
Introduction: Export/Import: American Civil Justice in a Global Context - Eighth Annual Clifford Symposium on Tort Law and Social Policy

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INTRODUCTION

*Stephan Landsman**

The goal of the eighth annual Clifford Symposium is to explore some of the issues raised by the export of American notions of civil justice and the impact of other nations' views on our system.

For more than half a century, America has sought to export its notions about the conducting of civil litigation to regimes around the world. The start of the new millennium seems an appropriate time to ask whether America has succeeded as a trendsetter in civil justice by exploring whether its ideas have captured the world's legal imagination or served as a model for emerging legal systems. It is also an appropriate moment to ask whether ideas that are increasingly controversial at home, including those regarding class actions and discovery, have had an influence on foreign legal thinking and practice.

American courts have also become a forum for the airing of a host of legal claims arising on foreign shores. One particular category has been cases involving alleged wrongs done by officials of other nations to citizens of those nations. The wisdom of using American courtrooms and converting foreign human rights abuses into American tort claims deserves the most thorough examination on both a substantive and procedural level.

The flow has not all been in the direction of supplying American courtrooms, concepts, or procedures to foreign legal systems. A number of legal disputes, especially several arising under NAFTA, have led observers to wonder whether American treaty and trade commitments might mandate changes in American legal processes. These sorts of claims suggest just how profoundly international arrangements may intrude upon American civil litigation.

The Symposium begins with an article by Professor Michael Zander of the London School of Economics about the astounding shift in the English approach to the funding of civil litigation. For several centuries, anything even remotely suggestive of a contingency fee arrangement was anathema in English practice. Over the past decade, however, a radical shift has occurred and some forms of payment con-

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tingent upon success have been accepted. Professor Zander explores whether England will go further and embrace the American approach of fees calculated as a percentage of the damages awarded and, along with it, a number of other changes including the abandonment of the fee shifting principle, a hallmark of English civil practice.

Professor Stephen Subrin of the University of Northeastern comes next with a provocatively titled article: *Discovery in Global Perspective: Are We Nuts?* Professor Subrin explores worldwide attitudes toward that quintessentially American practice, robust and wide-ranging pretrial discovery managed by lawyers representing the litigants. What he finds is that one size (or approach) may not fit all—that the differences in national political, legal and social arrangements move different countries in different directions with respect to discovery and that what is right for America may not be best elsewhere. He also, however, notes that there are some forces at work that place constraints on American divergence from other legal systems on matters of discovery.

New York University's Professor Linda Silberman shifts our focus to world reaction to the American civil justice system as expressed in the recent negotiations over the Hague Judgments Convention. What she finds, along with a number of other things, is a deep suspicion of American civil litigation among foreign observers and a desire to curtail the reach of American judgments. Interestingly, she joins Professor Subrin in seeing some of this as reflecting deep legal and social differences, particularly as expressed in the American conceptualization of due process. She suggests a method of building greater worldwide consensus about jurisdictional rules while recognizing a continuing diversity of perspective.

Hiram Chodosh, a professor at Case Western Reserve University, draws our attention to the United States' efforts to export various justice system approaches. In light of the Subrin and Silberman pieces, it is not surprising that he finds direct transplantation difficult and that there is a need for America to rethink how it goes about encouraging judicial reform. A nuanced appreciation of indigenous values, history, and institutions is essential to successful reform efforts.

Bryant Garth, the Director of the American Bar Foundation, reinforces these observations with his strikingly original piece about the potentially manipulative, even imperialistic, effects of current American efforts at building "strong and independent" judiciaries around the world. Although there appears to be a remarkable unanimity of view among influential reformers about the value of building vigorous judicial mechanisms, Garth argues that this agreement masks a variety

of agendas (both American and local) that have precious little to do with improvements in the judicial machinery.

Professor Edward Sherman of Tulane University returns our focus to the impact of a particularly American procedural institution, the class action. He notes foreign “admiration and suspicion” for class actions and traces the remarkable growth of such mechanisms, at least in some contexts, abroad. What he finds among proceduralists in the European Union, Australia, Canada and elsewhere is a willingness to experiment with the class idea while making a concerted effort to avoid what is perceived to be American-style practice. Foreign perceptions of American experience have, thus, influenced class action developments around the world, but in ways that are strikingly local.

Beth Stephens, a professor at Rutgers-Camden, shifts attention from the borrowing of American procedural ideas to the use of its courts to enforce international human rights under the aegis of the Alien Tort Claims Act. As the reach of such litigation has widened, it has raised difficult questions about the entanglement of the courts in foreign policy matters arguably better left to the executive branch of government. Professor Stephens contends that the difficulties posed by such litigation have been overstated and that private litigants have a key part to play in the enforcement of international norms of conduct, most particularly because human rights “are ultimately too important to be left to the unscrutinized domain of governments and government officials.”¹ She sees a consensus beginning to develop in the decisions of a number of nations, despite their different legal frameworks, that transnational enforcement of human rights is essential.

Professor Jacques deLisle, of the University of Pennsylvania, follows Professor Stephens with his own assessment of the implications of international human rights litigation under the Alien Tort Claims Act, as well as the Torture Victims Protection Act, the Racketeering Influenced and Corrupt Organizations Act and a number of other statutes. In contrast to Professor Stephens, Professor deLisle concentrates his attention on cases filed against one nation, the People’s Republic of China, for actions taken against such groups as the pro-democracy demonstrators in Tiananmen Square, members of the Falun Gong religious community and others. Professor deLisle notes that claims against Chinese officials are different from most other such claims in that they involve representatives of the sitting govern-

1. Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 435 (2003).

ment of a nation “in arguably the most important and volatile of the United States’ bilateral relationships.”² Hence, they present in starkest relief all the political and social problems posed when judges seek to review a foreign government’s actions affecting the right of its citizens. Pursuing a line akin to that adopted by Professor Stephens, Professor deLisle finds significant value in judicial consideration of at least some of these matters. He also suggests that procedures are already in place to manage most of the articulated risks of such an approach.

Professor William Dodge of the University of California, Hastings introduces us to a different question—the impact of treaty and trade commitments like the North American Free Trade Agreement (NAFTA) on the adjudication of cases involving foreign nationals or corporations in American courts. Professor Dodge’s main focus is the fascinating NAFTA proceeding involving the Loewen Group, a Canadian funeral home consortium that was found liable in a Mississippi state court to the tune of \$500 million for a range of torts and breaches of state antitrust law. Loewen, under extreme financial pressure, settled the case and filed a claim under Chapter 11 of NAFTA claiming that it had been the victim of a gross injustice in the Mississippi proceeding based on its nationality (Canadian) as well as because of racial and class prejudice. Loewen sought relief under NAFTA without perfecting its appeal in Mississippi’s state courts (where it faced a \$625 million bonding requirement). Professor Dodge argues that agreements like NAFTA should not be utilized as an alternative avenue of appeal and that NAFTA’s Chapter 11, which seems to permit such an end run around national courts, should be amended to require exhaustion of domestic remedies.

Professor David Golove of New York University also explores the impact of treaty obligations on American legal proceedings and legal rights. Professor Golove suggests that America may have a great deal to gain from consideration of “international human rights norms.”³ He contends that human rights conventions may significantly affect American interpretations of rights and constructs a powerful argument on behalf of the transformative impact of treaty agreements. Professor Golove reviews constitutionally based objections to reform by treaty and finds them unpersuasive. He, however, notes the poten-

2. Jacques deLisle, *Human Rights, Civil Wrongs, and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Issues Abroad*, 52 DEPAUL L. REV. 481 (2003).

3. David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579 (2003).

tially significant tension between change pursuant to treaty and process values inherent in the structure of the American Constitution.

Professor Paul Stephan of the University of Virginia challenges a number of the underlying premises of earlier articles in the Symposium. He voices prudential concerns about the trend toward American court review of human rights violations abroad. He also highlights evidence of serious American justice system problems in the *Loewen* case and similar matters. He argues that the judicial branch should be seen as having a special institutional obligation to refrain from too aggressive or strident an approach “in favor of a more becoming modesty.”⁴ The risk of excessive engagement is an erosion of the “expertise, deference, and reputation”⁵ of the courts. Professor Stephan stresses the contrasting functions of the legislative and executive branches, which may give them greater latitude to act in matters with international implications without impairing their perceived institutional efficacy.

The Symposium is rounded out by the commentary of Professor Richard Epstein of the University of Chicago on the Dodge, Golove, and Stephan articles. Professor Epstein with trenchant insight notes the difficulty of harmonizing systems when foreign and American legal constructs come into conflict in the sorts of cases that are the focus of the three preceding articles. There may be no easy way to resolve the differences encountered or, as Professor Epstein puts it, “Loose ends always remain loose.”⁶ What Professor Epstein urges is that America foregoes “the role of a nine hundred-pound gorilla in international affairs.”⁷ This view obviously has implications far beyond the boundaries of the issues explored by Professors Dodge, Golove, and Stephan. It strikes me as critical to remember in the wake of September 11, 2001, as we face the temptation to abandon the rule of law in the conduct of both national and international affairs.

4. Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 628 (2003).

5. *Id.* at 630.

6. Richard A. Epstein, *Smoothing the Boundary Between Foreign and Domestic Law: Comments on Professors Dodge, Golove, and Stephan*, 52 DEPAUL L. REV. 664 (2003).

7. *Id.* at 672.

