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## A Genuine Civil Justice Crisis?

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## A GENUINE CIVIL JUSTICE CRISIS?

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When this Association had its eleventh Congress, in Vienna in 1999, Professor Zuckerman presided over a session on 'Civil Justice in Crisis' regarding studies that were later published as a book.<sup>1</sup> In his masterful overview of the various studies in the book, Professor Zuckerman recognized that '[a] sense of crisis in the administration of civil justice is by no means universal, but it is widespread.'<sup>2</sup> He discerned that a procedure system should aspire to rectitude -- accurate decisions -- but also that no society could spend all its resources pursuing that goal.<sup>3</sup> He also recognized that '[p]rocedural quality is to some extent a function of the resources that we are prepared to invest in procedure.'<sup>4</sup> Given that tension, 'what lies behind different methods of doing justice is really a difference in priorities.'<sup>5</sup>

In 1999, that tension seemed remote compared to the challenges the world faces today. From the American perspective, some say the 1990s were 'the best decade ever.'<sup>6</sup> The tremendous

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<sup>1</sup> See Civil Justice in Crisis (A.A.S. Zuckerman, ed., 1999).

<sup>2</sup> Adrian A.S. Zuckerman, Justice in Crisis: Comparative Dimensions of Civil Procedure, in Zuckerman, *supra* note 1, at 3, 12.

<sup>3</sup> *Id.* at 8 (referring to 'the question of whether a well-ordered state is under an obligation to provide the most accurate civil procedure no matter how much it costs' and concluding that 'it would be absurd to say that we are entitled to the best legal procedure regardless of expense').

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> See Kurt Andersen, The Best Decade Ever? The 1990s, Obviously, N.Y. Times, Feb. 8, 2015: 'By the end of the decade, in fact, there was so much good news -- a federal budget surplus, dramatic reductions in violent crime (the murder rate in the

changes wrought by the end of the Soviet Union were then less than a decade in the past, and talk of a 'new world order' was popular. For example, some say that the events of 1989 were, for Germany, of comparable importance to the events of 1789 in France.<sup>7</sup> The European Union was gaining strength and moving toward more unity; the Euro had begun to replace the national currencies that were reflected in many of the national reports in Professor Zuckerman's book.

Today things are enormously different. For Americans, the date September 11 is burned into our memories. For many other nations other dates and events have similar weight. This year, the forces of intolerance and anarchy seem to be prominent, and may be ascendent in many parts of the world. Governmental arrangements that were gaining strength in 1999 are now under challenge. Most significantly, starting in 2008 most of the world has endured an extended economic crisis that is testing many political bonds, particularly in the EU. Thus, the title of this Congress -- 'Effective Judicial Relief and Remedies in an Age of Austerity' -- seems singularly suitable. Austerity may be the actual new world order.

So how much does procedure matter at such moments? At the last Congress, in Heidelberg, I offered some initial thoughts about the impact of austerity on procedure.<sup>8</sup> At this Congress, we will be able to focus on specific issues such as interim

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United States declined by 41 percent) and in deaths from H.I.V./AIDS -- that each astounding achievement didn't quite register as miraculous.'

<sup>7</sup> See Twenty Five Years On, *The Economist*, Nov. 8, 2014, at 54 (quoting the head of a foundation that studied East German, and noting that the 'end of history' seemed possible).

<sup>8</sup> See Richard Marcus, *Procedure in a Time of Austerity*, 3 *Int'l J. of Procedural Law* 133 (2013).

relief,<sup>9</sup> simplified procedure for smaller matters,<sup>10</sup> measures that affect personal mobility,<sup>11</sup> coercive in personam orders,<sup>12</sup> the reform of institutions,<sup>13</sup> and forms of relief.<sup>14</sup>

To set the scene for these detailed examinations, I propose to provide some general comments, drawing in part on the experience I've had since before the Vienna Congress in reforms of American procedure.<sup>15</sup> I will begin by reflecting on the enduring sense of crisis that serves as a recurrent backdrop to proposals for procedural change, and offer examples of stress that austerity places on some procedural institutions. I will then turn to the ways in which austerity bears on procedure, and particularly how one might cope with austerity by changing procedure to save money in operating a civil justice system. The concerns that emerge include making the parties responsible for as much as possible, rather than the court; the countervailing and widespread impulse toward greater judicial control of the lawyers; the possibility of saving money through use of

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<sup>9</sup> The first session of the Congress.

<sup>10</sup> The second session of the Congress.

<sup>11</sup> The third session of the Congress.

<sup>12</sup> The fourth session of the Congress.

<sup>13</sup> The fifth session of the Congress.

<sup>14</sup> The sixth session of the Congress.

<sup>15</sup> Since 1996, I have served as Associate Reporter of the US Judicial Conference Advisory Committee on Civil Rules, the body that develops proposals to change the Federal Rules of Civil Procedure. Since the Vienna Conference, that activity has included major amendment packages in 2000 (to discovery), 2003 (to the class-action rule), 2006 (for discovery of electronic materials), and 2010 (revising expert discovery practices). In 2015, the US Supreme Court has before it another package of reforms to discovery practice that may go into effect on Dec. 1, 2015, if adopted by the Court. Further changes to the class-action rule are now under study.

technology; the 'social services' functions of court systems that may produce substantial costs; and the possibility of simplified procedures to save money in the operation of the court system.

This array of possible responses leads to some reflection on the uses of austerity to further legal change. On that subject, I will draw from Professor Aviram's recent book *Cheap on Crime*,<sup>16</sup> which examines the way in which financial pressures have given new force to humanitarian arguments for changing America's 40-year embrace of mass incarceration. She cautions that saving money and serving humanitarian goals are different things, and adds that the alliance of these arguments is questionable and may be short-lived. It seems to me that a somewhat similar issue may confront us as proceduralists -- financial arguments may be advanced to further objectives that are really not particularly connected to reducing financial burdens on civil justice systems. Both with regard to civil justice and criminal justice, then, might one hesitate to regard austerity as a prime reason for serious changes.

#### I. PROCEDURE AND THE CRISIS MENTALITY

Professor Zuckerman touched a nerve with this crisis theme sixteen years ago. Rahm Emanuel, Chief of Staff in the White House during President Obama's first term, allegedly said: 'You never let a serious crisis go to waste. And what I mean by that is that it's an opportunity to do things you think you could not do before.' Similar sentiments have been attributed to Winston Churchill and others.

The history of procedural reform in America, and probably

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<sup>16</sup> Hadar Aviram, *Cheap on Crime* (2015).

elsewhere, lends strength to this notion.<sup>17</sup> The Judicature Acts in England in the 19th century reflected such concerns.<sup>18</sup> The American reforms of the 20th century began with a 1906 speech by Roscoe Pound declaring a crisis of popular dissatisfaction with US procedure.<sup>19</sup> More recently, unhappiness with procedure in America has produced very aggressive statements about its potential impact on the US economy and its economic future. A prominent example was the 1991 Agenda for Civil Justice Reform in America,<sup>20</sup> produced by a presidential commission headed by the Vice President. This document began by asserting that 'America has become a litigious society' and citing a finance professor who 'estimated that the average lawyer takes \$1 million a year from the country's output of goods and services.'<sup>21</sup>

Such assertions do not withstand careful examination. For one thing, as contributions to Professor Zuckerman's book pointed out, other countries experience high rates of litigation. As Professor Gottwald pointed out in that book regarding Germany: 'In percentage terms, the courts here are made use of to a greater extent than anywhere else in the world.'<sup>22</sup> Professor

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<sup>17</sup> See Richard Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 Brooklyn L. Rev. 761, 762-67 (1993) (discussing 'the crisis mentality' as it affects discussions of changing procedures).

<sup>18</sup> See Edson Sunderland, *The English Struggle for Procedural Reform*, 39 Harv. L. Rev. 725 (1926).

<sup>19</sup> See Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 Rep. of the A.B.A. 395 (1906).

<sup>20</sup> President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* (1991).

<sup>21</sup> *Id.* at 1.

<sup>22</sup> Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition. The German Perspective*, in Zuckerman, *supra* note 1, at 207, 220.

Cadiet, his successor as president of this Association, noted in the same book that France was experiencing '[a]n increasing ideology of compensation, transforming any trouble into a claim for damages against someone else. . . . France is moving slowly towards an American-styles litigation society.'<sup>23</sup> Similar reports abounded about other countries.<sup>24</sup>

Moreover, despite the perception abroad, much work on actual US litigation rates shows that this widely- held impression of US litigiousness is overstated.<sup>25</sup> Surely the American legal profession's cost cannot approach what the Council on Competitiveness said in 1991, for then it would signify a drain

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<sup>23</sup> Loic Cadiet, *Civil Justice Reform: Access, Cost, and Delay: The French Perspective*, in Zuckerman, *supra* note 1, at 291, 307).

<sup>24</sup> See, e.g., Yukio Hasebe, *Civil Justice Reform: Access, Cost, and Expedition. The Japanese Perspective*, in Zuckerman, *supra* note 1, at 235, 236 ('The civil justice system was faced with fierce criticism in the 1980s. The critics said that civil justice was slow, expensive, and hardly comprehensible to the ordinary person.');

Sergio Bermudes, *Administration of Civil Justice in Brazil*, in Zuckerman, *supra* note 1, at 347, 357 ('Most courts are unbearably overloaded').

K.D. Kerameus & S. Koussoulis, *Civil Justice Reform: Access, Costs, and Delay: A Greek Perspective*, in *id.* at 363, 369 (noting that the 'vast majority' of first-instance decisions are appealed).

On the other hand, the reports on some other countries were different. Professor Blankenburg reported that '[t]he Dutch pattern of litigation is amazing' because the rate of litigation is so low. Erhard Blankenburg, *Civil Justice: Access, Cost, and Expedition. The Netherlands*, *id.* at 442, 454. Professors Marques, Gomes, and Pedroso noted, somewhat ruefully: 'Little propensity to litigate, especially by individuals, is a sign of passivity which may be a trait of the Portuguese national character.' Maria Manuel Letao Marques, Conceiao Gomes & Joao Pedroso, *The Portuguese System of Civil Procedure*, *id.* at 413, 421.

<sup>25</sup> See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. Rev.* 4 (1983).

on the country of about \$1 trillion, given that the country probably has one million lawyers. Indeed, in her 1999 report on procedural reform on Japan, Professor Hasebe noted that the problem in that country was that there were too few lawyers.<sup>26</sup>

Nonetheless, the theme continues to be prominent in the US, just as it seems to have been prominent in other places in the 1990s. As I noted in 1993 regarding the situation in the US, 'it is hard to find anyone who is fundamentally satisfied with the course and condition of civil litigation today.'<sup>27</sup> But it also seems that crisis talk may be something that is viewed as necessary to get the attention of legislatures or other potential reformers, who might otherwise not take procedure too seriously. In 1922, for example, a witness told a committee in the US Congress that the weakness of American procedure 'is one of the things that is making Bolsheviks in this country.'<sup>28</sup> When there is a real crisis, however, there is not much room to strengthen the crisis rhetoric because it has been used so often in times of relative normality.

## II. THE AUSTERITY CRISIS AND PROCEDURE

It seems to be widely agreed that many countries now confront austerity in a way that was not true, or at least was not appreciated, in 1999, when Professor Zuckerman's book

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<sup>26</sup> See Hasebe, *supra* note 24, at 255-56.

<sup>27</sup> Marcus, *Babies and Bathwater*, *supra* note 17, at 763.

<sup>28</sup> See *Procedure in the Federal courts: Hearings on H.R. 2377 and H.R. 90 Before the House Committee on the Judiciary, 67th Cong., 2d Sess. 6, 13 (1922)*, quoted in Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 959 (1987).

appeared. It contains a mention or two of austerity policies,<sup>29</sup> but that is far from central.

Often the current austerity problem is traced to the tumult caused by the financial crisis beginning in 2008. From a more general perspective, that view may overlook deeper causes. Some sociologists regard austerity as the inevitable consequence of the advent of the 'welfare state' in many places after World War II. In the view of Professor Pierson, for example, those countries have been approaching a state of 'essentially permanent austerity' since the 1970s.<sup>30</sup> In 1996, he announced that '[t]he much-discussed crisis of the welfare state is now two decades old.'<sup>31</sup> As we have seen in many places, the result often is an effort to guard one's own place in the budget -- 'Let them cut somebody else's budget' is the reflexive call of the day; 'my budget is too important.' Thus, the challenge for proceduralists is to explain why *our* budget is sacrosanct.

As the overall theme of this Congress makes clear, austerity has begun to affect procedure. That reality surely appears in the US, and others can easily add examples from their own countries. As the various sessions of this Congress unfold, the consequences and limits of an era of austerity might well be kept in mind. An abiding reality may be that, compared to other governmental costs that feel the pinch of austerity, it may be a challenge to urge that the civil justice system -- and procedure in particular -- should be regarded as more important than, for

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<sup>29</sup> See Blankenburg, *supra* note 24, at 455 (referring to '[a]usterity policies' in the Netherlands regarding eligibility for legal aid).

<sup>30</sup> Paul Pierson, *Coping With Permanent Austerity: Welfare State Restructuring in Affluent Democracies*, 43 *Revue Francaise de Socologie* 369, 370 (2002).

<sup>31</sup> Paul Pierson, *The New Politics of the Welfare State*, 48 *World Politics* 143, 143 (1996).

example, pensions, health care, and schooling. It is perhaps the nature of austerity to pit such interests against one another. That may explain the appeal of 'across the board' austerity schemes. As a recent article in the Association's journal recognized, 'the main puzzle is how to meet the contemporary objectives of adjudication in view of civil litigation's material constraints.'<sup>32</sup> This point reflects a point made by Professor Zuckerman -- that proportionality is the new byword in many judicial systems.<sup>33</sup>

The point is also clear in various recent American expressions about austerity and our judicial system. In his 2013 year-end message, for example, Chief Justice Roberts decried the impact on the federal judiciary that budget cuts had produced: 'Unlike most Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts.'<sup>34</sup> Note that this message says that the judicial branch should be preferred to other governmental activities that are 'discretionary.' As a consequence of flat budgets, the Chief Justice also reported, the US federal courts had to reduce staffing by over 3,000 employees, to the lowest staffing level since 1997, despite workload increases during this period.<sup>35</sup>

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<sup>32</sup> Sergio Cruz Arenhart & Gustavo Osna, Complexity, Proportionality and the 'Pan-Procedural Approach': Some Bases of Contemporary Civil Litigation, 4 Int'l J. of Proc. Law 178, 191 (2014).

<sup>33</sup> Zuckerman, supra note 1, at 48 (referring to 'the development of a new philosophy of procedure' based on 'the idea of proportionality').

<sup>34</sup> Chief Justice John Roberts, 2013 Year-End Report on the Federal Judiciary, at 5. This report is available at:

[www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf](http://www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf)

<sup>35</sup> Id. at 5-6.

The story in the California state courts is similar. The new President of the State Bar of California, for example, noted: 'The impact of court budget cuts has been profound and will continue to affect us in a number of ways if we are not able to stabilize the funding for our courts. . . . [T]here have been enormous delays in the court system such that motions that would routinely take a few weeks can now take over a year to be heard and resolved.'<sup>36</sup> One reaction has been to close some outlying courthouses, and there is a debate about whether to sell these buildings or retain them in hopes of holding court in them again.<sup>37</sup> Proposals have been made to increase court fees for at least some litigants to raise more revenue, and there have also been proposals to curtail use of some procedural mechanisms to cut down on delay and cost.<sup>38</sup> Meanwhile, Governor Brown of California could appoint new judges, but they would have no staff due to staff cuts caused by austerity.<sup>39</sup>

Such situations present the conundrum what government should prefer during times of austerity (or, perhaps, eras of austerity). There may be other needs that might claim priority. To take one example, a newspaper story recently reported that in

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<sup>36</sup> Interview with Craig Holden, Civil Justice Reform, The Metropolitan Corporate Counsel, Nov. 2014, at 17.

<sup>37</sup> See Saul Sugarman, *Some Want to Sell Shuttered Courthouses But Details are Messy*, San Francisco Daily Journal, Dec. 17, 2014, at 1 (explaining that hundreds of thousands of dollars are being spent to maintain courthouse buildings that may never again be used).

<sup>38</sup> See Paul Jones, *Judges, Lawyers Consider Bill to Eliminate Many Demurrers*, San Francisco Daily Journal, Feb. 5, 2015, at 1 (describing legislative proposal to abolish or eliminate the demurrer, a move that challenges the sufficiency of the complaint and is asserted in as many as 20% of all cases).

<sup>39</sup> See Saul Sugarman & Paul Jones, *Brown Has Judges to Appoint, but Courts Lack Staff For Them*, San Francisco Daily Journal, April 25, 2014, at 1.

Greece 'private' nurses from other countries are available for 'rent' to replace nursing services hospitals can no longer provide. 'Greece's dire finances have gutted its health care system. Universal coverage effectively ended under the austerity measures imposed under the terms of the country's bailout.'<sup>40</sup> Admittedly, the situation in Greece may be extreme, but the pressures likely exist in many places.

One reaction to this sort of tension is to stress that civil litigation is an essential public service. That is at the heart of Professor Genn's 2008 indictment of the budget cutbacks in the UK on various court services, and increases in some court fees.<sup>41</sup> She despairs that 'an accepted principle is the need to control expenditure on civil justice,'<sup>42</sup> a willingness she puts down to governments' acceptance that there is a crisis.<sup>43</sup> But one might regard this argument as embracing a view whose time has passed -- that what Professor Zuckerman called the 'rectitude' of judicial decisions is a value above all others, including particularly the cost of arriving at that decision. That surely seems to be the thrust of Professor Sorabji's new book.<sup>44</sup>

It is, frankly, extremely difficult to devise guidelines on which services that public entities provide should be regarded as redundant when austerity arrives. Consider the recent complaints

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<sup>40</sup> Danny Hakim, Greek Austerity Spawns Fakery: Playing Nurse, N.Y. Times, feb. 8, 2015, at 1.

<sup>41</sup> See Hazel Genn, Judging Civil Justice, chp. 2 (2010).

<sup>42</sup> Id. at 58.

<sup>43</sup> See id. at 63 ('It is remarkable how willing governments around the world have been to assert the existence of crises and proposed solutions without any evidence base or means of assessing the effect on access to justice').

<sup>44</sup> See generally John Sorabji, English Civil Justice After the Woolf and Jackson Reforms: A Critical Analysis (2014).

of the new United Nations High Commissioner for Human Rights about his annual budget of \$265 million per year. Stressing that this amount is only 3% of the entire U.N. budget, he says that '[i]t's a trifle. You hardly convince yourself that it's a serious commitment by states, given the enormity of the task before us.'<sup>45</sup> Much as one must recognize the importance of human rights, one probably has to recognize also the importance of many other things the U.N. spends money to try to accomplish.

At least some American arguments for preferring public expenditures on courts seem as implausible as the Council on Competitiveness's 1991 suggestion that every American lawyer takes \$1 million out of the US economy.<sup>46</sup> Consider a 2012 report on the economic impact of reduced funding of the California judicial system.<sup>47</sup> The summary of the report is that 'reductions in civil judiciary funding were expected to produce declines of \$13 billion in business activity due to decreased utilization of legal services, \$15 billion in economic losses associated with increased uncertainty among litigants, damage to the Los Angeles and California economies amounting to 150,000 lost jobs, and lost local and state tax revenue of \$1.6 billion.'<sup>48</sup> It would seem that boosting spending on the judiciary is a sure route out of recession. But boosting such spending does not always seem to produce such effects. For example, in 1999 Professor Cadet noted that the French judicial budget had doubled in the 18 years

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<sup>45</sup> Nick Cumming-Bruce, U.N. Rights Chief Says He'll Shine a Light on Countries Big and Small, N.Y. Times, Jan. 31, 2015, at A8.

<sup>46</sup> See *supra* text accompanying note 21.

<sup>47</sup> See Nels Pearsall, Bo Shippen & Roy Weinstein, *Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation* (ERS Group) 2013.

<sup>48</sup> *Id.* at 1.

since 1981.<sup>49</sup> He added that it nonetheless made France a 'poor relation' in such expenditure to the UK and Germany, and that the budget for veterans was larger.<sup>50</sup> He did not claim that boosting the French judicial budget to equal levels would solve France's economic problems.

Although some say justice is a 'pearl beyond price,' that surely is not a solution to the challenges of modern austerity. At the same time, it is also surely true that having a functioning judicial system is an important value for a society. At some point, it may really be a burden on the economy. Thus, *The Economist* recently reported that '[t]he sluggishness of civil justice is a big reason why the Italian economy is still not growing.'<sup>51</sup> A 2011 *New York Times* story said that the difficulties businesses in the EU confront when trying to collect amounts due by using the court systems of other EU countries caused them to stop doing business across borders. EU officials said that 'at least 55 billion Euros a year is simply being written off, much of it because businesses find it too daunting to press expensive, confusing lawsuits in foreign countries.'<sup>52</sup> EU officials estimated that more effective judicial systems would generate 60 billion to 140 billion Euros a year in additional trade. At least sometimes, problems with the public court system actually drive away even potential local users; thus, a recent story reported that many Afghans are turning to Taliban courts

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<sup>49</sup> Cadiet, *supra* note 23, at 208.

<sup>50</sup> See *id.*

<sup>51</sup> Justice Denied?, *The Economist*, July 19, 2014, at 47. the story quotes a commercial diplomat as saying: 'There are defense companies that export all over Europe, but not to Italy, because they believe that what they make will be counterfeited and that to get redress will take many years.'

<sup>52</sup> Suzanne Daley & Stephen Castle, *Slow Payers Hinder Trade in Europe*, *N.Y. Times*, April 18, 2011.

because the public courts are corrupt.<sup>53</sup>

So as you consider the discussions in the sessions of this Congress that follow, one thing to keep in mind is the extent that the consequences of budget cuts for the judicial system can be regarded as more severe than the consequences of other budget cuts. If they suppress trade, perhaps they are.

### III. WAYS TO SAVE MONEY ON A JUSTICE SYSTEM

Like other governmental institutions, then, courts are likely to find themselves engaged in belt-tightening for some time. There are probably various ways to do so, and some of them involve matters at the heartland of procedure and provide contrasts among differing national systems. It may be useful to have those differences in mind as one considers the various topics covered in the sessions of this Congress.

#### A. *The BYO Approach*

Every American university student learns the term 'BYO' soon after enrolling -- it means 'bring your own' liquor to parties. American litigation is largely a BYO operation. Plaintiffs must do some investigation before filing complaints,<sup>54</sup> but the pleading standards are relatively forgiving compared to the standards of most countries, and even those relaxed standards are applied only if the opposing party makes a motion challenging the pleading. The parties are free to demand discovery without any

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<sup>53</sup> Azam Ahmed, *Taliban Justice Gains Favor As Official Courts Fail*, N.Y. Times, Feb. 1, 2015, at 1.

<sup>54</sup> See Fed. R. Civ. P. 11(b) (regarding the lawyer's certification that there is good ground for the complaint based on an investigation reasonable under the circumstances).

prior judicial review or even knowledge.<sup>55</sup> The judge has no duty (or even right) to investigate the circumstances of the case but only to respond to motions brought by the parties. The parties must list their evidence before trial begins,<sup>56</sup> and they may not use evidence that was not so disclosed.<sup>57</sup> Although the trial court can permit undisclosed evidence to be used if the use is 'harmless,' it is also true that the court should not permit that if it would be 'harmful' to a party's case. Given the broad willingness of courts in other countries to consider new evidence on appeal and attempt to ensure that the decision is justified under all the evidence, this is a singular commitment to the BYO approach.

That BYO approach even extends to the legal rules to be used to decide the case. In jury trials, the judge usually need not instruct the jury on any ground unless requested by a party to do so, and a party unhappy with a jury instruction may not seek reversal unless it argued in the first-instance court that the proposed instruction was wrong.<sup>58</sup> In court trials, the judge must make findings of fact and enter conclusions of law,<sup>59</sup> but the judge may direct the parties to submit proposed findings and conclusions and may adopt those as the court's ruling.<sup>60</sup> What

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<sup>55</sup> See Fed. R. Civ. P. 5(d) (commanding that discovery requests and responses not be filed in court).

<sup>56</sup> See Fed. R. Civ. P. 26(a)(3) (regarding pretrial disclosures).

<sup>57</sup> See Fed. R. Civ. P. 37(c)(1) (commanding that evidence not disclosed be excluded).

<sup>58</sup> See Fed. R. Civ. P. 51.

<sup>59</sup> See Fed. R. Civ. P. 52(a).

<sup>60</sup> See, e.g., *Counihan v. Allstate Ins. Co.*, 193 F.3d 357, 363 (2d Cir. 1999) (reviewing practice and upholding the district court's adoption of proposed findings submitted by the winning party).

this means, in large measure, is that it is not the court's responsibility to discern the proper legal rules to be applied to the case.

At the appellate level, this BYO approach continues. Only a small proportion of cases ever reach the point where an appeal is allowed because the US functions with a 'final judgment' rule that denies appellate review until after the end of the entire case.<sup>61</sup> Because most cases are settled (even after trial begins), that point never arrives in those cases. And the appellate court will defer to the trial court on many matters that are considered 'discretionary,' including admissibility of evidence, and will also affirm on 'harmless error' grounds even if it concludes that the trial court made a mistake.<sup>62</sup>

Finally, many disputes in the US are now subject to mandatory arbitration agreements that the US Supreme Court has enforced quite vigorously in recent years. These realities of the American legal system may lie behind our Chief Justice's objection that it is a relatively lean operation without much that can be cut.<sup>63</sup>

Yet another aspect of the American legal system in recent decades bears on costs borne by governments. As was explored during one session at the Heidelberg Congress in 2011, the US relies heavily on private enforcement of public norms.<sup>64</sup> There are many reasons why those from different legal systems might

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<sup>61</sup> See 28 U.S.C. § 1291.

<sup>62</sup> See Fed. R. Civ. P. 61.

<sup>63</sup> See supra text accompanying note 34.

<sup>64</sup> See Stephen Burbank, Sean Farhang & Herbert Kritzer, Private Enforcement, 17 Lewis & Clark L. Rev. 637 (2013) (revised version of the submission during the Heidelberg Congress).

question this feature of the American system. But one consequence is that the budgets of public regulatory agencies may be much smaller because they do not have to support the cost of enforcement in the same way public agencies in other countries do. A recent bill adopted by the California Legislature provides an illustration. The bill authorizes private lawyers to sue businesses for violating employment laws, and one report is that 'the law serves to take pressure off regulators who investigate alleged labor law violations by making it easier for the plaintiffs' bar to pull businesses into the courtroom with private companies.'<sup>65</sup> Beyond that, some state attorneys' general are hiring private lawyers to bring cases in the name of the state on a contingency basis. A *New York Times* article reports that these public officials explain that 'with tight budgets, hiring outside lawyers is often the only tool they have to achieve rough parity with the army of corporate lawyers who are aggressively trying to blunt the lawsuits.'<sup>66</sup>

Altogether, there may be many reasons why other countries to not adopt similar measures. To take the state attorneys general who hire private lawyers as a starting point, a former attorney general was quoted as warning that this practice 'seriously threatens the perception of integrity and professionalism of the

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<sup>65</sup> Laura Hautala, *Subcontractor Law Seen as a Coming Boon for Plaintiffs Lawyers*, San Francisco Daily Journal, Feb. 10, 2015, at 1.

<sup>66</sup> Eric Libpon, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, Dec. 18, 2014, at A1. The story goes on to quote an attorney general who explained that 'lawsuits against major corporations or industry sectors can require the hiring of expert witnesses and produce hundreds of thousands of pages of documents that need to be reviewed. All of this comes at high cost, and outside lawyers can foot the bills up front.'

office.'<sup>67</sup> Moreover, it may be that private enforcement can hobble public enforcement; in a recent case the settlement of a private class action was held to bar action by the California Attorney General seeking remedies for California citizens on the ground that they were bound by the class-action settlement on principles of *res judicata*.<sup>68</sup>

But the more challenging orientation is likely the BYO approach. To take a competing example from Professor Zuckerman's 1999 book, the report on Portugal said that judges 'have the duty to compensate for the omissions of the litigants, in furtherance of the principle of the discovery of the material truth.'<sup>69</sup> Much more generally, many (perhaps most) countries permit new issues and evidence to be presented on appeal even though not raised before the court of first instance, often due to the commitment that the appellate courts ensure that the outcome was correct whatever the skill or attentiveness of the litigants and their lawyers. This pursuit of what Professor Zuckerman called rectitude of decision may come at a fairly high price.

For those seeking savings on the public costs of litigation, some compromises may become necessary. At least from an American perspective, it sometimes seems that the greater judicial responsibilities in other systems come with a serious cost. For example, writing in the mid 1980s, an American professor focused on the requirement then that a Brazilian judge review and approve the complaint before the plaintiff can serve the defendant: 'The procedure for filing a complaint practically guarantees

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<sup>67</sup> See *id.*; for further questions, see Margaret Lemos & Max Minzer, For-Profit Public Enforcement, 127 Harv. L. Rev. 853 (2014).

<sup>68</sup> See *California v. IntelliGender, LLC*, 771 F.3d 1169 (9th Cir. 2014).

<sup>69</sup> Gomes, Marques & Pedroso, *supra* note 24, at 434.

substantial delays in starting a lawsuit, particularly if the courts are congested. Unlike the United States, Brazil does not permit the plaintiff's attorney to have the complaint served until the judge has reviewed and approved it, a process that can easily consume several months, and even more if an interlocutory appeal is taken. Since the work done by the judge on his own in reviewing the law can be done more easily after hearing from defendant's counsel, the [Brazilian code's] requirement of judicial approval prior to service of the complaint seems an inefficient expenditure of judicial resources.'<sup>70</sup> No doubt there are reasons for requiring advance judicial scrutiny of proposed suits, and some Americans urge that the US recognize them,<sup>71</sup> but that judicial effort involves a court burden compared to the BYO approach.

#### ***B. The Countervailing Push for Judicial Management***

Another feature that Professor Zuckerman noted in 1999 in many countries was what he called 'the universal assertion of judicial control.'<sup>72</sup> That activity surely typifies American judicial activity. Indeed, it may to a significant extent be a consequence of the BYO aspect of American procedure. More than a decade ago, at a procedure conference in Japan, I offered the view that judicial management was the American response to the increased latitude American lawyers have under our BYO

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<sup>70</sup> Keith Rosenn, *Civil Procedure in Brazil*, 34 *Am. J. Compar. Law* 487, 492 (1986). Note that Brazil has adopted a new procedure code.

<sup>71</sup> See E. Donald Elliott, *Twombly in Context: Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, 64 *U. Fla. L. Rev.* 895 (2012) (arguing that the American permission for plaintiffs to proceed with lawsuits before a judge has reviewed and approved the complaint violates due process because it imposes substantial expenses on defendants without any assurance there is good cause for the suit).

<sup>72</sup> Zuckerman, *supra* note 1, at 47-48.

procedure.<sup>73</sup> Similar emphasis on judicial control was introduced into UK procedure by Lord Woolf's reforms in the late 1990s. In various civil law jurisdictions it seems that such management has been a feature of judicial activity for a long time.

The question now may be whether the courts can undertake this new (or continuing) supervisory role while coping also with budget cuts. This sort of question may profitably be kept in mind during the various sessions of this Congress -- to what extent are measures that deal with the problems covered likely also to impose serious burdens on courts?

### **C. *The technology fix***

I work near Silicon Valley; Twitter and Uber both have their headquarters a few blocks from my office. Probably more than most assembled here, I find myself on the front lines in the Digital Age. In 2010, the Association held a full conference on the role of electronic technology in civil procedure, with the optimistic subtitle: 'New Paths to Justice from Around the World.'<sup>74</sup> Surely the pervasiveness of electronic communication has grown appreciably since then.

I confess myself skeptical about many claims that this technology will revolutionize legal or judicial practice and make it better.<sup>75</sup> Others, notably Richard Susskind of the UK, expect

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<sup>73</sup> See Richard Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 *Hast. Int'l & Compar. L. Rev.*, 3 (2003).

<sup>74</sup> See Miklos Kengyel & Zoltan Nemessanyi, *Electronic Technology and Civil Procedure* (2012).

<sup>75</sup> See, e.g., Richard Marcus, *The Impact of Digital Information on American Evidence-Gathering and Trial -- The Straw That Breaks the Camel's Back?*, in Kengyel & Nemessanyi, *supra* note 74, at 29; Richard Marcus, *The Electronic Lawyer*, 58 *DePaul*

that there will be a revolution in law practice. Those favorable on high-tech solutions agree; a recent article in *Law Technology News* is subtitled 'How Technology Will Disrupt, Transform, and Save the Legal Profession.'<sup>76</sup>

For present purposes, it should suffice to note this possibility and urge that those attending this Congress consider how technology may solve, or at least ease, the problems that are the focus of the various sessions of the Congress. Certainly there was a need for progress in 1999; as the report on Brazil in Professor Zuckerman's book observed: 'Most courts of justice in Brazil lack essential equipment to accomplish their tasks. Many tasks are performed manually which, in more developed systems, would be automated or simply obsolete. The pages of files of proceedings are still numbered and stamped by hand. Every new piece of paper is actually sewn to the files of the case with needle and thread.'<sup>77</sup> In the US federal system, all filings are made electronically, and accessible online 24 hours a day. Surely moves in this direction could produce savings even if they involved an initial capital outlay. Whether such measures would solve other problems is a topic of ongoing interest.

**D. *The 'social services' roles of judicial systems***

By and large, procedure rules in the US are designed to accommodate litigants who bear the responsibility for their litigations. That is, at heart, the BYO attitude. But American courts surely have considerable responsibilities that go beyond

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L. Rev. 263 (2009); Richard Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 *Northwestern L. Rev.* 1827 (2008).

<sup>76</sup> Monica Bay, *Trust Darwin*, *Law Technology News*, Feb. 2015, at 55.

<sup>77</sup> Bermudes, *supra* note 24, at 359.

this classic vision of a civil lawsuit. One way of regarding these additional responsibilities is that they are 'social services' performed by the courts. They may be more burdensome for courts than the classic lawsuit, but important ingredients of the role of courts in society.

Such things as divorce, child custody, foster care, guardianship of the disabled, commitment of the incompetent to public institutions and the like often depend on proceedings in court. A new US example involves children fleeing from warfare in Central America.<sup>78</sup> These proceedings often do not closely resemble the classic adversary proceeding. Even where they do have the trappings of such a proceeding, they may be delayed and burdened by judicial budget cuts. In California, for example, simple divorces, even where lawyers are involved, now take much longer to complete.<sup>79</sup> These proceedings can also be abused; a recent report on New York courts suggested that nursing homes were using guardianship proceedings to seize control of their patients' assets when disputes arose about paying for their services.<sup>80</sup> Almost certainly, courts in other countries

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<sup>78</sup> See Patricia MacLean, *Children at the Gates*, California Lawyer, October 2014, at 12 (describing statutory provisions for special custody and release arrangements for such children, a responsibility that falls on the courts).

<sup>79</sup> See *Clinics Ease Bottlenecks*, California Lawyer, Nov. 2014, at 6-7 (reporting the simple cases handled by lawyers can take 18 months to resolve, prompting the development 'one-day divorce' program in some courts); Kathy Robertson, *Justice Delayed: The High Cost of Court Cuts*, Sacramento Business Journal, Jan. 17, 2014 ('In Sacramento, the queue at family court can take seven hours'); Maura Dolan, *Cutbacks in California Court System Produce Long Lines, Short Tempers*, L.A. Times, May 10, 2014 ('A change in a child custody order can take at least four months because of lack of staff [a judge] said. "This is a lifetime for a child," she said.').

<sup>80</sup> See Nina Bernstein, *To Collect Debts, Seizing Control Over Patients*, N.Y. Times, Jan. 26, 2015, at A1 (describing a guardianship petition filed by a nursing home after the patient's

undertake similar responsibilities; and almost certainly those responsibilities are a considerable burden for those courts. As Professor Cadiet observed in his 1999 report, '[t]he judge in the modern welfare state is required to take charge in a vast range of difficult individual or collective situations.'<sup>81</sup>

A related development in the US is the increasing prominence of litigants without lawyers. Some countries do not permit people to handle their own cases in court, but in a time when austerity means that legal aid is more limited it is likely to become increasingly true that they will. This burden has come to typify family law matters in a number of states in the US. In some, children are assured of state-provided legal representation (because they are minors) while their parents are not.<sup>82</sup>

More generally, as the Chief Judge of the New York Court of Appeals reported, '[c]ases with unrepresented parties take more [judicial] time,' and family court proceedings present a particularly difficult example.<sup>83</sup> A California judge agrees: 'Sacramento Presiding Family Court Judge James Mize says self-represented petitioners can get stuck if they don't know how to write a marital settlement agreement or draft a final judgment that's acceptable to the court -- or how to get onto a calendar

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husband contested some bills; only after much delay and cost was the husband able to defeat the move).

<sup>81</sup> Cadiet, *supra* note 23, at 308.

<sup>82</sup> See Garrett Theolf, *Swamped with Dependency Cases, Law Center May Refuse Young Children*, L.A. Times, Nov. 14, 2014 (reporting that '[e]ach child must be represented by an independent lawyer,' but that funding to pay for those services has been severely cut).

<sup>83</sup> Jonathan Lippman, *New York's Template to Address the Crisis in Civil Legal Services*, 7 Harv. Law & Policy Rev. 13 (2013).

for a hearing.'<sup>84</sup> But for courts to provide the needed direction is an added burden, and can conflict with the impartiality that are to bring to adversary proceedings.

Several of the sessions in this Congress involve judicial responsibilities that might be regarded as within the 'social services' category, so this set of problems should be kept in mind. In terms of the larger societal problems that these responsibilities address, it may be that judicial investment can actually produce societal savings. For example, a recent study of an effort to provide legal representation for some such litigants can actually save governmental money: 'For every dollar spent representing families and individuals in housing court, the study concluded, the state would save \$2.69 in other services such as emergency shelter, health care, foster care and law enforcement.'<sup>85</sup> It may be that this is an exceptional situation, but it offers a different sort of argument for expenditure on civil litigation from the one Professor Genn seems to have endorsed.<sup>86</sup>

#### ***E. Small claims and simple procedures***

One way to save money is to simplify. Simplicity may even have aesthetic appeal for procedure reformers.<sup>87</sup> Complexity may strike many as the justifying opacity and mainly enriching those

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<sup>84</sup> Clinics Ease Bottlenecks, California Lawyer, Nov. 2014, at 6, 8.

<sup>85</sup> Erik Eckholm & Ian Lovett, A Push for Legal Aid in Civil Cases Finds its Advocates, N.Y. Times, Nov. 22, 2014.

<sup>86</sup> See supra text accompanying notes 41-42.

<sup>87</sup> See Janice Toran, 'Tis a Gift to be Simple: Aesthetics and Procedural Reform, 89 Mich. L. Rev. 352 (1990) (examining the drafting of the Federal Rules of Civil Procedure as responding to an aesthetic effort toward simplicity).

schooled in the art, in this case the art of lawyering. Perhaps the best way to deal with that complexity is to simplify.

Some have seen the evolution from 'rigidity' to 'flexibility' as an iron rule of procedural development.<sup>88</sup> Cutting through the red tape is often a good way to get to the heart of the issue, while lawyers often seem to have a fixation on the peripheral and unimportant. If we insist that judges pay attention to the lawyers' fixation with complexity, we will probably place a large burden on the litigation system. So it may be best to dispense with the formalities and mete out justice on the quick and on the cheap.

That is, in a sense, the notion behind small claims courts in America -- to enable the parties to present their positions to the judge and have the judge decide promptly. In California, lawyers are forbidden to appear in small claims court, which has jurisdiction over disputes involving up to \$5,000.<sup>89</sup> Proceedings are informal, and may resemble television shows like 'Judge Judy.' Regular judges need not be hired to handle such matters, which can (with the consent of the parties) be heard by members of the State Bar.<sup>90</sup> So there may be a savings even on judicial salaries, although there are also provisions calling for the courts to provide advice to litigants.<sup>91</sup>

Meting out justice in this way can be cheap, and it may be satisfactory to the litigants in ways in which the 'complex'

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<sup>88</sup> See Robert Millar, *Civil Procedure in the Trial Court in Historical Perspective* §2 (1952), entitled 'Rigidity to Flexibility as a Law of Procedural Progress.'

<sup>89</sup> See Cal. Code Civ. Pro. § 116.220(a).

<sup>90</sup> Cal. Code Civ. Pro. § 116.240(a).

<sup>91</sup> See Cal. Code Civ. Pro. § 116.940 (regarding advice to be provided to litigants in small claims courts).

regular court system is not. So a similar simplification of the regular court system might both provide better satisfaction to the users of the system (the parties, not the lawyers) and reduce the cost of operating that system. Some efforts along this line have been made. In California, for example, for 'limited civil cases' (claims up to \$25,000) there is an 'economic litigation' procedure that provides assurances of simplified and expedited resolution.<sup>92</sup> Simplified procedures for the federal courts also have been considered.<sup>93</sup>

To date, these methods have not siphoned off much of the expense of running the regular court system. One reason may be related to something addressed in the next section -- lawyers' profound mistrust of change. American federal judges who have experimented with simplified procedure to assure a prompt and expeditious trial have found almost no takers among members of the bar.<sup>94</sup> According to Professor Zuckerman's 1999 collection, however, the experience with 'special courts' in Brazil have been very successful: 'People can litigate at very low cost, in an informal manner, and see immediate results from their judicial initiative. Paradoxically, the highly successful experience of these special courts, all called "small cases courts", is highly likely to have a positive impact on traditional proceedings.'<sup>95</sup>

As California's rule against lawyers in small claims courts suggests, there may also be a cost of such arrangements. Perhaps the court system must provide advice for unrepresented litigants,

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<sup>92</sup> See Cal. Code Civ. Proc. §§ 90-99.

<sup>93</sup> See Edward Cooper, *Simplified Rules of Civil Procedure?*, 100 Mich. L. Rev. 1794 (2002).

<sup>94</sup> This statement is based on years of hearing laments from federal judges frustrated by their inability to get lawyers to consent to such treatment, even when the judges recommend it.

<sup>95</sup> Bermudes, *supra* note 24, at 351-52.

for otherwise it is difficult to see how equality of arms can be assured. Of course, equality of arms is not something any court system can truly ensure; those with more resources are likely to have a corresponding advantage in litigation. Nonetheless, simplicity alone is likely not to be a simple solution to the problems of austerity.

Recent US experience with 'small claims' procedures for criminal cases shows that there are justice concerns to be kept in mind, as evidenced by a story in the *New York Times*.<sup>96</sup> 'Over the past 20 years, U.S. authorities have made more than a quarter billion arrests, and they add 12 million each year.' 75% or so of those are for misdemeanor charges -- involving fines or short jail terms. The courts do not have the financial capacity to provide lawyers for all these defendants, and they manage this avalanche of cases by moving very fast. 'In Florida, misdemeanor courts routinely disposed of cases in three minutes or less . . . [A] district judge on an average day has over 100 misdemeanor cases on his or her docket -- or one every four minutes.' Assembly line justice is far from the ideal to which either criminal or civil justice should aspire, but austerity may push both in that direction.

#### IV. HOW CIVIL JUSTICE REFORM WORKS IN AN AGE OF AUSTERITY

Much as Professor Zuckerman's 1999 collection seemed to urge reform of procedure, it did not offer a particularly optimistic view of the promise of that sort of reform. Professor Leubsdorf's contribution to the collection had the melancholy

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<sup>96</sup> John Emschwiler & Gary Fields, Justice Dispensed in Minutes as Petty Crimes Clog Courts, *N.Y. Times*, Dec. 1, 2014, at A1.

title 'The Myth of Civil Procedure Reform.'<sup>97</sup> Professor Chiarloni's report on Italy reinforced Professor Leubsdorf's message with a poignant example.<sup>98</sup> He traced a century of procedural reform in Italy, but reached a distressing conclusion: '[W]e must face a paradox: quality of service has fallen during procedural modernization in Italy.'<sup>99</sup>

This gloomy experience may suggest that something 'cultural,' not just the nature of procedures, affects the efficient functioning of institutions. Indeed, the divergence in results of similar reforms seems not to depend on what the general procedural orientation of the country involved is. In the UK, Lord Woolf's reforms of the mid 1990s did not solve all the problems they meant to solve, and they were followed in a bit more than a decade by Lord Jackson's examination of costs of litigation. Only time will tell whether the Jackson reforms fully solve the problems Lord Woolf set out to overcome.<sup>100</sup> As Professor van Rhee noted a decade ago, 'legal practice and procedural culture are important issues when it comes to establishing the merits of a particular procedural model.'<sup>101</sup>

But 'culture' alone is likely an inadequate explanation for failures or shortcomings of reform efforts. In most places,

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<sup>97</sup> John Leubsdorf, *The Myth of Civil Procedure Reform*, in Zuckerman, *supra* note 1, at 53.

<sup>98</sup> See Sergio Chiarloni, *Civil Justice and its Paradoxes: An Italian Perspective*, in Zuckerman, *supra* note 1, at 263.

<sup>99</sup> *Id.* at 266.

<sup>100</sup> On this subject, see Sorabji, *supra* note 44. See also Neil Andrews, *On "Proportionate Costs,"* 18 *ZZPInt* 3 (2014) (describing the ways in which the concept of 'proportionality' is to be used under the Jackson reforms).

<sup>101</sup> C.H. van Rhee, *European Traditions in Civil Procedure* 7 (2005).

judicial and legal establishments are extremely resistant to change. In 1999, Professor Zuckerman called this phenomenon 'the obstructive influence of lawyers' vested interest.'<sup>102</sup> But it probably goes beyond pure self interest, or at least is clothed in other garb. In the US, recent efforts to curtail modestly the lax pleading and broad discovery that make American procedure 'exceptional' have prompted extraordinarily vehement outbursts that suggest what could be called 'procedural polarization.'<sup>103</sup> That sort of reception has long been the lot of procedural reformers. In the mid-19th century, the main reform effort was known as the Field Code; by 1910, an American court referred to '[t]he cold, not to say inhuman, treatment which the infant Code received from the New York judges.'<sup>104</sup>

At the same time, it can happen that austerity enables changes that have long been sought but not succeeded. To take an prominent example, as all know America has for the last generation embraced mass imprisonment as a solution to criminal behavior. Wave after wave of 'mandatory minimum' sentences and 'three strikes' legislation have earned the US the status (along with others such as North Korea) as the nation with the largest proportion of its citizenry in prison. During the same time, the crime rate has plummeted, which prompted some who favor the mass imprisonment effort to claim credit. But crime rates have plummeted throughout most of the post-industrial world, so that argument is hard to support. Indeed, it has sometimes seemed that enthusiasm for imprisonment (even the death penalty) has been impervious to data on the effects of these policies.

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<sup>102</sup> Zuckerman, *supra* note 1, at 44-45.

<sup>103</sup> See Richard Marcus, *Procedural Polarization in America?*, in 18 *ZZPInt* 303 (2014).

<sup>104</sup> *McArthur v. Moffet*, 128 N.W. 445, 446 (Wis. 1910).

Enter austerity, and there suddenly is a possibility that these policies will change because many are now realizing how expensive it is to imprison so many. As Professor Aviram has explored in her new book *Cheap on Crime*,<sup>105</sup> although for decades humanitarian effort has failed to persuade US policymakers and the American public that mass incarceration is a bad idea, the arrival of the financial crisis prompted many to reconsider the policy due to the huge financial costs it imposes. She calls this new attitude 'humonetarism' -- receptiveness to humanitarian concerns based on monetary concerns.

For Professor Aviram, the new humonetarism provides what may be a welcome opportunity to pursue objectives she long has favored on essentially humanitarian grounds: 'Speaking about financial prudence has freed politicians, administrators, and even law enforcement agents to advocate for policies that go against the grain of a four-decade-long project of mass incarceration. And while localities vary in their response to humonetarism discourse, political campaigns for change, such as death penalty abolition, scaling down of the war on drugs, and habitual offender law reform, have been successful in many state in which such reforms failed prior to the financial crisis. . . . [T]he emphasis on cost has made it possible to raise arguments that have long ago lost their public appeal.'<sup>106</sup>

Although she welcomes this opening, she is also worried that the humanitarian impulses will lose force when the monetary concerns abate: 'If the main justification for policy changes is financial, how likely is it that these policies will be reversed when punishing more harshly becomes more financially

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<sup>105</sup> Hadar Aviram, *Cheap on Crime* (2015).

<sup>106</sup> *Id.* at 150.

sustainable?'<sup>107</sup> There may be, at best, a tenuous connection between the financial concerns and the underlying policy concerns. For those who do not covet changes being promoted on austerity grounds, this is a reminder that those who exploit austerity may manage to overcome well-founded resistance to change while pursuing goals essentially unrelated to austerity. The US can provide a possible example here as well in relation to one of its distinctive procedural attributes -- broad discovery. Opposition to broad discovery goes back to a decade after it was introduced in 1938 by the adoption of the Federal Rules of Civil Procedure, and one could say that the basic terms of the debate have not changed even though the advent of what we call E-Discovery have changed the terms used in discovery.<sup>108</sup> These issues have been with us through thick and thin.

But a new strand has been added to the argument -- austerity. In 2011, a committee of the US Congress held a hearing on whether US discovery was harming the competitive ability of US companies.<sup>109</sup> It is hard to resist the conclusion that this argument is being advanced by those who have long favored the cures that they now urge be adopted to deal with the challenges of austerity and globalization. Yet the argument that

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<sup>107</sup> Id. at 159.

<sup>108</sup> For example, a 1951 conference on The Practical Operation of Federal Discovery, 12 F.R.D. 131, included comments from an experienced lawyer that sound like what continues to be said today by those seeking to limit American discovery (id. at 147): 'The rules as to discovery, that is, interrogatories, requests for admissions and depositions, seem to have been drawn on the theory that by filing his complaint, the plaintiff has made a case and is thereafter entitled to roam at will through the books, documents, and records of defendant, and in addition to compel him to prepare statements and computations and furnish figures no matter how great the difficulty and the expense involved.'

<sup>109</sup> See Hearings on 'The Costs and Burdens of Discovery,' US House Judiciary Committee, Dec. 11, 2011.

American business has suffered because of US discovery is difficult to credit. If that is so, one would expect that America would still be mired in recession while the EU, with its alternative civil litigation arrangements, would be leaping ahead economically. That obviously has not happened, and it is difficult to conclude that significant changes to US discovery would provide a shot in the arm for the American economy, though adopting more American-style procedures would also be unlikely to revive lagging EU economies.

So austerity is an ambivalent ground for procedural reform. As with mass incarceration in America, it may provide the stimulus to changes widely endorsed for other reasons, and it may be ameliorated by those changes. But it may also be embraced as a new argument for long-favored procedural changes even though the changes really don't seem likely to solve the austerity problem. Perhaps Professor Aviram is right that today's austerity attitudes will provide an opportunity for tomorrow's humanitarian arguments to succeed. At least the huge financial cost of mass incarceration makes austerity a somewhat natural argument even though distinctive from humanitarian concerns. But more generally we may want to look askance at old arguments that are now advanced under the banner of austerity if they don't really seem connected to it.

#### V. CONCLUSION -- HAPPY DAYS ARE NOT HERE YET

When he succeeded Ronald Reagan as Governor of California in the 1970s, Jerry Brown was fond of saying that the US had reached the 'era of limits.' As on many things, he was ahead of his time on this subject because he saw what others only realized twenty years later. Professor Pierson realized in the 1990s that 'permanent austerity' began in the 1970s,<sup>110</sup> but the body politic

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<sup>110</sup> See supra text accompanying notes 30-31.

did not realize what was happening, and it continued to favor policies that now seem to assumed the post-war party would never end. Now Brown is again Governor of California, and it seems that many recognize that the era of limits has arrived. But even that may change; in America we are told that the economy is 'adding jobs at the fastest pace since the boom of the late 1990s.'<sup>111</sup>

In Europe, the auguries are not so good. Questions about austerity policies still produce great tension,<sup>112</sup> although some confrontations seem to have been averted.<sup>113</sup> Other crises may follow. Whatever the economic future holds, however, the procedural future is likely to feel the ripple effects of austerity for some time to come. Ultimately all societies must acknowledge what Professor Zuckerman told us sixteen years ago -- unlimited investment in procedure is not sustainable. The organizers of this Congress have chosen their focus wisely, and we may take these thoughts with us to the sessions that follow.

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<sup>111</sup> Nelson Schwartz, Job Count Finds Best 3 Months Since Late 1990s, N.Y. Times, Feb. 7, 2015.

<sup>112</sup> See, e.g., Alison Smale & Liz Alderman, Germany's Insistence on Austerity Meets With Revolt in the Eurozone, N.Y. Times, Oct. 8, 2014, at B4: 'As Europe confronts new signs of economic trouble, national leaders, policy makers and economists are starting to challenge as never before the guiding principle of the Continent's response to six years of crisis: Germany's insistence on budget austerity as a precondition to healthy growth.'

<sup>113</sup> See, e.g., Peter Spiegel, Europe Clears France and Italy Budgets, Finan. Times, Oct. 29, 2014, at 2; Matthew Dalton & Gabrielle Steinhauser, Brussels Pulls Back From Budget Clash, Wall St. J., Oct. 29, 2014, at A13; Matthew Dalton, EU to Shun Hard Line on French, Italian Budgets, Wall St. J., Nov. 25, 2014, at A10.