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Procedure and Pragmatism

Stephen B. Burbank†

Abstract

*In this essay, prepared as part of a festschrift for the Italian scholar, Michele Taruffo, I portray him as a pragmatic realist of the sort described by Richard Posner in his book, *Reflections on Judging*. Viewing him as such, I salute Taruffo for challenging the established order in domestic and comparative law thinking about civil law systems, the role of lawyers, courts and precedent in those systems, and also for casting the light of the comparative enterprise on common law systems, particularly that in the United States. Speaking as one iconoclast of another, however, I also raise questions about Taruffo's depictions of American litigation, in particular the class action. Suggesting that he privileges the perspectives of sociology and cultural anthropology over those of economics and political science, I argue that, to the extent that professional ideology is involved in enforcing federal statutory rights, it is primarily the ideology of doing well by doing good. I also contend that, if one is not careful to trace the history of, and the purposes served by, the different types of class action authorized in Rule 23(b) of the Federal Rules of Civil Procedure, it is difficult to discern the different motives/ideology that may drive litigation under them, a question intimately linked to the different funding sources that may be available.*

It is a privilege to participate in this festschrift for Michele Taruffo, whose influence on civil procedure, evidence and comparative law transcends national boundaries, spans oceans, and needs no identity card or passport. One can say of Taruffo, as of Arthur von Mehren, that all the world is his stage.¹ Rarely has such broad-ranging intellectual curiosity been joined with such exuberant cultivation of experience and such embrace of friendship. We are all, I imagine, the beneficiaries of that friendship, as we are of Michele's deep learning.

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¹ See Stephen B. Burbank, *All the World His Stage* (book review), 52 AM. J. COMP. L. 741 (2004).

Great as the privilege of contributing to this symposium may be, for me the pleasure of doing so is accompanied by some anxiety. It is not uncommon for festschrift contributors to discuss what they please, exploring a topic of current interest to them and using bouquets to the honoree as mere bookends. My charge, as I understand it, does not permit me that luxury. Indeed, it was even suggested that I should address the subject of Taruffo as an American proceduralist, a mission that, were I to accept it, would make clear the double meaning of Michele's 2010 tribute to my colleague, Geoffrey Hazard, whom he celebrated as a "curious American."²

One source of anxiety derives, if not from the expectation that I actually engage Taruffo's scholarship, then from my linguistic limitations, as a result of which I am confined to his contributions in English, neglecting work that made him a major figure in Italy and Europe before he became a major figure in the United States. To be sure, there are many English-language contributions. Yet, much of that corpus was published after Michele and Geoff Hazard conceived the project that became the ALI/UNIDROIT Principles of Transnational Civil Procedure.³ The experience of reading it reminds me of a retirement dinner at Yale for the distinguished international law scholar, Myres McDougal. One of the celebrants on that occasion observed that "Myres has written hundreds of articles, some of them different." Like George W. Bush following the 2004 presidential election, Michele believes in spending capital, intellectual as opposed to political.⁴

² Michele Taruffo, *Geoffrey C. Hazard, Jr.: A Curious American*, 158 U. PA. L. REV. 1313 (2010).

³ See ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006).

⁴ "I earned capital in the campaign, political capital, and now I intend to spend it." <http://www.democraticunderground.com/10021773511>

A second source of anxiety derives from a quality that Michele and I share. It is a quality that, while often enriching the possibilities of celebration when possessed by a festschrift honoree, presents risks when possessed by a contributor. We are iconoclasts. One reason iconoclastic scholars tend to be unpopular is their belief that, *à l'heure actuelle*, bouquets are for florists. I well recall unsuccessfully trying to persuade a former law clerk of Judge Jack Weinstein that, were I to accept his invitation to write for a festschrift celebrating the judge's thirty years on the bench, it might be thought one fit for the Marquis de Sade. As predicted, some took a dim view of my contribution to the Weinstein festschrift,⁵ and it elicited a spirited response by another law professor, which was published in the same volume,⁶ turning a *liber amicorum* into a *liber belligerantorum*. Happily, Judge Weinstein and I have continued the friendly exchange of articles and correspondence that began long before my heresy. I trust Michele shares my view that, even if those who live by the scholar's sword need not die by it, they should have thick skins as shields even on the occasion of their apotheosis.

Iconoclasm is, in fact, a quality of Michele's work that I think is worth celebrating, and I intend to do so, albeit derivatively. There is nothing inherently good about iconoclasm, unless one thinks that challenging the established order is in all cases socially useful, defined as scholars would define that concept for this purpose. We do not honor the bull in the china shop. Whether or not an iconoclastic work of scholarship is to be honored should depend, rather, on

For representative articles, see, e.g., Michele Taruffo, *Principles and Rules of Transnational Civil Procedure: An Evidentiary Epistemology*, 25 PENN ST. INT'L L. REV. 509 (2006); Michele Taruffo, *A Project of Rules for Transnational Litigation*, in THE UNIFICATION OF INTERNATIONAL COMMERCIAL LAW (TILBURG LECTURES) 189 (Franco Ferrari, ed. 1998); Michele Taruffo, *Drafting Rules for Transnational Litigation*, 2 ZZPINT 449 (1997);

⁵ See Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997).

⁶ See Burt Neuborne, *Innovation in the Interstices of the Final Judgment Rule: A Demurrer to Professor Burbank*, 97 COLUM. L. REV. 2091 (1997).

whether there are good reasons to challenge the established order and whether the scholar advances an alternative that has greater social utility.

By those measures, Taruffo's work has made major contributions to knowledge – in Italy, in Europe, and wherever procedure scholars seek the light of comparative inquiry – not primarily because he is an iconoclast. Rather, they are the contributions of a pragmatic realist, an important part of whose life's work has been undressing fictions that long dominated writing about legal traditions, both domestically in countries following those traditions, and comparatively. Some of those fictions are with us still. As recently as 2003, Taruffo published a critique of an article on standards of proof by two American scholars whose perspective was decidedly Gaullist.⁷ He thereby provided fair warning to scholars in a country not known for expertise in comparative procedure about the risks of doing it without adequate foundations in other legal systems. Indeed, Taruffo made a good (if uncharacteristically diffident) case that, even as to their domestic law, the authors missed the mark in claiming that American civil procedure is especially oriented to the search for truth.⁸

In a recent book Richard Posner observed:

The law as seen from the formalist perspective is a compendium of texts, like the Bible, and the task of the judge or other legal analyst is to discern and apply the internal logic of the compendium. He is an interpreter, indifferent or nearly so to the consequences of his interpretations in the real world. He is not responsible for those consequences; if they are untoward, the responsibility for altering them through a change in law falls to the “political branches” (as judges like to call the legislative and executive branches of government, thus distancing themselves from the taint of politics). On this view, judges who take into account the

⁷ See Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659 (2003); *id.* at 661 (discussing the “reductivist fallacy” of “taking France as the representative example of civil law procedural systems”); *id.* (“Actually the French system is almost unique in many respects among civil law countries.”).

⁸ See *id.* at 676.

consequences of alternative interpretations are stepping outside law. Only the orthodox materials of legal analysis – statutes, constitutions, regulations, precedents, other legal documents – are law; all the rest is policy, or politics (or economics!). As one notable formalist has put it, impressively but opaquely, “formalism treats the law’s concepts as pathways into an internal intelligibility.”⁹

Judge Posner distinguished from formalism, so defined, “[l]egal realism in a sense distinct from the movement called legal realism,” which he described as

deeply skeptical of formalism, regarding it as more rhetoric than analysis – a rhetoric that conceals the actual springs of decision. The realist places emphasis on the consequences of judicial rulings, and in that regard is pragmatic but only if the realist considers systemic as well as case-specific consequences and thus avoids shortsighted justice – justice responsive only to the “equities of the particular case” – and is analytical and empirical rather than merely intuitive and political.¹⁰

“The core of a defensible legal realism,” Judge Posner argued, “is the idea that in many cases, and those the most important, the judge will have to settle for a reasonable, a sensible, result, rather than being able to come up with a result that is demonstrably, irrefutably, ‘logically’ correct. Law is not logic, but experience, as Holmes famously put it. And experience is the domain of fact, and so the realist has a much greater interest in fact than the formalist,”¹¹ and the realist judge “does not draw a sharp line between law and policy, between judging and legislating, and between legal reasoning and common sense.”¹²

Transpose the setting from the courtroom to the library, and Judge Posner could have been talking about Taruffo. In the first of his English-language articles that my library could locate, published in 1981, Taruffo sounded a theme that he has refined and sharpened over more than three decades. Disparaging the utility of thinking about the attorney’s role in terms of the

⁹ RICHARD A. POSNER, REFLECTIONS ON JUDGING 4-5 (2013).

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6.

¹² *Id.* at 120.

distinction between the adversary and inquisitorial models, he observed that “[t]he creation of pure models may be helpful for some analytic purposes, but it must be realized that such models do not exist in fact. In the real world both the civil law and the common law systems are mixed ones, and the differences between them are ones of degree.”¹³

Warming to his task, Taruffo invoked examples that cast doubt on the “equation of adversary process and partisan lawyer,” on the one hand, and the equation of inquisitorial process and lawyers as “nothing but a judge’s *longa manus*,” on the other.¹⁴ That led him to the conclusion “that every definition of the attorney’s role in civil proceedings, which is obtained by way of mere deduction from abstract models is wrong.”¹⁵ Instead, he argued, “the fact is that the shaping of the ethical duties of the lawyer is less influenced by the framework of the proceeding, and much more by conceptions of the general purposes of civil justice, and by the ideology of the legal profession that prevails at a given historical moment.”¹⁶

Similarly, in his masterly work on precedent, Taruffo identified two major factors contributing to the change from what he called “the legalistic and deductive style [that] is typical of traditional European courts.”¹⁷ The first was a “general transformation occurring in the European legal culture,” which “became less rigid and formalistic, more open to moral values and more sensitive to social problems, political issues, principles of equality and substantive

¹³ Michele Taruffo, *The Lawyer’s Role and the Models of Civil Process*, 16 ISRAEL L. REV. 5, 8 (1981).

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 17.

¹⁷ Michele Taruffo, *Institutional Factors Influencing Precedents*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 437, 449 (D. Neil MacCormick & Robert S. Summers, eds. 1997).

justice.”¹⁸ The second was “the influence of constitutional courts and their decisions.”¹⁹

Acknowledging that the traditional “conception of the role of courts is in conflict with an effective use of precedents,” Taruffo argued that “the growing use of precedents even by civil law courts, and even in areas of the law that are regulated by statutes, suggests that the actual current role of courts in modern developed systems is much more complex, flexible and varying than the one once defined, as it was in the middle of the eighteenth century, by Montesquieu.”²⁰

If this is not enough to persuade you that Judge Posner was channeling our honoree when he described the distinction between formalism and pragmatic realism, consider what Taruffo had to say about the influence of legal sociology and political science in transforming conceptions of the judicial role:

[The] idea of the judge as a legal or social engineer, or as a problem-solver ... entails a quite different model of decision-making: much more attention to the concrete facts of the case and to the social conditions surrounding the facts in issue; evaluative judgments about facts and about the relevant legal rules; a prominent creative and active role of the judge in the interpretation of the law and in shaping the final decision; attention paid to the personal, economic and social consequences of the judgments; due consideration of collective and general interests and values involved in the individual litigation.²¹

I salute Taruffo for challenging the established order in domestic and comparative law thinking about civil law systems, the role of lawyers, courts and precedent in those systems, and also for casting the light of the comparative enterprise on common law systems, particularly that in the United States. It is chiefly in considering the latter aspect of his work that my inner iconoclast seeks to be heard.

¹⁸ *Id.* at 449-50.

¹⁹ *Id.* at 450.

²⁰ *Id.* at 458.

²¹ Michele Taruffo, *Legal Cultures and Models of Civil Justice*, in *FESTSCHRIFT FÜR HIDEO NAKAMURA* 623, 636 (Anreas Heldrich & Takeyoshi Uchida, eds. 1996).

In waging the war that he started with a controversial article, *The German Advantage in Civil Procedure*,²² John Langbein had occasion to refer to certain German scholars with whom he disagreed as “flower children.”²³ Those who knew my late colleague, Friedrich (Fritz) Kübler, were astonished to find him so described,²⁴ none more so than his wife and daughters, who found it hilarious. However inapt that description was of Kübler, it did come to mind when I read some of Taruffo’s work on legal culture, in particular his 2000 article, *Transcultural Dimensions of Civil Justice*.²⁵ I support interdisciplinary legal scholarship, just as it supports me. I wonder, however, whether Taruffo’s interest in cultural anthropology and sociology, together with some forays into critical legal scholarship, may have caused him to pay too little attention to economics and political science when considering American lawyers and American litigation, both generally and specifically in connection with the class action. The same neglect may color his thinking about the possibilities for litigation reform in Europe.

The traditional cultural account of modern American litigation, used (usually by critics) to explain the enormous increase in cases filed in the federal courts starting in the late 1960s, pictures three forces at work: a litigious population, an entrepreneurial bar, and an imperial judiciary.²⁶ In his early comparative work on lawyers and litigation, Taruffo suggested a far more

²² John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

²³ John H. Langbein, *Trashing The German Advantage*, 82 NW. U. L. REV. 763, 781 (1988).

²⁴ See *id.* at 781 n.92; Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705, 759 n.250 (1988).

²⁵ Michele Taruffo, *Transcultural Dimensions of Civil Justice*, 33 COMP. L. REV. 1 (2000).

²⁶ See SEAN FARHANG, *THE LITIGATION STATE* 13-14, 69 (2010); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 646 (2013).

favorable view of *lawyers*, arguing that “the lawyer’s role [in the United States] is undergoing deep transformations because of ethical and political developments that take place inside the profession, and test the adversary ideology of the lawyer.”²⁷ And in a more recent consideration of group litigation in comparative perspective, he suggested a far more favorable view of American *plaintiffs*, distinguishing between “altruistic individualism” and “egoistic individualism.”²⁸ Taruffo argued that filling gaps created by systemic failure to remedy “super-individual problems” through “private group or class litigation . . . can only happen when the dominant attitude is altruistic individualism, and when altruistic individuals are able to avail themselves of adequate legal procedures.”²⁹

I believe that both the traditional account and Taruffo’s alternative are problematic for some of the same and some different reasons. The traditional account privileges the notion of American litigiousness but implies that something happened to make Americans much more litigious in the 1960s and 1970s. Notwithstanding this account’s pedigree starting with an observation by another French political thinker in the first part of the nineteenth century,³⁰ however, Robert Kagan is correct that “adversarial legalism in the United States does not arise from a deep-rooted American propensity to bring lawsuits.”³¹ Despite a decades-long organized

²⁷ Taruffo, *supra* note 13, at 19.

²⁸ See Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT’L L. 405, 417-18 (2001).

²⁹ *Id.* at 420.

³⁰ Taruffo summarized Tocqueville’s observation that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question” and asserted further that “the inclination to litigate seems a general phenomenon.” Taruffo, *supra* note 25, at 23 (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248 (J.P. Mayer & M. Lerner, eds. 1966)).

³¹ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 34 (2001).

campaign by American business to demonize lawyers and litigation, there is robust empirical evidence supporting Kagan’s observation that “[m]any, perhaps most, Americans are reluctant to sue”³² Moreover, subsequent work in political science, discussed below, both confirms and extends Kagan’s alternative explanation, namely that “American adversarial legalism arises from political traditions and legal arrangements that provide incentives to resort to adversarial legal weapons,”³³ making clear the centrality of purposefully designed private enforcement regimes to the increase of adversarial legalism. This work demonstrates that cultural explanations of private enforcement drastically oversimplify and that institutional considerations have been consequential.

The traditional account also seems to imply that American lawyers started being entrepreneurial fairly recently, even though contingent fee arrangements “have a long history in the United States.”³⁴ Further, the traditional account obscures the fact that under Article III of the Constitution federal courts only decide cases and controversies that are brought before them.

³² *Id.* Although Kagan’s 2001 book emphasized the problematic aspects of adversarial legalism, he has also acknowledged its strengths:

I also indicate that if adversarial legalism were by some miracle to be drastically eliminated in the United States, without also instituting major changes in other aspects of American law and public administration, then injustice almost surely would grow. Adversarial legalism fills a void in American governance. In a structurally fragmented, deadlock-prone, and often underfunded governmental system, adversarial legalism provides an essential way of elaborating and enforcing important norms of due process, equal treatment, and protection from harm. The United States lacks the highly professional, hierarchically supervised national bureaucracies, social welfare systems, and corporatist arrangements that characterize western European governments.

Robert A. Kagan, *On Surveying the Whole Legal Forest*, 28 LAW & SOC. INQUIRY 833, 859 (2003).

³³ KAGAN, *supra* note 31, at 34. See Burbank et al., *supra* note 26, at 646.

³⁴ Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 744 (2002). See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1586 (2014) (“The American bar did not wake up in 1970 and decide to become more entrepreneurial.”).

Those who speak of “judicial enforcement” of public law neglect that fact and, more importantly, they neglect the institutional and economic incentives at work.³⁵

Both the traditional account and Taruffo’s alternative miss a primary driver of federal litigation. When Congress invigorated old or created new rights across the entire federal regulatory landscape starting in the 1960s, legislators often made a conscious choice to provide economic incentives to sue, whether in statutory pro-plaintiff fee-shifting or multiple damages provisions (or both). That choice, in turn, usually reflected concern by congressional majorities -- in periods of divided government -- that leaving the enforcement of the statutes in question to, or entirely to, public authorities would invite subversion of congressional preferences by an ideologically distant executive.³⁶

In providing such incentives, Congress recognized, not that plaintiffs are motivated by greed, but rather that an expected positive economic outcome typically is a precondition to the choice to sue, even if there are other political, ideological or psychological reasons for proceeding.³⁷ As one scholar studying litigation from a social psychological perspective put it in reference to the effect of monetary damages on the choice to litigate, “even a boundedly rational

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When private actors are given access to courts for enforcement, we think it important not to conceive of or describe the phenomenon as “judicial enforcement,” or “judicial intervention.” Like exclusive focus on formal legal rules, such a frame can obscure the locus of initiation—clients and lawyers—and the impact of incentives on the prospects for initiation. As a result, it may be more difficult to discern what aspects of regulatory design affect the efficacy and durability of the policy sought to be implemented.

Burbank et al., *supra* note 26, at 641.

³⁶ See FARHANG, *supra* note 26; Burbank & Farhang, *supra* note 34, at 1547-51.

³⁷ See Burbank et al., *supra* note 26, at 672.

psychological model will assume that expectations play a central role in choice.”³⁸ Further, the decision to sue usually is not made by the plaintiff alone; it requires the agreement of a lawyer.

To the extent that professional ideology is involved in enforcing federal statutory rights, then, it is primarily the ideology of doing well by doing good. Call it “altruistic individualism” if you will, but note that the focus is on the lawyer not the client. Because American plaintiffs’ lawyers are regularly dependent on proceeds from the successful prosecution of a case for some or all of their compensation, unless a plaintiff is willing and able to carry the large burden of litigation costs on her own, before filing suit her attorney will have to assess whether investment of limited resources in a case is warranted based on an evaluation of its risks and potential returns.³⁹

To be sure, the American legal profession changed starting in the 1960s. Some of the anti-competitive rules and regulations imposed by self-governing elites were struck down.⁴⁰ One reason was that they made it difficult for interest groups to use litigation to advance their groups’ legal rights through litigation.⁴¹ When, however, a pre-existing interest group such as the NAACP -- as opposed to an ad hoc class -- seeks to enforce a federal statute on behalf of the group, it is not clear what altruism means.

³⁸ Robert J. MacCoun, *Media Reporting of Jury Verdicts: Is the Tail (of the Distribution) Wagging the Dog?*, 55 DEPAUL L. REV. 539, 539 (2006).

³⁹ See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 11 (2004); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1426 (1992); Earl Johnson, Jr., *Lawyers’ Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC’Y REV. 567, 567–68 (1981); Kritzer, *supra* note 34, at 748–49.

⁴⁰ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 353, 384 (1977) (holding that lawyer advertising is commercial speech protected under the First Amendment).

⁴¹ See *NAACP v. Button*, 371 U.S. 415 (1963) (First Amendment prohibits prosecution under Virginia statute banning “the improper solicitation of any legal or professional business”).

Moreover, interest group litigation accounted for relatively little of the huge increase in filings that started in the 1960s. Once it was apparent that interest groups were having success in the federal courts and that they were recovering reasonable attorney’s fees from losing defendants, the private bar brought most of the cases.⁴² And it was the success of Congress in so energizing the private bar that primarily fueled a campaign to cut back on court access and private enforcement. Litigation reform to retrench rights became a Republican issue in the first Reagan administration, which promoted but ultimately abandoned a bill that would have simultaneously crippled more than one hundred statutory fee-shifting provisions as applied in suits against state or federal governments.⁴³

Taruffo’s general portrait of the developing American legal profession is hard to reconcile with the views of another interdisciplinary scholar, Gillian Hadfield, who suggests that

[t]he bar [in the United States] has by and large steered utterly clear of the idea that it is responsible—politically responsible—for the system-wide cost and complexity of the legal system, far beyond the ethical call to help the poor and perform pro bono work. It requires a political process to shift perceptions—much as perceptions about the federal government’s responsibility for high gas prices or stock market failures are molded not in the abstract but in the crucible of political contest and public debate.⁴⁴

⁴² See FARHANG, *supra* note 26, at 3-18; Burbank & Farhang, *supra* note 34, at 1555 (“For-profit counsel, not interest groups, prosecute the vast majority of federal statutory private suits.”).

⁴³ See Burbank & Farhang, *supra* note 34, at 1551-55.

⁴⁴ Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 155 (2010). She also asks:

[I]s there a deeper threat to the structure of a democratic society—especially one that purports to organize its relationships on the basis of law and legality—suggested by the finding that Americans are far more likely than those in the U.K. and Slovakia to ‘do nothing’ in response to the legally cognizable difficulties they face? That they are far less likely to seek out others in their community capable of helping them to align their experiences with those contemplated by the laws and

Indeed, Hadfield found that

the vast majority of the legal problems faced by (particularly poor) Americans fall outside of the “rule of law,” with high proportions of people—many more than in the U.K., for example—simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics, and other dynamics in our complex society.⁴⁵

Taruffo’s engagement with the American class action over the last three decades raises some similar questions to those discussed above in connection with his views about American litigation in general. If one is not careful to trace the history of, and the purposes served by, the different types of class action authorized in Rule 23(b) of the Federal Rules of Civil Procedure, it is difficult to discern the different motives/ideology that may drive litigation under them, a question intimately linked to the different funding sources that may be available. Thus, for instance, something like altruism, if not “altruistic individualism,” seems a plausible motive behind much litigation seeking injunctive or declaratory relief under Rule 23(b)(2), a provision that was added in 1966 primarily to make developing substantive (including constitutional) protections for racial minority groups effective on a group-wide basis.⁴⁶ Because (b)(2) cannot be used to recover damages, however, such

procedures that stack up in the voluminous legal materials of regulation, case law, statutes, and constitutions? Is there a paradox lurking here that in the system of adversarial legalism that Robert Kagan describes as distinctive of the ‘American way of law’ (to be contrasted with the greater reliance on bureaucratic means of policy making and implementation found in Europe) ... law is in practice less a salient part of everyday life in the U.S. than elsewhere?”

Id. at 143.

⁴⁵ *Id.* at 143.

⁴⁶ See David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011).

litigation is effectively impossible in the absence of a well-funded interest group/advocacy organization or a pro-plaintiff fee-shifting provision.

Class actions seeking substantial monetary damages for class members under 23(b)(3) have little to do with altruism – by definition they could be maintained as individual actions -- and small claims (or “negative value”) class actions have little to do with plaintiffs. The latter cases are driven not by the named plaintiffs, who by definition could not rationally sue on their own, but by class counsel. Since many of such cases are not governed by pro-plaintiff fee-shifting provisions, a key economic incentive derives from a historic exception to the so-called American Rule on attorney’s fees that permits shifting a prevailing plaintiff’s attorney’s fees from that plaintiff (or more realistically class counsel, acting on a contingency basis) to a common fund created for the benefit of the class.⁴⁷

Taruffo may have been led astray by American scholars and judges about the history of Rule 23, and other problematic aspects of his account may derive from the same sources. Thus, proponents of small claims class actions in the United States tend not just to give them pride of place in the 1966 amendments, but also to impute to amended Rule

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The American Rule is subject to a number of exceptions, both judge-made and statutory. In the former category is the rule that courts carved out in order to ensure that those who created a common fund could be reimbursed from that fund. With the advent of the modern class action under Federal Rule of Civil Procedure 23, as amended in 1966, the scope for application of this exception vastly expanded and so did the influence of the class action on private enforcement.

Burbank et al., *supra* note 26, at 652.

23 itself -- as at times does Taruffo⁴⁸ -- a regulatory goal, whether compensating harms caused by, or deterring, behavior that creates multitudes of small financial harms, none big enough to warrant a lawsuit on its own.⁴⁹ In fact, however, small claims played a minor role in the deliberations that led to Rule 23(b)(3),⁵⁰ and it is extremely difficult to accept as a source of regulatory policy a court rule that was promulgated under a lawmaking delegation limited to rules of procedure that do not abridge, modify or enlarge substantive rights.⁵¹

Contributing to confusion in this domain, I suspect, is failure always to follow Taruffo's own excellent advice as a comparative lawyer: "[W]hen a lawyer considers several systems in a comparative perspective he should take into account that each system is the outcome of a given culture, but also that he himself is influenced by his own original culture."⁵² In particular, when the legislature fashions both substantive law and the law governing class or other group litigation, it need not be concerned about which is the source of regulatory policy. As already indicated, that must be a concern when a court promulgates trans-substantive rules of procedure the ambit of which is restricted precisely for the purpose of allocating prospective lawmaking power between court and legislature.

That does not mean, however, that such a legislature should have no concerns about a statutory trans-substantive class action provision. Indeed, the same institutional differences may

⁴⁸ See Taruffo, *supra* note 28, at 406, 409.

⁴⁹ See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 1, 59 (2011).

⁵⁰ See David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587 (2013).

⁵¹ See Burbank & Wolff, *supra* note 49; 28 U.S.C. §§ 2072-74 (2012).

⁵² Taruffo, *supra* note 21, at 623-24.

help to explain why efforts to secure trans-substantive class action reform in Europe and elsewhere are, *pace* Taruffo and many others,⁵³ misguided. First, the fact that such is the law in American federal courts has no portable normative content. It reflects a foundational assumption of the Federal Rules of Civil Procedure -- indeed, one that has been thought to serve as a measure of protection against overstepping the limits of the delegation of legislative power.⁵⁴ Yet, and second, Rule 23's trans-substantive scope virtually ensured that it would lead to results in some cases that were inconsistent with the regulatory aims of Congress (or other source of the governing substantive law), most notoriously instances of inefficient over-deterrence.⁵⁵

Legislatures are not constrained to fashion law trans-substantively, and the American class action experience suggests that reform in this domain should be substance-specific. Taruffo cites experience "show[ing] concretely that the U.S. class action can be used in flexible ways as a model for transplanting different legal cultures without any need to transfer all of its typical (but unnecessary) U.S. features."⁵⁶ I agree, but, acknowledging the power of the class action, I would not surrender the legislature's unique ability to both unleash and harness that power in the service of regulatory goals. Indeed, if Taruffo is correct that "the traditional model of general and comprehensive codes [is] break[ing] down, and there is a sort of explosion of specific, particular -- and therefore incomplete, variable and inconsistent -- legal provisions,"⁵⁷ it would make no sense to ignore that trend in fashioning law that, even if we call it procedural, has dramatic impact on substantive rights.

⁵³ See, e.g., Taruffo, *supra* note 28, at 406, 412-13.

⁵⁴ See Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009).

⁵⁵ See Burbank et al., *supra* note 26, at 655; Burbank & Wolff, *supra* note 49, at 68-74.

⁵⁶ Taruffo, *supra* note 28, at 412.

⁵⁷ Taruffo, *supra* note 25, at 14.

The American experience thus does not support the argument that “private group or class litigation can only [fill gaps] when the dominant attitude is altruistic individualism, and when altruistic individuals are able to avail themselves of adequate legal procedures.”⁵⁸ Altruism does not put food on the table, and it accurately describes the motives of most lawyers who bring small claims class actions only in their own minds. Moreover, altruism cannot overcome the veritable minefield that many countries have created for all litigation, starting with the so-called English Rule on attorney’s fee-shifting, and for group litigation in particular. Without major changes in the infrastructure for litigation – not just “adequate legal procedures” -- legislators enacting class action statutes in most systems are “building beautiful cars without engines.”⁵⁹

Taruffo might be thought to believe that many of the failures to secure class action reform in Europe and elsewhere to date are the result of ignorance or of an unfathomable failure to comprehend the American legal landscape.⁶⁰ Without more, that account does not sound like the diagnosis of a pragmatic realist. It is difficult to believe that the French really believe that *les droits des hommes* are implicated in a proposal for an opt-out class in cases where no one would opt out (because there is no litigation alternative).⁶¹ This seems more like the “ignorance” of a Chamber of Commerce, not interested in facts when they get in the way of the organization’s

⁵⁸ Taruffo, *supra* note 28, at 420.

⁵⁹ Filippo Valguarnera, *Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action*, 10 GLOB. JUR. Art. 10, 42 (2010).

⁶⁰ See Taruffo, *supra* note 28, at 414 (European rejection of class actions “essentially based upon ignorance”); *id.* at 415 (“this distinction seems too subtle for most European lawyers to perceive”); *id.* (“many civil lawyers seem unable to grasp such an obvious distinction”).

⁶¹ *But see* RAPPORT D’INFORMATION, No. 249, Sénat (March 6, 2006) (M. Jean-Jacques Hiest) (“Vous avez évoqué l’*opt out* et l’*opt in*. Or, il existe une interprétation d’une jurisprudence du Conseil constitutionnel largement partagée en ce qui concerne cette procédure. Une action ne peut être engagée au nom d’un consommateur sans qu’il en soit averti et donne son accord.”).

legislative goals, and confident that “the law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”⁶²

Even if Taruffo was somewhat inattentive to comparative institutional arrangements affecting the class action, his work is in general alert to institutional influences in a way that only one who has read deeply in political science would be. For instance, he noted the influence of supranational organizations “in the area of collective and diffuse rights,” and directly linked the passage of “statutes providing some forms of group action” in Italy and Germany to the EU’s consumer protection initiatives.⁶³ He thus anticipated work suggesting that, in thus stimulating private enforcement, the lawmaking dynamics of the EU, both horizontal (between the EU Council, Parliament, Commission, and Court of Justice) and vertical (between the EU and member states), may replicate the separation of powers dynamic that operates to promote the private enforcement of American federal statutory law.⁶⁴

Even more impressively, in his work on transcultural dimensions Taruffo declined to accept that a system’s choice between litigation and ADR turns on “the simple practical issue of choosing the quicker and less expensive device to solve a dispute.”⁶⁵ Positing “deeper and more complex cultural implications,”⁶⁶ he described work exploring “the controversial role of lawyers in the history of Imperial China,” which showed that “the negative attitude of the official culture against the lawyers was directly connected with matters of power.”⁶⁷ As a result, Taruffo observed that litigation aversion is “not only a matter of Confucian orthodoxy, but also an

⁶² ANATOLE FRANCE, *THE RED LILY* ch. 7 (1894).

⁶³ Taruffo, *supra* note 28, at 419.

⁶⁴ See Burbank et al., *supra* note 26, at 717-718.

⁶⁵ Taruffo, *supra* note 25, at 22.

⁶⁶ *Id.*

⁶⁷ *Id.* at 25.

attempt to preserve methods that were structurally in favor of the stronger party.”⁶⁸ That also seems an apt description of the United States Supreme Court’s decisions rewriting the Federal Arbitration Act, as a result of which not just Rule 23(b)(3) class actions, but group remedies in general (i.e., including in arbitration), may become extinct.⁶⁹

This brief essay hardly does justice to Michele Taruffo’s contributions to procedure and comparative law, let alone his contributions to knowledge in other legal domains. I have not even mentioned his important book, *American Civil Procedure*,⁷⁰ co-authored with Geoffrey Hazard, an immensely informative work that quite evidently issued from a dialogic process of the sort that Taruffo outlined in a subsequent article.⁷¹ Nor have I done more than mention the ALI/UNIDROIT project and the spate of articles that followed in its wake.⁷² As to the latter, I could plead the constraints of time or space, but iconoclasts are no better at bullshit⁷³ than they are at bouquets. Although I was a United States Adviser on the project, I was from the beginning, and I remain, deeply skeptical of its utility (other than in arbitration), and I am happy to let it remain on the library shelf. Certainly, the notion that its principles and rules could be extended from transnational commercial disputes for general use at acceptable cost in terms of social, political, and economic values is not a notion one would expect a pragmatic realist seriously to

⁶⁸ *Id.* at 25-26.

⁶⁹ See, e.g., J. Maria Glover, *Disappearing Claims and the Erosion of Public Law*, 124 YALE L.J. ____ (forthcoming 2015).

⁷⁰ GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, *AMERICAN CIVIL PROCEDURE: AN INTRODUCTION* (1993).

⁷¹ See Taruffo, *supra* note 25, at 37-43.

⁷² See *supra* text accompanying notes 3-4.

⁷³ See HARRY G. FRANKFURT, *ON BULLSHIT* (2005) (defining the word as the product of conscious indifference to truth content).

entertain.⁷⁴ But, as already suggested, Taruffo's sense of fun extends to his scholarship.⁷⁵ For that too we are in his debt.

⁷⁴ See Michele Taruffo, *Harmonizing Civil Litigation in Europe*, in MAKING EUROPEAN PRIVATE LAW 46, 58-59 (F. Cafaggi & H. Muir-Watt, eds. 2008).

⁷⁵ See Taruffo, *supra* note 2, at 1315 ("Prima facie, such an idea might have appeared to be a sort of foolish dream, but that did not prevent us from pursuing it.").