FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE

America's eighteenth-century founders expected of the nation's future civil justice system that everyone "ought to obtain right and justice freely, without sale, completely and without denial, promptly and without delay." They declared "that all establishments or regulations contravening these rights are oppressive and unjust." Few lawyers today would say that American civil justice fulfills the founders' expectations. Some say that it is oppressive and unjust. Many have given up the goals that the founders set. America's reformers have run out of ideas. They have no proven models for fixing what they know is broken.

This book provides a comparative critical introduction to civil justice systems in the United States, Germany, and Korea. It shows shortcomings of the U.S. system and compares them with German and Korean successes in attaining the expectations of America's founders. The book shows foreign systems as a source of ideas that are already proven to promote American goals of right and just decisions, achieved by fair process, efficiently without delay, and available to all. The book informs general readers as well as specialists. For the former, it is written in a layman-friendly style. For the latter, it offers suggestions for further reading that permit checking the book's analysis.

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Failures of American Civil Justice in International Perspective

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To

Elaine Foerster Maxeiner and Susanne Leppmann Bessac

and in memory of

Philip Arthur Maxeiner and Francis Bagnall Bessac

Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Warren E. Burger
Chief Justice of the United States (1984)[1]

Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States.

Earl Warren
Chief Justice of the United States (1959)[2]

If one were to be asked in what respect we had fallen farthest short of ideal conditions in our whole government, I think he would be justified in answering … that it is in our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts.

William Howard Taft (1908)
Later President and Chief Justice of the United States[3]

The United States in its judicial procedure is many decades behind every other civilized Government in the world, and I say that it is an immediate and an imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access to justice, is the greater part of justice itself.

Woodrow W. Wilson (1915)
President of the United States[4]

[1] *The State of Justice, Annual Report of the Chief Justice of the United States to the Midyear Meeting of the American Bar Association, Las Vegas, Address, February 12, 1984*, 70 A.B.A. J. 62, 66 (1984).

[2] *Foreword*, American Bar Association, Special Committee on Court Congestion, Ten Cures for Court Congestion 7 (1959).

[3] *An address delivered before the Civic Forum, New York City, at Carnegie Hall, April 28, 1908. Reprinted in* Paul S. Reinsch, Readings on American State Government 173 (1911).

[4] *Jackson Day Address at Indianapolis, January 8, 1915, reprinted in* President Wilson's State Papers and Addresses, Introduction by Albert Shaw 80 (1917).

Contents

Foreword

Philip K. Howard

In one of the lands in *Gulliver's Travels*, called Lagado, everyone follows a theory slavishly, with consistently disastrous results. Houses fall down because the inhabitants don't believe in right angles. Clothes don't fit because they're made pursuant to a mathematical calculation. Lagado is a place, as Jonathan Swift describes it, where inhabitants don't care whether things actually work. What they care about is their theory.

Swift could have written a similar chapter about America's system of civil justice. Everyone reading this book knows the theory: a completely neutral system in which judges see their job as referees of an adversarial process, with the ultimate verdict rendered by a jury picked (more or less) at random. This theory of justice has one predominant virtue: impartiality. No one can claim the fix is in when the judge lets parties claim almost anything, lets them seek discovery under every pebble for years, and then, if the parties can last it out, lets the jury make all important decisions. It's either thumbs up or thumbs down. Defenders of the system see in this theory an almost incarnation of our national values: Former Senator John Edwards, a successful trial lawyer, praised the system in an essay in *Newsweek* entitled "Juries: Democracy in Action."

However, if we step back from the theory and look at actual practice, American justice appears less virtuous. Compare American civil justice to justice in other countries, as Jim Maxeiner does in this important book, and the American system cries out for overhaul.

For most Americans, meaningful access to the courtroom is elusive. Fewer than 2 percent of cases in America make it to trial – the process is too inefficient and too expensive. A 2007 study of medical malpractice cases by the Harvard School of Public Health found that average length to resolution was five years, with fifty-four cents on the dollar spent on legal fees and administrative costs. Litigation in America is a crushing burden on both sides. In the German state of Bavaria, by contrast, almost all cases get a hearing and 28 percent of cases end in final reasoned opinions,

all with total costs proportionate to amounts in dispute. How? As Jim Maxeiner explains, in Germany the judges get right down to business, paring away remote or exorbitant claims even before the complaint is allowed to be served. Judges in Germany don't see their role as passive referees but as, well, judges. They view their job as applying the law to the facts and deciding right and wrong. Instead of a jury, the judges write written opinions for all to see. These opinions are subject to appeal, just as in the United States.

Because America's adversarial management of cases by competing lawyers jockeying for advantage tends to draw out proceedings, most citizens cannot afford to hire a lawyer. As a result, they can't effectively access the civil justice system. A recent report by New York Chief Judge Jonathan Lippman found that defendants in 99 percent of cases in New York City involving foreclosure, family law issues, and debt collection had no lawyer. The result is chaos in the courtroom and injustice all around:

> Many courtrooms are "standing room only," filled with frightened, unrepresented litigants who are fighting to keep a roof over their heads, fighting to keep their children, fighting to keep their sources of income and health care. These are often the most vulnerable in our society to begin with – the elderly, children, single parents, and so many more. But the impact of lack of legal representation extends well beyond the unrepresented: more time is required of judges and court staff to deal with unrepresented litigants, adjournments are much more frequent, and opposing parties represented by counsel (like landlords, banks, and businesses) have higher litigation and other costs. As a result, the courts become less efficient, and the quality of justice for every New Yorker suffers.[1]

Compare the scene in New York with Korea, where more than 80 percent of civil cases also involve *pro se* claimants. But the system works reasonably efficiently, as Maxeiner's book reports, because the judges view it as their job to sit down with the parties and get to the nub of the matter, much as a parent might sit down with feuding children. There's still a formal proceeding at the end, but parties just say what they have to say, rather than acting out the formal kabuki of evidence and objection. Which would we rather have – a formalistic process that looks good in theory, in which crying, frustrated claimants are jammed into courts with almost no capacity to deal with them? Or a system in which judges call the parties into an office and try to get to a fair conclusion?

Perhaps the worst indictment of American civil justice is its effect on daily dealings. Law is supposed to be the foundation of freedom. Yet in America, justice is perceived to be more like a legal minefield. Americans tiptoe through the day, looking

[1] Jonathan Lippman, The State of the Judiciary 2011: Pursuing Justice at 4–5 (February 15, 2011) available at http://www.courts.state.ny.us/admin/stateofjudiciary/SOJ-2011.pdf.

over their shoulders instead of striving toward where they need to go. Because of nearly universal distrust of justice, doctors routinely practice "defensive medicine," wasting an estimated $50 billion–200 billion annually in unnecessary tests. Because of the application of due process to ordinary classroom discipline, teachers have lost control of the classrooms. Because any accident is cause for a lawsuit, playgrounds have been stripped of seesaws, merry-go-rounds, jungle gyms, or any implement that might attract a child over the age of five. Some schools have banned tag. In the land of the First Amendment, businesses no longer feel free to give job references. The test of a system of law, Justice Benjamin Cardozo once observed, is how people in a society respond to it. By that standard, American civil justice is in trouble, because citizens no longer feel free to do what they think is right. Justice has undermined our freedom.

In Germany and Korea, by contrast, citizens feel free to act on their reasonable instincts. The difference is that judges see their job as upholding reasonable social norms.

This is a book not of legal theory, but rather of practice. The power of this book is in its lucid details of how justice actually works in America, Germany, and Korea. Step by step, Professor Maxeiner and his collaborators take the reader through exactly how decisions are made in each of the three countries. No rhetorical flourishes are needed to convince the reader of the need for a fundamental overhaul of American civil justice. The facts speak for themselves.

Maxeiner does not advocate importing German or Korean systems to the United States. Justice must adapt to the culture. But a missing element of American justice is hard to avoid.

There is an underlying flaw in American legal theory that is worth keeping in mind as the reader compares how judges do their jobs in different countries. The American theory of neutral justice was always doomed to fail because, although justice should be impartial, it's not supposed to be neutral. Justice is supposed to assert standards of law. A seesaw is or is not a reasonable risk for children over the age of five. An employer must be free to give honest evaluations of employees as a matter of law. Clinging to the jury system is not a sufficient reason for judges to sit on their hands – the role of the jury in civil cases is to decide disputed issues of fact, not to assert standards of law. If judges don't make rulings of law, which draw boundaries of reasonable claims, then almost any disagreement or accident can result in a nearly endless legal proceeding. Then fear displaces trust, with inevitable corrosion of everyone's freedom.

American legal theorists failed to understand that what people can sue for establishes the boundaries of everyone else's freedom. A lawsuit is not an act of free will, like speaking out on a street corner. A lawsuit is a use of state power against a private citizen. It's just like indicting someone – except that it's an indictment for money.

We would never tolerate a prosecutor seeking the death penalty for a misdemeanor. So why do we tolerate an angry customer suing his dry cleaner for $54 million for a lost pair of pants (as occurred in one famous case in Washington, DC)?

Justice doesn't work without constant application of values of reasonableness on behalf of society. That's what law is supposed to provide. That's what happens in Germany and Korea. That doesn't happen in the United States. Justice is not supposed to be "Democracy in Action." Justice is supposed to be rendered by the rule of law. America has strayed far from this core principle. This book demonstrates in clinical detail how the continual application of judgment by judges is essential to any functioning system of civil justice.

Preface

It is easier to criticize than to reform.

Fleming James, Jr., Geoffrey C. Hazard, Jr., and
John Leubsdorf, *Civil Procedure* 119 (5th ed. 2001)

Why don't you take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human experience?

Pierre Lepaulle (1929), Pioneering French international lawyer, on
judicial procedure in America, *as quoted by* Edson R. Sunderland[1]

Litigation is merely a means to an end, like transportation, and the same tests should apply to both. No American objects to the use of the Diesel engine because it is of German origin, nor to the radio because it is Italian, and the victims of rabies make no protest against the employment of Pasteur's treatment because it was developed in France. In every field of human activity outside of the law men are constantly searching for new and better methods, overcoming the barriers of language and forgetting the prejudices of nationality and race.

Professor Edson R. Sunderland (1929)[2], principal
drafter of the pretrial provisions of the Federal Rules
of Civil Procedure (1938)

It may be the oldest use of comparative law: You want to fix something at home that does not work well. You look next door to see how your neighbor does it.[3]

[1] Edson R. Sunderland, *Current Legal Literature*, 15 A.B.A. J. 35 (1929). Professor Sunderland was codrafter of the Federal Rules of Civil Procedure and principal drafter of its pretrial provisions.

[2] *Id.*

[3] *See* Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buffalo L. Rev. 361 (1977).

In our book the subject of neighborly inquiry is civil justice. That American civil justice does not work well is recognized worldwide. Those subject to it were among the first to complain, but today many American lawyers, law professors, and judges will tell you the same thing.

Professor Jay Tidmarsh, coauthor of a leading introductory work on civil procedure,[4] states the magnitude and persistence of the problem: "[O]ur civil justice system is broken.... The history of Anglo-American procedure has been an unending effort to perfect the imperfect.... Our system is not sustainable in the long run."[5] He is not alone in his assessment.[6]

We are not first to suggest comparative study as a route to American law reform. For generations, foreign and American jurists have been telling Americans of the virtues of the Roman-law-based legal systems of the European continent (known as "civil law" in contrast to Anglo-American "common law" systems). Jeremy Bentham was among the first.[7] The molders of American law were keenly aware of civil law virtues and sought to adopt many of them.[8]

Nor are we first to bring civil law insights specifically to American civil justice. The four Americans most important in the development of American civil procedure, Joseph Story, David Dudley Field Jr., Edson R. Sunderland, and Charles C. Clark, appreciated foreign civil justice systems. Yet American law reformers today pay civil law systems little mind.[9] We hope to help change that.

4 Suzanna Sherry & Jay Tidmarsh, Civil Procedure: Essentials (2007).

5 Jay Tidmarsh, *Resolving Cases on the Merits*, 87 Denver L. Rev. 407 (2010).

6 See the list of more than 150 titles in the Bibliographic Notes.

7 *See* Jeremy Bentham, Papers Relative to Codification and Public Instruction: Including Correspondence with the Russian Emperor, and Divers Constitute Authorities in the American United States, *reprinted in* Jeremy Bentham, Collected Works, "Legislator of the World": Writings on Codification, Law, and Education 1 (Philip Schofield & Jonathan Harris, eds., 1998).

8 *See* The Reception of Continental Ideas in the Common Law World, 1820–1920 (Matthias Reimann, ed., 1993).

9 *See* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 Am. J. Comp. L. 545 (1995); John H. Langbein, *The Influence of German Émigrés on American Law: The Curious Case of Civil and Criminal Procedure*, in Der Einfluss deutscher Emigranten auf die Rechts entwicklung in den USA und in Deutschland 321 (Marcus Lutter, Ernst Stiefel, & Michael H. Hoeflich, eds. 1993); Richard L. Marcus, *Review Essay: Putting American Procedural Exceptionalism into a Globalized Context*, 53 Am. J. Comp. L. 709 (2005) ("American proceduralists have not been comparativists"); Linda Mullinex, *American Exceptionalism and Convergence Theory*, *in* Common Law Civil Law and the Future of Categories 41, 45 (Janet Walker & Oscar G. Chase, eds. 2010) ("the one common characteristic among American law reform projects is the lack of reference to foreign law"). *See also* Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States – Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?*, 42 Am. J. Comp. L. 147 (1994), originally published in Festschrift für Karl Beusch zum 68. Geburtstag 853 (1993); Ernst C. Stiefel & James R. Maxeiner, *Why Are U.S. Lawyers Not Learning from Comparative Law? in* The International Practice of Law 213 (Nedim Vogt, et al., eds., 1997).

Today both need and opportunity for foreign insights to inform American civil justice are greater than ever. Need arises from the dysfunctional performance of American civil justice and from the long history of ignoring Continental systems. Opportunity springs from the dearth of domestic ideas that parochialism has produced and from the wealth of ideas that globalization is revealing. Today Americans have available in good number treatises in English on specific foreign systems together with supporting literature such as not been seen before. The success of the European Union portends still more opportunities for Americans to learn how civil law systems work.

Yet these books and articles alone will not be sufficient to induce Americans to learn about civil law justice systems. Many are descriptive of foreign systems and are couched in those systems' own terms. They do not relate foreign solutions to American problems. They are written by non-Americans with non-American audiences in mind.

For Americans civil law is different and therefore exotic;[10] civil justice in civil law countries is unfamiliar and consequently mysterious. For centuries common law jurists have been suspicious of Continental procedures. They assume that the civil law has a "different moral and legal framework";[11] they see its adoption in the United States as an "absolutely foreign" notion.[12] Their suspicion has blocked meaningful learning from foreign alternatives. It must be cleared away. Once cleared away, Americans do recognize when an institution of civil law is "hardly exotic" and that its elements may be "equally applicable to our own."[13]

Professor Kevin M. Clermont, an author of a leading introduction to American civil procedure,[14] demurs to borrowing, not because of suspicion, but because "foreign practice is not sufficiently familiar to most lawyers for the comparison to serve the practical purpose of a guiding hand."[15] The knowledge deficit is indeed great. Few American scholars have seriously studied even one civil law system. American law schools pay civil law systems little mind. Often, what they do teach is simplistic at best and misleading at worst; a generation ago one critic spoke of "a smattering of

[10] *See, e.g.*, Carden v. Arkoma Assocs., 494 U.S. 185, 190 (1990) (opinion of Scalia, J. for the Court, quoting prior decision describing Puerto Rican *sociedad en comandita* form of business organization as "an exotic creation of the civil law"). Some would avoid comparison by the moniker of "American exceptionalism." *See* Appendix.

[11] Antonin Scalia in Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University, Washington College of Law, January 13, 2005.

[12] Antonin Scalia, Address, January 4, 2010, Jackson, Mississippi, sponsored by Mississippi College School of Law, quoted in saynsumthn.wordpress.com/. . ./supreme-court-justice-antonin-scalia-on-abortion-and-international-law/.

[13] *Carden v. Arkoma Assocs.*, 494 U.S. at 208 (O'Conner, Brennan, Marshall and Blackmun, JJ., dissenting).

[14] Kevin M. Clermont, Principles of Civil Procedure Concise Hornbook (2nd ed. 2008).

[15] Kevin M. Clermont, Three Myths About Twombly-Iqbal 8 (May 22, 2010, Cornell Legal Studies Research Paper) available at SSRN: http://ssrn.com/abstract=1613327.

ignorance."[16] Thanks to neglect, most Americans today, if they have any knowledge of civil justice abroad, have a comic-book picture of "the inquisitorial system."

Our purpose in writing this book is to help make civil justice in Germany and Korea more familiar and less mysterious to Americans. Thus we have written a book that is *not* a treatise for specialists, but *is* an introductory textbook for civil justice in the United States, Germany, and Korea.[17] We intend for it to be accessible to people with an educated layman's knowledge of a modern legal system. We do not limit our audience to Americans. We want this book to inform Germans and Koreans about American civil justice. Non-Americans, too, need more familiarity and less uninformed suspicion of the American system.[18]

We want this book to be a beginning point, not an ending point. We want specialists to read it. We want to provoke reactions. To facilitate that, we have supplied the book with footnotes and other references for further reading. No reader need take what we have to say on faith.

To present three entire systems of civil justice, even at an introductory level, is a daunting task that we do not undertake. We have a more modest approach that we believe is sufficient to achieve our goal of making our systems more familiar to readers from other systems.

FAMILIARIZING FOREIGN CIVIL JUSTICE: THE BIOGRAPHY OF A LAWSUIT IN THREE COUNTRIES

We present our three systems by looking at a particular dispute as it would develop differently in each. We present, in effect, a biography of a lawsuit. This is a genre with a long tradition in the United States and, before that, in England.[19] What makes our biography unusual is that it is a biography of the same lawsuit in three different

[16] Benjamin Aaron, *Labor Courts: Western European Models and Their Significance for the United States*, 16 U.C.L.A. L. Rev. 847, 851 (1969).

[17] In this book we use "American" to describe the United States of America and do not include Canada, Mexico, or other parts of the Americas. We use "Korean" to describe the Republic of Korea, i.e., South Korea, and do not include the People's Republic of Korea, i.e., North Korea.

[18] Foreigners are no less frightened of the prospect of an American lawsuit: It gives them nightmares! *See* James R. Maxeiner, *Book Review*, 23 Int'l Lawyer 321 (1989); Rolf Stürner, Why are Europeans Afraid to Litigate in the United States (2001).

[19] *Compare* Abraham Caruthers, History of a Lawsuit in the Circuit Court of Tennessee: Addressed to a Law Student (1st ed. 1852; 6th ed. by Sam B. Gilreath 1937) with Marc A. Franklin, The Biography of a Legal Dispute: An Introduction to American Civil Procedure (1968); Stephen N. Subrin & Margaret Y. K. Woo, Litigating in America: Civil Procedure in Context 59 (2006) ("Chapter 4. An American Civil Litigation from Beginning to End"). *See also* Richard Boote, An Historical Treatise of an Action or Suit at Law: And of the Proceedings Used in the King's Bench and Common Pleas from the Original Processes to the Judgments in Both Courts (1781); John William Smith, An Elementary View of the Proceedings in an Action at Law, American Edition from the Third London Edition by David Babington Ring (1848).

systems.[20] By using a particular case, we can focus on those aspects of our systems of civil justice that are most relevant to understanding without being diverted by consideration of matters not germane to that case. The particular case gives a "contextual anchor" so that readers can move from one system to another without being cast adrift.[21]

We present all three systems of civil justice in their daily workings. We avoid the technical, the unusual, and the abusive. By focusing on the usual, we hope to make all three systems more familiar. In the usual we see common cause working to realize common values.[22] To address the technical, unusual, or abusive would accent differences among our systems; it would make difficult appreciation of what all three systems have in common. The technical, the unusual, and the abusive do not appear across all systems, at least not in the same way.

To keep our book focused on the goal of American law reform, we have limited it to three systems of civil justice. We chose the German system because throughout the world the German system is rightly viewed as a success story. Perhaps more than any other, it has been the principal counterpoint to American civil justice. Among civil law systems,[23] only the French system is a competitor. Although we might have chosen the French as a second system, that would introduce a different world of legal concepts while remaining a Euro-centric comparison. We have instead chosen the Korean system. Korea is a non-Western society that has been greatly influenced in its law by both the German and American systems. The Korean system of civil justice straddles the German-American divide. It provides an example of a system choosing between our two principal competing approaches.

As American readers know, we have also had to make a choice from among the civil justice systems of the fifty United States. We chose the federal system. Focusing on the federal system is a common convention in American works on civil procedure. Practically, one can present only one American system. The federal system is the closest that there is to a model for all systems. Although there is no better choice as a model for lawsuits, it has an important deficiency: The federal system focuses on cases that are large in most systems of civil justice, that is, where the amount in controversy is in excess of $75,000.[24]

[20] This is not the first such biography. The catalyst for this book and the first such biography is Andrew J. McClurg, Adem Koyuncu, & Luis Eduardo Sprovieri, Practical Global Tort Litigation: United States, Germany and Argentina (2007).

[21] *See* Andrew J. McClurg, Preface xii, *in* McClurg et al., *supra* note 24; *cf.* Markesinis, *infra* note 29, at 30.

[22] Although we assert common values and common cause, we are not injecting our book into what comparative scholars speak of as a search for a "common core" of legal systems.

[23] Common law systems are found in those countries where English is a national language and where Englishmen are either native or colonized the land. Civil law systems are found in most other modern countries.

[24] *See* Oscar G. Chase, *Reflections on Civil Procedure Reform in the United States: What Has Been Learned? What Has Been Accomplished? in* The Reform of Civil Procedure in Comparative Perspective 163, 164 (Nicolò Trocker & Vincenzo Varano, eds. 2005).

We have also chosen not to address "alternative dispute resolution," or "ADR" as it is known. ADR is a way that parties – by agreement before a dispute arises, often in a standard-form agreement, or after a dispute arises, by special agreement – arrange to have a private body resolve their dispute. It is particularly popular in the United States, in part because the alternative, ordinary civil justice, is less palatable in the United States than elsewhere. We choose not to address it, because our point in this book is to provoke Americans to make their civil justice more palatable.[25]

The Provocative in Our Book

Lay readers may think that our book is provocative because we see American civil justice as flawed.[26] To observe that American civil justice is flawed, however, is not provocative. It is conventional wisdom; others have said that for a long time.[27] What makes our book provocative is that we urge Americans to look abroad for insights for improving their system of civil justice. Here are five objections that may greet our call for learning from foreign experiences:[28]

1. American civil justice is the best in the world ("not invented here").[29]
2. German civil justice is not as good as we assert ("not so good there").[30]

[25] *Cf.* Langbein, *The Influence of German Émigrés*, *supra* note 13, at 323–324 ("Rather than confront the problem directly and undertake to solve it, we escape the problem by encouraging propertied persons to buy their way out, which leaves the poor and the unsophisticated to bear the main burden of victimization.").

[26] *See* Basil Markesinis, *Ways and Means of Teaching Foreign Law*, 23 TULANE EUR. & CIVIL L. FORUM 175, 204–206 (2008).

[27] We list in the Bibliographic Notes more than 150 such critiques. The most famous one is Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REP. 395 (1906).

[28] We need not be good soothsayers to foresee them: Similar objections greeted John H. Langbein's *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) and the references by United States Supreme Court justices to foreign law.

[29] *E.g.*, Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175, 175–176 (2003) (drawing a parallel to Churchill's famous aphorism about democracy). *See generally* Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States – Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?* 42 AM. J. COMP. L. 147 (1994), *originally published in* FESTSCHRIFT FÜR KARL BEUSCH ZUM 68. GEBURTSTAG 853 (1993); Ernst C. Stiefel & James R. Maxeiner, *Why Are U.S. Lawyers Not Learning from Comparative Law?*, *in* THE INTERNATIONAL PRACTICE OF LAW 213 (Nedim Vogt, et al., eds., 1997). *See also* Schlesinger, *supra* note 6, at 363 (noting the same xenophobia for criminal procedure).

[30] Professor Allen of Northwestern University Law School is Professor Langbein's principal protagonist on this point. *See* Ronald J. Allen *et al.*, *The German Advantage in Civil Procedure: A Plea for Fewer Generalities and Greater Detail in Comparative Law Scholarship*, 82 NW. U. L. REV. 705 (1988). For Professor Langbein's response, see John H. Langbein, *Trashing "The German Advantage,"* 82 NW. U. L. REV. 763 (1988). While Professor Allen questions the factual claims made for German civil justice, Professor Cappalli of Temple University School of Law argues the positive case that

3. American dispute resolution embodies American cultural values, which are incompatible with cultural values embodied in German dispute resolution ("American exceptionalism").[31]
4. American civil justice serves public law functions that German and Korean civil justice do not serve, which limits the value of international insights.[32]
5. Practically, for the foregoing reasons and because of the self-interest of those who preside over the system, it is foolish to think that Americans will ever adopt foreign models of civil justice ("real reform is hopeless").[33]

We do not in this book answer these objections directly. Instead, we present information that we hope will enable readers to reach their own conclusions.[34] We want first

American common law methods are better. *See* RICHARD B. CAPPALLI, THE AMERICAN COMMON LAW METHOD (1997); Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMPLE INT'L. & COMP. L. J. 87 (1998). *See also* Robert Adriansen, *At the Edges of the Law: Civil Law v. Common Law: A Response to Professor Richard B. Cappalli*, 12 TEMP. INT'L & COMP. L.J. 107 (1998).

[31] Professor Oscar G. Chase of New York University School of Law is the eloquent proponent of this view. His argument is that it is the general culture itself and not the legal culture that determines these differences. *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002); Oscar G. Chase, *Culture and Disputing*, 7 TULANE J. INT'L & COMP. L. 81 (1999); OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005); Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1 (1997); Oscar G. Chase, *Reflections on Civil Procedure Reform in the United States: What Has Been Learned? What Has Been Accomplished? in* THE REFORM OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE 163 (Nicolò Trocker & Vincenzo Varano, eds. 2005). For Professor Langbein's response to one of these, see John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT'L & COMP. L. 41 (1997). In a similar direction, see Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987). Professor Chase is not, however, the first proponent of the view. See Samuel Tyler, *Introduction, in* HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS (Samuel Tyler ed., 3d Am. ed., 2d London ed. 1871).

We cannot resist commenting on Professor Chase's selection of four institutions that are supposed to demonstrate the immutable influence of American culture on civil procedure: the civil jury, pretrial discovery, the role of the judge, and the role of the expert witness. "American Exceptionalism," *supra* at 287–301. We show that the civil jury has practically disappeared. We demonstrate that the pretrial discovery part of American civil procedure dates only to 1938 and as known today is younger than that. We conjecture that culture is little concerned with a topic as technical as expert testimony. That leaves only the role of the judge as barrier; but that role is anything but monotone in the history of Anglo-American legal history. *See, e.g.*, JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003).

[32] *See* Historical Notes.

[33] Professor Langbein reports that Max Rheinstein, the dean of the generation of émigré German scholars from the 1930s, thought the vested interests of those who run the defective legal machinery make reform of procedure "hopeless." *See* Langbein, *The Influence of German Émigrés on American Law*, *supra* note 13, at 322–323, 326–327. *See also* John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990).

[34] *See* Basil Markesinis, *Book Review Essay: Ways and Means of Teaching Foreign Law*, 23 TULANE EUR. & CIVIL L. FORUM 175, 206 (2008).

to help overcome the knowledge deficit. Throughout the book we point to factors that bear on these questions. We seek to provide help to readers in pursuing these issues on their own.

One of these objections – the asserted exceptional and additional public law functions of American civil justice – we cannot answer in the indirect way just mentioned if we are to stay true to our pedagogic approach of looking at how our respective systems handle a single hypothetical case. By looking at only one usual case, we necessarily do not consider all other cases, including the exceptional. We do not want to leave that objection completely unaddressed, so we summarize it in the Historical Notes and explain why we believe that it does not undercut the utility of comparative study.

Finally, a word on responsibilities: Although we share the conclusions stated, our experiences and knowledge on which those conclusions are based vary. Professor Maxeiner bears responsibility for the work as a whole and, in particular, for comparative conclusions critical of the American system.

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Abroad it is another story. I have had support in great measure, beginning with my two colleagues, Professor Gyooho Lee and Judge Armin Weber. For Korea, which is distant to me, Professor Lee is the perfect collaborator for comparative work: Gyooho could pass as a local in the United States. He has a familiarity with America's legal system, language, and culture that is unsurpassed among Korean jurists. For Germany, which is well known to me, Judge Weber has furnished critical insights into the practice of law and judging there such as only could a person who has spent a life's career judging and educating others to judge. His contribution makes sure that we write with law in practice in mind.

With Judge Armin Weber, I was doubly blessed: I not only received his support, but that of his wife, Judge Harriett Weber. She is another accomplished judicial educator and judge. I benefited from her instruction, her contributions to Armin, and her encouragement to her many colleagues in the *Landgericht* (District Court) Munich to share their knowledge and experiences with me.

The judges Weber are just two of scores of German judges who have opened the doors of their courtrooms to enable me to learn that which is natural for them. Just as helpful as the Bavarian judges were the judges of the courts of Freiburg im Breisgau. Often I had invitations, often I did not. I could turn up cold in the courtroom and announce that I was the "public," and could count on a warm reception.

My task was eased by the remarkable educational role that the German judiciary plays in educating German lawyers and judges for practice. In Germany, judging is learned. German judges teach each other how to do it. They teach all lawyers how to do it; to be a lawyer requires that one have the capacity to be a judge. I have benefited from the guidance of the masters of German judicial education. Thirty years ago Justice Günter Schmitz,[1] now retired from the Bavarian Constitutional Court, graciously welcomed me into his year-long class on practical civil and criminal judging. A quarter century later, when I began work on this book, he saw to it that I received guidance from the people who make civil justice a reality in Bavaria. He put me in touch with, among others, the then 15th Senate of the Court of Appeals of Munich (*Oberlandesgericht*), especially its Chairman Judge Hans-Werner Wolf and Judge Wolf's now retired colleagues Dr. Heinrich Reiter and Dieter Knöringer.[2] They patiently explained how their chamber works.

Meanwhile, the Bavarian State Ministry of Justice, in particular Executive Counsellor Dr. Helmut Palder and his deputy, Guido Tiesel, now judge of the Court of Appeals in Judge Wolf's Senate, enabled me to attend three of the ministry's week-long training programs, two for new judges and one for judicial instructors. Besides helping me hear what judges are supposed to do, these were perfect opportunities to get to know scores of Bavarian judges, to learn their understanding of their job, to get an idea of how they go about doing their work, and to prepare the way for later visits to their courts. Among the many judges who furthered my education, I mention from the Munich courts Judge Klaus-Peter Jüngst and Judge Leslie Trüstedt. Leslie may be the only American-German judge in Germany.

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[1] *See, e.g.*, Günther Schmitz et al., Die Station in Zivilsachen: Grundkurs für Rechtsreferendare (7th ed. 2006).

[2] *See, e.g.*, Dieter Knöringer, Die Assessorklausur im Zivilprozess: Das Zivilprozessurteil, Hauptgebiete des Zivilprozesses, Klausurtechnik (13th ed. 2010).

that of the many judges who participated in their programs. Their respective ministries of justice, the Thüringian and the Schleswig-Holstein, assumed the costs of my participation.

The openness that I experienced with state courts and ministries was mirrored at the national level. Justice Dr. Markus Wiebel, now retired from the Federal Supreme Court, repeatedly welcomed me to his court and exchanged thoughts with me. Director Markus Busch LL.M. of the Federal Ministry of Justice repeatedly welcomed me to the ministry in Berlin, provided understanding, and facilitated my meetings with his colleagues. Among the many people I spoke with there I would like to thank for comparative insights particularly State Secretary Dr. Birgit Grundmann and Ministerial Counselor Josef Brink.

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Here I can name the institutions that have formally extended me support. Above all I thank the Alexander von Humboldt Foundation, which could be the principal supporter of American studies of comparative law. I have also received support from the German Academic Exchange Service (the Germany Today Program) and from the Max Planck Society. The Humboldt Foundation is also responsible for my knowing Professor Dr. Keiichi Yamanaka of Kansai University. Without his support for an extended visit at his faculty in Osaka, I would not have dared to address Korean law.

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Where an American publisher would have preferred a descriptive rather than a normative book, Cambridge University Press and John Berger encouraged a provocative rather than a timid approach. In these days of instant photo-print publishing, his colleagues edited the book in a fashion that befits a press of the stature and tradition of Cambridge University Press.

At my home institution, the University of Baltimore, my greatest supporter among the faculty has been Professor Tim Sellers, founder and director of its Center for International and Comparative Law; among the librarians, Bjal Shah; and among the students, Oleysa Bulka (LL.M. 2010). The law school provided me with two summer research stipends for this work.

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James R. Maxeiner

Summary

REFORM IDEAS PROVEN IN PRACTICE

In 1776, when Americans declared independence from Britain, they also declared their rights. Among the rights that they declared were that everyone "ought to obtain right and justice freely, without sale, completely and without denial, promptly and without delay": just decisions that are accurate according to law, reached speedily by fair and efficient process, and accessible to all. Since 1776 Americans have invested heavily in courts that they believe will make good on these rights. They have been disappointed by returns that fall "far short of perfection" (Maurice Rosenberg).[1] They have found reform to be an "unending effort to perfect the imperfect" (Jay Tidmarsh).[2]

That Americans have built on the imperfect, that is, that they have looked only to the system that they have, explains the disappointing results. Contemporary critics can diagnose disorders but cannot contribute cures known to work. America's civil procedure scholars recognize that it "is easier to criticize than to reform."[3] Reformers must imagine how proposed new methods might work; they have no guide to ways that are proven to work.

Elsewhere in the world, there are civil justice systems that work better. American reformers need not imagine the unproven; they can study the proven. Yet contemporary reformers have not done so. They have foregone international insights. Why? Those better-functioning foreign systems are in non-English-speaking countries. Their civil law methods seem distant from American common law practices.

[1] Maurice Rosenberg, Devising Procedures that Are Civil to Promote Justice that is Civilized (Thomas M. Cooley Lectures, 1971), *reprinted in* 69 Mich. L. Rev. 797 (1971).
[2] Jay Tidmarsh, *Resolving Cases on the Merits*, 87 Denver L. Rev. 407 (2010).
[3] Fleming James, Jr., Geoffrey Hazard, & John Leubsdorf, Civil Procedure 119 (5th ed., 2001).

This book is intended to make our three systems of civil justice, the American, the German, and the Korean, more familiar and less foreign to each other. It demonstrates that civil processes in Germany and Korea are closer to American understanding than Americans assume. German and Korean civil justice values are familiar; their means of implementing those values are known and often practiced in America. Far from fearing foreign processes, American reformers should find them founts of tested ideas.

TEN REFORM IDEAS PROVEN TO WORK IN PRACTICE

1. Legal rules seek justice through statutes.
2. Civil justice is accessible independent of wealth.
3. Those in the right are not burdened with high litigation expenses.
4. Judges are professionals.
5. Trusted institutions coordinate civil justice.
6. Jurisdiction is determined without litigation.
7. Parties tell courts about their disputes.
8. Judges work with parties to prepare cases for decisions according to law.
9. Judges oversee taking evidence.
10. Courts base their judgments on law and explain them.