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Civil Processes

1. From Civil Process to Civil Processes

For much of the twentieth century, the term 'procedure' served as a reference to the processes by which courts made decisions. Courts were assumed to be institutions focused singularly on adjudication, and proceduralists were, in turn, focused exclusively on courts. But by the end of the twentieth century, courts no longer provided only adjudication but also offered an array of other processes. Further, through professionalization and administrative expansion, judiciaries had developed into corporate actors capable of pressing specific agendas about their own forms and charters. Scholars interested in civil processes were no longer able to cluster about a single topic, Procedure, nor could they focus solely on the processes for adjudication. Rather, they had come to understand that many venues (including administrative agencies in the public sector, arbitration in the private sector, and transnational bodies) were central sources of procedural rule-making and invention.

This chapter charts and analyzes the shifts in civil processes during the twentieth century by examining sequences of reformation and critique during which calls have been made for more, for less, and for different forms of process. I begin by contrasting different modes of process and by exploring the increasingly diverse paradigms of conflicts, which have prompted choices about what kind of process to provide for which kinds of disputes. Through examples from the Unites States, England, and Wales, I examine aspirations and the critiques of civil processes, which are, in turn, embedded in debates about substantive liability rules, the role of and the market for lawyers, empirical effects, and political conceptions of the utility and propriety of regulation.

A predicate to this discussion is the recognition that changes in legal, political, and economic regimes far afield from procedural rules often influence the use of civil processes. For example, during the first half of the twentieth century, some jurisdictions required owners of homes and automobiles to carry insurance. Those injured learned to seek compensation, both through their own policies and from defendants with the capacity to pay. The quest for recoupment, in turn, helped to spur a market for lawyers who (when permitted by ethical rules) financed small-scale cases in anticipation of returns on loans through contingent fee arrangements.[1] And, just as substantive and procedural rules create incentives for certain forms

1 Stephen C. Yeazell, *Refinancing civil Litigation*, 51 DePaul L. Rev. 183 (2002).

of lawyering, so does the legal profession's structure (policing access to lawyers) influence the shape of procedural rules.[2]

Assessing the effects, in turn, of procedural reforms also requires sensitivity to a range of non-procedural rules as well as to the political institutions and social movements that spawn them. For example, in many countries, efforts are ongoing to restructure procedural opportunities in the name of reducing complexity, cost, and delay. In some jurisdictions, that struggle comes against a backdrop of an independent and entrepreneurial bar with substantial authority over procedure. Entities opposed to the use of litigation to enforce or create government regulation seek procedural reform in an effort to limit their own liability. In other countries, a minimal tradition of lawyer independence exists, and most of a population lacks access to government-based dispute resolution processes. Reformers want to revamp process to make litigation a means of implementing legal norms. Thus, even when calls for change in different countries are comparable, the implications of restructuring civil process differ — requiring understanding of political understandings of the import of reforms, the resources available to support them, technical challenges to their implementation, and economic interests seeking expansion or constraint of procedural opportunities.

Assessing procedural debates not only requires sensitivity to particular jurisdictions.[3] Awareness of transnational movements is also needed. Worldwide commitments to — as well as unhappiness with — civil processes can be seen in international and regional treaties and in research from the academy. Increasing interaction among professional classes, driven by both political and economic transactions, are diminishing the structural distinctions between civil and common law countries in professional training, career paths, and tasks for lawyers and judges. Some features of the civil law system (such as extended fact-finding without a concentrated time for a trial and the reliance on a judge to supervise the gathering of information) are beginning to be incorporated in the common law system (relying on exchanges in discovery and the increasingly managerial stance of judges).

Further, initiatives are under way to create procedural norms and sometimes processes that cross jurisdictional lines.[4] A series of covenants, promulgated through the United Nations, announce rights to fair and public hearings, aimed at protecting economic and personal security and at ensuring equality before the law. Reliance is placed on impartial and independent judges as the iconic protectors of the rule of law, working through transparent processes to which the public has access. But those judges are also seen as vulnerable. In 1985, in an effort to protect judges

2 Lawyers in Society: An Overview (Richard L. Abel & Philip S.C. Lewis eds., 1995).

3 Mirjan R. Damaska, Evidence Law Adrift (1997).

4 Stephen Goldstein, The Utility of the Comparative Perspective in Understanding, Analyzing and Performing Procedural Law (1999; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985).

against the very governments that deploy them, the United Nations issued twenty 'basic principles on the independence of the judiciary'. Hoping for 'effective implementation', the UN appointed a special rapporteur to monitor compliance through yearly reports addressing corruption, accountability, and independence. In addition, private organizations are forging links among jurists worldwide. Significant foundation support (from the Open society Institute, the Ford Foundation, and others) has promoted judicial independence projects in efforts to use legal processes to enable societal and political development.[5] Courts have also lent their voices through ruling — predicated upon a mixture of constitutional and natural law — holding that a judiciary has a right to independence. Some decisions have required budgets for courts to be insulated from politics or that terms of service for judges be fixed to limit executive and parliamentary control.

In addition to developing a shared jurisprudence of 'the judicial', the UN, regional organizations, the World Bank, and other entities have created new dispute-resolution mechanisms for specific problems (some stemming from treaties on trade, others focused on equality rights) that rely either on court-based or arbitral models.[6] And, in the late 1990's, the American Law Institute (ALI), working in conjunction with UNIDROIT, launched an effort to draft principles and rules of 'transnational civil procedure', adoptable by a country for adjudication of disputes arising from commercial transactions.[7] Building on earlier attempts by European procedural scholars (many involved with an international association of procedural law) to harmonize different legal regimes, ALI/UNIDROIT seeks to negotiate differing legal traditions (most prominently those of civil and common law procedure). The proposed regime bears some resemblance to model rules for arbitration but aspires to be court-based — standing in contrast to the proliferation of mini-procedural codes detailed through individual contracts in which parties opt out of government-based dispute resolution either by turning to arbitration organizations or by crafting their own dispute-resolution mechanisms. Thus, unlike traditional comparativist conceptions of 'transplantation' of a distinctive feature from one system to another, the newer efforts can be understood as forms of domestication and homogenization.

Some read such developments as the proliferation and juridification of processes, attesting to the corporate power of judges and lawyers, enabled by administrative structures that facilitate their influence in legislatures and their control over process.

5 EU Accession Monitoring Program, Monitoring the EU Accession Process: Judicial Independence in the EU Accession Process, Open Society Institute (2001), *available at* http://www.soros.org/sites/default/files/judicialind_20011010.pdf

6 Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. Int'l Econ. L 189 (1999).

7 Am. Law Inst., International Jurisdiction and Judgments Project, Discussion Draft (Mar. 29, 2002).

But, while transnational political and professional organizations are linking political rights and commerce with formal court-based processes, many of the same institutions are also raising questions about the utility of process, examining the political economy of disputants, layers, and judges, and crafting alternatives to reduce formality.

In 2002, for example, a team of academics undertook cross-country comparisons of how, in 109 countries, law processed two kinds of creditor-debtor disputes — one that involved evictions of tenants for failure to pay rent, and another about collection on bounced checks.[8] Surveying what it described as the 'largest international association' of law firms, the group sought to measure the effects of 'formalism' in dispute processing, defined as including a rule-based process, staffed by professional judges who were required to accept written arguments, to limit their information through rules of evidence, and to provide legal justification for rulings for appellate review. The researchers concluded that, from the perspective of creditors, formal processes predicted slow processes. Formalism also predicted less judicial efficiency, less access to justice, and lower degrees of honesty and consistency.

Through different research techniques in one country (England), a parallel finding — that simple contracts are not readily enforceable in courts — has been made, there coupled with concern that current reforms of civil processes do not relate to the bedrock problem that most potential disputants have no means of access to any court-based remedy, regardless of levels of formality.[9] Such non-disputants are rarely the source of procedural reform because pressures for change in process come, in large measure, from those with the resources to use procedural systems repeatedly — the 'repeat players' who have the capacity to and the interest in playing for the rules.[10] Given the incentives of such repeat players, the concern is that their proposals are either irrelevant, non-responsive, or harmful to those not participating in shaping the process.

Thus, site-specific and global contests emerge from within the particulars of each country and from transnational agreements on process, responding to debates about the role of regulation as contrasted to private ordering, the function of the legal profession, and the capacity and desirability of law to create enforceable rights. Civil processes are one site of the struggle between public and private governance and between state-based redistribution efforts and market-focused mechanisms.[11] For some, civil processes ought to be a beacon of justice and embody a society's ideals about equal opportunities and fair allocation of resources. Conflict is, under this rubric, neither pathological nor inefficient but a means for public norms to be

8 Simeon Djankov et al., Courts: The Lex Mundi Project, Discussion Paper No. 1951 (2002) *available at* http://www.economics.harvard.edu/pub/hier/2002/HIER1951.pdf

9 Hazel Genn, Paths to Justice: What People Do and Think about Going to Law (1999).

10 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1972).

11 Patricia Ewick & Susan S. Silby, The Common Place of Law (1998).

understood, applied, and generated.[12] As the materials in Cover, Fiss, and Resnik exemplify, the public derives utility both from being able to bring claims and from being able to watch others in dispute, since the processes themselves express social values.[13] In this vein, lawyering is a form of social service, and reforms are needed to increase access and to render civil processes more transparent.

For others, reliance on civil processes is evidence of the failure of private ordering; the less such processes are used, the healthier the society. From this vantage point, goals for reform include the internalization of disputes to the immediate participants and a reduction in the visibility of conflict through privatization of processes. Yet other commentators see the use of civil processes as a palliative offered by legal liberalism, committed to sustaining the power of professional and propertied classes while dampening down distress about that very social order. Given such deep conflicts about the utility and propriety of reliance on civil processes, it is not surprising that the current era is filled with disagreement about the import and shape of such processes.

2. Modes of Processing Disputes and Paradigmatic Conflicts

2.1. Adjudication, Private Dispute Resolution, and State-Based Incorporation of Private Processes

One mode of civil processes — adjudication — focuses on the state and relies on the personage of the professional judge, sometimes working in conjunction with lay judges or with juries. Such decision-makers are charged with gaining a sufficient quantum of reliable information about a given dispute to render a decision that imposes a rule of law to legitimate the transfer of assets or the imposition of obligations. An alternative mode — private dispute resolution — promotes party-based consent as preferable to adjudication on the theory that parties possess the requisite information and can, at lower costs, obtain appropriate resolutions of their disputes. Under this approach, the parties or their advocates negotiate directly or authorize a third party to mediate or arbitrate their disagreement.

Both of these forms have been familiar long before the twentieth century but the paradigmatic disputes that fell within their respective domains shifted during that century. Private dispute resolution used to be identified with commercial controversies or with conflicts arising inside self-contained communities, sometimes delineated by religion or ethnicity. During the second half of the twentieth century, however, the state embraced private dispute resolution as appropriate for a broad range of disputes. A third mode of civil processing is thus emerging, in which governments require disputants, coming to court, to use non-adjudicatory mechanisms that

12 Owen M. Fiss, *The Forms Of Justice*, 93 Harv. L, Rev. 90 (1979).
13 Robert M. Cover et al., Procedure (2nd ed., 1988).

resemble private dispute resolution but that stem from state-based rules of process rather than from contractual agreements. One might understand this development as the legalization of private processes (with risks of professional domination and greater complexity) or as the privatization of public processes (with risks of diminished transparency and decline in regulatory potential).

2.2. Kinds of Conflicts

Paradigmatic disputes are implicit in modes of civil processes. As noted, private dispute resolution once focused on resolving conflicts among those with pre-existing and ongoing relationships developed through contracts or community. Adjudication, in turn, responded to disputes either among strangers or neighbors claiming rights under law. During the twentieth century, however, the dominance of those images was reduced by several shifts in political and economic organization — the emergence of understandings that the state itself was subject to regulation, the increase in transactions among larger-scale economic conglomerates, the conception of women as rights-holders both in and outside of their families, and the availability of technologies illuminating patterns of injuries experienced by large numbers of individuals. New prototypes of disputes have came to the fore.[14]

2.2.1. Civil Disputes between Individuals and the State

With the growth of regulation and of social welfare programs came efforts by the state to alter the status of individuals — for example, by seeking to terminate parental rights or to reduce state-funded benefits. Individuals, in turn, sought to require the state to meet regulatory obligations — for example, by arguing that state programs violated statutory constitutional mandates. Because such contests pit individuals against their governments, disputants argued that such civil litigants were similar to criminal defendants, and therefore that the state ought to provide civil opponents with formal procedural protections (and, when necessary, state subsidies) to make more equal the capacities and resources of the adversaries.

2.2.2. Civil Claims Transcending the Nation-State

In the latter part of the twentieth century, through increasing transnational trade and the nomenclature of 'human rights', the framing of conflicts between individuals and states moved beyond the boundaries of the nation-state. Corporate actors in transnational settings wanted reliable legal regimes. Political theorists conceptualized a small subset of claims as premised on rights of personhood to be enforceable domestically or through international bodies. Moreover, from within the boundaries

14 David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 Univ. Cal. L.A. L. Rev. 72-127 (1983).

of some nation-states came groups of 'First Nations', arguing that their sovereignty entailed control over their own dispute-resolution processes as well as rights to proceed through national or international processes.

The human rights paradigm incorporated both substantive rights and ideals of fair process, including adjudicatory processes conducted by impartial judges according defendants (civil as well as criminal) notice of their rights in their own language and, when needed, subsidized legal representation. But adjudication was not the sole mode relied upon for conflicts freed from territorial specificity. International and regional treaties, some related to human rights and others focused on commercial transactions, deploy an array of dispute-resolution mechanisms, ranging from adjudication (at the behest of either nation-states and, increasingly, individual complainants) to arbitration or settlement-focused processes.

2.2.3. Aggregate Claims

The increasing dominance of large-scale political and economic units and the visibility of group-based injuries has generated another paradigm of civil disputes: the aggregate claim. One set of exemplary cases involves individuals subjected to state-based regulatory frameworks (prisons, schools, or licensure provisions) and seeking structural reforms. Other cases come from widespread injuries — some involving a single event (a fire or plane crash) and others stemming from long-standing exposure to toxic substances (asbestos or nicotine). Commercial transactions generated yet other species of claims, some between corporate actors and others involving small sums but thousands of injured individuals (fraud or illegal overcharges).

As technology facilitated both knowledge of such harms and identification of the numbers involved, some advocates, scholars, and judges pushed for civil processes to respond. They urged reconfiguration to serve regulatory ends, with private actors and the state posited as potential defendants in adjudicatory proceedings that rely on representatives to bring claims and on the loyalty of lawyers to spearhead and finance them. Some focus on how to turn group-based disputes into group-based settlements, sometimes accompanied by mechanisms to disaggregate and individualize the remedies provided.

In some countries, such aggregate problems seem too far afield from civil processes and more appropriately handled through government regulation, ombudspersons, or state-based law reform. And in others, scholars have used examples of widespread harms to press for radical reconfiguration of dispute processes, to imagine more transformative possibilities — termed healing, restorative, problem-solving, or therapeutic justice.[15]

15 John Braithwaite, Restorative Justice & Responsive Regulation (2002).

3. Diversifying Demands and Responses

Civil processes have had to take into account this mushrooming array of demands — of disputes involving intra-family conflict, small-scale disputes between individuals and the state, grand-scale claims between corporate opponents or by those seeking either major structural changes or damages, and sometimes pressing beyond state boundaries. Responses have varied depending on a country's political structure and culture, the flexibility of its civil processes, attitudes toward social welfare, and its traditions about financing lawyers.

3.1. Manufacturing More Judges in Courts and Using Agencies as Courts

In the United States, for example, the constitutionally inscribed role of the federal courts as a vehicle for promoting national norms and traditions of lawyers as entrepreneurial activists created the backdrop for conceiving of private civil litigation as a part of the regulatory apparatus. Congress created hundreds of new statutory causes of action and increased the number of judgeships protected by guarantees, in Article III of the Constitution, of life-tenure and non-diminution of salary. The number of such 'constitutional judges' grew from around 100 in the early 1900s to more than 800 by the century's end. Yet such growth was insufficient to meet adjudicatory demands, so political invention and constitutional reinterpretation generated new sets of federal judges. Congress authorized life-tenured judges to appoint two groups of 'statutory judges' (magistrate and bankruptcy judges) to serve within the Article III judiciary for renewable terms but without the constitutional attributes of independence — thereby adding a corps of trial judges about equal in number to the life-tenured.

Further, agencies became an important site of adjudication. In 1946, Congress enacted the Administrative Procedure Act, licensing a cadre of 'administrative law judges' and protecting them through a civil service model. Yet others, grouped under titles such as 'hearing officers', 'administrative judges, or 'presiding officers', hold a more ad hoc status. By the beginning of the twenty-first century, within the federal system, about four statutory or administrative judgeships existed for every one life-tenured trial judgeship, and a career ladder for judges began to take shape.

Administrative adjudication also blossomed in England and Wales, where, beginning in the 1950s, reliance on administrative tribunals increased with the growth of government programs.[16] Proponents thought that court-based judges, identified with upper-class interests, were wedded to inflexible and overly complex procedures. Specially constituted tribunals might instead avoid over-burdening

16 D. J. Galligan, Due Process and Fair Procedures: A Study of Administrative Procedures (1996).

courts, unnecessarily involving lawyers, and imposing costs on losers. Founded on hopes of informality and accessibility, more than sixty different types of tribunals came into being to offer specialized decision-making for small-scale claims. By the century's end, some 2,000 institutions, working through a mixture of reliance on lay and professional decision-makers, rendered a volume of decisions many multiples of that produced by common law courts. Further, the Parliamentary Commissioner Act of 1967 established the office of Parliamentary Ombudsman; in 1974, a local equivalent, the Commissioner for Local Administration, was created.

3.2. Endorsing Alternatives to Adjudication and Multiplying the Sources of Process

Atop full-time additions to the judicial corps and the development of agency-based tribunals, other personnel became central participants in and redefined adjudicatory processes. In 1925, in the United States, Congress enacted the Federal Arbitration Act (FAA), mandating federal courts to enforce arbitration contracts. But judges remained leery of limiting their role in monitoring adherence to national norms, and they declined to enforce *ex ante* agreements to arbitrate federal statutory rights.

Towards the last decades of the century, however, US courts embraced alternatives both from within and from without. Judges lauded arbitration as a flexible, inexpensive method of dispute resolution, and focused on its similarity to adjudication, now reconceived as one of several techniques for resolution of disputes. Judges enforced contracts mandating arbitration programs created by employers, manufacturers, and providers of goods and services. Further, a movement in and beyond the United States developed to bring 'alternative dispute resolution (ADR) inside courts. Through judicial rule-making and statutory mandates, both court and agency-based services expanded to include arbitrators, mediators, 'neutrals', and other para-judicial officers giving advice to lawyers and litigants or making initial determinations about the validity of claims.

England, with London's dominance as a 'seat' of commercial arbitrations, had long been welcoming of arbitration. During the twentieth century, it revisited the law of arbitration. Debate centered on the degree to which parties were free to craft arbitration regimes or courts were to superintend such contracts for compliance with government-based norms on processes and outcome. The Arbitration Act of 1950 enabled parties to create their own procedural template but licensed judicial oversight to ensure that arbitrators' substantive decisions not result in a commercial law different from that of the English courts. Amendments in 1979 provided some buffer by giving parties the power to forbid, by contract, appeals on the law and by creating presumptions in favor of enforcing awards.

More substantial revisions came through the 1996 Arbitration Act, responding to criticism that English arbitration law had become too cumbersome and inaccessible,

too judge-controlled, and hence too uninviting, putting London's historic centrality to international commercial disputes at risk.[17] Commentators described the change as transformative in its insistence on party autonomy and its imposition of a 'judicial minimalism' that restricts court intervention. (Judges retain some control over consumer arbitrations by having the power not to enforce 'unfair contraction terms', sometimes defined as those not negotiated individually or creating a significant imbalance of rights between contracting parties.) The hope is for London to remain an attractive venue, welcoming to domestic and international users by permitting parties to seat an arbitration in England, Wales, or Northern Ireland regardless of where the actual arbitration occurs, and appealing to arbitrators by conferring statutory immunity from liability for failures in the services rendered.

The changes in England follow and interact with the creation — through the UN Commission on International Trade (UNCITRAL) — of a model arbitration law, promulgated in the mid-1980s and aimed at harmonizing provisions for international arbitration. UNCITRAL provided what some describe as an 'internal' law of arbitration, creating the format for selecting arbitrators, developing the case, and the terms of awards but neither addressing the governing principles nor the coercive authority of nations to enforce contractual terms. In contrast, the 1996 Arbitration Act provided a code detailing some mandatory and default rules to clarify expectations in the absence of specific tailoring through contract.

Such interactions exemplify the growing influence of federalism and transnationalism on civil processes, formerly conceived to be internally driven.[18] Both the United States and the United Kingdom have systems in which subnational units (states, or Scotland and Northern Ireland) control their own procedural systems. The United States has been reluctant to permit 'outside' legal regimes to affect domestic requirements,[19] whereas the UK has been more welcoming of regional and international regimes. In 1998, Parliament passed the Human Rights Act, making the European Convention on Human Rights (ECHR) the domestic law of the UK as of 2000. Questions are now being posed about the likely effects of ECHR and European Union law, including whether rights of public hearing will have applicability in arbitrations and whether EU understandings of judicial independence, speedy process, and access to justice will prompt court-based constitutional remedies. Further, while aggregate litigation has taken a back seat in the UK to specially commissioned public inquiries or direct government regulation, the increasing presence of EU law and of transnational legal professionals is producing pressures to use such processes for claims once understood as more appropriately subjects

17 Michael J. Mustill & Stewart C. Boyd, Commercial Arbitration (2nd ed., 2001).

18 The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures (Karl H. Ladeur ed., 2002).

19 Oscar Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Comp. L. 277, (2002).

of political reform. Proposals for 'representative claims', circulated in 2001, were prompted by the need to implement the European Directive on Unfair Terms in Consumer Contracts. For some, such developments are appropriate reconceptions of common law capacities, while others warn of the specter of 'gouvernement des juges'. The layers of federated legal norms may, in turn, make private venues attractive for those with the resources to shop.

4. Twentieth-Century Procedural Reforms in the United States, England, and Wales

As the market for adjudicatory services has expanded (in terms of demand and supply) and as it has diversified (in terms of the kinds of disputes eligible for legal resolution, the range of tasks for third parties, the kinds and quality of processes provided, and the remedies envisioned), choices emerge about which disputes deserve what form of process. Many countries — often invoking the language of 'crisis' — have taken on projects reorganizing their courts, retooling their civil processes, reallocating disputes across venues, and reconfiguring rules on costs and attorneys' fees. In England, the United States, and elsewhere, state-based civil dispute resolution systems are pushing litigants to rely on administrative tribunals and also to settle cases, either through private or court-based non-adjudicatory methods.[20] These systems are imbuing judges with discretion to ration procedural opportunities (including appeals) and with authority to engage in techniques other than adjudication — such as management, advice-giving, and mediation. Debates have ensued about which processes are optimal for what kinds of disputes, about whether government ought to subsidize litigants, and about how much access to courts should be permitted.

4.1. The United States

4.1.1. Trans-substantive Aspirations for Adversarial Process

The baseline for late twentieth-century critique was established by the great procedural reform project during the first half of the twentieth century, the Federal Rules of Civil Procedure. Under the governing 1934 statute, the Supreme Court gained the power to promulgate rules of practice and procedure that, absent an affirmative legislative override, became effective nationwide. To create those rules, the Court turned to experts—lawyers and judges. The resultant 1938 civil rules eschewed formal procedural distinctions in favor of functional delineations, aimed at easing access and focusing on the substantive issues in dispute. By spanning the country,

20 Hume Papers on Public Policy: The Reform of Civil Justice (Joelle Godard & David Guild eds., 1997); Hume Papers on Public Policy: Justice and Money (Joelle Godard & David Guild eds., 1999).

the new rules created national processes that united federal judges through shared daily practices, which in turn promoted their identity as a distinctive cadre of legal actors. The rules gave those judges a good deal of discretion, and, when courts subsequently adopted individual calendar systems, judicial authority over case processing resulted in the embrace of managerial judging.

The 1938 Rules thus represented a commitment to nationalization, to uniformity, to simplification, and to expertise. The scholarly and legal currents that supported this project have been conceptualized (at least in hindsight) as part of a progressive project promoted by individuals having faith in facts and government. The reworkings of procedure were concurrent with a larger movement committed to governance through increasing reliance on federal courts and agencies to enforce national norms in a milieu appreciative of managerial expertise. Constitutional interpretation looked favorably upon court-based processes; statutory provisions were understood as preferring adjudication to other forms of disposition, and courts were committed to streamlining and 'modernizing' their processes to meet growing demands.[21]

For several decades, this model was admired and its aegis expanded. More than half of the states formatted rules to resemble the federal system. Further, during the 1960s and 1970s, the template provided by the Federal Rules was applied to the administrative context. The Supreme Court — borrowing Professor Charles Reich's insight that statutory entitlements were forms of 'property' to be protected from state deprivation by 'due process of law' — required agencies making decision about individual entitlements to employ judicial modes of process to ensure fairness.[22]

4.1.2. Problems of Access and Equipage: Individual and Aggregate Responses

Equality problems haunt all procedural systems, and those that rely on party-based fact gathering and preparation are especially dependent upon the capacities of adversaries. As more individuals and groups (and specifically those who were poor or subject to other forms of subordination) came to be understood as rights-holders, their lack of resources tested a procedural system that sought to justify outcomes based on information generated by disputants. During the 1960s and early 1970s, some efforts were made toward equipping litigants with resources. The Supreme Court interpreted the constitutional guarantee of counsel for criminal defendants as requiring government to provide indigent defendants with lawyers, funds for expert evidence, and transcripts to enable appellate review. Scholars and activists offered theories of why constitutional mandates of due process and equal protection ought similarly to protect at least some civil litigants. They found a judiciary occasionally sympathetic to a specific example — such as poor litigants seeking to divorce

21 Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924 (2000).

22 Charles A. Reich, *The New Property*, 73 Yale L.J 733 (1964).

spouses but unable to pay filing fees. But advocates could not convince the federal judiciary to analogize problems of inequality based on poverty to those based on race, to which equal protection analysis applied. Moreover, the federal judiciary was leery of understanding due process guarantees as requiring subsidies for the many litigants handicapped by having fewer resources than their opponents.

But claims about the problems of unfair limitations on access to justice — linked more generally to a 'war on poverty' and the advancement of civil rights — obtained support for a few decades in the legislature. In 1974, Congress created the Legal Services Corporation to provide lawyers for community-based offices and for 'back-up centers' charged with thinking about how legal regimes affected the poor. Congress also denominated certain kinds of plaintiffs as serving public ends and thereby deserving of reimbursement for litigation fees and costs, often through one-way shifts from losing defendants to victorious plaintiffs.

Procedural rule-makers also played a role in facilitating access. For example, revisions in 1966 to the class action rule authorized self-appointed individuals (and their lawyers) to bring cases on behalf of hundreds or thousands of others, similarly situated, who might not know or be able individually to pursue claims of right. For some attorneys, working on behalf of litigants seeking institutional reform, statutory fee-shifts would fund their work, if successful. Others hoped to obtain large court-awarded fees through the equitable doctrine that co-plaintiffs, gaining monetary benefits through the work of representatives, had to pay those lawyers a 'percentage of the fund' generated. While the contingent fee system had provided a modicum of access for individual plaintiffs, the growth of aggregate damage litigation spurred the market for large-scale plaintiff-based tort work. As tort lawyers began to form collectives, they gained — for the first time — the economic resources to challenge industry practices.

These changes in civil and social processes both reflected and contributed to different understandings of the possibilities of adjudication. Court-based enforcement of federal law appealed to Congress, which authorized litigants to bring a widening array of lawsuits, and caseloads grew.[23] Sometimes the new statutory regimes came with built-in processes, often located in agencies. Statutes often created specified procedures for a particular kind of lawsuit, departing from the framework of trans-substantive procedures controlled by the courts. Further, the class action rule, complemented by other forms of aggregation, spawned the development of the 'big case', a genre of its own, prompting 'manuals for complex litigation' to detail methods of handling such litigations. At the other end of the spectrum, special procedures were developed for prisoners, claimants under federal benefit systems, and *pro se* litigants.

23 Wolf Heydebrand & Carroll Seron, Rationalizing Justice: The Political Economy of Federal District Courts (1990).

Legal scholarship debated whether the changing case-load included new forms of litigation or whether familiar templates had been adapted to handle new groups of claimants. For some, the civil rights injunction represented an innovation, no longer bi-polar, no longer retrospective, no longer party-driven because the judge was at the helm.[24] For others, such configurations resembled familiar formats used for probating wills, reorganizing railroads, and proceedings in bankruptcy. The novelty came from their adaptation for newly endowed groups of claimants (prisoners, welfare recipients, and schoolchildren) seeking future-looking decrees to restructure institutions, and for groups of tort victims, seeking to share large settlements to remunerate a cohort suffering comparable injuries. Moreover, such scholars argued, the increasing centrality of the judge to the processes of litigation was not a phenomenon limited to the 'big case' or the structural injunction. Rather, the managerial model was becoming a familiar facet of all federal cases.[25]

Legal scholarship thus attended to right, remedy, and scale of civil litigation but focused less on the structural implications of other profound shifts in civil processes, such as the proliferation of the kinds of judges. As Congress was authorizing more and varying kinds of lawsuits, Congress was also authorizing more and differing kinds of judges, many of whom did not enjoy much by way of the structural or individual independence that had been a signature of federal adjudication. The life-tenured judges, in turn, shaped legal doctrines accepting of administrative judging, of diminishing roles for juries, and of replacing both judge and jury by publicly sponsored and privately based ADR programs.

4.1.3. Failing Faith in Adjudicatory Procedure

During the last decades of the twentieth century, the celebration of the processes embodied in the 1938 Rules was replaced with the language of crisis, coupled with calls for restricted entry, limited access to information, and shifting litigants away from adjudication and towards other forms of dispute resolution. The critiques stem from a range of intellectual and political traditions.

Insufficient Fairness and Equality. Some objections came from those committed to the rubric of adjudicatory civil processes but wanting to take better account of economic disparities, discrimination against individuals based on their identity, and the many challenges of rendering legitimate judgments. The procedural system was faulted for not doing enough to facilitate rights-claiming, not only for the poor but also for large segments of the middle class. But legislatures refused to respond with sufficient subsidies. Further, well-heeled opponents convinced Congress to impose

24 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv, L. Rev. 1281 (1976).

25 Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).

severe restrictions on lawyers for the poor. Similarly, courts narrowed fee-shifting rights, refused to compensate attorneys for the risk of taking contingent claims, and curbed access enabled through class actions.

Others worried that courts were populated by governing elites inhospitable to claimants identified as occupying disfavored statuses. Although the demography of court users (both voluntary and involuntary) had shifted, the composition of judiciaries and of the legal profession had not changed as much, resulting in judiciaries often more than 80 percent white and male. The response, begun in state courts during the 1980s and 1990s, were projects to identify sources of 'bias' in the courts and to redouble efforts to enhance 'fairness', in terms of drafting codes and rules focused on civility in courtroom interactions, providing more translators, changing employment practices, and to a much lesser extent, altering substantive legal practices.[26]

Yet another source of friendly concern came from social science empiricism on cognitive processes. Psychologists explored how individuals and groups make decisions and interrogated procedural forms to assess whether to alter modes of presentation, rules of evidence, and the numbers and background knowledge of decision-makers. Some courts turned to scientific panels, admitted or refused expert testimony, or attempted to change procedures for juries.

Insufficiently Inclusive, Relaxed, or Creative Process. Another critique moved away from the 1930s adjudicatory mode but did not debate its aspirations for easy access to process. Rather, under an umbrella of humanism, communitarianism, and social welfare concerns, commentators objected to the depersonalization, objectification, and distance that they associated with courtroom formality and its dependency on legal professionals. Arguing for more user-friendly, less adversarial processes, posited as capable of producing more useful remediation, these critics sought to re-center process on the disputants' voices and goals. The movement embraced ADR as more generative than adjudication. While one form of critique sought to supplement adjudication by opening 'many [other] doors', another saw trial as requiring extravagant investments of resources to yield imperfect states of knowledge and unhappy participants.

This movement's success, if measured through formal rule changes, institutionalization, and support from lawyers and judges, has been substantial. The 1938 Rules were amended to direct judges to promote ADR; new statutes were written to authorize court-annexed arbitration, and legislatures mandated the use of ADR in agencies. Institutions supporting ADR proliferated, convening conferences, proffer-

26 Dorothy W. Nelson, *Introduction to the Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 731 (1994).

ing services, teaching law school classes, and shaping model rules, including, in 2001, a Uniform Mediation Act.

An alternative metric is empirical, attempting to ascertain the use of ADR processes and their costs, speed, and responsiveness to disputants' needs. Surveys of lawyers found that, aside from case-management and judge-run settlement conferences, courts in fact provided relatively few ADR services. Studies also found that ADR imposed costs (in terms of lawyers' time and energies) and — through strategic exploitation — could slow negotiations. Whether more lawyer or judicial investment yielded better process or outcomes has been difficult to measure, spawning a debate about why and when to advocate various kinds of ADR. Further, research on litigants undercut the claim that adjudicatory proceedings were as alienating as some had posited. Studies found that litigants liked to 'tell their stories' and preferred more formal processes, identified as dignifying the participants and treating them impartially.[27]

Too Much Process. A different kind of critique worried that the system has provided too many opportunities for process. These concerns regard twentieth-century aspirations for lawyer-based production of information to yield good and reliable outcomes as simplistic, superseded, or wrong. Game theorists and economists analyzed such processes and their efficiencies.[28] Critics pointed to rules of discovery, crafted before photocopying and computers were commonplace, which could not have envisioned the massive amounts of information generated, stored, or hidden. Such rules enabled lawyers to garner profits from production and obfuscation and created incentives to build large law firms fueled by associates clocking hourly bills. Commentators argued that aggregation rules were overly optimistic about the capacity to group similarly situated individuals in collectives that could be adequately represented through a single or small numbers of self-elected or designated advocates. Critics argued that strategic acting by attorneys for plaintiffs and by defendants in search of 'global peace' yielded judgments protecting both sets of interests at the expense of either those injured or the public.

Undersupervised Processes and Lawyers. Another critique fastened on sloppiness, inattention, ineptitude, inexperience, and misuse, attributed to lawyers engaged, with a range of motives and skills, in strategic interaction. As pre-trial and discovery rules made these problems more transparent, judges argued that they should take on a managerial role. Through formal redrafting of rules and energetic teaching programs, judges and other court personnel gained control over the pre-trial phase.

27 E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (1988).

28 Steven Shavell, *Suit Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55 (1982).

Managerial judges found themselves intrigued by the possibility that their oversight could not only reduce waste on the way to trial but also produce settlements, aborting litigation altogether. Court-based settlement efforts, once termed 'extra-judicial', became regular features of civil processes. The definition of the 'good judge' came to be the judge focused on and able to achieve dispositions, and trials came to be described as 'failures' of the system that ought to be producing settlements. Although popular culture proliferated images of trials, in legal civil processes they became increasingly rare. By the century's end, fewer than 3 percent of all federal civil proceedings ended with a trial by either judge or jury. The data for state courts were similar—that juries reach verdicts in fewer than 5 percent of contract and tort disputes.

4.1.4. Civil Processes Reconfigured

Thus, a range of constituencies produced critique, and a subset succeeded in reformatting processes. The aspiration for trans-substantive uniformity of the 1938 Rules has been rejected — through amendments made by the judiciary, carving out special processes for different kinds of cases and detailing local and varying rule regimes; by Congress, requiring that certain litigants use subject-matter-specific processes; by contract, creating a multitude of dispute-resolution programs. Within the academy, the plausibility of such aspirations have been undermined as the image of public-spirited expert judges and lawyers, presumed able to craft processes neutral as between opposing litigants, has eroded during the sixty years of practicing under the rule-making regime. Strategic repeat players within the litigation system have learned to lobby such rule-makers or to go to Congress to intervene at their behest. For example, while misuse of the discovery system was documented in only a small segment of cases, critics harnessed images of exploitative lawyers and of overwhelming quantities of data and successfully argued for rule revisions reducing access to information and increasing court authority over its exchange. Similarly, while class actions have a complex track record, opponents focused attention on those cases in which lawyers were paid vast sums of money in contrast to negligible recoveries of individual plaintiffs, and succeeded in limiting class action opportunities in federal courts. Of course, just as the expansion of civil processes had not been founded exclusively on premises about process, so the efforts at constriction have not come solely through interest in civil processes. The attack on the adjudicatory mode of the Federal Rules has been coupled with efforts to restrict liability for torts, environmental and consumer injuries, and civil rights.

While I have focused on civil processes at the trial level, changes in appellate process have followed a similar pattern. The right of appeal became enshrined in the later part of the nineteenth century and actualized in the twentieth century through expansion of the number of judges dedicated to appellate work and the

development (in both federal and state systems) of intermediate appellate courts, hearing all who filed. A third tier — the highest court — then selected a subset for additional review. The volume of appeals grew, as well as skepticism about its utility. By the later part of the twentieth century, substantial revisions were in place. While appeal as of right remained the law, some scholars argued that, in fact, a discretionary system of review had been put into place. Appellate courts relied on staff attorneys to screen cases; many cases were decided without argument, and fewer than 20 percent of the rulings in the federal system resulted in published decisions. Other scholars worried that the freedom gained by the Supreme Court during the twentieth century to select the cases it would decide had negative effects on the Courts jurisprudence, prompting an inappropriate set of rules for lower courts, too ready to oversee Congress and too constrained to remediate in individual cases.

4.2. England and Wales

England has had a long history of self-consciousness about its own procedures. By one calculation, during the twentieth century, some sixty official reports were commissioned to evaluate civil processes, and specifically problems of access, cost, delay, and complexity. Further, England was in the forefront of conceiving of access to civil justice as a right. In 1949 legal aid became available as an entitlement for individuals seeking to use civil processes.[29] During the late 1990s, England substantially revised both its civil and appellate rules and its legal aid system. As noted, England also expanded its reliance on administrative adjudication, enacted new arbitration legislation, and made the ECHR a document with domestic legal application. Commentators see these reforms as aimed at the costs of disputing, attributed both to party control over and to the complexity of process. Responses have been to limit state-funded lawyering, to direct attorneys towards settlement and ADR, and to give judges more authority over the pace and shape of litigation.

4.2.1. Lawyers' Services and Access to Civil Processes

The 1949 Legal Aid Program, termed by scholars as the "most ambitious" in the world, was initially responsive to need. Upon obtaining certificates of eligibility based on means, clients could obtain assistance from the private bar, paid according to a schedule of fees and protected against the "English rule" requiring reimbursement of victorious opponents. According to one study, within the first four years of the 1980s, the legal aid budget grew from some £100 million to more than £250 million, with most certificates related to family matters. By the mid-1990s, civil legal assistance

29 The Transformation of Legal Aid: Comparative and Historical Studies (Francis Regan et al. eds., 1999).

cost about £600 million. Public funds represented significant percentages of private lawyers" incomes.

But the growing budget also made visible the high costs of using civil justice processes. One response was to limit eligibility, which fell from 80 to 40 percent of the population. In the 1990s, two more fundamental changes occurred. Through legislation styled 'The 1999 Access to Justice Act', the open-ended features of England's Legal Aid system ended. And, based on a 1996 report, also labeled Access to Justice (called the Woolf Reforms), civil processes were revised in an effort to constrain cost and delay.

The 1999 Access to Justice Act abolished the Legal Aid Board and created in its stead a Legal Services Commission (LSC) to work through decentralized groups, Community Legal Services (CLS) and the Criminal Defense Service (CDS), charged with assessing local needs, identifying lawyers eligible for providing services, and requesting funding. Budgets came with annual caps, resulting in the rationing of services and further restrictions on eligibility. Criminal defense services headed the priorities, followed on the civil side by lawyers for disputes involving children, housing, and personal violence in homes. The 1999 Act also identified a few new areas of need (such as immigration proceedings) and attempted to enhance use of technologies (such as a website for the Citizens' Advice Bureaux (CAB)) to provide information on legal processes and rights.

Through 1999 revisions of ethical rules, some claimants unable to obtain Legal Aid gained a new means to obtain lawyers' assistance. England relaxed its ban on contingent fees by permitting 'conditional fee agreements' (CFAs) that enabled solicitors to take cases despite a risk of non-payment upon losing. 'After the Event' (ATE) insurance became available so that, if necessary, losers could pay victorious opponents, entitled under English fee-shifting rules to indemnification for fees and costs. The incentive to take such work was enhanced by entitling a lawyer for a prevailing plaintiff to the fees paid by the loser and to a bonus, paid directly by the client but limited to no more than 100 percent of the hourly fees and, under rules of the Law Society, presumptively capped at no more than 25 percent of client's damages. Revisions in 1999 permitted the victorious lawyer to recover that 'success fee' from the loser; the client recovers the insurance premium.

Revised legal aid rules and conditional fee agreements may alter the pool of lawyers in the market for representing claimants unable to pay directly. The reforms enhanced the power of LSC, CLS partnerships, and insurance companies, reduced the relevance of legal aid, and increased the focus on the monetary costs of litigation. Some commentators argue that, by changing the pool of lawyers eligible for legal aid payments, quality will suffer and the cadre of lawyers identified with an impoverished clientele will become marginalized. According to these scholars, despite being named the Access to Justice Act, the 1999 reforms restrict entry.

Proponents see the utility of the new legal aid rules in developing specialization among lawyers, in turn gaining expertise that will improve quality and reduce delay. Others see the conditional fee system as responsive to the concern about the declining role for legal aid but note that the new conditional fee system may have decreased incentives to reduce overall costs while itself being a source of litigation about fees. Commentary also links the reforms to shifting attitudes towards social welfare, labeled during the 1990s as the 'Third Way' in reference to efforts (under the Blair Labour government

in England and the Clinton Democratic administration in Washington) to reduce government spending on entitlement programs.

4.2.2. The Woolf Reforms

As noted, revisions in the financing of litigation occurred in tandem with revisions of civil procedure. A 1996 inquiry, chaired by Lord Harry Woolf, argued that a major reorientation was required to curb adversarialism by shifting control over the pace and quantum of litigation away from individual lawyers, by calling for increased use of ADR, by focusing on settlement, and by giving greater authority to judges to manage cases.[30] The 1996 report proposed that lawyers 'front load work' by requiring them, pre-filing, to avoid the need for litigation through discussions with opponents. The report urged that judges, in turn, be given managerial powers to make the costs of proceedings 'proportionate' to the amount at stake. To do so, the report called for detailed 'protocols' (to be developed for different kinds of cases through bench/bar committees) for how to proceed before filing and for assigned 'tracks' with proposed timetables for cases once filed. The report also proposed empowering judges to police compliance and to sanction misbehavior, in part by allocating costs based on assessments of the reasonableness of positions taken during proceedings. In 1999, pre-action protocols and new rules became effective in England and Wales that require claimants to serve pre-filing demands on opponents, who are charged with investigating and replying. Once filed, cases are assigned to one of three tracks ('small claims','fast', and 'multi-track').

4.2.3. Representative and Appellate Processes

In 2000, civil procedural rules were amended to permit a cluster of claims to proceed under a group litigation order (GLO) for decisions on common law or fact.[31] In 2001, the Lord Chancellor's Department circulated proposed procedures for 'representative claims', prompted in part to enable consumer organizations to challenge systemic

30 Sir Harry Woolf, Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996).

31 Neil Andrews, *Multi-Party Proceeding in England: Representative and Group Actions*, 11 Duke J. Comp. & Int'l. L. 249 (2001).

unfairness, as required by EU directives. Eighty respondents debated whether the proposal would — for better or worse — import US-style class actions.

Turning to the appellate level, in the late 1990s, a committee chaired by Sir leffery Bowman filed its report, Review of the Court of Appeal on civil appellate procedures.[32] Like the Woolf Report, that committee worried about expense, delay, and complexity, and focused on enhancing efficiency. Concerned about rising numbers of appeals, the Bowman Report concluded that leave for appeal was too leniently granted. Opining against any 'automatic right of appeal', the report called for a change in culture through court management, a fast track for certain appeals, and constraints on appeal rights — all to result in process deemed proportionate to the scope of a given controversy. In 2001, restrictions were put into place, requiring permission for almost all civil appeals and cross-appeals and making the decision to permit appeals final. Applicants need to show a real chance for success or 'some other compelling reason'. Grants can be limited to specific issues and accompanied by conditions, such as requiring security for payment of opponents' appellate costs or for the judgment itself.

4.2.4. Debating the Utility and Rationales for Change

Academic concerns include opposition to the increased authority and discretion accorded judges, suspicion about the shift away from adjudication, and skepticism about the degree to which reforms will produce change. For some, the revisions are too radical, undoing the best of English practices.[33] For others, the new rules have failed to alter the incentives of lawyers and therefore will not constrain the fundamental problem of the cost of process. Further, they predict that the rules will have little impact on the culture of lawyers and judges. Unaddressed, for example, were concerns about the closed nature of the legal profession, the lack of diversity of the judiciary, and the limited routes to appointment of judges, controlled by the Lord Chancellor's office. Work by researchers based at University College London and the National Centre for Social Research suggests a different critique — that, while ordinary individuals believed that law was relevant to their lives, almost none used court-based processes to remediate the many problems they encountered. Eight out of ten surveyed used neither ADR, nor courts, nor sought assistance from ombudspersons. For them, the Woolf and Bowman Reforms have no direct ameliorative effect.

Critics have also focused on administrative tribunals. Just as England has produced numerous reports on court-based procedures, it has also chartered several commissions to review administrative processes. Recent empirical work investigated

32 Sir Jeffery Bowman et al., Review of the Court of Appeal (Civil Div.): Report to The Lord Chancellor (Sept. 1997).

33 Michael Zander, The State Of Justice (2000).

the claimed advantages and distinctiveness of administrative tribunals.[34] A study of the Social Security Appeals Tribunals (SSATs) revealed poor first-tier decision-making, a lack of independence of decision-makers, and high error rates that went unchallenged due to claimants' general confusion, lack of knowledge, sense of powerlessness, and stress. Another surveyed the Immigration Appeal Tribunal and concluded that its greater formality and the provision of state-funded representation played a significant role in claimants' success. Researchers found that speed and reduced expenses were associated with losses in fairness, in accuracy of decisions, and reduced consistency — stemming in part from the complexity of regulations. The researchers argued that specialist tribunals were not havens from but depended upon legalism, and that claimants' lawyers appropriately used legalisms as a buffer against inaccurate and unfair decision-making, thereby checking state power.

5. Ambivalence towards Process

This review reveals several cross-currents. First, dissatisfaction with civil processes has become commonplace,[35] resulting in a language of crisis' that outlasts temporal dimensions implied by that term. A proliferation in the sources and forms of processes has been accomplished, accompanied by sense of a failure to make the kinds of changes required. What is 'required', however, varies substantially with one's vantage point.[36] The language of law and economics has shifted discussion toward incentives and efficiencies, as those modeling process and empiricists play significant roles in reform activities. However, the simplification entailed in modeling often fails to capture the complexity, variety, and the many constituencies that actual disputing involves. Further, adequate data collection requires both substantial resources and sophistication to identify the import of many variables. And the metrics by which to assess findings are not shared. Some critics rest concerns on usage rates (too much or too little), while others on the distribution of usage, or on costs (variously measured and charged), and yet others on the forms of remediation possible and achieved.

Secondly, given the long menu of civil processes available, choices are in the forefront, and the domain of civil processes is now widely perceived as an arena of social contest. Repeat players — both governmental and non-governmental — understand that civil processes affect regulatory capacity and therefore participate actively in shaping the content and scope of rules. The capacity for endless claims of crisis stems in part from the built-in instability of efforts that express conflicting

34 Hazel G. Genn & Genevra Richardson, Administrative Law and Government Action (1994).

35 Civil Justice in Crisis: Comparative Perspectives of Civil Procedure (Adrian A.S. Zuckerman ed., 1999).

36 Reform of Civil Procedure: Essays on Access to Justice (Adrian A.S. Zuckerman & Ross Cranston eds., 1995).

social and political values. Economy, for example, is in tension with oversight, and the benefits of any particular form of process are not evenly distributed across disputants.

Thirdly, the cost of process — made vivid, in part through efforts to subsidize the poor — has prompted interest in limiting its availability, at both first instance and appellate levels. But expense is not only translated in dollar terms; critics of appellate filings argue that they produce 'too much law' — costly in terms of predictability and consistency. That demands outstrip capacity at the conceptual level can also be seen through concerns about the feasibility of processing small claims. The last century has made vivid the tension between highly individualized inquiries undertaken by relatively visible and costly government actors and the need to produce millions of judgments about disputed claims of obligation and right. An early response was to vest decision-making authority in government institutions other than courts, yet recent analyses worry about the adequacy of agency processes. Another response was to turn to aggregate processing. Experiences with large-scale litigation have, however, exposed both its utility in redressing adversarial imbalances and the temptations for overuse and abuse. Questions focus on the degree of relatedness of claims, the quality of representation, the loyalty of agents often holding economic stakes larger than individual claimants, and the capacity of judges to monitor risks to the absentees — raising problems about the legitimacy of according finality to the outcomes so obtained.[37]

Fourthly, substantial pressures exist to shift away from adjudicatory processes, both by turning judges into settlement brokers and by turning to more privatized resolutions.[38] Yet when those processes are heavily used, pressures develop to regularize them through law. Earlier in the twentieth century, agency-based civil processes were seen as a useful addition or alternative to adjudication; critiques resulted in efforts to formalize those processes. Later in the century, court-based and private arbitrations came into vogue, and likewise, some saw these inventions as too unbridled. Repeat players have begun to call for more formality, precedent, and rules, promising predictability. Yet others now criticize ADR as too much subjected to legal constraints and urge a shift to mediation. And, concurrent with privatization come calls for more state-based civil processes, linked to economic and political stability. Federated governments rely on such processes to mediate internal disputes and to implement both national and subnational rules, while private actors use flourishing government-based processes as a metric of a well-functioning social order.

37 Deborah R. Hensler, Class Action Dilemmas: Pursuing Public Goals for Private Gain (2000).

38 Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 93 (1984).

Fifthly, reforms have underscored the centrality of lawyers and judges to developing process and the interdependence of civil processes and the legal and juridical professions. The turn, for example, in the United States, England/Wales, Australia, Canada, and Scotland towards 'case management' comes from a desire to manage lawyers as much as cases. Rules of civil process become prescriptions to lawyers for providing client services and responding to court demands. Merging, thus, are rules of process and lawyers' ethics. Less subjected to constraint — at least under current iterations — are judges, dispatched to superintend the process, imbued with substantial discretion, and largely immune from appellate oversight. The practice of judging has itself shifted, with the increase in reliance on staff, the development of administrative infrastructures, and increasing focus on goals for disposition. Higher status judges retain (and, in some instances, have gained) significant autonomy.

These developments in turn are subject to competing assessments. For some, judicially based civil processes are anachronistic, predicated on an obsolete nineteenth-century individualistic model. As societies organize through bureaucracies and lawyers move toward aggregate practices, judges were still peculiarly functioning as solo practitioners, inefficiently engaging in labor-intensive craft-like work. The judiciary is thus belatedly shifting gears to generate corporate capacity, and from this vantage point, higher court judges are appropriately becoming administrators, overseers, and employers — selecting and dispatching their juniors and rationing court attention. First-tier judges are, in turn, seen as properly engaged in multi-tasking, molding processes and interpersonal techniques to fit needs. Declining percentages of trials and formal appellate rulings become measures of success.

For others, the move to management is a retreat from the promise that, through transparent processes, shared norms will be developed and applied. That faith in governance and expertise persists is evident in professional efforts to format sets of transnational rules to make processes accessible at least to some strata of society. Further, a massive socialization project remains intact that, through television, film, news, and international activities, focuses on the centrality of court-based processes. Yet others, relying on empirical work about usage of public and private process, see both early and late century self-styled 'reforms' as unresponsive and therefore irrelevant to many disputants, who are without the ability to participate in any mode of civil processes.

The changes are also starting to stimulate interest in new sets of questions. For example, given the shift away from common law courts —promoted and supported by common law courts — will judges be able to control their own dockets by attracting the cases they deem 'important'? As the market of dispute providers expands, what institutions will become dominant? Perhaps, in light of infinite volume (or government control over volume through its power over legal claims) and political and economic reliance on government-based processes, courts will

retain control. Further, in the twentieth century, some kinds of disputes (workers[5] compensation, car accidents, and divorce) have cycled into and others out of courts. On the other hand, as judges themselves press to alter juridical modes and resemble other governmental workers engaged in an array of tasks, it is not clear how they will or why they should sustain claims on resources or rights of independence from political oversight.

The proliferation of venues also prompts question about what inventions await. Some argue that all these reforms are just variations on a legal theme, professionally dominated and capable of sustaining its own legitimacy. Others see a natural law of trans-substantive procedure — based in democratic theory and psychological needs — that consistently produces a format involving a hearing, framed by rules of transparency, with an impartial decision-maker limited in its powers. Whether predicated upon state or private authority, civil processes repeatedly shape comparable means by which to enable interaction among parties, the development of information, and the constrained power of decision-makers. But others see this template as culturally specific, missing understandings of justice and remediation that could prompt imagining new forms of proceeding.

A final note is the reminder that a focus on proceduralism ought not to imply an autonomy that does not exist. Reforms of the past century were never 'only' about procedure but were related to the creation of professionalized judiciaries, to the institutionalization of courts as corporate actors within governments, to the development of agendas by academic and practicing lawyers, and to the goals of court users, all as part of country-specific and of transnational social movements.