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Book Review. Civil Procedure: Other Disciplines, Globalization, and Simple Gifts

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CIVIL PROCEDURE: OTHER DISCIPLINES, GLOBALIZATION, AND SIMPLE GIFTS

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AMERICAN CIVIL PROCEDURE: AN INTRODUCTION. By *Geoffrey C. Hazard, Jr.* and *Michele Taruffo.* New Haven: Yale University Press. 1993. Pp. x, 230. $28.50.

The unassuming tone and diminutive size of this book belie its worth. Authors Geoffrey Hazard[1] and Michele Taruffo[2] have produced a remarkable exegesis of their subject. As an introduction for academics without law training, this book is without equal. It will help American proceduralists wishing to acquire a comparative or global perspective. Beyond all that, it is simply a seamless, lucid, and thoroughly enjoyable work.

Far more is known in this country of the first author than of the second. Coauthor of a major civil procedure treatise[3] and author of many influential civil procedure articles,[4] Hazard stands with Charles Alan Wright[5] at the top of the field. Taruffo's English-language publications have not been extensive; he is a scholar primarily of Italian law.[6] The publications that have appeared could suggest an interest less focused on civil procedure than Hazard's.[7] Taruffo's interest in

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1. Sterling Professor of Law, Yale University.

2. Professor of Law, University of Pavia, Milan.

3. FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE (4th ed. 1992).

4. They are too numerous to list. A few of my favorites are Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure,* 137 U. PA. L. REV. 2237 (1989); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241; Geoffrey C. Hazard, Jr. & Myron Moskovitz, *An Historical and Critical An[a]lysis of Interpleader,* 52 CAL. L. REV. 706 (1964).

5. Wright's publications are also too numerous to list. They include the leading multivolume series CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (1969-1993) (some volumes coedited with Professor Arthur Miller and others) and Wright's distinguished single-volume treatise, CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS (4th ed. 1983).

6. *See, e.g.,* Massimo La Torre et al., *Statutory Interpretation in Italy, in* INTERPRETING STATUTES: A COMPARATIVE STUDY 213 (D. Neil MacCormick & Robert S. Summers eds., 1991) [hereinafter INTERPRETING STATUTES].

7. This is not to suggest that Hazard's work has been confined to civil procedure. *See, e.g.,* GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (3d ed. 1994).

law appears to be that of a comparativist[8] and seems wide ranging.[9]

Readers may assume, then, that Hazard is largely responsible for the richness of the book's discussion of American procedure and for the surefooted progress the book makes through that entire subject. Taruffo's greatest contributions may have come in the selection and explanation of foreign law procedural models and in the successful process of melding that material with descriptions of American procedural law. His role may well be greater in a counterpart of this book to appear in Europe.[10] In the end, speculations concerning the relative contributions of the coauthors are, of course, just that. Hazard and Taruffo merely state: "The underlying analysis reflects several years of discussion and many written exchanges between us" (p. x).

Most civil cases filed in the United States never see trial.[11] When trials do occur, they are not always efficient or reliable means for settling controversies.[12] For better or worse, however, trial is the centerpiece of American civil procedure, and it contributes more than any other event to the shape of the subject.[13] It therefore makes sense for Hazard and Taruffo to make use of civil trial — or the prospect of civil trial — to link together much of their work.[14] About half the book consists of successive chapters describing American procedure for preparing for — or preventing — trial, basic and specialized forms of

8. Taruffo is described as a "comparativist" in D. Neil MacCormick & Robert S. Summers, *Preface and Acknowledgements, in* INTERPRETING STATUTES, *supra* note 6, at xi, xii.

9. *See, e.g.*, Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis, in* INTERPRETING STATUTES, *supra* note 6, at 461.

10. "A different version of this book, designed for a European audience, is being published in Italian." P. x.

11. "Usually they are settled, voluntarily withdrawn, or decided on the merits prior to trial." GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 87 (2d ed. 1994).

12. For example, commentaries on the reliability and efficiency of juries in civil litigation are less than reassuring. *See, e.g.*, PAULA DIPERNA, JURIES ON TRIAL (1984); JEROME FRANK, COURTS ON TRIAL (1949); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986); Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process — The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15 (1990); Ronald C. Wolf, *Trial by Jury: A Sociological Analysis*, 1966 WIS. L. REV. 820.

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> [M]any cases do require trial. As a more basic matter, the idea and prospect of trial strongly influence the shape of procedure for all civil cases. Pleadings and pretrial proceedings set bounds of inquiry for trial: discovery and less formal means of investigation prepare the parties for trial: and trial can be either a specter which facilitates or an enticement which blocks settlement.

SHREVE & RAVEN-HANSEN, *supra* note 11, § 87.

14. At the same time, the authors do not exaggerate the importance of their subject. They write:

> Although civil litigation is highly visible in the American political scene, resort to litigation is in fact exceptional. In most situations where the injured party has a legally provable claim, the loss is covered by the victim's own insurance (for example, medical insurance) or simply absorbed as a misfortune. Litigation ordinarily is pursued only in cases of serious injury resulting from conduct whose legal wrongfulness is at least reasonably arguable.

P. 208.

procedure for the trial itself, and the particular procedure involved in appeal and judgment enforcement (pp. 105-204).

The other half of the book — most of it at the beginning — consists of material enabling readers to view American civil procedure in broader contexts. The book surveys the antecedents of American procedure found in our own history and abroad (pp. 1-28). It discusses how American courts function as coordinate units of government, with particular attention to public law disputes (pp. 29-34). The authors review sources of governing law — constitutional, statutory, and common law — and the relation between federal and state law (pp. 34-43). They describe the structures of federal and state court systems and explain the important influence of American courts, especially the U.S. Supreme Court, on the shape of American law (pp. 43-70). The authors end the book by reflecting on a variety of matters, including procedural goals and justifications, financial constraints on court access, and future reforms that might reduce the cost and improve the quality of litigation (pp. 205-15).

This summary may suggest that *American Civil Procedure* is rather orthodox. In fact, the opposite is true. The book does not really conform to any established model in the civil procedure literature. It attempts no radical critique or reconceptualization of its subject. The book does not confine itself to any particular aspect of the field. It lacks the length, detail, and how-to orientation of a basic reference work. It is also far too reflective to serve as an exam-preparation device for law students. What are the contributions of this book, then, and how important are they?

The balance of this review addresses those questions. I suggest that at least three groups of readers should be pleased by the appearance of this book. In the first group are scholars who are not law trained but who have a budding interdisciplinary interest in law. In the second are law-trained readers with a substantial but insular understanding of American procedural law, who wish to enrich that understanding with comparative perspectives or who realize that even an American law practice may now require some global understanding of civil procedure. I inhabit the third group. It consists of hardened proceduralists who delight in viewing their subject through the work of a great master.

I. INTERDISCIPLINARY ATTRIBUTES

Perhaps the most significant development in modern legal scholarship has been the increase in interdisciplinary inquiry.[15] Civil procedure writing has benefited enormously from this movement.[16]

15. *See* FRANCIS A. ALLEN, LAW, INTELLECT, AND EDUCATION 56-57 (1979); Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85, 90 (1991).

16. Work at the intersection of civil procedure and the social sciences provides an important

However, effective use of the research methodologies and knowledge of another academic discipline require of law faculty a "remarkable task of self-education."[17] When they have proper respect for disciplines not their own, law faculty embarking on interdisciplinary work share a frightening realization. Unless they immerse themselves in the new discipline and really come to understand it, they risk disseminating naiveté or misinformation — in other words, bad scholarship.

Whatever else individual law faculty do to prepare for interdisciplinary work,[18] all must read a great deal. All search in the beginning for an authoritative introduction to the field that will get them across the threshold of the new discipline. It may be a work written for academic lawyers moving toward a particular discipline,[19] or it may inform a broader audience.[20] Such writings have one thing in common: they give relative strangers to an area a kind of jumpstart — enough enlightenment to plan research agendas and to begin to become informed consumers of scholarship within the new field. Only a special work may be entirely successful in performing such a role. It must be comprehensive but not debilitating in length or detail. It must engage readers who are highly intelligent and educated, yet uninformed in the new area.

Reverse this process and it is possible to understand the great interdisciplinary contribution of Hazard and Taruffo. Academics from other fields wishing to include legal subjects as part of their interdisciplinary work will search for their own special books — informed, comprehensive materials on law compatible with their needs. While I cannot experience their reaction to *American Civil Procedure,* I imagine that this is such a book.[21]

Professor Austin Sarat thinks so, and his capacity to empathize with academics who have interdisciplinary designs on law is greater than mine.[22] He states that the book "does a wonderful job of explain-

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example. *See, e.g.,* HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4 (1983); David M. Trubek et al., *The Costs of Ordinary Litigation,* 31 UCLA L. REV. 72 (1983).

17. ALLEN, *supra* note 15, at 56.

18. Some beginning interdisciplinarians may be able to enroll in courses, attend conferences, or obtain the collaboration or informal assistance of one grounded in the new discipline.

19. *See, e.g.,* G. EDWARD WHITE, INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE (1994). This book can serve as an informed and sensitive guide for those wishing to move from traditional legal scholarship to legal history.

20. *See, e.g.,* ALBERT BORGMANN, CROSSING THE POSTMODERN DIVIDE (1992). This concise and illuminating discussion of modernism and postmodernism could be an invaluable starting point for a project combining law and critical theory.

21. For another book of similar value to scholars untrained in law — one outside the field of procedure — see J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY (1992).

22. While Sarat is now thoroughly versed in the law, he became interested in law as a soci-

ing clearly and directly both the institutional bases and legal meaning of our procedural system."[23] He adds that "[i]t will be the best single resource for a lay audience seeking a broad comprehension of the civil justice system . . . ."[24]

II. CONTRIBUTIONS TO COMPARATIVE LAW AND GLOBALIZATION

Hazard and Taruffo note at the outset their intention to "contrast American civil procedure with the civil law system of procedure that is employed in Europe, Latin America, and Japan" (p. x). The authors make comparisons with civil law in specific parts of the world.[25] They also note features that set American civil procedure apart from all foreign law.[26] At this level, however, the book is a little disappointing. Its treatment of foreign procedural law is unstructured and episodic. Over significant stretches of the book, references to foreign law all but disappear. The book therefore lacks the impact on either comparative law or the newer globalization movement one might have expected of these authors.

Comparative law and *globalization* both describe the transformation of a single-system inquiry into one contemplating the law of two or more systems. The terms differ, however. The focus of the older concept of comparative law tends to be either on the use of comparisons to enhance understanding of a particular legal system — usually one's own — or on the search through different legal systems for universal principles of law.[27] Hazard and Taruffo take aim at the first of these goals[28] and achieve a measure of success. They would have been more successful, however, had they made more than scattered use of comparisons.

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ologist. He has become a distinguished interdisciplinary scholar. *See, e.g.*, Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Austin Sarat, *Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-Empiricist Sociology of Law*, 15 LAW & SOC. INQUIRY 155 (1990); Austin Sarat & William L.F. Felstiher, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOCY. REV. 371 (1980); Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOCY. REV. 339 (1976).

23. Austin Sarat, quoted on the back cover of *American Civil Procedure.*

24. *Id.*

25. For example, the authors explain how differences between the European conception of law as a command of the state and the American conception of law as a shared political understanding affect how judges decide cases. Pp. 73-74.

26. For example, they write: "The most conspicuous characteristic of American civil procedure is the jury system. No other legal system employs juries as the norm in civil cases . . . ." P. 128.

27. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 3-4 (1982).

28. They write, "Contrast, we hope, avoids both idealizing the American system and denigrating it by comparison with an unreal system of perfect justice." P. x.

A newer term,[29] " '[g]lobalization' means different things in different contexts."[30] One working definition for the term is the manner in which political, economic, and technological developments have made it increasingly difficult to contain legal practice within the borders or system of a single nation. The notion that a lawyer practicing locally may occasionally need to understand foreign law appeared as one justification for comparative law study.[31] In contrast, the rhetoric of globalization forces reexamination of our very concept of "local" cases.[32] Applying the principle to civil procedure would suggest that the interaction of domestic and foreign procedural law will affect an increasing proportion of cases.[33] Hazard and Taruffo do not ignore the trend of globalization,[34] but they do not devote much attention to the subject.

To be fair, it might have been difficult for the authors to go a great deal further in developing the comparative law and globalization dimension without sacrificing the strengths of the book touted in this review.[35] Moreover, while the authors' contributions on the international side are a bit thin, the book unquestionably conveys some useful information about other procedural systems and broadens the reader's horizon.

III. SIMPLE GIFTS

The Shaker religious sect flourished in this country in the late

29. Globalization "in academic circles . . . was not recognized as a significant concept, in spite of diffuse and intermittent usage prior to that, until the early, or even middle, 1980s." ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8 (1992).

30. Alfred C. Aman, Jr., *Indiana Journal of Global Legal Studies: An Introduction,* 1 IND. J. GLOBAL LEGAL STUD. 1 (1993).

31. GLENDON ET AL., *supra* note 27, at 3.

32. Aman, *supra* note 30, at 1-3; Alfred C. Aman, Jr., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation,* 102 YALE L.J. 2107, 2114 (1993).

33. This is already evident concerning service of process abroad. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 12.7 (2d ed. 1992); Robert M. Hamilton, Comment, *An Interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents Concerning Personal Service in Japan,* 6 LOY. L.A. INTL. & COMP. L.J. 143 (1983); Pamela R. Parmalee, Note, *International Service of Process: A Guide to Serving Process Abroad Under the Hague Convention,* 39 OKLA. L. REV. 287 (1986). It is also evident concerning the enforcement of judgments. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance,* 67 NOTRE DAME L. REV. 253 (1991); Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany — The 1992 Decision of the German Supreme Court,* 40 AM. J. COMP. L. 729 (1992); Robert E. Lutz, *Enforcement of Foreign Judgments, Part I: A Selected Bibliography on United States Enforcement of Judgments Rendered Abroad,* 27 INTL. LAW. 471 (1993).

34. For example, the authors review discovery in international litigation. Pp. 126-27.

35. A solid comparative law project — even one involving American law and that of only one other nation — might require a much larger book. *See, e.g.,* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1987). A comprehensive attempt to survey settings for procedural globalization might require the same. *See, e.g.,* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (1989).

eighteenth and early nineteenth centuries.[36] Shakers are best remembered for the distinctive and well-crafted buildings and furnishings they left behind. According to a well-known Shaker hymn, "Tis the gift to be simple."[37] Shaker design is spare and outwardly simple, but it reflects a sublime understanding of form and purpose. It is high praise, then, to report that *American Civil Procedure* is quite Shakerish.

Like the Shakers, Hazard and Taruffo obviously have the courage of their convictions. It takes courage to write a *serious* book on civil procedure that — while a boon to interdisciplinarians[38] — is not itself interdisciplinary,[39] that dares to use description as its primary mode,[40] and that believes a consensus about what civil procedure is or ought to be is still possible.[41]

The authors are also courageous because they have selected an approach for writing about their subject that leaves them quite out in the open. Those of us who have written hornbooks have been tempted in moments of difficulty to take the easy way out, making strategic use of the maxim: "[W]hat the legal system cannot answer it organizes."[42] Faced with difficulties in synthesis or in the search for animating principles, authors of books conveying information in detail can use the process of organizing that detail as a dodge. On the other hand, the project Hazard and Taruffo undertake is all synthesis and animating principles. There may be points here or there in the book with which one could argue.[43] Overall, however, the authors got it wonderfully

36. LINDA BUTLER & JUNE SPRIGG, INNER LIGHT: THE SHAKER LEGACY (1985); JUNE SPRIGG, SHAKER DESIGN (1986).

37. MARTIN E. MARTY, PILGRIMS IN THEIR OWN LAND 191 (1984).

38. *See supra* notes 21-24 and accompanying text.

39. While it is difficult to overstate the positive contributions of interdisciplinary legal scholarship, the movement has produced a regrettable byproduct — the tendency of some to attack all legal scholarship that is not interdisciplinary. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 766 (1987) ("The supports for the faith in law's autonomy as a discipline have been kicked away in the last quarter century."); *cf.* Christopher D. Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1156 (1981) ("Asking 'what is law?' has fallen, I fear, out of fashion.").

40. The prevailing mode for serious legal scholarship in this country is normative rather than descriptive. In contrast, there is still a healthy descriptive tradition in England. For an excellent example, see P.P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA (1990).

41. Some of us have expressed doubts on that score. *See, e.g.*, Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. (forthcoming July 1994); Shreve, *supra* note 15; Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659 (1993); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

42. THOMAS L. SHAFFER & ROBERT S. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 7 (1977).

43. For example, the book states: "The proliferation of complex litigation has resulted in repeated calls for reform, but proposals to reduce or simplify complex litigation have typically

right.

The best statement I have encountered in legal literature of the aesthetic and intellectual standard this book meets was made by the late Professor Arthur Leff. In 1981, Yale Law School held a symposium on the function of legal scholarship. In a postscript, Leff observed:

> I do not want to end this symposium on a note of pure Yellow-Book aestheticism, but I defy any of the symposiasts (and at least many of the readers) to deny that they're also in the game (as, I suspect, were Adam Smith and Karl Marx) for those occasional moments when they say, in some concise and illuminating way, something that appears to be true.
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> Oh, I concede that people who write about law also have other reasons for doing what they're doing: getting promoted, illustrating the economic rationality of the common law . . . illuminating the necessary incoherence of the infrastructure of the late monopoly-capitalist state so as to hasten its eventual destruction. Whatever. But isn't it also true that what we all also want is the rush that occasionally comes from doing something very well which is very hard to do at all?
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> . . . [T]o have crafted, on occasion, something true and truly put — whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too.[44]

The simple gifts in *American Civil Procedure* are great gifts indeed.

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been superficial." P. 156. Most of the work on the major reform proposal in this area, THE AMERICAN LAW INSTITUTE'S COMPLEX LITIGATION PROJECT (1993), must have occurred by the time the authors completed *American Civil Procedure.* The approach of the ALI proposal is not superficial. If anything, it suffers from a tendency to overreact to the problems of complex litigation. *See generally* Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project,* 54 LA. L. REV. 1139 (1994). On the Complex Litigation Project generally, see *Symposium on the American Law Institute Complex Litigation Project,* 54 LA. L. REV. 833 (1994).

44. Arthur A. Leff, *Afterword,* 90 YALE L.J. 1296, 1296 (1981).