PROCEDURE IN A TIME OF AUSTERITY

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As all recognize, we have entered an era of austerity in the "rich" world. Many governmental institutions have been and will be affected by this development. Already, the governmental budgets in many countries have been cut aggressively, and there are aggressive budget cuts in prospect for many additional countries.

Because courts are governmental institutions, those cuts will inevitably affect courts in some way. Already, newspaper cartoons in the legal press in the U.S. emphasize this concern. A recent cartoon in the San Francisco Recorder, a legal newspaper in San Francisco, thus shows the California trial courts caught in a vortex of budget cuts, and the Chief Justice of the state court system trying to figure out how to throw the trial courts a life saver.[1] This Spring, two of America's most prominent lawyers created a task force within the American Bar Association to lobby for court funding, noting that "there's no political constituency for this."[2]

The operation of the courts is intrinsically linked to procedure, and one question that seems to merit consideration is whether, or how, this era of austerity is likely to affect procedure. Beginning that discussion is the purpose of this paper. It is by definition preliminary and impressionistic. At most, it may be able to identify areas on which to focus for those from different countries with different procedures. Beyond that, it may also identify areas of comparison; maybe austerity will have less effect on certain systems than on others. Getting this discussion started seems worthwhile, and completing it now seems unrealistic. The era of austerity may have unexpected turns, and its impact on procedure is somewhat peripheral.

That peripheral status results from the fact that although court funding is obviously important, court funding does not seem to have been an overt consideration in designing rules of procedure. In some places, those proposing legislative change have to state whether their proposals will have "budget

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[1] See S.F. Recorder, Dec. 20, 2010, at 3.

[2] D. Ingram, 'New Battle for Boies, Olson,' Nat. L.J., March 21, 2011, at 1.

implications," but it seems unlikely that rules of procedure have ever been conceived in those terms.

But costs and funding do relate to procedural arrangements, and changes in costs and funding may affect those arrangements, as emphasized by a recent book providing initial exploration of this rarely considered relationship.[3] A generation ago Professor Alschuler linked the growth of alternative dispute resolution in this country to a shortage of adjudicatory capacity for civil cases.[4] Meanwhile, however, the dominant theme in procedural reform in this country besides alternative dispute resolution -- case management -- has proceeded on the assumption that courts should invest more rather than less time and energy into their civil caseload. Whether this attitude makes sense in an era of austerity seems worth asking.

To raise these questions, this paper begins by briefly invoking study of the effects of austerity more generally on governmental programs, for that topic has been salient in other scholarly areas for several decades. It then turns to a critical question -- what legal issues should be conceived as "procedural" when one considers austerity measures. That question can be answered in a variety of ways that are likely to affect the way in which one evaluates the potential impact of austerity on procedure. One American answer to the question limits "procedure" to topics that are likely not to be seriously affected by austerity. But a broader conception shows a broader effect, and a broader conception of the potential impact of austerity on law in general suggests a broader effect.

This preliminary paper is no place to try to survey all potential effects of austerity in any country, much less many countries, although some comparisons seem in order on occasion. Others can reflect on the domestic effects on procedure in their systems. The importance of those effects depends significantly on the role of civil litigation in various countries, and the likelihood that probable changes could have a significant impact on that role, a topic that lies at the heart of at least one segment of this Congress.[5]

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[3] See C. Hodges, S. Vogenauer, & M. Tulibacka, *The Costs and Finding of Civil Litigation: A Comparative Perspective* (Hart Pub., Oxford U. Press, 2010).

[4] A. Alschuler, 'Mediation With a Mugger: The Shortage of Adjudicatory Services and the Need for a Two-Tier System of Civil Cases,' 99 Harv. L. Rev. 1808 (1986).

[5] See S. Burbank, S. Farhang & H. Kritzer, 'Private Enforcement of Statutory and Administrative Law in the United States (And Other Common Law Countries)' (paper for Congress

I. A POLITICAL SCIENCE ANALYSIS OF COPING WITH AUSTERITY

For legal academics, austerity has not been a preoccupation. Procedural reform, in particular, has not been significantly preoccupied with governmental cost. Indeed, the clarion call to reform in the U.S. -- the 1906 speech by Roscoe Pound at the American Bar Association convention -- hardly mentioned costs of operation of the legal system. Instead, it honed in on preoccupation with procedure as an obstacle to decisions on the merits, an abiding procedural concern. Budgets have never been unlimited, but the intrinsic cost of operating a court system was not a major concern of procedural reform. In large measure that was because court systems did not themselves dispense governmental support or largesse.

The post-war welfare state, however, has been a source of support to many and it is now in what some call a state of "essentially permanent austerity."[6] These problems result from a familiar litany of slow (or no) economic growth, increasing populations of older people, and automatic or indexed rises in entitlements. Indeed, this same writer announced in 1996 that "[t]he much-discussed crisis of the welfare state is now two decades old."[7] These crisis factors present what must by now be familiar in many nations:

> During the 'golden age' [of post-war prosperity] politicians could make generous promises while deferring the cost (i.e., high payroll tax rates). Today's politicians, rather than being in a position to claim credit for new initiatives, act primarily as bill-collectors for yesterday's promises.[8]

This predicament is unlikely to go away soon, even if the crisis resulting from the 2007-10 financial storm subsides:

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session on Private Law Enforcement on 27 July).

[6] See P. Pierson, 'Coping With Permanent Austerity: Welfare State Restructuring in Affluent Democracies,' 43 Revue Francaise de Sociologie 369, 370 (2002). The following discussion is drawn largely from this article and from P. Pierson, *Politics of the Welfare State* (Cambridge U. Press 1996). I am indebted to my colleague Dorit Rubenstein Reiss for calling my attention to this body of work. I lack the background to offer a critique of it, but do hope that borrowing it will provide useful background for the discussion that follows.

[7] P. Pierson, 'The New Politics of the Welfare State,' 48 World Politics 143, 143 (1996).

[8] Pierson, supra, 43 Rev. Fr. Soc. at 381.

> Barring an extremely unlikely return to an era of high economic growth, fiscal pressures on welfare states are certain to intensify. While tax increases may contribute to closing the gap between commitments and resources, it is difficult to imagine that in many European countries changes in revenues alone could be sufficient to maintain fiscal equilibrium.[9]

For politicians, the core problem is that there is broad support for the measures that the welfare state provides; indeed, in many countries very considerable segments of society (probably more than half) either presently draw income from these measures (such as governmental pensions and health care) or expect in the future to do so. That widespread self interest in the welfare state means that there is a large built-in constituency favoring preservation of benefits. Curtailing those benefits is made extremely difficult by institutional "stickiness" resulting from the multiple "veto points" that those desiring to prevent change can employ to preserve the status quo. In many places, similar veto points may confront one who seeks to increase taxes to cope with the growing demands on the public fisc. In particular, there may be many instances in which a limited but definable group have an intense interest in preserving their benefits, while the society-wide interest in fiscal integrity is much more diffuse, leading to the conventional reality that a small group with intense interests often prevails over a larger group with weak interests.

In terms of our current topic, however, invoking a general fiscal crisis as a reason for making big changes in procedure seems farfetched. The welfare state is not usually thought to include civil litigation or the way it is handled by the courts.[10] In short, the austerity does not connect meaningfully to procedure, leading to the question whether it will be affected at all. But one can regard civil justice in general, and therefore also procedure to some extent, as broadly affected by the more general urge toward governmental austerity that the

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[9] Id. at 374.

[10] Pierson offers the following description: "'The Welfare State' is generally taken to cover those aspects of government policy designed to protect against particular risks shared by broad segments of society. Standard features, not necessarily present in all countries, would include: protection against loss of earnings due to unemployment, sickness, disability, or old age; guaranteed access to health care; support for households with many children or an absent parent, and a variety of social services -- child care, elder care, etc. --meant to assist households in balancing multiple activities which may overtax their own resources." Pierson, supra, 43 Rev. Fran. Soc. at 377.

graying of the welfare state seems to have produced. This is the thrust of Professor Genn's 2008 Hamlyn Lectures.[11] She finds that, in the common law world, "an accepted principle is the need to control expenditure on civil justice."[12] She objects that the crisis rhetoric is not supportable, and that any real problems are not the result of procedure.[13]

Taking a different tack, this paper reaches a similar destination. There *is* a valid ground for worrying about the fiscal consequences of welfare state commitments in light of contemporary demographic realities. But that problem hardly affects the civil justice system in general, or procedure in particular. And the immediate fiscal crisis of the last few years could have broad and unfortunate consequences for procedure and for court systems. Consider, for example, the debate about an overhaul of the state court system in Florida, a state in which the bursting of the real estate bubble wreaked particular havoc, that would broaden the Legislature's control over the courts:

> Legislative tug-of-wars with the judiciary occur in some state [legislative] houses every year. But the tussles are usually limited to a single, narrow issue. What has made Florida's fight different is the breadth of the proposed changes.
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> The debate also came at a time when the court system, like Florida itself, is struggling with a financial crisis. Fewer lawsuits are being filed, which means a decline in filing fees, and that has left the courts with a $74 million shortfall. The resolutions in the Legislature guarantee full financing, but several senior judges said financial security for the courts in exchange for a less independent bench was a bad trade-off.[14]

Bad trade-offs prompted by austerity might show up in other places, so there is reason to be wary of the effects austerity could have on procedure.

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[11] See H. Genn, *Judging Civil Justice* (Cambridge U. Press, 2010) ch. 2.

[12] Id. at 58.

[13] "It is remarkable how willing governments around the world have been to assert the existence of crises and propose solutions without any evidence base or means of assessing the effect on access to justice." Id. at 63.

[14] D. van Natta, 'Florida Puts Overhaul of Courts to Voters,' N.Y. Times, May 4, 2011, at A17.

II. DEFINING THE BOUNDS OF "PROCEDURE"

This Association focuses on "procedural" law, not all law, and this paper is about the impact of austerity on "procedure," not on all legal rules. For a political scientist, boundaries between different legal disciplines may seem entirely irrelevant, but for law professors they often matter a lot. And for them it may be said that the dividing line between "procedural" and "substantive" legal rules is crucial.

But it may often be debated whether a given legal topic is properly described as "procedural." In part, that description demarks a portion of the law school curriculum. In the U.S., therefore, topics dealing directly with the nature of materials that may be considered at trial are labelled "evidence" and consigned to another part of the curriculum. The world surely need not respect curricular line-drawing, however.

For an American, a more important dividing line might be about power. In the U.S. federal court system, the authority of those who may make procedural rules are limited by statute to "general rules of practice and procedure."[15] Within that sphere, the rulemakers have very considerable latitude in designing procedures that will not usually be altered by Congress. But when they seem to wander near the dividing line, Congress may raise serious questions, or even overrule the procedural rulemakers. So for this purpose defining "procedure" can be extremely important.

For some rules -- e.g., whether one need file a complaint in court before obtaining a summons that will require a defendant to respond to the complaint -- there is little debate that they fit within "procedure." For others, there can be. A classic definition of the pertinent American dividing line on rulemaking power was offered in the mid 1970s by Professor Ely:

> We have, I think, some moderately clear notion of what a procedural rule is -- one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because, and this may point quite the other way, it is a means of promoting the efficiency of the process. Or the protective of the process may proceed at wholesale, as by keeping the size of the docket at a level consistent with giving those cases that are heard the attention they deserve. The most helpful way, it seems to me, of defining

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[15] 28 U.S.C. § 2072(a).

> a substantive rule . . . is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.[16]

But even this guiding line does not purport to answer all American questions about what should be considered "procedural." Choice of law questions may also arise about whether some legal rule is "procedural," and therefore governed by the forum's domestic law even though another state's law controls the "substantive" matters in dispute.

For our purposes, however, it should suffice to recognize that many of the most important legal rules that the recent study of litigation funding addressed are beyond the American definition of "procedure." For example, attorney fee shifting and the "American rule" that each litigant must usually pay its own lawyer, win or lose, are generally beyond the federal rulemaking power. Similarly, court fees are generally not regarded as procedural rules. And setting statutes of limitation is generally regarded as outside the power of procedural rulemakers. In other systems, however, those rules may be regarded as "procedural."

These distinctions can matter because the implications of austerity may matter a great deal more in relation to court fees than the core procedural matters that American considers within rulemaking. As a result, one could overlook what some would call the procedural impact of austerity by excluding various topics from "procedure."

An example is litigation funding by the state. In some countries -- notably the U.K. -- very extensive government-supported assistance has existed for civil litigants. In the U.S., the Supreme Court has declared that courts do not have inherent "procedural" power to award fees even to successful litigants,[17] having long before ruled that attorney's fees are not a part of the "costs" that could successful litigants can recover almost automatically from the losing party.[18] Although the American contingency fee system meant that many personal injury claimants could obtain representation without cost to themselves, it also meant that other impecunious litigants -- particularly defendants -- could not obtain representation.

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[16] J. Ely, 'The Irrepressible Myth of *Erie*,' 87 Harv. L. Rev. 693, 726 (1974).

[17] Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).

[18] Arcambel v. Wiseman, 3 U.S. 306 (1796).

One response was the "pro bono" movement among American lawyers, which led also to the creating of private "legal aid" offices in many cities to provide representation to those who could not afford to hire lawyers.[19] Another, in criminal cases, was a growing recognition of a constitutional right to have a lawyer appointed to represent impoverished people accused of crime, memorialized in the Supreme Court's famous *Gideon* decision in 1963.[20]

The government did not step in to support civil litigants until the late 1960s, however; then a national legal aid scheme was created as part of the "Great Society" vision during the presidency of Lyndon Johnson. But that program ran into very forceful political opposition. In California, legal aid organizations repeatedly went to court to challenge efforts by Gov. Ronald Reagan to reduce welfare payments and won. Reagan tried to cut off federal financing for the legal services organizations and failed in that effort also. When Reagan was sworn in as president in 1981, he tried to end the legal services program. Although he failed in that effort, the program was significantly overhauled and new regulations were adopted forbidding "impact litigation" and requiring that legal aid lawyers represent only individual clients, avoiding many politically sensitive types of cases.[21]

For the last 30 years, the budget for government-supported legal services in the U.S. has been cut regularly, and "cost-saving" efforts in Congress to eliminate it entirely have been fiercely resisted by the American Bar Association and others. These developments were not prompted by more general austerity. Meanwhile, prominent law firms have inaugurated "pro bono" programs under which their lawyers volunteer their time to represent civil litigants unable to pay for representation. And a movement urging recognition of "civil *Gideon*" rights has arisen, seeking to require that the courts appoint counsel to represent civil litigants unable to hire their own lawyers. Crisis situations produce similar efforts. Thus, in the wake of the Sept. 11, 2001, tragedies, lawyers volunteered to represent victims free of pay. And in 2011 the Chief Judge of the New York

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[19] For discussion of this evolution, see A. Saltzman, 'Private Bar Delivery of Civil Legal Services to the Poor: A Design for a Combined Private Attorney and Staffed Office Delivery System,' 34 Hast. L.J. 1165 (1983).

[20] Se Gideon v. Wainwright, 372 U.S. 335 (1963) (upholding constitutional right of impecunious felony defendant to appointed counsel).

[21] For a review of this history, see 'Legal Aid: A Special Report,' National L.J., March 14, 2011.

Court of Appeals endorsed procedures to guarantee that all homeowners faced with judicial foreclosure in that state have legal representation.[22]

Although these recent developments have generated much attention, and provided representation for a significant number of people who would not otherwise have had the assistance of a lawyer, the last decade has seen a dramatic rise in the frequency of "pro se" litigation in U.S. courts. Unlike some countries (such as Germany), people have a right to litigate on their own without counsel in the U.S. In growing numbers, they have been doing so.

The proliferation of unrepresented litigants has placed stresses on American procedure, which is premised on litigation by lawyers. When nonlawyer pro se litigants fail to do things the right way, courts are confronted with the question whether to decide against them because they have not followed proper procedure. A prime concern has been raised by motions for summary judgment, which can end a case. At least some federal courts insist that represented parties advise their opponents about what is required to respond to such motions.[23] But this involvement by the court threatens the customary impartiality of the judge. As a judge dissenting from imposing such a requirement on parties opposed by unrepresented litigants observed, "[w]e are not supposed to be advocates for a class of litigants, and it is hard to help pro ses very much without being unfair to their adversaries."[24]

This example shows that even measures within the American definition of "procedure" can feel stress due to budgetary concerns. In the U.S., one could say that the opposition to some legal aid efforts was as much ideological as budgetary. Often -- as was the case with Governor Reagan in California -- the defendant in suits brought by legal aid was government itself, and a strong cry went up about paying lawyers to sue government and thereby (often) impose new budgetary burdens on government to comply with the relief granted in the lawsuit. And it does seem that nonideological budgetary pressures are causing significant curtailment of legal aid funding in other countries. Here, the

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[22] See D. Streitfeld, 'State Effort to Assure Legal Aid in Housing,' N.Y. Times, Feb. 16, 2011, at B1.

[23] See Irby v. New York City Transit Auth., 262 F.3d 412 (2d Cir. 2001) ("the moving party should routinely provide a pro se party with notice of the requirements of Rule 56 [the summary-judgment rule]").

[24] Rand v. Rowland, 154 F.3d 952, 968 (9th Cir. 1998) (dissenting opinion).

recent U.K. experience seems a prime example.

An alternative approach might be to impose more responsibility on the judge to make sure the case turns out right. Of course, every system imposes some responsibility on the judge to attempt to reach the right result, but generally the adversary method is relied upon to bring both evidence and arguments to the judge's attention, leaving only the judging to be done. But this may not work when lawyers are not involved. In Japan, for example, reportedly more the half the civil cases involve an unrepresented litigant on one side.[25] As Professor Taniguchi has reported, the Japanese reaction to such problems was that the judge should take over:

> If both sides are not represented, the judge would be at limbo unless he actively intervenes in the process in order to guide the lay parties by the clarifications and suggestions. Having realized this reality, the [Japanese] Supreme Court changed its view in the mid-1950s and held that a failure to exercise the clarification power was reversible error. Ever since, the same position has ben kept and even strengthened. Today, the clarification as a judge's duty is a firmly established part of Japanese procedure.[26]

From one perspective, this sort of effort in the U.S. could fit within the "case management" movement that has grown here in recent decades. If it did, it would raise not only issues about judicial partisanship but also compound the potential budgetary impact of this relatively new judicial activity. To do this job effectively, America would have to deploy more judges and incur the increased costs that deployment would entail. To date, that has not happened, and the current budgetary crisis is not likely to prompt moves in that direction.

But the American experience does merit one more note about legal aid. Although this governmental activity has not been embraced, fee-shifting has become a fairly widespread phenomenon as a feature of various substantive areas. In the 1960s, Congress considered methods of enforcing new civil rights protections. Proponents of those protections strongly favored enforcement by a governmental agency, the Equal Employment Opportunity Commission, but they needed legislative support from

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[25] C. Goodman, *Justice and Civil Procedure in Japan* (Oceana Pub., 2004), at 233.

[26] Y. Taniguchi, 'Japan's Recent Civil Procedure Reform: Its Seeming Success and Left Problems,' in *The Reforms of Civil Procedure in Comparative Perspective* (N. Trocker & V. Varano, eds., G. Giappichelli Ed., 2005), at 91, 94.

Republican senators who opposed giving the EEOC that enforcement authority and instead proposed that individual employees be empowered to sue if they claimed their rights had been violated.[27] In order to facilitate such suits, Congress provided that the prevailing party could recover its attorney's fees from the loser, and the Supreme Court held that there should be a presumption in favor of such fee recoveries when plaintiffs win and against it when defendants win.[28] Thus, rather than directly subsidizing "worthy" litigation (or "worthy" litigants), this American approach has been in keeping with the more general "offloading" of the fiscal costs onto private litigants. This orientation reportedly is gaining support in Europe also, as Professor Kelemen has recently written:

> The increasing cost of popular legal aid schemes clashed with governments' mounting fiscal pressures, leading policy makers [in Europe] to introduce various reforms designed to cut spending on legal aid and to promote alternative, privatized means of facilitating access to justice.[29]

Thus may austerity have a direct impact on "procedural" arrangements considered more broadly.

III. THE LIMITED IMPACT OF COURTS' AUSTERITY ON "PROCEDURE," CONSIDERED IN THE NARROW AMERICAN WAY

As noted at the outset, in the U.S. the pervasive governmental austerity of recent years has affected court operations and raised concerns about impaired access to trial, and perhaps greater barriers to access, for civil litigation. Even when legislatures do not use "across the board" budget cutting measure, courts have seen their budgets fall, and if all governmental operations must face "equal pain," those budgets may fall farther. In the state courts in California, for example, many court personnel have been forced to take unpaid days of leave called "furloughs," and courts have been closed on days

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[27] A thorough account of this can be found in S. Farhang, *The Litigation State* (Princeton U. Press, 2010).

[28] See Chirstiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (holding that winning defendants should recover their fees only on proof that the suit was "frivolous, unreasonable, or without foundation"), and Newman v. Piggie Park Ent., Inc., 390 U.S. 400 (1968) (holding that defendants must usually pay successful plaintiffs whether or not their defenses were groundless).

[29] R. Kelemen, *Eurolegalism* (Harvard U. Press, 2011), at p. 64.

when they would usually be open. Other efforts have been made to save costs on court operations, such as by curtailing use of in-court security personnel, and reducing use of official court reporters, relying instead on mechanical recording devices to make a record of court proceedings.

These efforts have encountered their own forms of "stickiness." Court employees are governmental employees; unpaid leave for them therefore undercuts the "welfare state" at its broadest. More focused counterpressure is also identifiable. In California, the sheriffs who provide in-court security and the court reporters are well organized and have vehemently fought efforts to use recording devices in court instead.[30] Indeed, a generation ago they similarly fought rule changes designed to permit recording of pretrial discovery using recording devices rather than human court reporters. Gradually, however, the video machine has become more and more important as a way of recording pretrial depositions.

But it seems likely that the courts' cost-cutting efforts will not focus much on what we might most narrowly define as "procedure," for that does not involve large expenditures of time or money in courts in the U.S. Unlike some countries, America makes the parties bear most of the cost of case preparation and presentation. American courts generally are relatively lenient in passing on the sufficiency of pleadings. Court-authorized pretrial discovery is very broad, but subject to very little judicial oversight. To the contrary, the parties and their lawyers are expected to work it out themselves. As emphasized by a prominent federal magistrate judge more than a quarter century ago, this reality is a central feature of the system:

> The courts, sorely pressed by demands to try cases promptly and to rule thoughtfully on potentially case-dispositive motions, simply do not have the resources to police closely the operation of the discovery process. The whole system of civil adjudication would ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.[31]

So there is little money to be saved by changing discovery rules to reduce costly judicial involvement in the discovery process.

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[30] See E. Green, 'Court Officials Balk at Cost-Saving Proposals,' S.F. Daily Jour., Feb. 11, 2011, at 1 (noting that '[t]he sheriffs and the court reporters both have strong unions with clout in Sacramento [the state capital].').

[31] In re Convergent Technologies Securities Litigation, 108 F.R.D. 328, 331 (1985).

Things are similar with regard to attorney fees. As noted above, the U.S. has never had generous arrangements for state-supported representation for the poor in civil cases. But there are many exceptions to the American Rule that the parties must pay their own lawyers,[32] and determining the amount due in such cases is a chore for the courts. That chore is necessary, however, only in a small proportion of all civil cases.

In budgetary terms, contrast this situation with the governmental responsibility to provide representation for the poor when they are accused of crimes. There, recent budget problems have delayed payments to private attorneys who provide much of that representation.[33] Meanwhile -- in another example of "stickiness" -- unionized public defenders (government attorneys who provide such services in-house) are suing a California county for referring misdemeanor cases to private attorneys. A budget shortfall led to layoffs of about half the in-house public defender attorney staff, resulting in a surge of work for private attorneys. The public defenders' union sued, claiming that this outsourcing violated the county charter because it "displaced" civil service employees.[34]

Things might well be different in a different system. We are told, for example, that in many European countries party-controlled discovery is anathema, and that court control of fact gathering is considered a matter of almost constitutional importance. That system may have much to recommend it. Long ago, for example, Professor Langbein proposed that the U.S. shift to judge-controlled evidence-gathering to achieve the "German advantage" in civil procedure.[35] Perhaps that would lead to a lot less evidence-gathering and save money, but it would also almost certainly require a lot more judicial activity and generate higher costs for the court system's administration of civil cases. Because it has not happened, however, the cost cutters will have to look elsewhere for savings.

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[32] For discussion, see A. Saltzman, 'Incorporating Statutes Into the Common Law: The Judicial Response to Statutes Shifting Attorney's Fees, 30 St. Louis Univ. L.J. 1103 (1986) (discussing the proliferation of fee-shifting statutes that operated as exceptions to the American Rule, and the prospect that they might affect the common law rule against attorney fee shifting).

[33] See G. Friedman, 'Lawyers for Indigent Fret Over Past-Due Payments,' S.F. Daily Jour., March 9, 2011, at 1.

[34] See B. Ortiz, 'Sacramento Public Defenders Say County is Outsourcing Their Work,' S.F. Daily Jour., May 3, 2011, at 1.

[35] J. Langbein, 'The German Advantage in Civil Procedure,' 52 U. Chi. L. Rev. 823 (1985).

And they have looked elsewhere, largely focusing on areas that don't fall readily within the narrow definition of procedure. Instead, much of what American courts do, and particularly in state courts, is more like the conventional welfare state concept and more costly in terms of court operations and ancillary services. One example has to do with protecting children; although social agencies have responsibility to monitor and provide care for at-risk children, the vehicle for providing that protection is often a court order.[36] Similarly, in instances of spousal brutality, a court proceeding is essential to reducing or eliminating the risk. The costs for those efforts might predictably be a more inviting target for cost-cutters. And much as the interests of battered children and battered spouses are of vital importance, it need not follow that those cutting the resources available for them encounter the kind of "stickiness" that will be presented when cuts are considered for less vulnerable groups, such as court reporters.[37]

In other countries the procedural arrangements may call for more judicial involvement in ordinary civil litigation and also therefore produce a stronger incentive to curtail procedures to save money. In Germany, for example, there are far more judges than in most other countries; one might well expect that statistic to make revising procedures to save judges time seem more promising as a way of reducing court costs. In other countries, appellate review is available much more frequently and can be more intense than in the U.S., meaning that cost savings could result from curtailing those features of other countries' procedural systems.

Although the American approach to litigation generally minimizes the sorts of public expenditures that might prompt cost-cutting, the trends is much American procedural innovation in the last few decades cut the other way. Since the 1960s, the byword for judges' approach to civil litigation has increasingly been to emphasize "judicial management." This activity calls for early and regular monitoring of the case by the judge, and it is not installed in a number of court rules.[38] Reacting to the

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[36] For a general discussion, see A. Pellman, 'Introduction to the Dependency Court System,' S.F. Daily Jour., March 28, 2011, at 6.

[37] Thus, F. Silberberg, 'Traffic Jam,' S.F. Daily Jour., March 14, 2011, describes the new delays resulting in family court proceedings (regarding divorces and child custody matters) due to priority for cases involving domestic violence.

[38] See, e.g., Fed. R. Civ. P. 16 (requiring that courts set schedules for completing pretrial tasks in most cases and authorizing -- indeed encouraging -- them to do much more).

supposed abuse of discovery in some cases, judges are expected to monitor what they formerly permitted to proceed on its own. More recently, the U.S. Supreme Court has announced decisions on pleading suggesting that the federal courts should engage in more vigorous scrutiny of complaints before allowing them to proceed to discovery.[39] Similarly, American courts increasingly undertake labor-intensive scrutiny of the merits of cases in deciding whether they should be certified as class actions.[40] For a quarter century, the availability of summary judgment has been very important, where formerly it was thought impossible to obtain, meaning that in certain types of litigation summary judgment are more the rule than the exception, and these motions tax courts who much review piles of evidence to decide whether to proceed to trial.

One view of these developments is to remark that they make the American judge look much more like her European counterpart -- taking an early and continuing interest in the progress of the case, superintending the factual development, and often resolving the case on the basis of written submissions and oral hearings involving presentations by the lawyers.

Another view of these changes, not inconsistent, is that they *do* emulate the supposed German model, and that they may also require that the judiciary be increased in size to cope with its new responsibilities. Put differently, one could argue that the way to respond to austerity would be to unwind the general trend of procedural development in this country in the last few decades.

There is no indication that is happening. To the contrary, it seems that other common law countries are emulating the American model. The U.K., for example, adopted a modified form of case management, using "case management teams," as a result of the reforms proposed by Lord Woolf. The very need for "teams" suggests that considerable judicial resources are involved. In other countries, interest in case management has also risen. Cost savings have not emerged as offsetting considerations.

IV. AUSTERITY AND AMERICAN EFFORTS TO CONSTRAIN THE COSTS OF AMERICAN PROCEDURE

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[39] See Ashcroft v. Iqbal, 130 S.Ct. 1937 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (directing the courts to determine whether the factual allegations of a complaint make the claim "plausible").

[40] See R. Marcus, 'Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification,' 79 Geo. Wash. L. Rev. 324 (2011).

As all know, American procedure is hardly cost-free even if much of the cost it produces falls on the parties rather than the courts. Indeed, a major force prompting the investment of judicial energy into managing litigation has been to control those costs. Left to their own devices, it is said, American lawyers will invest too much energy into discovery and related activity, or use it to inflict unduly large costs onto their adversaries. Beginning in 1983, the rules directed that such "disproportionate" discovery be forbidden on a case-by-case basis.[41]

But the procedural solution of applying a proportionality measure to constrain the costs of litigation itself imposes a cost. As some have suggested, the burden of performing this proportionality analysis on a case-by-case basis prompts courts to develop across-the-board treatments for categories of cases. As Professor Subrin observed about U.S. cases management in the late 1980s:

> Case-by-case management developed because the transaction costs of procedural rules with broad attorney latitude were too high. As a result of federal local rules and state experimentation, the judiciary has already demonstrated that it thinks the transaction costs of ad hoc case-by-case management are also too high. Judges are already turning to formal limitations and definitions in order to reduce transaction costs.[42]

That development should not have been surprising; otherwise the rising cost of managing litigation would impose a significant burden on court administration. The experience of the California state courts somewhat reflects this attitude. In California, the Legislature adopted a Trial Delay Reduction Act that produced computer-generated deadlines for completing pretrial tasks in civil cases, but the rigidities of that system soon caused substantial modification.[43]

Many say that the American proportionality effort has failed

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[41] See, e.g., Fed. R. Civ. P. 26(b)(2)(C) (forbidding discovery that is disproportionate); 26(g) (treating a lawyer's signature on a discovery document as a certification that it complies with the rules including the proportionality rule).

[42] S. Subrin, 'Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. Pa. L. Rev. 1999, 2049 (1989).

[43] See R. Marcus, 'Malaise of the Litigation Superpower,' in *Civil Justice in Crisis* (A. Zuckerman, ed., 1999), at 71, 103-04.

because American litigation continues to result in high costs. A recent study, for example, demonstrated that multinational companies incurred much higher litigation expenses in the U.S. compared to their sales volume in this country compared with a wide variety of other countries.[44] But another recent study suggests that in most American litigation the level of expenditure is usually closely proportionate to the stakes in the case.[45] On one level, these two virtually simultaneous reports seem to conflict. But on another level, they do not conflict. Instead, what they may show is that the stakes in American litigation are much higher than the stakes in litigation in other countries. Thus, unlike most of the rest of the world, America relies has relaxed pleading rules, broad discovery, and jury

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[44] See 'Litigation Cost Survey of Major Companies,' available in the Library at http://civilconference.uscourts.gov. This research effort collected data on legal expenditures (not including amounts paid to satisfy judgments or settle cases) by Fortune 200 companies for the period 2004 to 2008. It contrasted the amounts paid for U.S. litigation costs and non-U.S. litigation costs. The comparison presented those legal costs as percentages of revenue -- U.S. legal costs as a percentage of U.S. revenue, and non-U.S. legal costs as a percentage of non-U.S. revenues.

Figure 9, on p. 13 of the study, presents those comparisons, and they are striking:

	U.S. costs	Non-U.S. costs
2004	0.48%	0.11%
2005	0.48%	0.06%
2006	0.56%	0.07%
2007	0.53%	0.06%
2008	0.51%	0.06%

As the study points out, measured in this manner the U.S. costs range from four times as much to nine times as much. It suffices to emphasize that they are much higher. The survey was administered and the data were compiled by the Searle Center on Law, Regulation, and Economic Growth of Northwestern University School of Law.

[45] See E. Lee & T. Willging, 'National Case-Based Civil Rules Survey,' available at www.fjc.gov/public/pdf.nsf/lookup/FJC_Civil_Report_Sept_2009.pdf (last visited May 2, 2011).

trials, and often permits very substantial recoveries for pain and suffering or comparable emotional distress, and sometimes also permits very substantial punitive damage recoveries.

Thus, it seems that proportionality may be working in America, perhaps due to the American approach to financing litigation. The American Rule that one must usually pay one's own lawyer naturally inclines litigants (and lawyers) to calibrate their litigation efforts to what they may gain or lose due to litigation. Although many who object to American broad discovery deplore the burden of providing responses, others who seek information complain of "dump truck" discovery responses, and deplore the burdens imposed on them in culling through the dumped material to find the truly important (sometimes, perhaps, the only actually requested information). What this situation suggests regarding austerity is that self-regulation may suffice to avoid disproportionate expenditure on litigation by the parties.

In other ways, however, recent trends in American civil litigation do seem calculated to address austerity. It is a truism now that the rate of trial in civil cases has been falling for half a century.[46] That reduction in the trial rate also reduces the resources American courts must expend on holding civil trials. Indeed, some who have criticized the alternative dispute resolution movement have contended that it reflects a judicial attitude that a trial is a failure of the judicial process.[47] One can deplore the declining trial rate on a variety of grounds, but it surely holds the potential to save money for courts, and could be regarded as a response to austerity, or at least a strategy for coping with austerity.

There is some evidence that austerity connects to the declining trial rate. In California, for example, when court budgets were cut one response was to stop holding civil jury trials because that would save on juror fees. More significantly, there is an understandable priority of criminal trials, which implies austerity in that there is insufficient trial capacity to accommodate criminal and civil cases.

The widespread phenomenon provides weak evidence that austerity affects procedure, however. Most importantly, it has been going on for a long time. Most studies of the civil trial

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[46] See, e.g., the symposium on 'The Vanishing Civil Trial' in 1 Empirical L. Rev. 459-984 (2004).

[47] See E. Brunet, 'Questioning the Quality of Alternate Dispute Resolution,' 62 Tulane L. Rev. 1, 50 (1987) (referring to judges who have "an attitude that a trial represents a judicial failure").

rate in the U.S. trace a decline beginning around the middle of the 20th century and continuing relatively steadily to the present very low trial rate.[48] True, the predicament of the welfare state outlined in Part I above has existed for roughly the same period of time, but there the comparison ends. Unlike the welfare state predicament, it is difficult to identify some governmental commitment comparable to the post-war welfare undertaking that mounted over the ensuing 50 years. Moreover, the steady decline in trial rate seems directly contrary to the steady increase in more general social entitlements during the same period, and it is that increase that has led to the current funding predicament of the welfare state.

One might point to the growing costs of pretrial procedure in the U.S. since World War II as comparable to the growing financial commitments of the welfare state. But that comparison does not fit either. True, the commitment to broad discovery at the heart of the 1938 adoption of the Federal Rules of Civil Procedure in the U.S., coupled significantly with technological developments such as the development of the photocopier (and email at the end of the 20th century), has fueled the growth in litigation costs in the U.S. But other stimuli to that growth were broadened grounds for liability and increased judicial tolerance for large recoveries in personal injury and other litigation. Those changes were not constant over time, and they did not owe anything to austerity in the general society. To the contrary, they might better be regarded as symptoms of wealth in the greater society. And these procedural responses to American litigation cost began over 30 years ago, not as a result of the intrusion of austerity into the American economy or the judicial system.

In sum, austerity does not explain the actual procedural reforms that have occupied the last few decades in American procedure, or the most prominent phenomenon during that period, the declining trial rate in civil cases. The declining trial rate may be a symptom of the courts' limited trial capacity and the priority of criminal cases in the trial queue, but it seems largely also to result from increased judicial efforts to manage civil litigation and, most specifically, to promote settlement in civil litigation. Those efforts, as we have seen, actually create new burdens for courts and might be expected to be victims rather than results of austerity.

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[48] "When the Federal Rules of Civil Procedure became law in 1938, about 18% of cases terminated in Federal Court were resolved by trial. In the early 1960s, the figure was down to about 12%; in 2002 it was below 2%." S.B. Burbank & S.N. Subrin, 'Litigation and Democracy: Restoring a Realistic Prospect of Trial,' 46 Harv. Civ. Rts.-Civ. Lib. L. Rev. ___ (forthcoming 2011).

V. THE USES OF AUSTERITY -- ON JUSTIFYING PROCEDURAL CONSTRAINTS

Concluding that American procedural arrangements do not produce costs that would prompt change due to governmental austerity and that the changes in American procedure do not seem to result from austerity does not exhaust the possible impacts of austerity on procedure.

To the contrary, austerity can be used to support arguments for abolishing or changing procedural arrangements because they are linked to other costs. The particular example from the U.S. is the argument that litigation outcomes are peculiarly costly in this country. As noted in Part IV above, a recent study illustrated that divergence by focusing on litigation costs, but another called into question the conclusion that American litigation ordinarily generates disproportionate costs for the litigants by showing that in a sample of recent federal-court litigation the costs had almost always been proportional to the stakes.

That sort of insight may cause one to want to change the stakes, and to use austerity as a way of justifying such changes. Austerity probably adds force to such arguments. When times are tough, the argument that each country must avoid burdening its enterprises with higher costs than those borne in other countries may acquire added salience.

Certainly there are examples of such arguments having effects in the past. A particular example is the "crisis" in medical malpractice insurance that has received attention from time to time in recent decades. Often the crisis theme was supported with indications of rapid rises in premiums for medical malpractice insurance. Critics of the argument would stress that the increase in premiums often could be traced to declining earning by insurance companies from their investments or in other activities that they sought to recoup with the increase in premiums. But a key point in the debate was the supposed contribution to rising premiums of large jury awards, particularly for pain and suffering or other "noneconomic" injuries.

The specter for state legislatures was that insurers would refuse to provide coverage in their states or doctors would refuse to practice there -- variants on an austerity argument that cutbacks are necessary. A number of state legislatures in the U.S. have responded by placing ceilings on recoveries for noneconomic damage. This response reportedly had a significant effect on the economics of bringing medical malpractice claims. Those cases are almost always filed on a contingency basis, and a plaintiff must have a medical expert to support the claim that the defendant medical provider failed to comply with the standard

of medical care applicable in the community. As a result, a plaintiff lawyer who does not win a judgment or settlement gains nothing and can incur large costs to hire a medical expert. When the patient does not have large economic losses (e.g., lost earnings), the case may suddenly become too expensive to file if there is a cap on noneconomic damages.

Somewhat similar arguments can be made about the handling of issues closer to the heartland of procedure. For example, the Private Securities Litigation Reform Act of 1995 responded to the alleged ease with which plaintiffs making securities fraud claims against corporations (many of them Silicon Valley high-tech companies) could win large settlements because of the low pleading obstacles and broad discovery provided in American procedure.[49] The legislation "corrects" those features by imposing a very high pleading requirement and forbidding discovery until the complaint survives a motion to dismiss.[50] In 2005, the Class Action Fairness Act was adopted to facilitate removal of class actions from state court to federal court because of concern about state-court class actions enabled plaintiff lawyers in some instances to "hold up" national companies by suing them in out-of-the way "magnet" courts that would treat them unfairly, thereby generating enormous recoveries on behalf of class members who had never heard of, much less hired, the lawyer who filed the suit.

Linking these measures to austerity requires a bit of a stretch, but not a great one. On one level, the impulse to guard against excessive jury awards is a product of what one might call a "conservative" view, and the main proponents of such legislation often are drawn from that end of the political spectrum. But on another level, the success of the legislation depends on a more general uneasiness about the fiscal condition of the economy, and the risk that litigation outcomes may put

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[49] For an elaboration of this argument, see J. Alexander, 'Do the Merits Matter? A Study of Settlements in Securities Class Actions,' 43 Stan. L. Rev. 497 (1991). Professor Alexander reported that securities fraud class actions were routinely settled for a relatively uniform percentage of prospective damages, and concluded that this meant that the merits -- the actual strength of the particular claims in a given case -- did not matter. Compare J. Seligman, 'The Merits Do Matter,' 108 Harv. L. Rev. 438 (1994) (questioning Alexander's conclusions).

[50] See 15 U.S.C. § 78u-4(b)(2) (requiring plaintiff in a securities fraud suit to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [intent to defraud]." See also Id., § 78u-4(b)(3)(B) ("all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss").

businesses out of action and put people out of work.

Austerity can produce this mind-set. A striking example is the report recently that prospective American jurors have become markedly more antagonistic toward serving than they were until recently. As reported in the *National Law Journal*:

> As hard times stretch into their fourth year, people are becoming increasingly uptight about leaving their work to serve on a jury. Statistics are hard to come by -- nobody, apparently, is measuring the phenomenon. Still, lawyers report anecdotally that more prospective jurors are asking to be excused for financial reasons. Many are self-employed and worried they'll lose business. Others fear their employer will find it all too easy to replace them while they're out on jury service -- permanently, perhaps.[51]

A trial consultant reported advising that lawyers settle cases that would strain jurors' sympathy, explaining that "[t]he jurors are much less empathetic than they would've been a few years ago."[52]

Although jury service has long been viewed by many as an unattractive burden, this development could be a harbinger of a more general austerity effect on features of American procedure. To the extent businesses and other defense-side interests can link American procedure to lack of competitiveness for American businesses (and employers), they may be able to prompt procedural changes that are promoted as designed to ameliorate the supposed burden American litigation places on American business.

One effective counter-argument to this impulse could be to compare the differences between a variety of American arrangements and comparable arrangements in other parts of the world, particularly Europe. Although the U.S. has now (perhaps temporarily) adopted a limited form of nearly universal health care, most European countries have had governmentally provided health care for decades. Although most American workers (except significant numbers of public employees) have no fixed pensions, most European workers do have defined benefit pensions. Indeed, it is precisely those sorts of arrangements that have created the general climate of austerity, and the American reliance on litigation as a substitute for major portions of the social safety net found in other countries can explain some of the open-

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[51] A. Bronstad, 'Voir Dire as Contact Sport,' Nat. L.J., March 21, 2011, at 1, 4.

[52] Id. at 5.

ended aspects of the American litigation arrangements.[53] The next part will reflect on the risks that austerity might blind the public to important features of the current arrangements. For the present, however, the basic point is that austerity could put American procedures under stress even though it is difficult to support the conclusion that those procedures produced the austerity, or that changing them would undo the financial conditions that did produce the austerity.

Another point worth making is that procedure can so increase the impact of substantive legal provisions as to create its own austerity concerns. A prime example is the American class action. We are told that although Europe is giving serious consideration to developing mechanisms for group litigation, it is adamant that such arrangements would be significantly different from the American class action, which is widely denounced.[54] At least in some circumstances, class treatment can raise austerity concerns where they would not otherwise exist. A prime example exists with consumer protection legislation that requires businesses to employ certain technical protective measures and authorizes private civil actions by those not accorded such protections for a set amount, often called a "statutory penalty." Handled one by one, such cases permit mild enforcement measures to be effected by private enforcement. Bundled into a class action, however, these provisions could assume much greater importance than the legislature probably intended. An early example was provided by the American Truth in Lending Act, which required various disclosures be made in specified ways, such as certain type faces and sizes. When a 1974 class action on behalf of 130,000 Master Charge credit-card holders challenged the adequacy of such disclosures and sought the minimum $100 per customer award for all class members, the

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[53] Remarkably, a significant factor in opposition to expansion of the social safety net in the U.S. came not only from corporate America, but also from the plaintiffs' bar. For a recounting of this history, emphasizing the collaboration on this project between Melvin Belli -- a famous plaintiff trial lawyer known as the "King of Torts" -- and Roscoe Pound, a former Dean of Harvard Law School, see J.F. Witt, 'The King and the Dean: Melvin Belli, Roscoe Pound, and the Common-Law Nation,' in J.F. Witt., *Patriots and Cosmopolitans* (Harvard U. Press, 2007) at 211-78.

[54] See, e.g., C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Hart Pub., Oxford Univ. Press, 2008). This book begins by explaining that "[t]he key question that is facing European legislators is how to enable collective redress without producing the undesirable consequences that are associated with the most obvious historical model, namely the US class action." Id. at 1.

judge refused to certify the class because it would result in "annihilating punishment."[55] Congress later solved the problem by amending the Act to limit class-action recoveries to the lower of $100,000 or 1% of the defendant's new worth.[56]

Particularly in an era of austerity, one might expect courts to be diffident about the overkill the class action could make possible. But in a 2010 decision, the U.S. Supreme Court refused to exercise such restraint in another proposed class action for such a penalty. In that case, the case was in federal court but the claim was created by state law.[57] That state's law also said that class actions should be allowed in actions for penalties only if the statute creating the penalty expressly authorized them, which the pertinent statute did not. Nonetheless, the Supreme Court held the state prohibition on class actions irrelevant in federal court, where the federal class-action rule holds sway.[58] For proceduralists, then, it might be appropriate sometimes to be cautious about aggressive uses of procedures that could worsen problems created by austerity.

VI. THE USES OF COURTS -- WHAT FEARS OF AUSTERITY MIGHT DO

We have seen that austerity may prompt changes in American procedure even though current procedures seem not to have been major causes of fiscal problems and the changes may seem poorly designed to solve the fiscal problem. (Of course, changing things that did not cause the problem is likely generally not to solve the problem, but that does not always undercut the urge to

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[55] Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

[56] See Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat,. 1500, 1518. Congress later raised this amount to $500,000.

[57] Ironically, this case could be filed in federal court only because of the Class Action Fairness Act, mentioned above. That legislation -- vigorously opposed by plaintiff lawyers and supported by corporate America -- enabled this potentially mammoth case to be filed in federal court; before that legislation was adopted it could only have been filed in state court, where it could never have been handled as a class action. This is a delicious irony that points up how even-handed procedural "reform" can be.

[58] Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 130 S.Ct. 1431 (2010). For trenchant criticism of this decision, see S. Burbank & T. Wolff, 'Redeeming the Missed Opportunities of *Shady Grove*,' 159 U. Pa. L. Rev. 17 (2010).

change when the problem is felt to be sufficiently oppressive.)

Changes in American procedure that are justified on austerity grounds could affect a variety of American practices. One possible change (though not really a change in procedure, properly conceived) would be to increase access fees, the charges required of those who file or first appear in an action. It is said that, at some times and in some places, filing fees were a mainstay of financial support for court systems; Professor Genn reports that new filing fees introduced in the U.K. in 1992 meant that, by 2006, the English civil justice system was actually generating a "profit" that was diverted to other uses, such as paying for the criminal justice system.[59] In the U.S., this sort of approach to filing fees has been rejected in the past. Two decades ago, for example, the U.S. Federal Courts Study Committee concluded the using filing fees as a way to fill gaps in the budget would violate fundamental norms, so much that even introducing higher fees where they would seem to produce no access difficulties -- say, to suits between corporations -- was considered too risky to contemplate. More recently, however, states have given serious consideration to raising filing fees for civil cases to raise revenue.[60] But a "pay its own way" attitude has not yet set in.

The pay-as-you-go possibility -- and some other possible changes to procedure-- raise serious concerns about unduly impeding access to court, and perhaps also about unduly facilitating (or subsidizing) access to court. One might well ask why access to court should be almost cost-free for a suit between two rich corporations. An answer might be that subsidized access for the rich corporations gives them a stake in the quality of the court system that is valuable for other users.

Whether or not Professor Genn is right that the new filing fees in the U.K. actually produce a "profit," it is likely that for most cases most countries would not favor so pricing their court systems. At the same time, cost-free access to court -- particularly for those who get subsidized legal representation -- seems unwarranted and risky. In the U.S., although there is a guarantee of legal representation for poor defendants in criminal cases, that guarantee is limited for appeals from convictions, and virtually disappears for post-conviction review by petition for habeas corpus. And the proliferation of pro se litigants in American civil litigation show that there is a difference between

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[59] H. Genn, *Judging Civil Justice* (Cambridge U. Press 2010), p. 48.

[60] See, e.g., E. Burke, 'Utah's Open Courts" Will Hikes in Civil Filing Fees Restrict Access to Justice?' 2010 Utah L. Rev. 201.

access in the abstract and effective access; the filing fees now required in most U.S. courts are not keeping prospective litigants for using the courts. Certainly charging fees has limited value in deterring "bad" uses of the courts while facilitating "good" uses of the courts. But equally certainly, some fiscal measures are likely to constrain access in some manner by limiting the case-resolution capacities of the courts.

Sixty years ago a famous American judge speaking at a banquet celebrating a private legal aid organization proclaimed that "Thou shalt not ration justice!" But of course we do that all the time, and one reason for doing it is austerity. In terms of procedure, the negative consequences depend in part on how the rationing is done. It can be done by charging filing fees, or by adopting a full-indemnity loser pays rule for all costs including attorney fees, or by adopting a loser pays rule that sets limits below the normal range of actual expenditures, or by closing courts for extended periods, or by declaring that certain types of cases (for example, criminal cases and spousal abuse cases) have priority over other types (for example, civil cases).

Whether rationing of justice is tolerable depends in part on what goal one pursues for the judicial system. At its narrowest, one might adopt a pure law-and-economics focus, and ask whether given procedural arrangements promise to contribute more to achieving an accurate outcome than the cost to implement. A broader notion of the purpose of procedure is to regard the civil courts as a crucial arm of government that contributes mightily to the public order by articulating and implementing the law.[61] Somewhat more broadly yet, one may embrace a "procedural justice" attitude toward procedure and civil courts, emphasizing the litigant's interest in dignified participation, which litigants seem to value somewhat without regard to whether they win or lose.[62] From any of these perspectives, austerity measures could undercut procedural goals.

One measure of the importance of that undercutting would be the risk that the cumulative effect of impediments to justice will prompt people to resort to self-help. Even in a modern society, that is not an inconceivable result. Consider the following 20-year-old description of the dispute resolution

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[61] This seems close to the heart of Professor Genn's view. See H. Genn, *Judging Civil Justice* (2010), at 46-47, where she deplored a trend to "package" the civil justice system as "a public service." See also J.A. Jolowicz, *On Civil Procedure* (Cambridge U. Press, 2000), ch. 3 (entitled "On the nature and purposes of civil procedural law").

[62] See generally E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

services provided by Japanese gangsters:

> [T]he yakuza have been able to work their way into legitimate society by offering their services for resolving disputes where no other efficient means exists. While Americans enjoy access to the courts to resolve disputes, in Japan litigation is almost unheard of because it is so expensive, time-consuming (cases can take 10 years and more) and rarely produces results that challenge the status quo. Therefore, to collect on an overdue loan, you can hire a member of a yakuza group to stand outside the home of the debtor and hurl obscenities and insults until the debtor caves. Disputed traffic accidents are handled at times by one party hiring a mobster to intimidate the other into agreeing to a resolution.[63]

Assuming that description of Japan was accurate, it is not likely that austerity measures will soon create similar circumstances in many modern societies. To the contrary, the public seems willing to persist in using public courts even when they don't work very well or rapidly. Readers of Dickens' *Bleak House* see a 19th century version of litigants enduring long delays. And such conditions still seem to exist in some places. Consider the following description of contemporary Pakistan:

> When I visited the city courts of Quetta, Baluchistan, a majority of the people with whom I spoke outside had cases which had been pending for more than five years, and had spent more than 200,000 rupees on legal fees and bribes -- a colossal sum for a poor man in Pakistan.[64]

Somewhat similarly, a U.S. study of the "dispute pyramid" a generation ago reported that only about 5% of grievances in the U.S. led to court filings.[65] The authors -- who were focusing largely on the argument that Americans are singularly litigation-prone, summed up their data as follows:

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[63] J. Sterngold, 'Japan's Rigged Casino,' N.Y. Times, April 26, 1992.

[64] A. Lieven, *Pakistan: A Hard Country* (PublicAffairs, 2010). See also Bhatnagar v. Surrendra Overseas, Ltd., 52 F.3d 1220 (3d Cir. 1995) (describing the district court's finding that India's court system was "in a state of virtual collapse").

[65] D.M. Trubek, A. Sarat, W.L.F. Felstiner, H.J. Kritzer, J.B. Grossman, 'The Costs of Ordinary Litigation,' 31 U.C.L.A. L. Rev. 72, 87 Fig. 2 (1983). The authors were then concerned largely with the assertion that Americans are singularly litigation-prone.

> These figures show that lawsuits are filed in just over 10% of the disputes involving individuals where $1,000 or more is at issue. Approximately 90% of the cases were settled or abandoned without a court filing. When one realizes that in many lawsuits little or nothing occurs except filing the complaint, an 11.2% litigation rate does not seem particularly high compared to the potential baseline. Of course, in a country as large as the United States, even at such a rate there will be numerous lawsuits which will involve substantial judicial activity. Nevertheless, it is clear that litigation, even in the limited sense of starting a lawsuit, is by no means the most common response to disputes.[66]

At its most basic, the unavailability of civil justice may hamper business and produce austerity. A recent *New York Times* story entitled "Slow Payers Hinder Trade in Europe" makes the point. It reports that "debt collection problems are a profound deterrent to commerce within the European Union and one of the reasons that job creation and wealth generation falls consistently behind the United States, where pursuing debts across state lines is a comparatively easy task."[67] Because collecting through the courts of another EU country often proves so difficult, business debts in the EU totalling at least 55 billion Euros per year are simply written off each year. "EU officials are starting to circulate proposals for fixing this comparatively simple problem, in hopes of yielding a quick cost-free stimulus to Europe's financial health."[68] Sometimes, in other words, improved access to civil justice can be the vehicle to prosperity instead of falling victim to austerity.

It is impossible, of course, to determine whether austerity-driven or other changes will markedly affect the willingness of people to pursue civil justice. It is even more difficult to guess when such changes would produce conditions like the ones reported two decades ago in Japan. So probably the current austerity is not going to produce dramatic rises in self-help in the near term. Looking farther into the future, however, one can sense that important social bonds reinforced by civil justice will not endure forever if austerity taxes them beyond a certain limit.

VII. CONCLUSION

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[66] Id. at 86-87.

[67] S. Daley & S. Castle, 'Slow Payers Hinder Trade in Europe,' N.Y. Times, April 9, 2011, at B1.

[68] Id.

Austerity seems to loom over everything nowadays, and procedure is not exempt. The paper begins at a different point from Professor Genn's Hamlyn Lectures, and accordingly ends at a different point also. Professor Genn essentially sees the last four decades -- and the case management movement in particular -- as symptoms of a manufactured austerity "crisis" that has been employed to drain vigor from civil justice.

Although sounding a tocsin regarding the possible effects of general concerns about austerity in constricting procedure, this paper regards the pertinent austerity much more narrowly, focusing on the fallout from the financial crisis that began in about 2007. It ends up with a rather mild conclusion about the potential impact of austerity measures on procedure. For countries like the U.S., the court system and its attendant procedures do not seem to fit the mold of welfare state measures that rely on expenditure of public funds and therefore must face pressures for change. At the same time, the "stickiness" that characterizes opposition to such changes in the welfare state is likely not to manifest itself frequently in relation to changes in procedure or court functioning. The forceful and organized resistance in California to reducing court expenditures for in-court security and court reporters would be unlikely to be repeated in response to changes in procedures such as the broad discovery and relaxed pleading that characterize American procedure.

Austerity can thus been seen as largely beside the point in a procedural system like the U.S., in which the main costs are borne by the litigants, not the courts. The existence of those costs may, however, fuel efforts to dismantle the procedural system to reduce costs, or to weaken substantive provisions to remove a "competitive" disadvantage for those subject to them. There has been a long history of lampooning American outcomes in order to undercut the legal provisions on which they were based. Austerity measures might more likely focus on those substantive provisions, although altering procedure might be an inviting back door to doing much the same thing to keep the nation's businesses competitive.

For countries that rely much more heavily on their courts to shoulder the cost of civil litigation -- for example, by leaving fact development to the judges and relying on repeated and stringent review of first-level judicial actions by higher-level judges, the prospective impact of austerity on procedure would -- if the austerity continues -- hold greater potential to cause procedural changes.

When the Obama Administration took office in the U.S. at the height of the current financial crisis, someone associated with it was quoted as saying that it would be a pity to let a good crisis to "go to waste," meaning the crisis could be exploited to

justify desired change. From the perspective of procedure, it may be best to hope this crisis does go to waste.