and from non-parties) and to frame new or alternative grounds for recovery or defense. Second, the parties use discovery as a means to probe the evidence supporting the opposing party’s case, as a means either to promote settlement before trial or to prepare to meet the opposing case at trial. Third, as part of discovery, parties may seek to limit or discredit the opposing party’s case. With some limitations, the overall theory is to use the discovery process largely to eliminate factual or legal “surprise” at trial, which tends to focus American trials on questions of “credibility,” i.e., which party has presented the more persuasive case. The procedure also includes tie-breaking rules, in which one party (usually the plaintiff) bears the “burden of proof” in both of two ways: the burden of “production,” which identifies the party who is required to

¹⁷ For state-by-state details, see *State Court Organization 2004* (cited in note 13 above).

¹⁸ Perhaps for this reason, the ALI/UNIDROIT Reporters’ Study proposed an implementing rule encouraging a concentrated final hearing. ALI/UNIDROIT Final Report, at 144.

present evidence on a given point; and the burden of “persuasion,” which identifies the party who must persuade the trier of fact that its version of the facts is “true.”

Common-law procedure also embodies a highly developed and separate body of the “law of evidence” that is not replicated in the civil law systems. While both common-law and civil-law systems both embody principles of “relevancy” that focus the evidential presentation on the issues framed by the substantive law and the pleadings, and both systems also provide some protection for “privileged” matter (such as communications between lawyers and clients), evidence in common-law procedure is distinguished most sharply by a set of “reliability” rules that exclude certain forms of evidence. While the best-known of these is the rule against “hearsay” evidence, they also include the rule of first-hand knowledge (testimonial or documentary statements generally must be based on the personal sense impressions of the witness or writer), the rule of authentication of documents, and a rule of preference for originals of documents (the “Best Evidence” rule).¹⁹

All of these “reliability” rules tend to reinforce the function of the culminating trial, preceded by discovery, as testing the “credibility” of each side’s case.²⁰ These rules also share the common theme of preferring the form of evidence that is most proximate to the facts that are sought to be proved, and most amenable to testing by the adversary in the culminating trial. This is where the “adversarial” system becomes the most adversarial, as the system embodies a strong norm of in-court, personal confrontation and cross-examination of the opposing party’s case to test its credibility.²¹ The pre-trial discovery phase reinforces that function by generating

¹⁹ For a summary and economic analysis of the principal rules of American evidence law, see Jeffrey S. Parker & Bruce H. Kobayashi, *Evidence*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS, art. 7900, at 290 (B. Bouckaert & G. De Geest gen. eds. 1999; Edward Elgar), available online at <http://users.ugent.be/~gdegeest/7900book.pdf> . .

²⁰ Actually, a test of “credibility” is nearly the only function of trial in the American system. Cases that do not present credibility issues ordinarily can be, and are, decided on the basis of “summary judgment,” which is given unless portions of the case presented a “genuine issue as to any material fact,” Rule 56(c) of the Federal Rules of Civil Procedure. Under the dominant judicial constructions, “genuine issue” generally means an issue of credibility.

Given liberal discovery and screening by summary judgment, the actual incidence of trial in the American civil procedure system is quite small: for the U.S. federal courts, historically this rate is no more than 6% of filed civil cases, and probably is smaller in the state courts. As most of these dispositions are by a privately-arranged settlement between the parties following party-conducted discovery procedures, traditionally the U.S. system did not engage in extensive pretrial “management” by the judge, on the view that this was a waste of public resources.

²¹ In criminal cases in both federal and state courts, the 6th Amendment to the U.S. federal constitution guarantees the defendant the right “to be confronted with the witnesses against him,”

evidence that can be used at trial to discredit the opposing case. One of the functions of pretrial discovery is to “pin down” opposing witnesses by taking their sworn depositions: if the witness then changes his story at trial, his credibility can be “impeached” during cross-examination by the contrast between the trial and deposition testimony. To this same end, documentary evidence often is excluded by the “hearsay” rule, which forbids out-of-court statements when offered to prove the truth of the matter asserted by the statement, because it is more difficult to confront and cross-examine a document. In general, the Anglo-American law of evidence evinces a strong distrust of documentary proof of non-documentary facts, in contrast with most civil-law systems.

While the development of the law of evidence in common-law systems also was historically linked with the use of jury trial, all of the same rules apply in both jury and non-jury trials.

7. *The Use of Expert Witnesses.* In American procedure, “expert” witnesses are treated similarly to non-expert witnesses, i.e., within the framework of party control of evidence, in that each party generally is permitted to hire and present its own experts, which are then subject to cross-examination and impeachment by the opposing party.²² While American judges also are permitted to designate court-appointed expert witnesses, this power is used relatively infrequently and almost never is allowed to supersede the parties’ rights to present their own expert witnesses.²³

In civil law systems, the use of a court-appointed “neutral” expert is more common, and is the prevailing norm in many systems.

8. *Cost Allocations.* In contrast with both civil-law systems and most other common-law systems, American civil procedure continues in general to follow the “American rule” that

U.S. CONST. amd. VI, and this “confrontation” right has been interpreted as including the right to cross-examine and to constitutionalize certain aspects of the rule against “hearsay” evidence (i.e., out-of-court statements used as a testimonial substitute). While not constitutionally required by the 6th Amendment in civil cases, both aspects of “confrontation” generally are followed in civil cases, with some constitutional grounding in the “due process” clauses of the 5th and 14th Amendments, as applicable in federal and state courts, respectively.

²² Despite broad criticism of expert witness practice in American courts, reliance on traditional adversarial methods featuring cross-examination and rebuttal by opposing parties was strongly reaffirmed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, which was codified in 2000 amendments to Rules 701-703 of the U.S. Federal Rules of Evidence.

²³ For an example of the prevailing American approach, see Rule 706 of the U.S. Federal Rules of Evidence.

litigants bear their own litigating costs, win or lose, although there are several important exceptions to this general rule. Outside of the United States, most systems follow some variation of the two-way “loser pays” rule, i.e., that the prevailing party presumptively is entitled to reimbursement for some portion of its litigation costs. In virtually all operating examples of such systems, the amounts of such awards are subject to generally applicable caps or “reasonableness” limitations.

B. Similarities versus Differences

Despite the numerous points of difference noted above, it is well to bear in mind that there also are many (perhaps more) points of similarity between common-law and civil-law procedural systems. Although the common law and the civil law are often thought to represent divergent legal cultures, they actually are two branches of single shared cultural tradition in Western thought. Much of the substantive law is similar in content and emphasis; recognition of fundamental human rights is shared. Concepts of jurisdictional competence to adjudicate, the importance of neutral decision-makers and reasoned decisions in accordance with law, standards of fair notice and equal treatment of parties, the right to representation by counsel, the importance of finality and stability in judgments, the right of appellate review, among many other matters, are the same or very similar across both systems. Both American and European systems purport to declare their common adherence to the goals of “just,” “speedy,” and “inexpensive” civil procedure, even though they differ widely on how to accomplish and reconcile those sometimes-conflicting desiderata.²⁴

Furthermore, there may be certain “universal” features of any system of civil adjudication: any system must designate a tribunal with competence to consider the case, it must formulate some statement of what the case is about, and have some procedure identifying a final and binding resolution.

Some of these points of similarity have been subject to international agreements. In the context of procedure, the most successful of the international agreements have concerned matters of jurisdictional competence and international recognition of judgments and arbitral awards, though much work remains even in these areas.

However, there has been little movement toward “harmonization” of civil procedural law as such (excluding matters of international recognition of jurisdiction and judgments), prior to the ALI/UNIDROIT proposal. Under that proposal, much of what is distinctive about American

²⁴ This point is developed further, for both civil and criminal procedure, by Peter Lewisch and Jeffrey S. Parker, *Procedure in American and European Law: A General Economic Analysis*, GMU Law and Economics no. 07-40 (2007), forthcoming in *ECONOMIC ANALYSIS OF LAW: A EUROPEAN PERSPECTIVE* (Edward Elgar: Aristides N. Hatzis, ed.).

civil procedure is sought to be suppressed. The following sections of this paper will seek to examine why.

C. Interrelationships and Larger Issues

As indicated in the preceding discussion, one general consideration important to comparative analysis but sometimes overlooked is that even seemingly disparate features of a civil procedural system may be so interconnected with one another that they cannot be examined separately to good result. Thus, any comparative analyst may be strongly tempted to compare, for example, pleading standards under system A with pleading standards under system B. However, in many instances, such a comparison may miss important features of one or both systems, as the pleading standards of one of both systems may be explainable substantially by reference to one or more other features of their own system.

Extending that example, in the American system, the relatively “liberal” pleading standards appear designed to promote a particular role for pretrial discovery as allowing the parties to identify new factual and legal issues that may ultimately decide their case. In turn, this feature is related to the role of the culminating trial phase, which is when the parties ultimately commit to their legal and factual grounds. More profoundly, this same sequential interrelationship exposes one of the key tradeoffs made in the American system between expedition and reduced expense on the one hand, and “justice” on the other. As represented by the Federal Rules of Civil Procedure first adopted in 1938, the American civil procedure system sought to determine cases ultimately upon their substantive merit, whether or not the parties originally appreciated the issues made by the case, and that objective was placed above matters of expense or expedience.

Taking another important example, expansive pretrial discovery seems also to be related to the functions of the culminating trial and the law of evidence as presenting the maximal opportunity for each side to produce and test the evidence, particularly as regards the central object of assessing the “credibility” of each side’s case. While this object seems particularly concerned with the nature of the “truth” or “justice” that should determine the cause, it may also be related to other profound concerns regarding the strengths and weaknesses of the tribunal’s decision-making authorities. Both the culminating trial and the law of evidence are historically linked with the institution of jury trial, and jury trial itself has been associated with a distrust for leaving the adjudicatory function entirely in the hands of judges who, regardless of how they are selected and trained, ultimately are agents of the state.

D. The Remedial Structure

A final consideration of general importance in the comparative analysis of American civil procedure may be its role in the overall mix of public and private law enforcement in the United States. Unlike many other countries, the United States relies heavily on private cases, governed by the same rules of civil procedure, to enforce both public and private law. Furthermore, many government-initiated enforcement cases also are brought under the same rules of civil procedure

and in the same courts, both federal and state.

Moreover, even purely private civil cases are often viewed as vindicating public interests in law enforcement. This is one of the factors that accounts for the relatively greater use of “punitive damages” in U.S. courts, and provisions in many U.S. jurisdictions for enhanced recoveries for “private attorneys-general” that bring cases that are thought to redress an under-provision of law enforcement by public authorities.

This is not the place to develop a general analysis of the tradeoffs involved in public versus private enforcement.²⁵ However, the possibly differing mix of enforcement activity may account for some of differences across national procedural systems.

There is another difference in remedial structure that should be considered: are American courts more generous in their damage awards? Although there is no comprehensive data on the subject, much expert opinion in the international practicing bar tends in that direction. If it is true, then one should not be surprised to see that, in transnational matters, plaintiffs prefer to litigate in the United States, while defendants prefer to litigate elsewhere. This opens up the problem that international discussions of law reform may be influenced by familiar public-choice considerations. .

But there is also a second implication. If American cases, on average, involve higher stakes, then a simple cost-benefit analysis suggests that American cases also probably should, on average, involve more expensive and less expeditious procedures, at least if those procedures arguably raised the quality of the dispute-resolution outcomes.

III. Some General Observations on the Economic Analysis of Civil Procedure

The economic analysis of procedure is an enormously complex undertaking, for several different reasons. First, as noted above, the various features of a procedural system are so closely interconnected that they are difficult to isolate for separate study. Second, procedural law and substantive law are both complements to and substitutes for one another, so that an assessment of overall welfare consequences requires a consideration of the combined effect of both substantive and procedural rules. Third, procedure is concerned fundamentally with the production and distribution of information, which itself is a complex problem. Fourth, litigation involves a range of strategic interactions among parties, non-parties, and tribunals, and procedural rules are designed in part to both account for and to regulate such behaviors.

In addition to these theoretical problems, empirical research also is difficult to conduct, because of the inherent sorting purposes of procedure in general, and civil procedure in particular. The visible observations of functioning procedural systems are the product of intense selection effects, which can hide important data. Cases that reach a final decision by a tribunal

²⁵ This is one of the topics developed in Lewisch and Parker (2007), cited above.

are a small and unrepresentative sample of filed lawsuits, which in turn probably are a small and unrepresentative sample of legal disputes, and those in turn are a small and unrepresentative sample of transactions or events that could give rise to legal disputes. And yet, every one of those ever-expanding circles of actual or potential disputes are affected by the “shadow” of both the substantive law and the procedural system of enforcement.

For these reasons, the existing economic literature, despite its impressive volume and diversity, remains relatively underdeveloped, especially in terms of assessing the welfare consequences of procedural systems.²⁶ The most dominant body of literature on the economic analysis of procedure is primarily descriptive, in that it seeks to develop the features of strategic bargaining between the parties within the context of litigated matters.²⁷ While this literature has produced many useful insights, and addresses an important aspect of procedural systems, it does not fully characterize the social problem of procedure. A more general model, proposed many years ago by Posner,²⁸ provides a more inclusive framework for assessing procedural efficiency as minimizing the sum of “direct” costs plus “error” costs, both of which have both private and social dimensions. While some additional refinement of this model has been achieved, it remains underdeveloped and in some instances controversial as to particular problems in procedure.²⁹

Many of the problems in the economic analysis of civil procedure can be illustrated by the example of the “fractional cow.” This example is inspired by one of Coase’s examples in *The Problem of Social Cost*³⁰ of an adjoining farmer and cattle rancher whose land use affects one another—specifically that the size of the rancher’s herd could affect the incidence or magnitude of the “externality” that the rancher’s cows would escape and trample on the farmer’s crops. Coase’s purpose was to show that the joint product of the conflicting uses could be maximized under opposite legal entitlements respecting the “externality,” provided that positive transaction costs did not prevent the rancher and farmer from reaching an optimal “Coasian bargain.”

²⁶ For a general survey of this literature as of 1999, Bruce H. Kobayashi & Jeffrey S. Parker, *Civil Procedure: General* in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS, art. 7000, at 1 (B.Bouckaert & G. De Geest gen. eds. 1999: Edward Elgar), available online at <http://users.ugent.be/~gdegeest/7000book.pdf>.

²⁷ An early survey of this literature is given by Robert D. Cooter, & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. Econ. Lit. 1067-1097 (1989).

²⁸ Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Leg. Studies 399-458 (1973).

²⁹ For a recent analysis and assessment, see Jeffrey S. Parker, *Economics of Evidence and Proof*, in 1 Encyclopedia of Law and Society 524-27 (David S. Clark ed. 2007: Sage).

³⁰ R.H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1-44 (1960), *reprinted in* R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW*, at 95-156 (1988: Chicago).

My example begins by noticing two aspects of the solution that Coase did not consider explicitly. First, while suppressing both transaction costs generally and information costs between the conflicting parties, Coase's statement of the problem assumes positive costs of legal policy formulation, in that the law can err in assigning the original legal entitlement. Second, what happens after the "Coasian bargain" is reached? In particular, what happens if one of the parties fails to live up to the Coasian bargain? Coase seemed to assume that the enforcement of both the original entitlements and the Coasian bargains between the parties were perfect and costless. Relaxing those assumptions is what begins to characterize the problem of civil procedure.

The most interesting case is where the likely alternative structures of the beginning legal entitlement—either that ranchers were liable for all crop damage caused by straying cows, or that farmers were required to absorb those costs—were both sub-optimal, because joint product was maximized by an agreement to control the size of the rancher's herd at some level above zero. So, let us assume that the optimal herd size is 2 cows, because increasing the herd to 3 cows increases marginal crop loss more than marginal ranch product, and similarly, a decrease in herd size reduces marginal ranch product more than marginal crop loss. This solution also assumes that regulating herd size is the least-cost method of controlling the "externality." However, because the parties have chosen the intermediate solution, crop loss from cow straying is not reduced to zero, but presumably is compensated ex ante by the consideration paid in order to reach the Coasian bargain.

Now, what happens if one of the parties accuses the other of breaching the Coasian bargain? Suppose that the farmer sues or threatens to sue the rancher, claiming that the rancher exceeded the contractually-specified herd size, thus producing "excess" crop loss. This is where the characteristics of the procedural system, in a world of positive information costs, begin to have an effect.

In procedural systems featuring "strict" pleading rules that require plaintiffs to state the factual grounds of their case with particularity, the farmer may not have a litigable case at all, if the farmer knows only that his crops were trampled down. In systems with more "liberal" pleading rules and a right to pretrial discovery, the farmer may be allowed to bring his case and might actually win, if it turns out to be true that the rancher exceeded the agreed herd size. On the other hand, it could be argued that "liberal" pleading rules might encourage "frivolous" litigation, as the farmer's crops could have been trampled by vandals, or by one of the farmer's careless farm workers. Or the same case may present both possibilities simultaneously: the rancher may have run too many cows, but the actual trampling of the crops was caused by a farm employee. In that case, both parties would have an interest in pretrial discovery from the other. These possibilities present problems of asymmetric information as to the actual merits of the case, and raise substantial questions as to the tradeoff between accuracy or "justice" on the one hand, and speed and expense of adjudication on the other.

But these are only the obvious, first-order problems. More subtle problems may appear. Depending upon the structure of the adjudication system, the decision maker may or may not be

willing to explore some of the more exotic possibilities, such as whether the crops were trampled by incompetent crop-circle hoaxers, or whether scientific analysis of the crop field could distinguish cow-trampling from other forms of trampling. And there could be issues of credibility: the farmer may actually believe that the cows trampled his crops, and therefore failed to question his farm workers; or, the farmer may simply be a lying rent-seeker, who deliberately trampled his own crops, after they failed from some other cause, such as unfavorable weather. Or, the credibility of the rancher, and his business records, could be in question: if the rancher were deliberately cheating on the bargain, he may be unlikely to make an honest record of his cheating. Should he be permitted to present his own business records as proof that he observed the herd limitation? Should non-parties who dealt with the rancher be subpoenaed to produce records and testimony? Who is in the better position to decide whether to pursue these avenues of proof, and to assess the credibility of the results?

But even these questions are relatively conventional. Suppose that the facts, as developed, show that the rancher actually ran 3 cows on his property for one quarter of the year. This is the “fractional cow” problem, as we now have 2-1/4 cows per year. The ex ante bargaining of the parties may or may not have considered the “fractional cow” in specifying the contractual 2 cows. In that case, how is the contract to be construed? It is easy enough to say that the “intent of the parties” should govern. But how is that intent to be found? Is it subjective intent, as would be suggested by economic analysis? Or is it objective intent? And how much of that choice is influenced by information costs associated with ascertaining the parties’ intent? If the parties actually never foresaw the “fractional cow” problem, then this question may not be answerable ex post. This raises the question, often encountered in procedural systems, of just how such a question should be resolved. Should court pretend that it is simply determining an historical fact? Or, should it recast the substantive rule, because the pre-existing rule is too costly to enforce with tolerable accuracy? Or, should it pretend that the question of fact is actually a question of law? Or, should it dismiss the case because the parties, or one of them, has failed in the burden of proof? These are all variations that are observed in practice.

From the economic point of view, the best solution to the “fractional cow” problem may have been for the parties to recognize and agree on a solution ex ante. If information and transaction costs are negligible, this could be the efficient solution. But in a world of positive transaction and information costs, it is a costly activity, and incurring that cost could exceed the benefits of a more precisely-specified contract. For example, suppose that the “fractional cow” was a new calf. Did the parties mean to include calves in cows? If they failed to foresee that contingency, who should bear the resultant loss? Is there actually any way to “find” what the parties’ ex ante intent was, or would have been?

Moreover, the parties’ incentives to solve the problem ex ante are given in part by the features of the ex post procedural system, or, in other words, the assumed ex post procedural system is endogenous to the contracting parties’ choices. In this respect, the procedural system can reduce economic efficiency by being too *inexpensive*. If it is the case that social efficiency would be promoting by ex ante bargaining to this level of detail, then the provision of a expeditious and inexpensive procedural system ex post reduces economic efficiency, because it

still may be more costly in the deeper sense that coercive litigation can never replicate the exact result of ex post bargaining. On the other hand, an unduly expensive or unreliable litigation system may impair efficiency by encouraging parties to over-specify their ex ante bargains in terms of improbable contingencies.

The law and economics literature only recently has begun to address some of these problems, by developing in the contractual context the general proposition of substitution between substantive law (or contract terms) and procedural law, as a way of optimizing the endogenous tradeoff between ex ante bargaining and ex post litigation costs by the contracting parties.³¹ However, including this perspective introduces an array of new considerations that have yet to be worked out completely.

In particular, considering the substitution of procedural rule specifications for substantive contract terms introduces a third party into the analysis—the adjudicating authority itself. If the contracting parties fully internalize all of the litigation costs, including those borne by the adjudicating authority, then private contracting can provide the efficient solution. However, this would not necessarily be true, and would not be true where the adjudicating tribunal faces lower marginal costs than the contracting parties themselves in selecting and implementing efficient procedural rules.

In contrast with the pure case where the adjudicating tribunal is merely a private agent for the contracting parties, most adjudicating tribunals in fact are repeat players who specialize in dispute resolution, spread their production costs over a number of disputes, and thus have a comparative advantage over the contracting parties who, by definition, specialize elsewhere (farming and ranching, in Coase’s example). To see the effect, we need not resolve the question whether dispute resolution is a public good that is more efficiently provided on a social scale, although that is one of the standard explanations for the public provision of courts to resolve civil disputes. Even private arbitral tribunals may provide economies of scale and skill in providing dispute-resolution services. Those economies may require that the tribunal adhere to repeat patterns of procedure. To take a crude example, suppose that the adjudicating tribunal has chosen the English language for its adjudications. If the parties instead choose Mandarin as their optimal language of ex post disputation from their point of view, the tribunal may be unable to provide the dispute-resolution services at a cost that the parties are willing to bear, simply because there are not enough disputants to justify a tribunal using Mandarin. This puts the contracting parties back into the problem of contracting under constraints imposed by the

³¹ See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 Yale L. J. 814 (2006); Chris William Sanchirico & George Triantis, *Evidentiary Arbitrage: The Fabrication of Evidence and the Verifiability of Contract Performance*, 24 J. L. Econ. & Org. 72 (2008). I am grateful to the Alon Klement for calling this literature to my attention. His own paper presented at the 2008 Travemunde symposium (chapter of this volume) makes a further contribution by developing contractual choice of procedural rules.

available adjudication choices ex post.

In the case of publicly-provided courts, this problem becomes even more severe. Publicly-provided systems vary in their amenability to contractual specification of procedural rules, but nearly all of them will draw the line somewhere, in order to maintain their basic competency as tribunals. Actual functioning systems are likely to have even more complex pricing structures. For example, public “common-law” courts in the Anglo-American system specialize in part in providing rules of law—substantive and procedural—for the benefit of the larger society. Part of the “price” paid by litigants for access to the publicly-subsidized courts may be the parties’ provision of the facts of their dispute—or a certain quality of factual dispute—in exchange for the publicly-subsidized resolution.

Now we can see the problem that can arise from “harmonization” of procedural law. As “harmonization” approaches homogenization, contracting parties will have a reduced range of choices for the resolution of their ex post disputes. As contracts and disputes become more diverse, so also becomes the optimal ex post procedure for each given dispute. Reducing the range of choice among ex post procedural systems can also constrain the range of contractual choice ex ante, and thereby reduce the efficiencies obtainable in the joint product of ex ante bargaining and ex post disputation.

IV. Economic Analysis of Distinctively American Features in Civil Procedure

Working within the framework developed in Part III, this part examines the most distinctive aspects of American civil procedure, as compared with continental European systems, from an economic perspective. In the course of the discussion, I will take particular note of recent developments in U.S. procedural law that serve to illustrate some of the problems discussed.

The discussion is divided into three main subheads, considering: (A) the party-control emphasis in general; (B) the several roles of pretrial discovery; and (C) cost-allocation rules.

A. Party Control and Decisional Separation of Powers

Most of what is meant by the “adversarial system” is party control over the proceedings, with particular reference to the provision of evidence to the tribunal. That feature, plus the use of juries to resolve issues of fact, were the most distinctive historical features of the Anglo-American civil procedural system.

From the economic point of view, it would seem that there is a strong case for adverse parties to compete with one another in the provision of information to the tribunal, for largely the same reasons that competition is preferred over monopoly in the provision of other goods and services. Some objections to the party-control system seem to proceed from the misconception that information inherently is a pure rent. However, in litigation, as elsewhere, information is not

merely “found” but is developed, and therefore incentives matter.³² The participants with the strongest incentives to develop relevant information, and the most detailed knowledge of the facts of a particular case, are the litigants and not the judge.³³

The main objections to the party-control system seem to be that the parties will over-provide information or that one (or perhaps both) parties will be seeking to “obfuscate” rather than edify. The concern about over-supply seems overdrawn, particularly given the parties’ incentives, and the concern about “obfuscation” seems limited to a special case where one of the litigants has invincibly superior access to relevant information, as would the case, for example, in marketplace competition where only one firm has access to an essential resource. So, it may be the case that some provision for pretrial discovery or other exchange is essential to the effective operation of the adversarial system.

There is no reason to distinguish these results in the general case from the provision of expert testimony. Given that expert testimony in fact is purchased in a competitive market, it would seem that the provision of expert testimony is nearly the ideal case for party control of evidence.³⁴

The use of juries to decide questions of fact may display similar attributes. While juries generally are thought to be “noisier” decision-makers than judges, and involve their own agency cost problems, their redeeming virtue could rest in the multiplicity of decision-makers and in the very naivete of the jurors.

1. The Competitive Provision of Evidence to the Tribunal.

Perhaps the best-known critique of the adversarial system in America was given by Gordon Tullock in *Trials on Trial* (1980), which argued that the adversarial system would be less “accurate” than the civil-law system, because “in adversarial proceedings, a great deal of the resources are put in by someone who is attempting to mislead.”³⁵ Tullock’s argument made the somewhat unrealistic assumption that one of the contesting parties always knew in advance that he was “Mr. Wrong,” and therefore sought to obfuscate the fact-finding process. Tullock’s

³² The classic treatment is Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 Am. Econ. Rev. 561 (1971).

³³ See F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945).

³⁴ See Jeffrey S. Parker, *Daubert’s Debut: The Supreme Court, the Economics of Scientific Evidence, and the Adversarial System*, 4 Sup. Ct. Econ. Rev. 1 (1995).

³⁵ GORDON TULLOCK, *TRIALS ON TRIAL* 96 (1980: Columbia).

argument was opposed by competing models, notably by Milgrom and Roberts (1986)³⁶ showing that even entirely self-interested provision of information to a tribunal could produce full and accurate revelation when the interested parties' reports were subject to verification, which would seem to better approximate the American system.

Tullock's argument also was subjected to testing by experimental research that I conducted with Michael Block and others.³⁷ We sought to follow Tullock's assumptions, and therefore drew case scenarios in which one of the two contesting parties actually was "Mr. Wrong," and was supplied with the discrediting information privately. We then subjected the same case scenarios to treatment under idealized versions of "adversarial" versus "inquisitorial" procedures, in which undergraduate experimental subjects played the roles of parties and judges, and the resources invested in fact-finding were equalized across the systems, though of course distributed differently as between adversarial versus inquisitorial procedures.

The experimental results indicated that Tullock's argument was highly sensitive to the relative starting endowments of information to the parties. Under a strongly asymmetrical information structure in which "Mr. Wrong" had a monopoly on the discrediting fact that showed him clearly to be "Mr. Wrong," and "Mr. Right" had no signal at all, the inquisitorial procedure was relatively more efficient at uncovering the discrediting fact, though neither system was very efficient in absolute terms. However, under a less radical but still asymmetric information structure in which "Mr. Right" was given a slight "clue" to the discrediting fact (still within the exclusive knowledge of "Mr. Wrong"), the relative performance of the two systems was reversed, and the absolute efficiency of the better system, in that instance the adversarial, was dramatically higher.

It is always dangerous to over-generalize from any research, and especially experimental research using extreme and abstract representations of comparative systems. However, the Block-Parker experimental results did show a significant difference between the two systems, based upon rule systems alone. Furthermore, the sensitivity of the adversarial system to information structure strongly suggest the important role that pretrial discovery plays in the

³⁶ Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. Econ. 18-32 (1986).

³⁷ Michael K. Block, Jeffrey S. Parker, Olga Vyborna, & Libor Ducek, *An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes*, 2 Am. L. & Econ. Rev. 170-94 (2000). Further results from this series were reported in Michael K. Block & Jeffrey S. Parker, *Decision Making in the Absence of Successful Fact Finding: Theory and Experimental Evidence on Adversarial versus Inquisitorial Systems of Adjudication*, 24 Intl. Rev. L. & Econ. 89-105 (2004), and Jeffrey S. Parker & Peter Lewisch, *Materielle Wahrheitsfindung im Zivilprozess*, in 100 JAHRE ZPO: ÖKONOMISCHE ANLAYSE DES ZIVILPROZESSES (P. Lewisch & W. Rechberger eds.1998: Manz).

adversarial system, presumably as permitting the type of “verification” of parties’ submissions as was postulated by the Milgrom and Roberts theory. What is most striking about these results is the dramatic difference in absolute performance that was produced by this seemingly minor change. In the experimental results, this produced a change in successful revelation of the hidden fact by the relatively superior system, from 28% of cases (by inquisitorial procedure under “private” information) to 77% of cases (by adversarial procedure under “correlated” information). We do not know whether these rates have any relationship to actual systems of procedure, but if they do, the change in information structure alone transformed the better procedural system from something much worse than a coin-flip to something much better than a coin-flip.

It is also striking that these results obtained under an experimental design that suppressed the differences in resource inputs across the two systems, and also suppressed agency cost problems by supplying all agents, including judges, with perfect incentives. Thus, while more research is required to confirm and extend these results, they cast doubt on the idea that the adversarial system is inherently more costly in terms of inputs, or that its agency problems are severe, at least at the trial stage.

2. *Expert Testimony.*

Further development of the Milgrom and Roberts model by Froeb and Kobayashi indicates that expert testimony also is efficiently provided competitively, and that both naivete and bias by jurors do not change that result.³⁸

From the economic point of view, it is difficult to understand the argument for the superiority of court-appointed experts. To an even greater extent than ordinary “lay” witness testimony, experts certainly have no monopoly on the truth. Expert testimony already is provided in an explicit competitive market, and experts often disagree with one another. Why throw away the benefits of competitive production in this context?

The main arguments against competing experts seem to be that parties will “oversupply” expert testimony, or “confuse” the trier of fact. The first argument does not seem plausible. The contesting parties’ incentives are governed by the stakes of the litigation, and therefore can be expected, especially under the “American rule” that each side bears its own costs, to ration their expenditures among the various means of persuasion. Strategic behaviors by opposing parties do not seem very likely to cause an oversupply, because they are no more plausible than irrationally predatory behaviors in the marketplace. In the absence of external effects on other cases, this

³⁸ See Luke M. Froeb & Bruce H. Kobayashi, *Naive, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 J. L. Econ. & Org. 257-75 (1996); Luke M. Froeb & Bruce H. Kobayashi, *Evidence Production in Adversarial vs. Inquisitorial Regimes*, 70 Econ. Letters 267-72 (2001).

does not seem to be a likely problem.

The second argument is more plausible, but it is not clear that it provides a good reason to abandon party control. The best antidote to “confusion” is clarification. If both sides confuse the trier of fact, this does not benefit either side, and so it also seems counter-productive.

3. *“Expert” fact-finding and the separation of powers: judges versus juries*

It is often said that one of the advantages of civil-law procedure is “expert” judges, which seems to mean judges who have training and experience in fact-finding in addition to law determination. This is one of the points stressed by Langbein (cited in note 9 above), but his description of the training and incentives of German judges is neither precise nor inspiring, as it seems to involve primarily a peer-review career ladder that may promote orthodoxy over actual efficiency. Apart from the findings of the Block-Parker experimental research discussed above, there does not appear to be any systematic study of this factor. However, there are some obvious criticisms to the idea of applying “expertise” to fact-finding in litigated matters.

These criticisms follow from two major points: one about litigation, and the other about “expertise.”

As noted above, litigated matters presented for final decision are not representative of even of litigated matters, much less anything else. For this reason, the application of generalizations concerning human behavior to litigated matters on trial seems problematic at best. This problem receives special attention in the American law of evidence, through its general rule against “character” evidence, which forbids the introduction of past conduct in order to prove the event at issue in the litigation.³⁹ In common with many rules of evidence law, this is sometimes rationalized as protecting against prejudice or dissonance on the part of juries, but in fact it applies equally to both jury trials and bench trials. Fundamentally, it recognizes that events contested in trials are not random samples of human events, but rather are, by definition and ultimately by adverse selection for trial, are unique and unrepresentative events.

The second criticism of “expertise” follows on similar lines. After all, what is an “expert” on any subject? It is one of two things: one is a person with extensive experience in a particular subject; the other is a practitioner of a scientific discipline. When it comes to fact-finding in litigation, the first type of expertise is a drawback rather than an advantage, because it actually detracts from the decision-maker’s objectivity, attention to detail, and neutrality. As this type of expert already “knows it all,” he or she will not be as open to revise their priors in light of the evidence. This type of expert will be like one of the American television shows featuring “Judge Judy,” who never listens to the parties or witnesses, because she already has made up her

³⁹ In the Federal Rules of Evidence, which also are used in substantial part by 40 of the 50 states, the basic rules are given in Rules 404 and 405.

mind about the case before ascending the bench.⁴⁰

The “Judge Judy” type of expert also represents the general human tendency to find facts by first formulating an hypothesis, and then seeking out evidence to “confirm” their preliminary judgment. This is also the type of fact-finding that one observe in police investigators, who “play a hunch” by seeking out confirmatory evidence. That is why the results or reports of such investigations are not admitted as evidence in American courts.⁴¹

The second type of expert, the practitioner of a scientific discipline, is nearly the opposite of the know-it-all “Judge Judy.” By the general standards of scientific inquiry, this type of expert forms hypotheses and then seeks out evidence not to confirm but to refute or falsify the hypothesis.⁴² This scientific process of conjecture and refutation is more nearly simulated by the adversarial system, where each opposing party’s conjecture is subject to the opposing party’s efforts at refutation.

Thus, whether “expert” judging is an arguable advantage depends on which type of expert is involved. If expert judging involves a process of conjecture and refutation, and if this process is monitored sufficiently to ensure adherence to the discipline, then it can be an advantage. If, on the other hand, “expert” judging implies that the judges already “know it all,” or nearly all, before considering the case, then it is a disadvantage.

Part of the problem with these types of assessments is that the legal system almost never provides an opportunity to validate or refute its fact-finding efficacy. This is why experimental research methods have unique value in this context, as one can supply “truth” exogenously to the system. But in actual legal systems, it is the rare case whether absolute “truth” can be established.

In contrast with the idea of expert fact-finding, the American civil procedure system displays a distinct preference for “naive” fact-finders, i.e., jurors. Moreover, it insists on a multiplicity of such fact-finders (the minimum civil jury size is 6 in most jurisdictions), and near-

⁴⁰ For those unfamiliar with the reference, see www.judgejudy.com.

⁴¹ Any report to this effect would be hearsay, and such reports are specifically excluded from admission as an exception to the hearsay rule, *see* Rule 803(8) of the U.S. Federal Rules of Evidence. Similar live testimony by a police or official “expert” also would be excluded under federal evidence law, unless framed in terms of the opposite “falsifiability” criteria of current doctrine (see note 42, below, and note 22, above).

⁴² In the U.S. federal system, insistence upon this type of expertise, for purposes of determining the admissibility of expert testimony, is an explicit requirement of the law of evidence. *See* the sources cited in note 22 above.

unanimity in their decision (usually 5 out of 6).⁴³ To the extent that the use of jurors is related to fact-finding efficiency, it seems to rest on both the naivete and multiplicity of fact-finders, perhaps on the ground that the multiple points of view will leave no aspect of the case unexamined.

The institution of the jury certainly increases the cost of the American system, as it removes citizens from their ordinary activities and thereby imposes both out-of-pocket and opportunity costs that are substantial in the aggregate. Whether this cost is justified from the standpoint of efficiency in fact-finding is a debated question that, as yet, has no clear answer.

4. Agency costs

Traditionally, the American jury was not justified on the basis of its fact-finding efficiency, but rather as a check on government power and thus as part of the political arrangement.⁴⁴ In economic terms, this suggests a concern with the agency costs of relegating judicial decision making to state actors alone.

By requiring citizen participation in adjudication, the American system extends the separation-of-powers concepts within the courts themselves. As practiced in most American jurisdictions, jury trial essentially requires a concurrence of both the citizen-component (the jury) and the state-component (the judge) before a judgment may be entered, at least in cases involving substantial issues of fact. This may reflect a concern that judges' incentives may be imperfectly aligned with the fair determination of facts. It may also reflect a concept of specialization as opposed to expertise.

Judges certainly present agency cost problems, which may be worse for factual as opposed to legal questions. Given the lack of authoritative external standards, it is difficult to provide judges with incentives to find facts accurately, as this type of performance generally is unobservable. In contrast, performance on questions of law not only can be reviewed on appeal, but also is subject to criticism by reference to more-or-less ascertainable sources of legal decision, with replications over time. From this perspective, the jury may simply be an imperfect solution to a difficult problem. Of course, jurors' incentives are not very well-aligned to the public interest, either. Jurors may simply want to get the case over with and back to their own lives, or, in the opposite direction, they may take a prurient interest in the affairs of the litigants. However, given the size and diversity of jury panels, juries could involve a mix of both, and thus

⁴³ Under Rule 48 of the Federal Rules of Civil Procedure, the minimum size is 6 and the verdict must be unanimous, unless the parties agree otherwise.

⁴⁴ These are the "political considerations of broader range" to which Wigmore (quoted in note 11, above) had reference. For a general treatment of this aspect of the civil jury, see Oscar G. Chase, *American 'Exceptionalism' and Comparative Procedure*, 50 Am. J. Comp. Law 277 (2002).

cancel each other out.

In contrast, judges have more stable perverse incentives. As they cannot be evaluated on the basis of fact-finding accuracy, then they have no incentive to perform that job well. Instead, they may have a perverse incentive to maximize their observable “throughput” of cases by giving short shrift to the parties’ factual disputes, and instead concentrate on legal rulings that might ensure their promotion, or simply shirk by concentrating on leisure, with observable throughput.⁴⁵

It is not clear that the incentives of civil-law judges are any better. Unlike common-law judges (at least in jury trials), civil-law judges are subject to more searching appellate review of factual determinations, and peer review of their performance. Whether this is an effective check depends on the incentives and proclivities of the reviewing judges. However, given that civil-law systems have no better external standards than common-law systems, it is difficult to see how appellate review alone can be relied upon to insure more accurate fact-finding. It may assure more faithful adherence to approved methodologies of fact-finding, but this is not the same thing.

B. Pretrial Discovery

The relatively expansive use of pretrial discovery in America appears to have caused the most direct conflict between U.S. and European authorities.⁴⁶ While these conflicts ostensible are over respective rights of “sovereignty,”⁴⁷ their economic basis is unclear. Presumably, the

⁴⁵ For an interesting treatment along these lines, by a sitting federal judge, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993).

⁴⁶ While some of the European “blocking statutes” have a more durable and general intent, see *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), the enactment of such statutes, with the specific design to “block” broad American-style discovery, reached a crescendo in the 1980s. See RESTATEMENT, THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (ALI:1987). However, efforts to channel all foreign discovery for use in U.S. courts through the Hague Evidence Convention were turned back by the U.S. Supreme Court’s decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987). Since that time, the degree of conflict seems to have subsided.

⁴⁷ Ironically, U.S. law never insisted on reciprocity, and always was open to providing U.S. judicial assistance in obtaining discovery for use foreign proceedings. See 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). In the *Intel* case, the U.S. Supreme Court held that discovery in aid of an EC Commission proceeding may be obtained from a U.S. firm, even of matters that may not have been ordered by the foreign public body

major economic major point of contention would be over the cost effects of the U.S. system, which almost certainly improves the accuracy of adjudications. But much depends upon whether the improved “justice” is worth the additional expense, and whether the debate ultimately is over different concepts of “justice.”

One of the suggestive recent developments in U.S. procedural law concerns the interplay between relatively “liberal” pleading rules and pretrial discovery. As originally enacted in 1938, the Federal Rules of Civil Procedure involved a considered decision to permit the commencement of civil cases that depended crucially on the expectation that pretrial discovery would supply necessary evidence. While subject to considerable debate and some refinement over the years, that system remains in place.⁴⁸

However, in 1995, the U.S. Congress enacted legislation that singled out private civil cases under the federal securities laws for special treatment, including heightened standards of “particularity” in pleading as a condition for proceeding into discovery on such cases.⁴⁹ Under those provisions, a number of private civil cases were dismissed on the pleadings. Included within those dismissed private cases were initial efforts to bring to light some of the corporate accounting scandals that rocked the American financial industry in later years. Now, in retrospect, there is a growing body of literature questioning the wisdom—indeed even the motivation—of the Congressional legislation.⁵⁰

We can see that this episode points up one of the problems illustrated by the “fractional cow” example. Under “strict” pleading rules and limited (or no) discovery, as is the law in most civil law jurisdictions, and the standard proposed by the ALI/UNIDROIT rules, there will be meritorious cases that will not survive the pleading stage. Furthermore, as illustrated by corporate accounting scandals, “strict” pleading rules may differentially provide greater protection to precisely those cases where vigorous and timely private enforcement is most

itself.

⁴⁸ For a general treatment, see CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL COURTS § 86 (6th ed. 2002).

⁴⁹ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

⁵⁰ See, e.g., Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. Ill. L. Rev. 913 (2003); Steven J. Choi, *The Evidence on Securities Class Actions*, 57 Vand. L. Rev. 1465 (2004); Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J. L. Econ. & Org. 598 (2007). For a more general reflection on the developments, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the ‘Litigation Explosion,’ ‘Liability Crisis,’ and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003).

needed, as informational asymmetries are most pronounced.

On the other side of the balance, it is said that “strict” pleading are necessary to deter “frivolous” cases and to protect parties against burdensome or even extortionate discovery demands. While these points remain under debate in U.S. law and policy, they also present an interesting problem in comparative procedure.

Ultimately, the comparison may depend upon what each system means by “justice.” Screening out meritorious cases simply on the basis of asymmetric information seems both unjust and inefficient. Going back to the example of the “fractional cow,” denying enforcement in such a case can provide a disincentive to reaching efficiency-enhancing bargains in the first place. On the other hand, in light of the high cost of such ex post litigations, the social optimum may require that parties be given incentives to bargain for a more symmetrical information distribution ex ante. However, if that is so, it would seem to require a more refined procedural system than now exists on either side of the Atlantic.

Another important function of pretrial discovery is to assist the litigants in preparing for the trial or final hearing. It seems difficult to argue that this function fails to improve the quality of fact-finding. Recurring again to the “fractional cow” example, this would include such cases as the farmer who is ignorant or dishonest about his own worker trampling the crops, or the rancher who falsifies his business records. What one hears in the debates over pretrial discovery is that it is too “burdensome” or “oppressive” to permit the rancher to depose the farmer’s workers, or for the farmer to depose the rancher’s workers. Why? It could be that the facts will turn out differently from what the deposing party wishes or hopes, but how do we know in advance whether a given case is one of “hidden” discrediting information, or one where there simply is no evidence to be had. We can not make this decision based upon “average” or “typical” cases, because the fully litigated case is neither one of those.

Similarly, whereas one hears a lot about “overdiscovery” as a problem, most of the reported cases actually involve the opposite situation of failure to respond fully to discovery requests.

C. Cost Allocations

One of the virtues of the “American rule” that each party bear its own costs of litigation is that it tends to dampen opportunities to use litigation procedures for purely strategic purposes, at least in cases involving symmetrical stakes between the parties. Like the example of “strategic” use of expert testimony, raising one’s own expenditures purely to raise the costs of one’s adversary is a form of predation that is not a very credible threat, and therefore not an effective strategy.

In contrast, the “loser pays” rule of fee-shifting introduces a number of complications. First, it may induce “strategic” expenditures, by introducing a moral hazard, which becomes more acute with cases that are more certain in outcome. Second, the basic form of the rule

introduces selection bias, as it tends to reward conventional or orthodox cases differentially, and thus discourages lower-probability cases, particularly where the plaintiff is risk-averse. Third, as the rule fundamentally raises the stakes in the case, it may discourage settlement. Fourth, it tends to increase administrative costs that are unrelated to the merits of the case. For these reasons, most functioning systems include principles and policies designed to control the first three problems, which consequently exacerbates the problem of administrative costs.

The analysis of fee-shifting depends importantly on the question whether legal damages under- or over-compensate for economic harms. To the extent that legal damages rules over-compensate, then fee-shifting makes that problem worse. To the extent that legal damages rules under-compensate, then fee-shifting may ameliorate the problem. Thus, fee-shifting itself is a relatively complex problem that depends in part on larger issues concerning the remedial structure.

It remains to be shown whether fee-shifting is, on balance, a good policy. Even when justified in theory, it is difficult to implement in practice. From an economic point of view, fee-shifting tends to discourage the adoption of new technologies and other cost-control measures by the party who expects to prevail. In some U.S. cases where fee-shifting, or explicit awards of attorneys' fees, are permitted, there is some movement toward the idea of awarding fixed percentages of the damages award, rather than the traditional hourly rates, in order to preserve the incentive to adopt efficient methods.

In the United States, it seems likely that cost-allocation rules will continue to evolve toward a more selective approach rather than an all-or-nothing fee-shifting regime. Given that asymmetrical resources and strategic expenditures are an unlikely scenario, more attention is given in U.S. law to the distinct problem of asymmetrical vulnerability to discovery burdens. Thus, when one party holds a large amount of discoverable material and the other holds little or none, it is at least plausible that broad discovery requests could be used strategically as a form of predation, in order to extract a monetary settlement that is less than the costs of discovery exposure. It is not clear that this concern is anything more than a "cosmic anecdote," as was admitted when rules amendments were first adopted in 1983 in response to these problems.⁵¹

Since that time, significant further rule amendments were made to the federal rules in 1993, and again in 2000.⁵² The resulting structure gives judges ample authority to regulate and control abusive discovery requests in a variety of ways, including cost-shifting on the discovery request itself (i.e., that the requesting party compensate the producing party for the expense of compliance), subject to re-adjustment at the end of the case. So far, these authorities have been

⁵¹ See ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984: Federal Judicial Center)

⁵² See Rule 26, Federal Rules of Civil Procedure, as amended.

sought and used sparingly, thus tending to indicate that this is not a widespread problem in practice as opposed to rhetoric.

It seems important to distinguish alleged forms of “extortionate” discovery from the responding party’s desire to conceal discrediting information. Most of the fully litigated cases to date have involved the latter rather than the former, though it is arguable that successful instances of “extortion” produce settlements and therefore are selected out of the decided cases that are publicly reported.

V. “Harmonization”?

If we set aside jury trial as a sui generis issue, and cost-shifting rules as an indeterminate one, the principal remaining differences between U.S. and European civil procedure appear to present a relatively confined policy debate. The main differences that distinguish U.S. procedure—party control of evidence, and relatively more expansive pretrial discovery—seem to make a strong case for a higher “quality” of adjudication, if we define “quality” in terms of a more thorough development of the facts of a case. The main policy debate thus reduces to a question whether that increment of “quality” is worth its additional cost. It may be more refinement than is necessary for the purposes.

Regardless of one’s view on the overall debate, we can all think of instances and examples where the full panoply of rights and procedures under any system—European or American—simply are not justified by the nature or stakes of the case at hand. Therefore, we should expect and in fact do see in both systems that there is a deviation from the standard model of procedure in such instances as small claims courts, traffic courts, and the like. Varying the elaboration and cost of procedures with the stakes makes economic sense, and common sense.

From this point of view, the ALI/UNIDROIT proposal of transnational procedures seems particularly jarring. This work purports to be aimed at promoting “harmonization” in a particular class of cases, defined as “transnational commercial disputes.” Thus, it focuses on business transactions, which are generally based in contract, between relatively sophisticated parties. As noted above, the proposal essentially seeks to eliminate the distinctively American aspects of civil procedure from its “transnational principles.”⁵³ And yet, if the foregoing summary of the debate is correct, this would seem to be least favorable potential application for “harmonization.” If there is any class of cases that calls for the arguably more expensive but also arguably more thorough procedures of American law, it would seem to be commercial disputes. So, the proposal seems to contradict just about everything we know about comparative civil procedure, as well as economics.

⁵³ I note in passing that some aspects of the proposal—such as the elimination of civil jury trial—would not be feasible under U.S. constitutional law. For example, in the U.S. federal system, the 7th Amendment to the constitution would invalid any statute purporting to implement that aspect of the proposal.

In terms of the economic analysis, as developed in Part III above, it is a relatively non-controversial point that contracting business parties, whether national or transnational, are in the best position to make their own specifications of the procedures to be followed in the event of a dispute. International business contracts have done so for decades, and most nations respect those choices, which include choice of law, choice of forum, and choice of procedure in the event of a dispute.⁵⁴ Almost by definition, the parties' choice is the most efficient, as the parties together internalize the costs and benefits of that choice, and know better than anyone else. Therefore, if the ALI and UNIDROIT were proposing yet another template for agreed-upon procedure, akin to the arbitral systems of the AAA, the ICC, or UNCITRAL, the proposal might be unobjectionable. But in fact what the proposal apparently seeks to do is to eliminate competition in procedural systems, at least those supplied by national courts, and to do so through national legislation.

The argument seems to be that “the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems.”⁵⁵ But simple economics shows the opposite. Especially as applied to transactional commercial disputes, the argument for procedural “harmonization” is like saying that “the costs and distress” of consumer choice in the marketplace can be “mitigated” by establishing a monopolist. Procedural systems are no different from any other product. The more choice that exists, the more effective the competition.

Note that, given the contractual context and the pre-existence of a wide variety and diversity of procedural systems, there is no “public good” or “market failure” argument, nor can there be any argument that transnational “harmonization” will reduce transaction costs for anyone. The proposal is to establish a procedural law cartel, plain and simple.

What about the idea that transnational rules or principles will provide a workable “default” rule for transnational parties sufficiently foolish to omit to specify procedural choices in their contract? Even that argument fails, because a transnational commercial transaction with that little attention to the prospect of dispute seems unlikely to involve any knowledge of either the existence or content of such transnational principles, on the part of one or both parties. So, it seems just as likely to involve a fraud as a meaningful “default” assumption about the parties' intent. Furthermore, the better rule in such a case may be to consign such parties to utter chaos ex post, in order to induce optimal attention to the question ex ante.

Thus, there seems to be no economic argument for the enactment of such transnational

⁵⁴ As noted above in Part III, there are limits to the parties' ability to both choose a pre-existing system and contract to modify its procedures. However, this factors tends to strengthen the economic argument against “harmonization.” The more diversity that exists among procedural systems, the broader the range of choice available to the contracting parties ex ante.

⁵⁵ ALI/UNIDROIT Final Report, at 1.

procedures as either a mandatory or default rule. And there are good economic reasons to maintain and even to expand the range of diversity in existing procedural systems. The main reason is that procedural rule makers—whether they are private reformers or public officials—are highly unlikely to choose efficient procedural rules of uniform application, simply because they lack sufficient knowledge to do so, even assuming that they are well intentioned and even assuming that there is an efficient uniform rule.⁵⁶ Another recent experience in U.S. procedural law illustrates this point.

In 1993, the rulemaking committees for the U.S. federal rules of civil procedure promulgated a new standard for “disclosure” in U.S. federal procedure. The idea apparently was to save transaction costs in discovery by imposing a self-executing duty of initial “disclosure” on the parties, guided by the issues made in the pleadings. The proposal had been controversial, because “disclosure” required the parties spontaneously to produce both favorable and unfavorable evidence, and thus, in effect, required each party to imagine what would be helpful to the opposing party’s case. Given the controversy, the committees took the unusual step of expressly authorizing each of the 94 federal districts to “opt-out” of the uniform rule. In the event, many districts did opt out, and the pattern of deviation was both diverse and informative.⁵⁷ After seven years under the opt-out system, the rule was amended in 2000 to remove the self-abnegatory aspects of the disclosure requirement, which is now limited to those matters supporting the disclosing party’s case.⁵⁸ Of course, some of the critics of the original proposal had predicted that outcome from economic theory. But the deeper point was that localized experimentation with diverse rules had produced more information about the relative properties of procedural options than either the rulemaking committees or the their critics had foreseen, and the imposition of a uniform rule would have delayed or frustrated the development of that knowledge.

This point may be generalized. All other things equal, more diversity in procedural

⁵⁶ For a general treatment of uniform laws, see Larry E. Ribstein and Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Leg. Studies 131 (1996). As Ribstein and Kobayashi point out, there are many impulses that can account for uniform laws, other than the efficiency of uniformity.

⁵⁷ See Bruce H Kobayashi, Jeffrey S. Parker, & Larry E. Ribstein, *The Process of Procedural Reform: Centralized Uniformity versus Local Experimentation*, George Mason University School of Law Working Paper (1996). The basic findings were that districts with heavy judge workloads were the most likely to opt-out, which was exactly the opposite of the assumption by the central rulemaking committees.

⁵⁸ See Rule 26(a) of the Federal Rules of Civil Procedure, as amended in 2000. That same amendment also excluded a number of particular types of proceedings from even the reduced general requirement of “disclosure,” see Fed. R. Civ. P. 26(a)(1)(B).

systems is better than less diversity, because it provides more opportunity to develop rules that are suitable for either general, special, or localized application. This is particularly true where parties have the opportunity to choose among procedural systems prior to their dispute. But even when the choice is made after the dispute arises, it is still more efficient to allow the disputing parties a choice of systems.

Now returning to the comparative properties of American civil procedure, if we view that system as embodying an “expensive,” but perhaps more refined, option, then the preservation of that distinctive option is what promotes efficiency in transnational procedure. If in fact transnational commercial disputes are more likely to involve higher stakes than other disputes, then we should expect to observe at least some contracting parties choosing that option. If some do, there is no reason to suppress that choice by international agreement or national legislation. Thus, the entire project of procedural “harmonization” seems wrong-headed, even if well-intended. The adoption of such a proposal would actually reduce the efficiency of the transnational procedural system.