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## Pound's Century, and Ours

Jay Tidmarsh

Notre Dame Law School, [jay.h.tidmarsh.1@nd.edu](mailto:jay.h.tidmarsh.1@nd.edu)

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## POUND'S CENTURY, AND OURS

*Jay Tidmarsh\**

### INTRODUCTION

On August 29, 1906, a little known Nebraska lawyer climbed to the podium at the twenty-ninth American Bar Association convention in St. Paul, Minnesota, and commenced the most thoroughly successful revolution in American law. The success of the revolution has been so complete that it swept clean lawyers' collective memory of what it had replaced, obliterated a system that had taken centuries to construct, killed off an entire vocabulary, and inverted the way in which every lawyer—every person, really—thinks about the law. In the words of John Henry Wigmore, who was present, the speech was “the spark that kindled the white flame of progress.”<sup>1</sup>

The lawyer was Roscoe Pound, and the title of his address was *The Causes of Popular Dissatisfaction with the Administration of Justice*.<sup>2</sup> The speech was hardly popular in its own time. The ABA nearly refused to publish the remarks.<sup>3</sup> Thirty-two years would pass before Pound's

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\* Professor of Law, Notre Dame Law School. I thank Howie Erichson for useful discussions, and Joe Bauer and Roger Trangsrud for their helpful comments on a draft of this Article.

1 John Henry Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176, 176 (1937) (stating that the speech “struck the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession”). Wigmore's words are engraved on a plaque commemorating the speech. A picture of the plaque can be seen in *Proceedings in Commemoration of the Address Delivered in St. Paul, Minnesota, August 26, 1906, by Dean Roscoe Pound Before a Convention of the American Bar Association*, 35 F.R.D. 241, 259 (1964).

2 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395 (1906), reprinted in 35 F.R.D. 273 (1964) [hereinafter Pound, *Causes of Popular Dissatisfaction*].

3 A biography of Pound recounts the debate over the speech's publication, see DAVID WIGDOR, *ROSCOE POUND* 126–29 (1974), as does a commemorative essay by Wigmore, see Wigmore, *supra* note 1. Wigdor's biography is excellent, but Wigmore has the advantage in the recounting because he was an eyewitness to the speech and ensuing debate. For further discussion of the debate over the speech's publication, see *infra* notes 307–14 and accompanying text.

seeds fully flowered.<sup>4</sup> Even today, many of Pound's criticisms of our adversarial civil justice system ring as true as the day that Pound spoke. Nor was the revolution that Pound wanted to foment exactly the revolution that occurred.

Pound's insight was to make procedure and substance work in an integrated fashion. In England (and eventually America), procedure had dominated substance for much of the time since the eleventh century. The question often was not "What substantive right has the defendant violated?" but rather "What legal form, with what procedural attributes, must the plaintiff use to assert the claim?" As Maine famously observed, "[s]o great is the ascendancy of the Law of Actions [i.e., common law procedure] . . . that substantive law has at first the look of being gradually secreted in the interstices of procedure."<sup>5</sup> The energy devoted to constructing a procedural system yielded dozens of technical terms—such as the *praecipe quod reddat*, the *capias ad*

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4 In 1934, Congress enacted the Rules Enabling Act, which invested in the Supreme Court the power to create uniform rules of procedure for federal courts. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. §§ 2071–2077 (2000)). Years in the making, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (discussing history of the statute's enactment); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (same), the Enabling Act placed the creation of procedural rules in the hands of the Supreme Court. The Court then composed an Advisory Committee to draft the rules, precisely as Pound had recommended. Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 443, 448 (1910) [hereinafter Pound, *Practical Program*]; see also Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402–03 (1910) [hereinafter Pound, *Principles (Part I)*]. The rules that emerged, the Federal Rules of Civil Procedure, went into effect in 1938. See Order of December 20, 1937, 302 U.S. 783 (1937); Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645 (1938).

Some of the ideas that Pound espoused found earlier expression in the Equity Rules of 1912, see Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912), which in turn heavily influenced the Federal Rules of Civil Procedure. Before crafting the Equity Rules, the Supreme Court received significant input from a committee of the ABA that had been constituted as a result of Pound's speech, on which he sat, and into whose deliberations he had significant input. See Austin W. Scott, *Pound's Influence on Civil Procedure*, 78 HARV. L. REV. 1568 (1965).

5 SIR HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOMS* 389 (Arno Press 1975) (1886); see also S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 59 (2d ed. 1981) ("There was no substantive law to which pleading was adjective. These were the terms in which the law existed and in which lawyers thought."); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 617 (1908) [hereinafter Pound, *Mechanical Jurisprudence*] (claiming that "[lawyers] lose sight of the end of procedure, they make scientific procedure an end of itself, and thus, in the result, make adjective law an agency for defeating or delaying substantive law and justice instead of one for enforcing or speeding them").

*respondendum*, the demurrer, the general issue, the plea in avoidance, the traverse, and the wager of law—whose meanings would have been clear to lawyers one hundred years ago, and whose intricacies often determined the outcome of cases.

The system for which Pound advocated was based on the classic model of equity, in which procedure (in theory) never got in the way of deciding cases on the merits. It was, as Pound said, “justice without law.”<sup>6</sup> Procedural rules should be general, discretionary guidelines placed into the hands of judges whose scientific administration would lead to the just determination of each case.<sup>7</sup> Increased judicial involvement would constrain the excesses of the adversarial system. The substantive merits would determine the outcome.

The procedural system we developed in the twentieth century clung closely to the specifics of Pound's proposals. But we never fully integrated procedure and substance. Instead, we now have a system in which the importance of substance and procedure has been inverted. Substance now dominates procedure. The promise of Pound's integrated approach remains illusive. To some extent the fault is Pound's, for he failed to appreciate that his “on the merits” approach invited subjugation rather than integration of procedure. But subjugation was not Pound's objective. We have comprehended only dimly the meaning of the prophet, and have focused on concrete actions rather than on the imaginative call to action.

I wish to step back from the details of our present schizoid efforts at incremental procedural reform—in which we simultaneously entrust more power to judges and pursue ever more detailed procedural codes—in order to make two larger observations. One is fairly evident, and the other will take most of this Article to explain.

First, let me justify my claim that the procedural revolution Pound commenced was the most thoroughly successful one in twentieth-century American law. Given the contested nature of the details of our procedural system, my claim might seem surprising. My measure of success, however, lies on the grand scale, not in the particular. The revolution was successful because, when ultimately put into action, it made procedure an irrelevant consideration in thinking about substantive law. Milsom may well have been right that the measure of a mature legal system is its ability to think in categories of substantive

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6 Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 24 (1905) [hereinafter Pound, *Decadence*]; see also Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 398, reprinted in 35 F.R.D. 273, 275 (1964); Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696, 696–705 (1913) [hereinafter *Justice (Part I)*].

7 Pound, *Principles (Part I)*, *supra* note 4, at 388–89.

rather than procedural law.<sup>8</sup> By that measure, Pound helped to make us mature. When we ask what rule we should use to declare a design defect in a product, or what the level of scienter should be for corporate wrongdoing, or what rule should apply to affirmative action programs, we do not stop to ask how we propose to enforce the rights under consideration. Instead, those who argue about the terms of substantive law assume procedural enforcement is possible. At best, difficulties of enforcement are secondary considerations. Today in the academy, procedure is often a second-class subject, thought to be a practically oriented matter devoid of insight and unworthy of sustained thought. We take for granted that cases will be, or at least ought to be, decided on their merits. How that is accomplished is a matter of mere practice and detail.

In this forum, my claim that procedure has become an academic backwater is singing to the choir; those interested enough to read this Article know what I mean. Although I once thought that perhaps it was, the insight is not original to me. By the turn of the last century, even before Pound's speech, American lawyers were beginning to discuss the law in substantive terms, without filtering their thinking through procedural categories.<sup>9</sup> Pound too observed a nascent tendency to assume away the procedural dimensions of a problem, and to focus only on the substance.<sup>10</sup> He thought the tendency unfortunate. I will observe only that the tendency has not diminished over the years.

My second observation is more controversial: it is again time to consider bold reforms to our procedural system. Today our system faces pressures and challenges across numerous fronts, and modest tweaking of this rule or that doctrine cannot address the system's fundamental crisis. Reforming procedural systems is not an easy task. Expectations about litigation become settled, and the status quo becomes reinforced by the hundred thousand lawyers who do quite well under the present system, thank you very much. The system

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8 MILSOM, *supra* note 5, at 44, 59, 94.

9 The classic text is *The Common Law*, a masterful series of lectures in which Oliver Wendell Holmes cut through the procedural niceties of the common law writes to distill the substantive principles within. OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). But progress was fitful. For one example of a court imperfectly struggling to convert once-dominant procedural categories into substantive principles, see *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891).

10 Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 514 (1912) [hereinafter Pound, *Scope and Purpose (Part III)*].

Pound criticized had become stale three centuries earlier. So it is possible to limp along with an outdated system for quite a while.

But we shouldn't have to. Some of the pressures on the system will not wait another century before exploding. The time for clear-eyed critique and for imagination about the next procedural moment is now. To be successful, however, we must recover a sense of the importance of procedure—a sense that Pound himself possessed but that has been lost as we implemented what we thought were Pound's insights.

Like Pound's speech, most of this Article will be critique—exploring the challenges that make our present procedural system unstable, rather than proposing a positive agenda for reform. The pressures that make our procedural system ripe for reimagining can be broken down and categorized in any of a number of fashions. For my purposes, I will package them into four categories that I describe in Part II: competitive pressures, political accountability, representativeness, and theorization. In Part III, I suggest several issues to which future reform efforts must pay special attention. But first, in Part I, I describe Pound's vision, the parts of the vision we kept, and the parts we forgot.

## I. POUND'S CENTURY

Pound's "spark" looks less radical when we consider the kindling on which it rested. Many of his procedural ideas found prior voice in Bentham's critiques of the British system, the mid-century code reform efforts of New York's David Dudley Field, England's Judicature Act of 1873, and the works of contemporary continental philosophers.<sup>11</sup> But so much depends on timing. In the reform-minded

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<sup>11</sup> Pound acknowledged these influences on his own work. See, e.g., Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 408 (citing JEREMY BENTHAM, FRAGMENT ON GOVERNMENT (1776)), reprinted in 35 F.R.D. 273, 283–84 (1964); Roscoe Pound, *Enforcement of Law*, 20 GREEN BAG 401, 403–05 (1908) [hereinafter Pound, *Enforcement*] (discussing leading schools of nineteenth-century Germanic jurisprudence); Pound, *Mechanical Jurisprudence*, *supra* note 5, at 610–13 (discussing ancient and modern works of jurisprudence, including continental philosophers and Bentham); Pound, *Practical Program*, *supra* note 4, at 443–44 (discussing Field's code pleading system in New York and the Judicature Act); Pound, *Principles (Part I)*, *supra* note 4, at 403–04 (mentioning the Judicature Act). His most ambitious historical survey of jurisprudential thought was a three-part article entitled *The Scope and Purpose of Sociological Jurisprudence*. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140 (1911) [hereinafter Pound, *Scope and Purpose (Part II)*]; Pound, *Scope and Purpose (Part III)*, *supra* note 10. The greatest influence on Pound was Rudolf von Jhering, a nineteenth-century German philosopher whom

spirit of the early twentieth century, when the country found itself willing to reexamine foundational assumptions about American life,<sup>12</sup> Pound supplied the ready critique of the legal system and the call to action. His 1906 speech marked the beginning of the reform movement that led directly to the creation of the gold standard of modern procedure, the Federal Rules of Civil Procedure, in 1938.

Trained in botany,<sup>13</sup> Pound applied scientific methods to his analysis of law. He saw law as an organism in need of synthesis and systematization, of diagnosis and prescription. As a result, Pound did not see procedure in a vacuum. In his comprehensive view, procedure was one of the vital systems that helped law to fulfill its organic objective—which, in Pound's mind, was the administration of justice according to the moral norms of a society.<sup>14</sup> Pound's diagnosis of the legal organism in 1900 was that too much dissonance existed between the law as it was functioning and people's sense of and desire for justice. In a democracy, such dissatisfaction with justice was a cancer that bred lawlessness and contempt for the law, and thus threatened the health of the entire social structure. The etiology of the cancer was what we would call today "legal formalism," or what Pound called "mechanical jurisprudence": the deductive application of legal rules that bore little relation to and took little account of social conditions. The cure was "sociological jurisprudence."

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Pound regarded as the father of his own sociological jurisprudence but whose name Pound often rendered as "Ihering." See Pound, *Mechanical Jurisprudence*, *supra* note 5, at 610; Pound, *Scope and Purpose (Part II)*, *supra*, at 140–47.

12 See Pound, *Practical Program*, *supra* note 4, at 439 (describing a "general movement in all departments of mental activity away from the purely formal, away from hard and fast notions, away from traditional categories" that was infecting science, history, political theory, economics, and sociology and was "changing our attitude toward all problems of social life").

13 Born in 1870, Nathan Roscoe Pound was the son of a respected Nebraska judge. In 1888, at the age of seventeen, he graduated from the University of Nebraska with a degree in botany, and matriculated at Harvard Law School the following year. Because of his father's poor health, he did not return to law school for a second year, but instead sat immediately for the bar in Nebraska. He became a member of the bar in 1890, and quickly became a successful lawyer. As he was developing his practice, he commenced graduate work in botany, and obtained a Ph.D. in 1897. In 1898, he coauthored an important work on botanical specimens in Nebraska that led both to international awards and to his ultimate recognition as America's first ecologist. See WIGDOR, *supra* note 3, at 3–67.

14 See, e.g., Pound, *Decadence*, *supra* note 6, at 20 (stating that "the object of law is the administration of justice" and defining "laws" as "general rules recognized or enforced in the administration of justice"); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 612 (1907) [hereinafter Pound, *Need*].

The basic idea of sociological jurisprudence was to bring the insights of the social sciences—economics, history, sociology, and the like—to bear on the law, in order to make the law conform to the needs and aspirations of an industrializing, urbanizing society.<sup>15</sup> The common law was too individualistic to meet the needs of the modern world, and in any event had become so rigid and mechanical in its operation that it had lost sight of the effects of its rules on society: “Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and rightly.”<sup>16</sup>

Legislation was the only way to smash through this ossified legal system, and it needed to be written and administered in a way that accounted for social realities.<sup>17</sup> The law professor as social scientist would lead the way in knocking down outmoded legal categories;<sup>18</sup> people's needs and aspirations would match up fairly well with the laws on the books; and popular support for and compliance with the law would replace popular dissatisfaction with the legal system.

I do not wish to debate here whether sociological jurisprudence was a branch of legal realism, a form of proto-realism, or some third

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15 See, e.g., Pound, *Need*, *supra* note 14, at 610–12. Although he used the word with great frequency, Pound never precisely defined the meaning of “justice.” Given his general antipathy toward the natural law jurisprudence of his day, see WIGDOR, *supra* note 3, at 118, 166–68, and given his general preference for cutting-edge social scientific insights to determine the direction of the evolving legal organism, Pound probably held no fixed view of justice, but saw it simply as the extant moral norms and aspirations of a particular society. To Pound, these norms had a claim on law that distinguished his jurisprudence from a rank positivism. See *id.* at 167–68. Pound's early jurisprudence is perhaps best described as methodological, focusing on the structures and intellectual habits that would foster a just society rather than trying to determine the content of the norms in such a society. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 399 (“Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world.”), reprinted in 35 F.R.D. 273, 276 (1964); *id.* (describing “conflicting ideas of justice” in a “divided and diversified” community), reprinted in 35 F.R.D. 273, 276 (1964); Pound, *Enforcement*, *supra* note 11, at 403 (“Not liberation of energies but satisfaction of wants is made the central point. They are defining social justice.”).

16 Pound, *Mechanical Jurisprudence*, *supra* note 5, at 612.

17 See Pound, *Enforcement*, *supra* note 11, at 401–03; Pound, *Mechanical Jurisprudence*, *supra* note 5, at 612; Pound, *Need*, *supra* note 14, at 613–14.

18 Pound, *Need*, *supra* note 14, at 615 (“To this end it is the duty of teachers of law, while they teach scrupulously the law that the courts administer, to teach it in the spirit and from the standpoint of the political, economic, and sociological learning of to-day.”).



thing.<sup>19</sup> As with the realists, Pound's target was legal formalism in all its manifestations, and his early work brimmed with both caustic appraisal of the weaknesses of the existing system and infectious optimism that these weaknesses could be overcome with simple bromides. He was a master taxonomist, assigning three causes for this phenomenon or diagnosing four flaws in that phenomenon. In one of his most systematic efforts at diagnosis, he argued that the dissatisfaction with the legal system had four dimensions: (1) a shift in the people's sense of justice, from the individual to the group, from property to person, and from legal to social justice; (2) the "conflict between legal theory and judicial practice in the application of law"; (3) common law theories that frustrated administrative action by the executive branch and forced excessive administrative responsibilities on judges who were ill equipped to handle the work; and (4) "the backwardness of judicial organization and procedure."<sup>20</sup>

For Pound, the disconnection between justice and law resulted in some measure from the inevitable growing pains of a legal system that was in the process of switching from the common law to legislation for its foundation.<sup>21</sup> For Pound, legislation posed certain challenges. He was a traditionalist, believed in the genius of the common law method, and had little sympathy for the populist movement that fueled a great deal of the legislative initiative.<sup>22</sup> In order for legislation to be sound, it needed to reflect social scientific insights that would bring social justice and law together.<sup>23</sup> As important, in order to be

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19 Although he found aspects of legal realism useful, Pound maintained distance between his own theories and those who are generally acknowledged as the leading legal realists. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) [hereinafter Pound, *Realist Jurisprudence*]. See generally AMERICAN LEGAL REALISM 6-7, 49-50 (William W. Fisher III et al. eds., 1993) (discussing Pound's relationship to legal realism); WIGDOR, *supra* note 3, at 256-75 (discussing transformation of Pound's thought in response to legal realism).

20 Pound, *Enforcement*, *supra* note 11, at 402.

21 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 403-04, 415, reprinted in 35 F.R.D. 273, 280-81, 289 (1964); Pound, *Enforcement*, *supra* note 11, at 401-02. Pound also recognized numerous other causes of popular dissatisfaction, some of which were inevitable in any system of law. Among them were the mechanical (or formalistic) operation of rules, the lag between popular opinion and legal change, the mistaken but common view that administering justice is an easy matter, and the human dislike of any restraint on freedom. Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 397-402, reprinted in 35 F.R.D. 273, 275-79 (1964). But he also thought that many of the causes were particular to the American system of the time. *Id.* at 397, 402-16, reprinted in 35 F.R.D. 273, 275, 279-90 (1964).

22 WIGDOR, *supra* note 3, at 72-74.

23 Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 30, 35-36 (1910) [hereinafter Pound, *Law in Books and Law in Action*].

effective, legislation required excellent administration. One of the inevitable difficulties of legislation, however socially just in principle, was its breadth—its inability to tailor itself to the equities of each situation in which it might apply. Disdaining what we would today call a textualist approach,<sup>24</sup> Pound argued for the equitable tailoring of legislation to the facts of each circumstance—in essence, a common law approach that considered the purpose of the legislation in relation to the individuals it affected.<sup>25</sup>

The way to achieve equitable tailoring was discretion. Discretion lay at the heart of Pound's jurisprudence.<sup>26</sup> As "a proper quality of administration," discretion allowed government officials to apply social scientific insights and thus give proper effect to legislation enacted pursuant to social scientific principles.<sup>27</sup> Pound recognized the costs of discretion: disuniformity, uncertainty, unpredictability in commercial transactions and industrial undertakings, and lack of security of property.<sup>28</sup> Because "mechanical action" was a "proper quality of law," he believed that some certainty and stability in legal rules were

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24 Today academic debate rages over the merits of a textualist (or "faithful agent") approach as opposed to an "intentionalist" (or "cooperative partner") approach. Compare, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (arguing that an intentionalist approach is often justified), and William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (finding historical roots for nontextualist approach), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (claiming an originalist basis for textualism), and Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005) (analyzing differences between textualists and intentionalists). Pound called the textualist approach the "literal school," and he had few good things to say about it:

[T]he whole human element is excluded. The process and the result are conceived of as something purely logical and scientific. If the result chances to be just, so much the better. But justice in the cause in hand is not the chief end. The facts of concrete causes are to be thrown into the judicial sausage-mill and are to be ground into uniformity; and the resulting sausage is to be labeled justice.

Pound, *Enforcement*, *supra* note 11, at 404.

25 See Pound, *Enforcement*, *supra* note 11, at 409; Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 103 (1914) [hereinafter Pound, *Justice (Part III)*]; Pound, *Mechanical Jurisprudence*, *supra* note 5, at 621–23; see also WIGDOR, *supra* note 3, at 220.

26 Many of Pound's essays and speeches put into opposition the "mechanical" or "technical" (in other words, the self-referent formalistic) element in law and the "discretionary," "scientific," or "flexible" element. See, e.g., Pound, *Decadence*, *supra* note 6, at 20; Pound, *Justice (Part III)*, *supra* note 25; Pound, *Mechanical Jurisprudence*, *supra* note 5, at 621–23.

27 Pound, *Enforcement*, *supra* note 11, at 409.

28 *Id.* at 407–08.

desirable.<sup>29</sup> He saw the movement of law through history as a pendulum swinging from excessive certainty to excessive discretion and back. By the early 1900s, the pendulum had swung too far in the direction of the certain and the mechanical.<sup>30</sup> The goal was to find a proper balance between certainty and discretion. In striking the balance, he warned not to “overvalue certainty.”<sup>31</sup>

In general terms, Pound supported aspects of the emerging administrative state (especially its turn to social science), and he looked on with horror at Lochnerian efforts to stymie social legislation.<sup>32</sup> But Pound was never fond of “executive justice,”<sup>33</sup> and always believed that an independent judiciary should be the principal organ for transmitting social scientific principles into action.<sup>34</sup> That fact drew questions of procedure to the very center of his thinking:

[T]he controlling reason for a systematic and scientific adjective law must be to insure precision, uniformity and certainty in the judicial application of substantive law. . . . Hence full, equal and exact solutions of controversies of fact are at least as important to the public as scientific adjustment of legal standards to the facts when determined.<sup>35</sup>

Although he believed that procedure was instrumental and ought to be subservient to substance,<sup>36</sup> Pound’s integration of substance and

29 *Id.* at 409; see also Pound, *Principles (Part I)*, *supra* note 4, at 388–89.

30 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 397–98, *reprinted in* 35 F.R.D. 273, 275–76 (1964); Pound, *Decadence*, *supra* note 6, at 20–26. Pound also argued that the mechanical, formalistic approach of the early twentieth century had not eliminated judicial discretion, but instead had driven it underground and perverted its proper exercise. See Pound, *Enforcement*, *supra* note 11, at 406–07.

31 Pound, *Enforcement*, *supra* note 11, at 408.

32 *Id.* at 409; see also Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 406–07, *reprinted in* 35 F.R.D. 273, 282–83 (1964); Pound, *Mechanical Jurisprudence*, *supra* note 5, at 615–16. On the judicial activism of the era dominated by *Lochner v. New York*, 198 U.S. 45 (1905), see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 492–503 (15th ed. 2004).

33 “Executive justice” was Pound’s phrase to describe the goal of administrative regulation and enforcement. See Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 12 (1914) [hereinafter Pound, *Justice (Part II)*].

34 See *id.* at 24–26; Pound, *Justice (Part III)*, *supra* note 25, at 120–21. As his own views hardened later in his life, Pound’s opposition to the New Deal agencies was virulent. WIGDOR, *supra* note 3, at 266–74.

35 Pound, *Principles (Part I)*, *supra* note 4, at 388.

36 See Roscoe Pound, *Cardinal Principles To Be Observed in Reforming Procedure*, 75 CENT. L.J. 150, 153 (1912) [hereinafter Pound, *Cardinal Principles*] (noting that “the vindication [of substantive law] is the sole ground of having procedural rules at all”); Pound, *Practical Program*, *supra* note 4, at 438 (stating that “we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machin-

procedure is unique among American legal philosophers in the extent to which he saw social justice and its administration as inextricably interwoven.<sup>37</sup>

Not surprisingly, Pound thought that discretion was vital to effective adjudication. "[W]ithin wide limits [the judge] should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men."<sup>38</sup> Because the application of law "is not a purely mechanical process," the judicial process "involves, not logic merely, but discretion; . . . the cause is not to be fitted to the rule but the rule to the cause."<sup>39</sup>

Pound proposed to foster judicial discretion in adjudication primarily through greater flexibility in procedure. "The demand for wider discretion in the courts may be satisfied legitimately in the direction of procedure," he argued.<sup>40</sup> The procedural system of the day failed his demand miserably. Problems in "judicial organization and procedure" were "the most efficient causes of dissatisfaction with the present administration of justice in America."<sup>41</sup> Other causes of dissatisfaction, like the movement from an individualistic common law age to the collectivist era of legislation, would eventually "take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure."<sup>42</sup>

Pound's 1906 speech was his central effort to identify the deficiencies in the procedural system. His criticisms can be generally organized into three categories<sup>43</sup>: (1) outmoded and rigid procedural

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ery of justice shall be restrained by and made strictly to serve the end for which it exists"); *id.* at 439 ("Adjective law is but an instrument . . . for the enforcement of the substantive law, to be judged as such . . .").

37 The importance that Pound attached to procedural issues is evidenced by the fact that many of Pound's early speeches and papers involve primarily procedural topics. Even in his broader jurisprudential essays, Pound often devoted a sizable section to questions of procedure, or used examples from procedural history to make broader jurisprudential points. See, e.g., Pound, *Decadence*, *supra* note 6 (using history of law and equity to argue against legal formalism); Pound, *Mechanical Jurisprudence*, *supra* note 5 (devoting slightly less than half of the essay to issues of procedure).

38 Pound, *Enforcement*, *supra* note 11, at 405.

39 *Id.*

40 *Id.* at 408.

41 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 408, reprinted in 35 F.R.D. 273, 284 (1964)

42 *Id.* at 416, reprinted in 35 F.R.D. 273, 290 (1964).

43 Because of his own taxonomy for discussing problems of popular dissatisfaction, Pound's criticisms of procedure were sprinkled throughout his speech rather than concentrated in a single place or on a single list. The synthesis in the text does no violence to Pound's concerns. See also Pound, *Enforcement*, *supra* note 11, at 410

rules or doctrines; (2) antiquated organization of the nation's court systems; and (3) the lack of professionalism and independence of the judiciary. Both of the latter criticisms resulted in significant reforms,<sup>44</sup> but here I wish to focus on his criticisms of procedure, which ranged from the broad to the mundane.<sup>45</sup> One significant concern was the age-old "Chinese Wall" that many states and the federal system maintained between law and equity; to Pound, the distinction was both an irrelevancy in modern times and a wasteful technicality that too often determined the outcomes of cases.<sup>46</sup> A more specific concern—the "lavish" willingness to grant new trials because of technical

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(listing "backwardness of judicial organization and procedure" as one of four principal causes of dissatisfaction, but not discussing it in detail).

44 On judicial organization, Pound praised modernizing changes made by the federal courts in the late nineteenth century. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 412 (calling organization of federal courts "a model of flexible judicial organization"), reprinted in 35 F.R.D. 273, 287 (1964). See generally RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 36–38 (5th ed. 2003) (describing the major changes). Many state courts had not yet caught up with these reforms when Pound spoke. But Pound also articulated a series of other organizational difficulties, including a multiplicity of state courts, concurrent federal jurisdiction, and varying state procedures. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 409–13, reprinted in 35 F.R.D. 273, 284–88 (1964). Many of these criticisms remain valid today. See *Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990) (discussing presumption in favor of concurrent federal jurisdiction); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003) (discussing variations among rules of procedure in state courts).

On the independence of the judiciary, in 1913 Pound and others established the American Judicature Society in order to foster greater judicial independence and pursue other judicial reforms. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 723 (1995); American Judicature Society, About Us, [http://www.ajs.org/ajs/ajs\\_about.asp](http://www.ajs.org/ajs/ajs_about.asp) (last visited Dec. 14, 2005) (describing as the mission of the American Judicature Society "to secure and promote an independent and qualified judiciary and fair system of justice"). See generally JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002) (discussing judicial independence and professionalism from interdisciplinary perspectives).

45 In later work Pound argued that the causes of the deficiencies of American procedure were six: the development of procedural rules during medieval times when keeping the peace by resolving disputes was more important than getting the result right; the excessive formalism of the seventeenth and eighteenth centuries, when the system matured; Puritanical jealousy of and desire to severely constrain the judicial personality; America's frontier spirit; the bar's distrust of judicial power; and the economic and professional incentives of lawyers to align with their clients' interests rather than the interest in administering justice. Pound, *Principles (Part I)*, *supra* note 4, at 395–99.

46 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 412, reprinted in 35 F.R.D. 273, 287 (1964); Pound, *Decadence*, *supra* note 6, at 26–27, 35.

errors during trial that had little to do with the substance of the jury's verdict—was “the worst feature of American procedure.”<sup>47</sup> Likewise, excessive attention to missteps on points of how to preserve or take an appeal—“the mere etiquette of justice”<sup>48</sup>—wasted judicial time and avoided decisions on the merits.

The most trenchant, memorable, and enduring criticism in Pound's speech, however, was a two-paragraph attack on America's “exaggerated”<sup>49</sup> “common law contentious procedure.”<sup>50</sup> Famously describing it as the “sporting theory of justice,”<sup>51</sup> Pound thought that the American adversarial system excessively emphasized the procedural “rules of the game.”<sup>52</sup> A judge was “a mere umpire”<sup>53</sup> whose job was to enforce the rules and decide the points raised by lawyers; the judge was not allowed to “search independently for truth and justice.”<sup>54</sup> Lawyers forgot their roles as officers of the court, and strained to find winning procedural advantages rather than trying to “dispose of the controversy finally and upon its merits.”<sup>55</sup> Witnesses were savaged in cross-examination, regardless of whether they were telling the truth. Parties claimed “vested rights in errors of procedure.”<sup>56</sup> In short,

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47 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 413, *reprinted in* 35 F.R.D. 273, 288 (1964). Surveys by Pound found that between twenty-nine percent and forty percent of all reported appellate cases in the early 1900s were decided on procedural grounds. *Id.* at 413–14 (reporting twenty-nine percent and forty percent in two different surveys), *reprinted in* 35 F.R.D. 273, 288 (1964); Pound, *Principles (Part I)*, *supra* note 4, at 392 (reporting thirty-five percent in another survey).

48 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 408, *reprinted in* 35 F.R.D. 273, 282 (1964); *see id.* at 414 (“[T]ime is frittered away on mere points of legal etiquette.”), *reprinted in* 35 F.R.D. 273, 289 (1964).

49 *Id.* at 406, *reprinted in* 35 F.R.D. 273, 282 (1964).

50 *Id.* at 404, *reprinted in* 35 F.R.D. 273, 281 (1964). Although it is the most well known portion in Pound's speech, his criticism of the adversarial system occupied less than ten percent of his talk. Pound repeated the phrase “sporting theory of justice” in later work, *see* Pound, *Principles (Part I)*, *supra* note 4, at 399, and also referred to the adversarial system as a system of “untrammelled advocacy,” *id.* at 398.

51 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 404, 417, *reprinted in* 35 F.R.D. 273, 281, 291 (1964). Pound attributed the phrase to Wigmore. *Id.* at 404, *reprinted in* 35 F.R.D. 273, 281 (1964).

52 *Id.* at 405, *reprinted in* 35 F.R.D. 273, 281 (1964).

53 *Id.*; *cf.* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. Rev. 1031 (1975) (criticizing the adversarial system's demand that the judge be a passive umpire).

54 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 405, *reprinted in* 35 F.R.D. 273, 281 (1964).

55 *Id.*

56 *Id.* at 406, *reprinted in* 35 F.R.D. 273, 282 (1964).

The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, . . . our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.<sup>57</sup>

The pernicious effect was to create a popular misapprehension of—and dissatisfaction with—the purposes of law. Treating law as sport led Americans, with their natural dislike of legal restraint, to try to beat the game.<sup>58</sup> Thus, rather than fostering respect for the law, the courts “are made agents or abettors of lawlessness.”<sup>59</sup>

Pound’s 1906 speech was long on critique and short on corrective measures.<sup>60</sup> But the correction was not hard to see. The constant theme of Pound’s criticism of procedure was the system’s failure to arrive at the substantive merits of a case. The evident solution was to design a procedural system whose sole commitment was resolving cases on their merits. Then the conduit from socially just legislation to the socially just determination of each case would be frictionless, and the legal system would work (at least in theory) in perfect harmony. Popular satisfaction with the legal system would supplant dissatisfaction.

Pound turned to specific corrective measures in later work. Some of his proposed procedural agenda can be gleaned from his short notes in the *Illinois Law Review* (which he co-edited); he occasionally commented on a procedural development in this state or that court which he thought propitious.<sup>61</sup> His most complete statement of positive measures for procedural measure came in 1910, in a two-part article entitled *Some Principles of Procedural Reform*.<sup>62</sup> Pound resisted any attempt to draft specific rules; he recognized that an actual set of rules had the inevitable tendency to become rigid and mechanical in opera-

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57 *Id.*

58 *Id.* at 401–04, 406, reprinted in 35 F.F.D. 273, 278–81, 282 (1964).

59 *Id.* at 406, reprinted in 35 F.R.D. 273, 282 (1964); see Pound, *Principles (Part I)*, *supra* note 4, at 394 & n.15.

60 See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 396 (stating that “the first step must be diagnosis, and diagnosis will be the sole purpose of this paper”), reprinted in 35 F.R.D. 273, 274 (1964).

61 See, e.g., Roscoe Pound, Editorial Note, *Oral Instructions to Juries*, 4 ILL. L. REV. 140 (1909); Roscoe Pound, Editorial Note, *The Revision of the Code of Civil Procedure in Kansas*, 4 ILL. L. REV. 53 (1909).

62 Pound, *Principles (Part I)*, *supra* note 4; Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 491 (1910) [hereinafter Pound, *Principles (Part II)*]. Pound often recycled material in his articles, which were often based on speeches he gave to different audiences. For a slightly modified version of these reform proposals, see Pound, *Practical Program*, *supra* note 4.

tion.<sup>63</sup> Instead, between the two articles, Pound provided ten principles that he thought would make a set of procedural rules fairly impervious to petrification.<sup>64</sup>

Not surprisingly, the principles turned on two ideas: the resolution of cases on their substantive merits, and judicial discretion. The first three principles set the tone:

I. *It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and such discretion should be reviewable only for abuse.*

II. *Except as they exist for the saving of public time and maintenance of the dignity of tribunals, . . . rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity. . . .*

. . . .

III. *A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time as actual experience of their application and operation dictates.*<sup>65</sup>

Pound then sketched somewhat more specific principles that served as much of the framing for the Federal Rules of Civil Procedure and related statutes: pleadings should give notice of the claims and defenses, but no more;<sup>66</sup> law and equity should be merged;<sup>67</sup> broad joinder that allowed the court to resolve all claims of all parties should be

63 Pound, *Principles (Part I)*, *supra* note 4, at 388–89.

64 Pound never wrote a detailed set of procedural rules. Indeed, he was even uncertain about the form that such rules should take—in particular, whether a code should contain a relatively small number of rules (he mentioned one hundred as a target) that were open-ended or a larger number of more precise rules (he mentioned two thousand as a possibility). See Pound, *Practical Program*, *supra* note 4, at 442; Pound, *Principles (Part I)*, *supra* note 4, at 403, 407. He recognized that a legislature could enact the rules itself, but he argued that the best approach to reform would be for a legislature to enact a broad and simple practice act, directing courts to create their own rules. Pound, *Practical Program*, *supra* note 4, at 441–43; Pound, *Principles (Part I)*, *supra* note 4, at 403–07; Roscoe Pound, *Reforming Procedure by Rules of Court*, 76 *CENT. L.J.* 211, 211–12 (1913); Roscoe Pound, *Regulation of Procedure by Rules of Court*, 10 *ILL. L. REV.* 163, 169 (1915) [hereinafter Pound, *Regulation*].

65 Pound, *Principles (Part I)*, *supra* note 4, at 402–03.

66 Pound, *Principles (Part II)*, *supra* note 62, at 495–97; see *FED. R. CIV. P.* 8; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (stating that Rule 8 requires only notice pleading).

67 Pound, *Principles (Part II)*, *supra* note 62, at 498–501; see *FED. R. CIV. P.* 2 (creating single type of claim, a “civil action”).



established;<sup>68</sup> a single trial should be held to resolve all issues;<sup>69</sup> and cases should be transferred to proper venues rather than dismissed in an improper venue.<sup>70</sup> The only major component of our present system missing in Pound's litany is a process for discovering the facts.<sup>71</sup> Of course, the linchpin of Pound's principles—judicial discretion—saturates the Federal Rules.<sup>72</sup>

Aside from deciding cases on their merits and imbuing trial judges with discretion, a reform that naturally flowed from Pound's 1906 critique was abolition of the adversary system. Pound, however, made no such suggestion. He harbored no illusions about how "the yoke of commercialism"<sup>73</sup> had perverted "the relation of attorney and client" into "that of employer and employee."<sup>74</sup> Nor did he harbor illusions about how a lawyer was likely to resolve the lawyer's conflicting loyalties to client and court in light of the reality that the lawyer's present and future compensation hinged on successful results for the client.<sup>75</sup> Yet he wanted lawyers to become true officers of the court

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68 Pound, *Principles (Part II)*, *supra* note 62, at 501–03; *see* FED. R. CIV. P. 8(e)(2), 18–24 (allowing joinder of claims and defenses on a liberal basis).

69 Pound, *Principles (Part II)*, *supra* note 62, at 494, 498–99. An implicit assumption of the Federal Rules is a single culminating trial. *Cf.* FED. R. CIV. P. 42(b) (authorizing separate trials within the judge's discretion "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy").

70 Pound, *Principles (Part II)*, *supra* note 62, at 497–98; *see* 28 U.S.C. §§ 1404, 1406, 1631 (2000). Today the achievement of this objective remains only partial. The statutes cited above apply only in federal courts. Moreover, § 1406(a) permits dismissal rather than transfer of claims filed in the wrong district or division.

71 *See, e.g.*, FED. R. CIV. P. 26–37 (providing methods for and limitations on factual discovery). Among Pound's principles were also some recommendations that never caught on. They included a vigorous power of the judge to comment on the evidence and arguments, as well as a power to require the jury to render conditional verdicts on various hypothetical states of affairs, so that new trials could be avoided if the appellate court disagreed with the factual findings of the jury. Pound, *Principles (Part II)*, *supra* note 62, at 503–05.

72 By Professor Subrin's count, judicial discretion is explicitly or implicitly provided for in twenty-eight of the eighty-four Federal Rules; the list includes many of the most significant of these rules. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923 n.76 (1987).

73 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 417, *reprinted in* 35 F.R.D. 273, 291 (1964).

74 *Id.* at 415, *reprinted in* 35 F.R.D. 273, 289 (1964); *see also* Pound, *Principles (Part I)*, *supra* note 4, at 399 (describing the "leaders of the American bars" as "client-care-takers" whose "interest centers in an individual client or set of clients, not in the general administration of justice").

75 Pound, *Principles (Part I)*, *supra* note 4, at 399.

with less allegiance to their clients' interests.<sup>76</sup> He knew a great deal about German jurisprudence and law<sup>77</sup>—indeed, his apparent sympathy for Nazi Germany later led to his intellectual ostracization among realists<sup>78</sup>—and German law presents the archetypical nonadversarial system, with a powerful judge who possesses discretion to decide cases on their merits, and with lawyers who see themselves as assistants in the judicial process.<sup>79</sup> But Pound never argued for an abandonment of the American adversarial system or the jury trial process so closely aligned with it.<sup>80</sup> He was, in the end, a traditionalist about the Anglo-American adjudicatory method, a believer in the organic development of the common law, and a former trial lawyer<sup>81</sup>—and all of these aspects of his personality seem to have blinded him to these evident solutions to his own critique. He apparently believed, in his characteristically optimistic way, that a procedural orientation toward merits-based decisions, together with judicial discretion that policed sharp procedural practices, would be sufficient to let lawyers' better natures emerge.<sup>82</sup>

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76 *Id.*

77 Pound, *Enforcement*, *supra* note 11, at 403–05; Pound, *Mechanical Jurisprudence*, *supra* note 5, at 606; Pound, *Scope and Purpose (Part II)*, *supra* note 11, at 140–47. In particular, Pound was aware of German procedure, which he described as “put[ting] all initiative in the judge” who “in a sense conducts both sides of the cause.” Pound, *Cardinal Principles*, *supra* note 36, at 152. He placed this approach at the opposite of the American “sporting theory of justice” in which “procedure takes away all initiative from the judge and relies wholly upon counsel,” and thought that his approach struck a balance between the two. *Id.*

78 For a brief history of Pound's contacts with Nazi Germany and the realists' negative reaction, see AMERICAN LEGAL REALISM, *supra* note 19, at 50, and Kyle Graham, *The Refugee Jurist and American Law Schools 1933–1941*, 50 AM. J. COMP. L. 777, 789–90 (2002).

79 For classic accounts of Germanic inquisitorial justice, see Benjamin Kaplan et al., *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958); and John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

80 Which is not to say that Pound enthusiastically supported jury trials. As a former trial lawyer himself, he well appreciated their limitations. He accepted juries grudgingly, as an imperfect vehicle to assist in the individual tailoring of justice. Pound, *Enforcement*, *supra* note 11, at 406; Pound, *Justice (Part I)*, *supra* note 6, at 701; Pound, *Law in Books and Law in Action*, *supra* note 23, at 18–19; Pound, *Mechanical Jurisprudence*, *supra* note 5, at 606. A reading of Pound's tepid defense suggests that he might have been willing to abandon jury trials once judges began to apply the insights of sociological jurisprudence.

81 See WIGDOR, *supra* note 3, at 209–10.

82 See *id.* at 209 (discussing Pound's “enthusias[m] for procedural reform, because it increased the creative capacity of the judiciary, and thus increased the professional character of a traditional institution designed to preserve an organic

Many of the ideas on which Pound constructed his jurisprudence, and consequently based his procedural reforms, remain contested today. The first and broadest points of contention are Pound's views that law serves social-justice purposes, and that the litigation process should be a frictionless conduit to achieve law's social objectives. The nature of law is still debated;<sup>83</sup> indeed, Pound's own views were not entirely consistent.<sup>84</sup> An argument over whether law was an organ of social growth and progress, as opposed to a shield to provide security for property rights against such social interference, was playing out even as Pound spoke.<sup>85</sup> Pound's ideas about law's foundations were neither deep nor profound. Assuming that he correctly saw law's function as the administration of social justice,<sup>86</sup> deep disagreement about the demands of social justice existed in his time, and still exists today. Thus far, social science has not been able to produce a consensus about policy objectives or appropriate legislation. Will the judge who uses her discretion as Derrida might counsel arrive at the same result as the judge using his discretion to apply Skinner's insights? How much bad social science—like "Herbert Spencer's *Social Statics*"<sup>87</sup>—is out there? Progressive government by the best and the brightest—especially in the 1910s, the 1930s, and the 1960s—has not produced laws of incontestable merit. Those facts do not inherently threaten Pound's procedural system, which is designed to make social policy effective—*whatever* the policy might be. But the inability to agree on the nature of law or the content of social justice creates the risk that procedure will be the frictionless conduit of bad rather than good legal arrangements; and, because frictionless procedure con-

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connection among past, present, and future"); Pound, *Cardinal Principles*, *supra* note 36, at 152–53.

83 The available, and conflicting, jurisprudential justifications for law—such as natural law, legal positivism, and morality—are much richer than they were in Pound's day. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (linking law and morality); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (arguing for natural law); H.L.A. HART, *THE CONCEPT OF LAW* (1961) (arguing for a positivist account of law); see also JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (creating theory of justice for a pluralistic society).

84 Pound vacillated between an instrumental and an organic view of law. See WIGDOR, *supra* note 3, at 207–32.

85 See *supra* note 32 and accompanying text.

86 See *supra* note 14 and accompanying text.

87 See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Pound was aware of Holmes's derisive reference to Spencer, and even used it himself to chide the Court's constitutional formalism. See Pound, *Mechanical Jurisprudence*, *supra* note 5, at 616.

tains no checks on bad policy choices, it might increase rather than decrease dissatisfaction with the law.

That risk multiplies in the legal environment that began to take shape fifty years after Pound spoke. The type of litigation with which Pound was familiar—mostly retrospective application of legal principles in dyadic disputes affecting few parties or interests—has changed. Today many cases are “public law litigation”: prospective and quasi-legislative in orientation, with vast social interests at stake and amorphous party allegiances.<sup>88</sup> Adjudication in these cases does not simply transmit broad social-justice principles to individuals; it often creates the principles themselves. Malleable procedural rules with a heavy dose of judicial discretion place even more power in the hands of the judge.<sup>89</sup> The capacity of the judge to exercise such broad power wisely, well, and with respect for democratic and federalist principles is much debated.<sup>90</sup>

Nor is there agreement about the role of litigation in relation to substantive law—whether it serves primarily a private dispute-resolving function, or whether it is, as Pound had wanted it, an occasion for

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88 See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004). In a rough sense, we can date the movement toward public law litigation to 1954. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Pound's own law practice and brief tenure as a commissioner (in essence, a temporary appellate judge) usually involved discrete, dyadic disputes. See WIGDOR, *supra* note 3, at 69–71, 87–99. So did the examples he cited to prove the failure of judicial administration. See Pound, *Principles (Part II)*, *supra* note 62, at 492–94, 500–01. Of course, public law litigation existed well before *Brown*, and Pound seemed to have low regard for the use of courts to resolve such controversies. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 407 (noting that “the constitutionality of the Missouri Compromise [was] tried in an action of trespass” and “the power of the federal government to carry on the Civil War [was] tried judicially in admiralty”; stating that these questions “are largely matters of economics, politics and sociology upon which a democracy is peculiarly sensitive” and that “[t]he strain put upon judicial institutions by such litigation is obviously very great”), *reprinted in* 35 F.R.D. 273, 282–83 (1964). The differences between Pound's time and today are the extent of such litigation and the enormous remedial power judges exercise. See Chayes, *supra*.

89 See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1265–66 (arguing that discretionary procedural rules helped to lay the groundwork for public law litigation).

90 See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393–404 (1978) (contending that “polycentric” disputes cannot be adjudicated); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 949 (1978) (expressing federalism concerns); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 662 (1978) (expressing separation-of-powers concerns).

society to declare and enforce its norms.<sup>91</sup> Comparative analysis suggests a reason to doubt that Pound's more ambitious role for procedure fits the American character.<sup>92</sup> Nor, in many eyes, does it fit the needs of modern litigation, with its emphasis on efficient dispute resolution.<sup>93</sup> Recent assertions that judges should only be dispute-resolving umpires, with no overt social agenda to advance, seem to have been favorably received,<sup>94</sup> but are antithetical to Pound's views.

More broadly, Pound's view suggests limited independent value in procedural rules. As Justice Frankfurter famously observed, however, "[t]he history of liberty has largely been the history of observance of procedural safeguards."<sup>95</sup> Procedural rules serve, most certainly, as a conduit to determine the merits of a controversy. But they also serve many other functions that check, rather than act as a perfect conduit for, the realization of substantive government policy;<sup>96</sup> and their regular observance provides legitimacy to the judiciary

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91 Compare Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2668–71 (1995) (suggesting numerous advantages of alternative dispute resolution), with Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1087–90 (1984) (arguing that because adjudication serves important social functions, private settlements often should not be encouraged), and Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 8 (2004) (arguing that dispute resolution paradigm weakens clarity and force of legal rules).

92 See generally MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986) (suggesting that nations with different attitudes toward the organization of authority and the regulation of human behavior have different procedural norms).

93 See *infra* notes 201, 244–45 and accompanying text.

94 In his confirmation hearing, Chief Justice John G. Roberts, Jr. received widespread publicity for his remarks that "[j]udges are not politicians who can promise to do certain things in exchange for votes" and that "judges are like umpires. Umpires don't make the rules; they apply them." See Charles Babington & Jo Becker, "Judges Are Not Politicians," *Roberts Says*, WASH. POST, Sept. 13, 2005, at A1.

95 *McNabb v. United States*, 318 U.S. 332, 347 (1943); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring) ("Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. . . . The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.").

96 For some of these functions, see John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657 (1994); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Robert A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893; Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v.*

and the government as a whole. It is hardly clear that judges imbued with discretion and constrained by no checks other than reaching the merits of a controversy will always create greater satisfaction with the administration of the law.

Second, and relatedly, Pound's approach blithely ignores the political implications of procedural choices. One of the appeals of Pound's view is the apparent neutrality of his "on the merits" principle; value determinations are left to the substantive law, of which the judge is a disinterested but enthusiastic expositor. Because it takes no sides on the outcomes of specific disputes, Pound's procedural system seems to be one on which partisans can agree.<sup>97</sup> But the claim of neutrality is a chimera. Differing case management practices, in which judges are given wide (indeed, Pound-like) discretion to choose procedures to manage litigation, can deliver widely different expected outcomes.<sup>98</sup> In the joinder context, studies have shown that different joinder schemes can also result in dramatically different expected out-

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Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights—Part I*, 1973 DUKE L.J. 1153.

97 Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (arguing that judges should engage in constitutional adjudication through the use of principles "that in their generality and their neutrality transcend any immediate result that is involved"). See generally Fuller, *supra* note 90 (describing the ideal of a disinterested judge).

98 For example, different management techniques can result in markedly different outcomes in an alleged mass exposure of nearby residents to a release from a chemical plant. In *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000), the district judge issued a "Lone Pine order" to 1600 plaintiffs, thus requiring them to provide individualized evidence, at the outset of the case, about their exposure to defendants' chemicals and their medical diagnoses, as well as an expert's opinion linking the two. When plaintiffs failed to produce sufficiently particularized affidavits, the district court dismissed all 1600 claims. Although no provision of Rule 16 specifically authorizes Lone Pine orders, the court of appeals held that such orders were within the district court's general case management powers, and upheld the dismissal on abuse-of-discretion review. In contrast, comparable toxic-chemical exposure cases, using different case management techniques that did not focus on proof of plaintiffs' injuries at the outset, have resulted in multimillion dollar settlements. See *In re Combustion, Inc.*, 978 F. Supp. 673 (W.D. La. 1997) (approving plan allocating more than \$20 million in settlement proceeds to 10,000 neighborhood residents, who were for the first time providing information about exposure and medical diagnosis); see also Francis E. McGovern & E. Allen Lind, *The Discovery Survey*, LAW & CONTEMP. PROBS., Autumn 1988, at 41 (discussing the case management technique of an informal pre-trial survey to obtain exposure and medical information on 10,000 nearby residents; the case eventually settled for \$15 million, after the dismissal of more than 3000 plaintiffs for their failure to complete the survey).

comes, in terms of both the merits and the remedy;<sup>99</sup> other data confirm that result with other procedural choices.<sup>100</sup> Contrary to Pound's rose-colored view,<sup>101</sup> there is no such thing as a baseline "neutral procedure."<sup>102</sup> Put differently, in a world with omniscient judges, there is no need of procedure; but, in a world without omniscient judges, "on the merits" resolutions do not exist independently of the procedures used to obtain the result. The procedures used help to define what the merits are; "on the merits" has no meaning or significance apart from a given procedural system. The decision between competing procedural rules is often a decision between competing outcomes—between the groups we choose to favor and those we do not. Therefore, judicial discretion carries the inherent risk that individual judges will shape procedural rules to achieve desired outcomes. Procedure is not devoid of politics.<sup>103</sup>

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99 See Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions*, 12 LAW & HUM. BEHAV. 209 (1988).

100 See, e.g., Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990) (reporting changed effects on liability and damages outcomes in bifurcated trials); Samuel Isacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990) (discussing changes in expected litigation outcome from varying summary judgment standards); Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963) (finding rise in defense verdicts when issue of liability was bifurcated and tried before damages).

101 Pound apparently believed that changes in procedural law would have no significant effect on substantive law: "Change in the substantive law, involving interference with the security of individual interests and impairing the social interest in the general security, must proceed slowly and cautiously. No such interference or impairment is involved in changes of details of procedure today . . ." Pound, *Regulation*, *supra* note 64, at 167.

102 See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472–73 (1987) (book review) [hereinafter Burbank, *Complexity*]; Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1706–07 (2004) [hereinafter Burbank, *Procedure*].

103 This reality is graphically summarized in the observation of Representative John Dingell: "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. Dingell). This insight has not been lost on many politicians. On a number of occasions in recent years, Congress has changed procedural requirements in the hope of affecting substantive outcomes. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (to be codified in scattered sections of 28 U.S.C.) (changing jurisdictional and settlement rules for federal class actions); Y2K Act, Pub. L. 106-37, 113 Stat. 185 (1999) (codified as amended at 15 U.S.C. §§ 6601–6617 (2000)) (imposing notification and heightened pleading requirements in Y2K liability lawsuits); Private Securities Litigation Reform

Third, and again relatedly, Pound oversold the ability of his procedural principles to control American adversarial culture. If different procedural contours can indeed shape different expected outcomes, then discretionary procedure will heighten the attention that adversaries will pay to procedural choices, not lessen it. Indeed, discretionary procedure creates a new level of gamesmanship—arguing not only over questions of compliance with procedural rules but also over the very rules to apply. Three-quarters of a century into Pound's experiment, concerns for excessive adversarialism have not abated, and complaints about "the sporting theory of justice" echo through the decades into the present.<sup>104</sup> As the economics of the legal profession have continued to evolve in ways that Pound could not have imagined, incentives for sharp practices have increased.<sup>105</sup> So

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Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C. § 8u-4) (changing aspects of the federal class action rules in federal securities cases). See generally Burbank, *Procedure*, *supra* note 102, at 1699–703 (describing recent congressional efforts to create "statutory procedural law").

104 See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1979); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005); Langbein, *supra* note 79; Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994); William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

105 For instance, one court sanctioned a law firm for pressing obviously perjured testimony from a client whose lack of candor had already caused a prior firm to withdraw. In the course of justifying the Rule 11 sanction, the court noted:

The Court is familiar enough with large law firm practice in New York to know that this is a typical large law firm situation in which a client is introduced to the firm by one partner but the litigation is handled by another. The Court is also aware of the substantial economic benefits that flow to "finders", the partners who find the clients, and the pressure to please the client that is felt by the "minders", the lawyers that actually do the client's work. Thus, the litigating partner in this case no doubt felt an obligation to his partners not to jeopardize the firm's relationship with the client by telling the client that the client's factual statements were not credible in light of all of the contrary evidence. . . . Given the economic pressures of big firm practice, it is the responsibility of the firm to insure [sic] that each of its partners is aware that it is firm policy that its partners and associates adhere to the highest ethical standards and that if a lawyer's adherence to those standards results in the loss of a client, large or small, the lawyer will not suffer any adverse consequence.

*Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 98 Civ. 10175 (JSM), 2002 WL 59434, at \*9 (S.D.N.Y. Jan. 16, 2002), *vacated sub nom. In re Pennie & Edmonds LLP*, 323 F.3d 86 (2d Cir. 2003) (overturning the sanction due to a lack of bad faith by the law firm). Sadly, this situation was not the only occasion on which the pressures of modern litigation forced the court to consider sanctions against the law firm's behavior.



has the concern for such practices, as numerous changes in the Federal Rules show.<sup>106</sup> Of course, excessive adversarialism is not an issue in all, or even most, cases;<sup>107</sup> but it is unlikely that it was so in Pound's time either. And the solution we have sought to apply to the "problem cases" is Pound-like: we give district judges more power and authority over litigation. As we do so, however, we sometimes miscalculate how the new powers create even more incentives for sharp practices,<sup>108</sup> and even more opportunities for the creation of novel, ad hoc procedural practices that can shift expected outcomes in litigation.

Whatever the merits of such powers, however, they tinker only at the margins. Our procedural system remains firmly in the hands of

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*See Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, No. 99 Civ. 10175 (JSM), 2001 WL 1154669, at \*3 (S.D.N.Y. Oct. 1, 2001) (sanctioning a lawyer for filing a meritless motion that the lawyer filed "in order to prove to his client how tough he could be"), *aff'd*, 317 F.3d 209, 222 (2d Cir. 2003) (mentioning the lawyer's slightly amended justification that he had brought the meritless motion "to apply pressure on Plaintiff to produce [certain discovery] after the discovery deadline had passed"). Nor is the situation described in this litigation unique. *See Note, Collective Sanctions and Large Law Firm Discipline*, 118 HARV. L. REV. 2336 (2005). *See generally* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 924 (1999) (describing the large-law-firm culture).

106 For instance, among other matters, amendments to the Federal Rules of Civil Procedure in 1983 imposed new obligations on lawyers not to pursue frivolous claims or defenses, gave judges expansive new case management powers under Rules 16 and 26(f)-(g), and provided additional opportunities (presently codified in Rule 26(b)(2)) for judges to curtail disproportional discovery. In 1993, Rule 11 was modified to curtail some of the sharp practices that the 1983 amendment had engendered, the list of case management powers in Rule 16 was expanded and the discovery conference requirement of Rule 26(f) strengthened, mandatory disclosure (presently codified in Rule 26(a)) became an optional method to avoid some costs of discovery, and the number and duration of depositions, as well as lawyers' behavior in depositions, were limited in Rule 30(a)(2), (d)(1), and (d)(2). In 2000, further amendments precluded federal districts from opting out of mandatory disclosures of Rule 26(a), and cut back on discoverable information in Rule 26(b)(1). *See infra* notes 294-96 and accompanying text.

107 *See* James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998); Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649 (1989); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practices Under the 1993 Amendments*, 39 B.C. L. REV. 525 (1998).

108 The classic example is the saga of Rule 11, which was toughened in 1983 to deter frivolous litigation but which became a favorite tactical weapon to intimidate an opponent during the ensuing ten years. Amendments in 1993, especially Rule 11's safe harbor provision and its softening of sanctions, attempted to save the core of Rule 11 while counteracting its excessive use. *See* FED. R. CIV. P. 11(c)(1)(A), (c)(2); FED. R. CIV. P. 11 advisory committee's note (1993 amend.).

lawyers in its day-to-day operation, and judges cannot exercise control of legal practice at the level of specificity needed to change the client-comes-first culture of American adversarialism. The years lived under the Federal Rules suggest that Learned Hand's assessment of human nature and the adversarial process sounds a truer note than Pound's optimism:

The truth is that no rules in the end will help us. We shall succeed in making our results conform with our professions only by a change of heart in ourselves. . . . But not, I fear, short of something like that; we are made all of a piece, and the cloven hoof will show however well the bestial heart be covered.<sup>109</sup>

This fact does not mean that we should necessarily abandon the adversarial system.<sup>110</sup> But it means that we have reason—in particular, seventy-five years worth of accumulated experience Pound did not possess—to question Pound's assumptions about how easily his prescription would cure America's love for sporting justice.

Finally, Pound's solution undervalued the side effects of a highly discretionary procedural system: lack of procedural uniformity (except at a high level of generality),<sup>111</sup> delay, expense, and uncertainty. Pound recognized that some of these costs were inevitable in a legal system based on an equitable approach,<sup>112</sup> but never suggested ways to avoid them. Our experience under the Federal Rules shows that the anticipated consequences of an equitable code have for the most part played out.<sup>113</sup> Most of the significant amendments to the Federal Rules since 1980, as well as numerous statutory developments in the same era, have been designed as antidotes for the Federal Rules' equi-

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109 Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*, in LECTURES ON LEGAL TOPICS 1921–1922, at 87, 104 (1926).

110 For further discussion of this point, see *infra* Parts II.C, III.C.

111 See Burbank, *Complexity*, *supra* note 102, at 1474. But see David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1975 (1989) (arguing that discretion and the consequent disuniformity are not necessarily undesirable). Ironically, Pound had thought disuniformity in procedure was one of the problems in American procedure. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 413, reprinted in 35 F.R.D. 273, 287 (1964). Pound never addressed the evident counterargument that a discretionary procedural code in a real sense lessens rather than increases uniformity, because each case or type of case receives tailored procedures. See generally Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003) (developing typology of judicial discretion).

112 See *supra* note 28 and accompanying text.

113 Subrin, *supra* note 72, at 922–25, 974; see also Kessler, *supra* note 104, at 1251–60 (arguing that the present difficulties developed from the effort to incorporate inquisitorial equitable procedures into the adversarial model).

table side effects.<sup>114</sup> But these antidotes again work principally at the margins and leave discretion as the baseline. Indeed, in order to remedy problems of cost and delay, many of the significant recent developments have expanded the judicial discretion that lies at the very heart of cost and delay. Side effects like disuniformity, cost, and delay do not necessarily mean that an “on the merits,” discretionary system is not worth its price, but their existence does mean that the system’s price is greater than Pound’s own work would have had us believe—and *perhaps* great enough to abolish or significantly temper his approach.<sup>115</sup>

Even if these conceptual problems do not refute Pound’s procedural vision, they raise a serious question about whether we should maintain a procedural system built on the sinking sands of Pound’s foundation. One argument for the status quo, which Pound would surely have despised, is that, even if the procedural system was based on doubtful or flawed assumptions, it has now been set into motion, and must be allowed to mechanically roll forward in order not to unsettle present expectations. I think another argument is better. It lies in the aphorism that sums up Pound’s system: “on the merits.” Pithy and self-evident, the principle of deciding cases “on the merits” seems an irrefutable truth. (“You mean, Lester, you want to set up a procedural system that *doesn’t* resolve cases on their merits?”) At the margins, of course, the principle can be opposed; if every case can be resolved perfectly on the merits, but at a cost of \$10 million apiece, we might need to look for a much cheaper system that performs nearly as well.<sup>116</sup> But the notion that we would set up rules that are not geared to getting it right most of the time seems unimaginable in an affluent modern society. With the painful experience of rigid common law

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114 For a discussion of some of the changes in the Federal Rules of Civil Procedure, see *supra* note 106. For two statutory changes trying to address the expense and delay endemic to equitable procedure in an adversarial culture, see Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C. (2000)); Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658).

115 Cf. ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE princs. 9.2, 11.3 (Am. Law Inst. & UNIDROIT 2004) (requiring pleadings to identify a party’s “principal evidence” and to state “in reasonable detail” the facts and the law supporting their position in model rules for transnational commercial disputes); *id.* princs. 16.1, 16.4 (permitting discovery of relevant, nonprivileged information, but only allowing the customs of the forum to determine how discovery is to be conducted).

116 See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.1 (6th ed. 2003); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244–59 (2004) (analyzing accuracy-cost tradeoff in terms of political philosophy).

procedure seared into our collective legal conscience, and with the flexibility and profusion of our modern substantive laws, it is also difficult to see how we can achieve merits-based decisions without a considerable amount of judicial discretion. Whether the adversarial system helps or hinders “on the merits” decisions remains an open debate,<sup>117</sup> but the lack of a clearly better alternative and our historical familiarity make the adversarial process palatable. And so we keep that which we know.

Other considerations weigh in to maintain the system. Pound advocated uniformity in procedure among different jurisdictions;<sup>118</sup> and, due to the way that events played out, the Federal Rules proved influential enough that rough uniformity, at least at the level of formal rule, has been achieved.<sup>119</sup> Moreover, the system, while hardly simple, is far more comprehensible and less technical than the com-

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117 Compare STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 33–39 (1988) (arguing for adversary system), with Frankel, *supra* note 53, at 1035–36 (arguing that adversary system distorts search for truth), and Langbein, *supra* note 79, at 833–34 (arguing that adversary collection of evidence hinders truth-seeking).

118 Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, at 409–13, reprinted in 35 F.R.D. 273, 284–88 (1964). Followers of Pound realized the difficulty of achieving such uniformity at the state level. Hence, they focused on creating a federal system of rules that might serve as a model for state reform. As one of the leading proponents of the Rules Enabling Act stated:

[T]he conceded failure of state conformity called for a substitute. The Federal government could not follow the States, so it was reasonable to give the states an opportunity to follow the Federal government. That state which tries to live unto itself will suffer, if it does not perish. . . . [A] simple, scientific, correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States, would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states.

Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916).

119 I do not mean to suggest that the states have a single, uniform procedural code. State procedural variation is wide, and apparently increasing. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); Oakley, *supra* note 44; cf. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001) (discussing the effect of local legal culture on interpretations of the Federal Rules and related state rules). For the most part, however, the variations lie at the edges; the basic process—relatively liberal pleading and joinder, pretrial discovery and management, single (often jury) trial—is roughly comparable in all states. Of course, a highly discretionary code is more uniform in its literal language than in its application in real cases, in which differing discretionary choices can lead to widely disparate rules on the ground. See *supra* note 111 and accompanying text.

mon law and code pleading regimes it supplanted. Pound's reform movement took hold at a unique time in American life, when the clarion call of progress led us to believe that the social scientific lawyer could create an—indeed, *the*—optimal procedural system. Given our heightened sensitivity to the politics of procedural choices, it is difficult to imagine that we could achieve anything as uniform and simple as the Federal Rules if we tried again today. So the “on the merits,” discretionary, and adversarial system of Pound's design is still the one we employ—whatever the validity of the jurisprudential commitments and beliefs undergirding it. Pound's evocative jurisprudence has faded from memory, but the tangible residue of its procedural system remains.

## II. OUR CENTURY

Pound's 1906 speech invites us to consider the causes of popular dissatisfaction with the administration of civil justice at the start of our century. To a limited extent, the present challenges and pressures are the same as they were when Pound spoke, but to a greater extent, they are different in kind and order of magnitude. And our procedural system today is no more ready to face these challenges and pressures than the system of Pound's time was able to face its own.

### A. *Competitive Pressures*

Competitive pressures create the most pressing concerns for the American litigation system. Competition comes from two principal sources: globalization and the rise of alternative methods of dispute resolution. Together these sources continue to marginalize the American litigation system, which has been slow to respond but which, if it is to remain viable, must adjust to counter the challenges these sources pose.

Globalization takes one of Pound's concerns to a heightened level. Pound abhorred disuniformity in procedure—but he was talking about disuniformity among states whose procedural systems bore a family resemblance to each other.<sup>120</sup> Today, transnational commercial ventures bring into contact procedural regimes that differ at the foundational level. Understandably, parties to transnational agreements feel most comfortable with their own procedures and courts, and distrust the procedures and courts of other parties. Four responses to this discomfort are possible: (1) a “take it or leave it” approach, in which the party with superior bargaining position forces

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120 See *supra* note 119.

the inferior party to accede to the superior party's legal system; (2) an "I'll just walk away" approach, in which parties of rough equality fail to come to terms because of unbridgeable differences in preferred processes for dispute resolution; (3) a "we'll hope for the best" approach, in which the parties fail to resolve transnational dispute resolution issues in the hope that resort to litigation will be unnecessary; or (4) a "vote with our feet" approach, in which the parties opt out of the litigation system of both nations, and agree to arbitrate the dispute privately—often with negotiated procedural norms (or at least with contractual provisions for determining such norms).<sup>121</sup> The first approach does nothing to lessen the dissatisfaction of the inferior party toward the superior party's adjudicatory system; but, except in cases of extreme bargaining disparity, is likely to hurt the superior party's ability to obtain as a favorable deal on other terms of the contract. Similarly, the second and third approaches do not lessen dissatisfaction, and the second approach threatens to prevent otherwise productive transnational deals. The final approach, which is used today with great frequency,<sup>122</sup> keeps both procedural systems fully functioning within their respective spheres, but makes these systems less relevant than the arbitration processes that replace them. If the parties are opting into an arbitration process that they prefer to the adjudicatory process, then a strong argument can be made that the defect lies in the adjudicatory process, which should be reformed in order to reflect the "law in action."<sup>123</sup>

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121 For instance, in international arbitrations, a common approach is not to specify the norms directly, but to allow the chosen arbitrator to determine the procedures that apply to the case. In such cases, a series of procedural norms for international arbitration have emerged to guide arbitrators, including the widely used United Nations Commission for International Trade Law (UNCITRAL) arbitration rules. Under one view, the overall effect of allowing arbitrators to select procedural norms has been the development of a set of arbitration rules "which progressively rise[s] to the level of a standard arbitration procedure" and which "has the invaluable merit of merging different procedural cultures." Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1322–23 (2003). For a somewhat more cautionary tale, see Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449 (2005).

122 ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, introductory cmt., at 3 (Am. Law Inst. & UNIDROIT 2004) (Cambridge Univ. Press 2006). The practice of including an arbitration clause in a transnational contract is so pervasive that I have been informed by some practitioners and scholars in the field of international business transactions that the failure to negotiate for such a clause is tantamount to legal malpractice.

123 The idea of reforming law (especially commercial law) to correspond to individuals' ordinary or customary behavior, which is sometimes referred to as "law in action," is usually associated with Karl Llewellyn, the legal realist with whom Pound

These concerns have special importance in the context of American procedure. Global dissatisfaction with the American procedural system is well known.<sup>124</sup> On numerous fronts, American procedure is exceptional, standing far outside the mainstream of procedural regimes. The first set of differences concerns the basic rules for processing lawsuits. On pleadings, a number of systems demand great specificity; the American system of “notice pleading” is among the most liberal in the world.<sup>125</sup> Rules of joinder vary; most famously, class actions are almost entirely a common law phenomenon,<sup>126</sup> and nowhere are they employed with anything approaching the enthusiasm that Americans have shown for class action litigation.<sup>127</sup> In many countries, especially within the civilian tradition, the “trial” is essentially a series of hearings that eventually produces a final judgment; others, including the United States, follow the common law method of a single, culminating trial.<sup>128</sup> Perhaps the most significant aspect of

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remained on good terms. *See, e.g.*, Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930). Llewellyn credited Pound with coining the “law in action” phrase. *Id.*; *see also* Pound, *Law in Books and Law in Action*, *supra* note 23, at 34–35.

124 *See, e.g.*, ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, reporters’ preface, at xxvii (Am. Law Inst. & UNIDROIT 2004) (Cambridge Univ. Press 2006) (noting particular dissatisfaction with American-style discovery and the American right to jury trial); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

125 *See* ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE R. 12.3–12.4, 13.4; *id.* R. 12 cmt. R-12A. Among the systems generally noted for requiring great specificity in pleadings is the German system, on which Rules 12.3 and 13.4 are based. *See* Thomas Karst, *Federal Republic of Germany*, in INTERNATIONAL CIVIL PROCEDURE 239, 242–43 (Shelby R. Grubbs ed., 2003); *see also* OUTLINE OF CIVIL LITIGATION IN JAPAN 6, 10 (Sup. Ct. Japan 2002) (describing specificity of Japanese pleadings); Govand Asokan & Juanita Low, *Singapore*, in INTERNATIONAL CIVIL PROCEDURE, *supra*, at 605, 610–11 (describing specificity required in pleadings submitted in Singapore courts).

126 *See* RACHEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE 5 (2004). A few civil law systems, such as Quebec, Brazil, and China, have in recent years adopted class action procedures. *Id.*; Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 381 (2003); Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998). For a description of somewhat comparable protections extended to groups in some civil law systems, *see* Gidi, *supra*, at 313 n.1.

127 *See* MULHERON, *supra* note 126, at 9 (calling the United States the “home of the class action”). American enthusiasm for class actions is not monolithic. State rules differ somewhat among themselves, and with Federal Rule of Civil Procedure 23, concerning the details of class action practice. *See* SECTION OF LITIG., ABA, SURVEY OF STATE CLASS ACTION LAW—2005 (Anne P. Wheeler et al. eds., 2005).

128 For a description of Germany’s discontinuous-trial method, *see* Langbein, *supra* note 79, at 826–32. The differences should not be overstated. Increasingly,

American exceptionalism, however, involves pretrial discovery. While many systems provide for limited forms of discovery, none approaches the breadth of American inquiry into the facts. Much of the world is on record as opposing American-style discovery.<sup>129</sup>

A second form of American exceptionalism involves the distribution of adjudicatory functions in a manner that varies substantially from that of other systems. At a functional level, an adjudicatory system must allocate responsibility for numerous roles, including the development and presentation of claims, evidence, and arguments, the determination of the law, and the determination of the facts.<sup>130</sup> In terms of developing and presenting claims and evidence, the United States and other common law countries use an adversarial approach. This model places lawyers in charge of the critical adjudicatory tasks of constructing claims and defenses, gathering evidence, and presenting the client's legal and factual case. The adversarial system's main competitor, the inquisitorial model of the civilian tradition, places the judge in charge of these tasks; the lawyer's role is to suggest lines of

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German and other civil law countries are moving toward the common law's concentrated-trial approach. See ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE R. 29 cmt. R-29A (recommending general adoption of concentrated-trial approach); Arthur Taylor von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609, 614–15 (1988). On the other side, the Federal Rules also allow for separating the trial into parts, at least when separation would be convenient and would not upset jury trial rights. See FED. R. CIV. P. 42(b); *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

129 Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1022 (1998); Subrin, *supra* note 124. Indeed, Article 23 of the Hague Convention allows a signatory country to “declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.” Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, July 27, 1970, art. 23, 23 U.S.T. 2555, 847 U.N.T.S. 231, *reprinted in* 28 U.S.C.A. § 1781 (1994 & Supp. 2005). Most of the present signatories (including some common law countries with discovery rights less generous than the United States) have declared in their ratifications a reservation forbidding or limiting common law discovery under this convention. See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND THE ADVERSARY SYSTEM* 1164 (1998). For an overview of other nations' discovery procedures, which range from non-existent to limited, see INTERNATIONAL CIVIL PROCEDURE, *supra* note 125; TRIAL AND COURT PROCEDURES WORLDWIDE (Charles Platto ed., 1991).

130 A fuller description of adjudicatory tasks would include presentation of claims and defenses, issue definition, evidence gathering, marshaling of evidence and arguments, determination of law and fact, application of fact to law, declaring appropriate remedies, and ensuring compliance with those remedies. The tasks highlighted in the text are those over which different jurisdictions most frequently disagree in their allocation.



inquiry and to facilitate the court's demands for information.<sup>131</sup> Although pure versions of neither model exist in the world,<sup>132</sup> many countries adopt an inquisitorial approach to civil justice, and others the adversarial.<sup>133</sup> In yet another example of American exceptionalism, the United States places itself far into the adversarial camp at the level of procedural rule, and even farther as a matter of practice.<sup>134</sup>

In terms of the law-determining function, judges perform this task across all legal systems,<sup>135</sup> but that consensus conceals more than it reveals. Nations whose histories, political institutions, social structures, and experiences with judicial independence vary widely also differ, not surprisingly, about the meaning of law and the rule of law, about the proper sources of law, and about the judge's competence to create law.<sup>136</sup> The common law judge's power to declare and tailor law is a point of American pride, but an institutional horror to countries with traditions or experiences of despotic rule and limited judicial independence.<sup>137</sup> Similarly, the distribution of judicial authority—from France's judicial hierarchy and limited attitude toward judicial review<sup>138</sup> to the broad diffusion of power among trial

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131 Hazard, *supra* note 129, at 1019–20.

132 See THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 2–3 (2004).

133 See INTERNATIONAL CIVIL PROCEDURE, *supra* note 125; Langbein, *supra* note 79.

134 See ROWE ET AL., *supra* note 132, at 3, 27–28. A common perception among foreign lawyers is to see the American legal system as extreme. Cf. Gidi, *supra* note 126, at 322 (discussing concerns in the Brazilian system about importing the “Yankee package,” or “American-style litigation”). Of course, foreign concerns over American-style litigation extend beyond the use of an aggressive client-focused adversarial approach, and include such matters as discovery, jury trial, attorneys' fees, the size of American damage awards, and the perceived litigiousness of the American population. In particular, issues concerning attorneys' fees—such as the “American rule” that prevents fee-shifting to the losing party, the broad availability of contingency fees, and the use of multipliers in some fee awards—create a unique set of incentives that distinguish the American adversarial system.

135 Cf. *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979) (upholding delegation of adjudicatory authority to a special master, but declining to award compensation to a law professor who served as a legal advisor to the master).

136 See MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 192–210, 671–99 (1994).

137 See Hazard, *supra* note 129, at 1025–28 (explaining that the infusion of American-style discovery can appear to “civil law jurists in the French tradition . . . as foreshadowing a restoration of the Bourbons”); F.L. Morton, *Judicial Activism in France*, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth M. Holland ed., 1991) (detailing French aversion to judicial review and judicial activism). See generally JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE, *supra* (describing reluctant attitudes of many legal systems toward a more activist judiciary).

138 France's courts of appeal are entitled to determine *de novo* all factual and legal issues brought before them; and, although the matter is beginning to change

courts in the United States (a diffusion powerfully aided by the jury system and by Pound's reforms that increased procedural discretion)<sup>139</sup>—creates differing forms of judicial structure in practice.

Finally, in terms of factfinding, most procedural systems rely on judges; in many common law countries, juries also find occasional use.<sup>140</sup> In another instance of American exceptionalism, however, no country uses juries as widely as the United States, whose federal and state courts are constitutionally compelled to employ juries in a wide array of cases.<sup>141</sup> The power of the American jury is not limited just to finding facts; juries are typically asked to perform the all-important task of applying the law to the facts as well.<sup>142</sup> Along with discovery, jury trial is a principal reason that other countries react with visceral negativity toward the American legal system.<sup>143</sup> Yet jury trial is in-

with respect to constitutional questions, all French courts have traditionally taken a very limited view of their ability to strike down legislative or executive action or to create new legal principles. See GLENDON ET AL., *supra* note 136, at 77–85, 190–206; Morton, *supra* note 137. See generally DAMASKA, *supra* note 92, at 36 (locating origins of hierarchical ordering of the French judiciary in the French Revolution).

139 See *infra* notes 140–45, 171–78 and accompanying text.

140 See generally WORLD JURY SYSTEMS (Neil Vidmar ed., 2000) (surveying uses of civil and criminal juries in various nations and finding that juries, although available in numerous countries' criminal justice systems, are either unavailable or rarely available in civil cases).

141 The federal right to a civil jury can be conferred by statute, see FED. R. CIV. P. 39(a), but is generally contained in the Seventh Amendment, see U.S. CONST. amend. VII. Because it "preserve[s]" the English right to a jury trial, which extended in 1791 only to common law cases, the Seventh Amendment does not require juries to determine the facts in all civil cases. In a thumbnail, juries are required only in private-rights cases when historical practice and the monetary nature of the relief sought combine to make a claim appear more "legal" than "equitable" in nature. Even then, a judge can determine certain facts within the claim in some circumstances. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). American states are not yet bound to follow the Seventh Amendment, see *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973) (Marshall, J., dissenting) (noting that "the Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States"), but most states provide comparable if not greater protection to the jury trial right, see Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 655 & n.2 (1963).

142 The jury's function of applying the law to the facts can be taken away or highly regulated. See FED. R. CIV. P. 49(a) (limiting jury to finding facts through the technique of the special verdict); FED. R. CIV. P. 49(b) (providing a check over the application function through the technique of a general verdict accompanied by answers to interrogatories). In practice, however, these techniques are infrequently employed.

143 ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, reporters' preface, at xxvii (Am. Law Inst. & UNIDROIT 2004) (Cambridge Univ. Press 2006).

grained in the American psyche, and also in American procedural rules.

Indeed, the architecture of the American procedural system is determined largely by two variables: the expectation of jury trial and the unsatisfactory results of our history of common law pleading. In particular, jury trial affects our entire system of legal procedure. Juries cannot be reconstituted easily, and the Constitution limits the power of a second jury to re-examine the factual findings of the first.<sup>144</sup> Therefore, a strong presumption lies in favor of a concentrated, all-issues trial. That presumption in turn requires that all development of legal or factual issues be concentrated in a pretrial phase. In order to prevent unfair surprise at trial, while still assuring that pleading tricks and traps do not thwart “on the merits” decisions, the pretrial process therefore must be designed to allow significant development of factual and legal issues. More generally, juries check judicial power—a preference that adversarial process further helps to buttress.<sup>145</sup> It is no exaggeration to say that the jury looms over everything procedural, and that the jury’s existence makes compromise between the American and other procedural systems difficult to achieve.

Spanning procedural disagreements over discovery, the adversarial system, and jury trial will be no easy feat. Many of the variations in procedural rules sprouted from the political, economic, and cultural forces at work in particular regions and countries in particular historical times. These variations create deeply embedded social expectations; we would be unhappy to wake up tomorrow to find the Chinese or French procedural system in full force in the United States, and citizens of China and France would not likely be any happier waking up to our system. Mirjan Damaska has argued persuasively that the different types of political states and the distribution (or centralization) of authority determine fundamental procedural forms and rules.<sup>146</sup> A logical corollary is that efforts to bridge procedural

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144 U.S. CONST. amend. VII (“[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”); *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

145 See Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS*, *supra* note 140, at 1, 7–18 (exploring the political theory underlying jury trial and noting the relationship between the adversarial system and jury trial).

146 DAMASKA, *supra* note 92, at 181–239. Professor Reitz has suggested a simpler metric: that major “architectural” features of a country’s laws and legal system can be derived from the notion of “political economy.” John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 *TUL. L. REV.* 1121 (2001).

differences are unlikely to yield satisfactory results until countries first bridge the political and social differences that create or reinforce procedural variations. Transnational agreement on procedural norms might be possible only in subcultures whose shared values transcend national boundaries; thus, it is not surprising that transnational corporations that agree on market solutions and that value certainty, expertise, and efficiency choose to contract for arbitrated dispute resolution processes.<sup>147</sup>

Pressure for "leveling out" in procedure is likely to increase as regional and international "federations," "communities," "unions," or "trade zones" become commonplace. Clinging to exceptionalism threatens to isolate the legal regime of the United States at a time when isolation is not the smart bet. Strong arguments support each item of American exceptionalism; in important ways, discovery, class actions, a strong adversarial system, and jury trials are all helpful to the effective workings of an American-style democracy, economy, and culture. But fondness cannot substitute for clarity of thought, nor can nostalgia blind us to the trend line. If American rulemakers believe, as I do, that it important not to desert the United States on a remote island, they must begin to build bridges toward other procedural systems. To do so, we must develop a clear understanding of the procedural pieces we must preserve, the pieces on which we should compromise, and the pieces we must jettison—and we must do so now, before events on the global stage overtake our system.

Surely, an objection might run, transnational litigation is, and is likely to remain, only a small part of the workload of American courts. Even in a more globalized world, transnational pressures on our procedural system can be contained; "federations" or "communities" of countries can function only with a high degree of cosmopolitanism, which will need to tolerate "local choice" on a wide variety of matters, including a country's choice of procedural system.<sup>148</sup> Perhaps. But that objection misses an equally significant point: the American proce-

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147 Cf. Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335 (2003) (suggesting that economic factors have created a culture of transnational arbitration).

148 The cosmopolitan movement hypothesizes a world with a loose, ill defined, and somewhat messy "federated" structure, in which overlapping authorities deal with comparable issues until, perhaps at some distant point, shared values and methods trump regional differences. On cosmopolitanism generally, see GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (David Held et al. eds., 1999); DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER (1995); David Held, *Cosmopolitanism: Ideas, Realities and Deficits*, in GOVERNING GLOBALIZATION (David Held & Anthony McGrew eds., 2002).

dural system is facing competitive pressures on the domestic front at least as great as those likely to emerge on the international front. Americans are avoiding the litigation system in unprecedented numbers, either choosing not to resolve disputes at all or relying on pre-litigation alternative forms of dispute resolution such as arbitration, mediation, settlement, and other hybrid processes.<sup>149</sup> Even when a plaintiff selects litigation as the dispute resolution mechanism, the lawsuit frequently serves only as an entry point into another ADR solution. Courts sponsor—and often require litigant participation in—one or more forms of ADR,<sup>150</sup> which appear on balance to lead to no worse results, in terms of cost, delay, and participant satisfaction, than litigated solutions.<sup>151</sup> In most cases, discovery is useful more for developing information needed to negotiate an alternative end to the case than for avoiding unfair surprise at trial.<sup>152</sup> According to the most recent statistics, only 1.6% of all filed civil cases reach trial.<sup>153</sup> Of course, these last statistics are misleading, because litigated outcomes—i.e., outcomes that result in “on the merits” judgments, including

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149 See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183–89 (1992) (summarizing statistical evidence showing that less than twenty percent of injured parties seek any redress, and, depending on the nature of the claim, only two percent to eleven percent file civil cases due to their injuries). On methods of dispute resolution that are effective alternatives to litigation, see generally LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 2–6 (abr. 2d ed. 1998).

150 See Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658 (2000)); FED. R. CIV. P. 16(c)(9). See generally Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609–22 (2005) (describing various legislative and judicial efforts to promote ADR).

151 See JAMES S. KAKALIK, *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 4* (1996); see also *id.* at 9–13 (describing inconclusive findings in prior studies). But see Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85–95 (detailing empirical evidence suggesting that litigants prefer adversarial adjudication to court-annexed mediation).

152 See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 435–36 (1994) (describing different possible uses of discovery); Amy Farmer & Paul Pecorino, *Civil Litigation with Mandatory Discovery and Voluntary Transmission of Private Information*, 34 J. LEGAL STUD. 137 (2005) (describing circumstances under which mandatory discovery can increase the likelihood of settlement). In some cases, the threat of discovery itself becomes a settlement tool. See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636–37 (1989).

153 LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR* app., at 159–61 tbl.C-4A (2004) [hereinafter REPORT], available at <http://www.uscourts.gov/judbus2004/appendices/c4a.pdf>. The full report is available at [http://www.uscourts.gov/library/dir rpt04/2004AnnualReport\\_Full.pdf](http://www.uscourts.gov/library/dir rpt04/2004AnnualReport_Full.pdf).

judgments based on motions to dismiss, motions for summary judgment, dismissals as a sanction for violating a court order, and trials—constitute one-fifth of all case dispositions.<sup>154</sup> The critical statistic, however, is that four-fifths of the claims that enter the litigation system exit through nonlitigation processes—principally settlements, arbitrations, and voluntary dismissal of claims.<sup>155</sup>

Despite this reality, our procedural system is structured around the belief that a case will be resolved at a culminating, all-issues jury trial. A fair question is to ask whether the entire procedural system should be designed around that most rare occurrence, the vanishing jury trial.<sup>156</sup> If form follows function, a procedural system designed to develop the types of information useful to settlement or summary disposition, and to structure the litigation process in stages most conducive to settlement or summary disposition, is more logical.<sup>157</sup> Put differently, in Pound's opinion, the specific procedural evil of very greatest consequence was the "lavish" granting of new trials.<sup>158</sup> It was

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154 According to one study of more than 1,600 federal and state cases, approximately two-thirds of all civil cases settled, and another fifteen percent ended in "arbitration, decisions, or dismissal for cause." Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163 (1986). The remaining cases are adjudicated, although most are dismissed on pretrial motion rather than after trial. *Id.* at 162–64.

155 *Id.*; see also Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40, 1387 (1994) (describing the Kritzer study and analyzing factors likely to cause even greater movement toward settlement in the future).

156 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–63 tbl.1 (2004) (reporting that, of the 1.8% of all federal cases that reached trial in 2002, two-thirds (or 1.2% of all cases) were jury trials) [hereinafter Galanter, *Vanishing Trial*]; see also Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002–2003*, BUREAU JUST. STAT. BULL., Aug. 2005, at 2–3 (reporting an eighty percent decline, from 3,600 to 800 per year, in federal tort trials between 1985 and 2003); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1256 (2005) (describing "a long-term and gradual decline in the portion of cases that terminate in trial and a steep drop in the absolute number of trials" during recent years) [hereinafter Galanter, *Thirty Years War*]. For a discussion on the limits of using such data, see Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571 (2004).

157 See Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727 (2005).

158 See *supra* notes 47, 57 and accompanying text. In some sense, Pound was a victim of his own method. He relied on regional reporters to determine the greatest procedural deficiencies, finding that new trial motions predominated in reported appellate decisions. Reported appellate decisions constitute a skewed sample from which to make judgments about the overall health of the procedural system. George

largely as an antidote to this evil that he advocated for a highly discretionary procedural system. I doubt one lawyer in one hundred would claim that the lavish granting of new trials is the greatest problem in today's procedural system.<sup>159</sup> Perhaps that fact proves the validity of Pound's discretionary, "on the merits" approach; we have fairly well cured the nation of excessive new trials. Or perhaps we should question the factual foundation of Pound's vision, and therefore the efficacy of his cure. In either event, we need to be realistic that the cure has caused other diseases, such as cost, delay, disuniformity in application of procedural rules, perceived variability in outcomes, and the attendant dissatisfaction with our procedural system. Those concerns erect barriers to entering the litigation system and then induce those who enter the system to exit.

In a procedural world attuned to resolutions other than trial, the identification of sticking points and of each party's needs and concerns, and the tailored development of information to address these matters, would take center stage.<sup>160</sup> Pleadings might need to be fuller, and discovery narrower in its early stages. The critical question of "relevance"—i.e., "relevant to what?"—will switch from "relevant to the claims or defenses of any party"<sup>161</sup> to "relevant to early, inexpensive, and amicable disposition of the case." Surgically targeted determination of legal and factual issues might replace the "meat cleaver" approach of summary judgment.<sup>162</sup> Negotiation skills rather than liti-

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L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1-3 (1984). Indeed, evidence exists that, even in days much closer to Pound's than ours and before Pound's reforms took effect, trials were not common occurrences. See Galanter, *Thirty Years War*, *supra* note 156, at 1257-59 (describing trial rates in various jurisdictions before and after the turn of the twentieth century; virtually all the trial rates were significantly less than fifty percent with anywhere from two-thirds to seven-eighths of filed cases not being tried). In any event, given the rarity of the modern trial, lavish and unwarranted grants of new trials under Pound's definition might conceivably affect only a tiny percentage of modern cases.

159 Commentaries on potential causes of dissatisfaction with the procedural system do not mention the excessive frequency of new trials as a principal weakness of the American litigation system. See, e.g., THE BROOKINGS INST., JUSTICE FOR ALL (1989).

160 See Moffitt, *supra* note 157; cf. Hensler, *supra* note 151, at 96-97 (suggesting ways in which trial procedures might influence court-annexed ADR).

161 FED. R. CIV. P. 26(b)(1) (allowing "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" and, on a showing of good cause, additional "discovery of any matter relevant to the subject matter involved in the action").

162 In theory, summary judgment is available only when an entire claim or defense can be resolved. See FED. R. CIV. P. 56(b). But see FED. R. CIV. P. 56(d) (allowing adjudication of specific facts when motion for summary judgment fails); cf. Paul D. Carrington, *Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the*

gation skills will be the desired commodity in lawyers, and a strict adversarial ethic will be replaced by an ethic—still adversarial in its way<sup>163</sup>—that seeks to find points of cooperation and agreement in order to structure the best deal possible.

Of course, one argument for maintaining our present system is that its broad access to information provides parties with the information to make better assessments of their cases, thus fostering settlement; another is that the expense and uncertainty of American litigation and trial actually foster settlements by opening up a wider settlement range.<sup>164</sup> Changes that streamline the litigation system

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*Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2095 (1989) (analyzing proposed changes in summary judgment rules to permit courts to adjudicate factual disputes not materially in dispute even when their resolution will not dispose of a claim or defense).

163 Negotiating lawyers still have as their primary loyalty the client's interests. Indeed, in a world in which litigation is unlikely, that interest is likely to predominate, perhaps even more than it does now, over the lawyer's conflicting loyalty as an officer of the court. But negotiation is not always a zero-sum game in the way that litigation is, and the best negotiators know that meeting the other party's critical needs are central to a satisfactory deal. The ABA has recently suggested ethical guidelines for negotiation. See SECTION OF LITIG., ABA, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf>; see also Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218 (2004).

164 For rational actors, settlements are a function of two variables: expected recovery at trial and the costs of litigation. For instance, risk-neutral rational parties facing a \$100,000 expected judgment with a fifty percent chance of recovery and no litigation costs should settle the case for exactly \$50,000. Any slight variation in the parties' assessment (say, the defendant believes the case has only a forty percent chance of success) will make settlement impossible, as the defendant will pay no more than \$40,000 and the plaintiff will take no less than \$50,000. Once the uncertainties of litigation and litigation costs enter the picture, however, settlement dynamics change. Juries can introduce greater variability in the chances of success and in the size of the likely judgment, see Horowitz & Bordens, *supra* note 99, and the expense of litigation makes parties willing to expand their settlement range as well. For instance, assume that the plaintiff and defendant assess the chances of winning as somewhere between thirty-five percent and sixty-five percent, with a likely judgment somewhere between \$80,000 and \$120,000, and that each side will incur \$10,000 in litigation costs. A rational plaintiff is willing to take anything more than \$18,000 ( $[\.35 \times \$80,000] - \$10,000$ ) and defendant will pay as much as \$88,000 ( $[\.65 \times \$120,000] + \$10,000$ ). In theory, any settlement in this range is good for both parties. Of course, a wide settlement range also creates inducements to engage in strategic bargaining behavior, thus reducing the likelihood of settlement. See generally A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 135–41 (3d ed. 2003) (analyzing the factors that enter into the decision to settle); POSNER, *supra* note 116, § 21.4 (quantifying such factors).



narrow the settlement range and make settlements less likely. But these criticisms miss the mark. Pressed to their limit, they argue for an exorbitantly expensive procedural system in which alternate dispute resolution is almost always preferable. Given that the status quo entering litigation is an actual or threatened loss borne by the victim, such expensive procedural systems in effect create a policy bias in favor of injurers' actions and against victims' needs for redress. Furthermore, the ways in which ADR might make the civil justice system change would not necessarily make litigation less costly; the point would be to change litigation procedures in a way that makes nonlitigated solutions easier to achieve. Such solutions (for instance, staging early information exchanges to obtain only the information useful for settlement<sup>165</sup>) might actually increase the costliness of going to trial, and thus increase settlement ranges.<sup>166</sup>

Like the visions of the Ghost of Christmas Yet to Come, changes signaled by transnational and ADR pressures are not "the shadows of the things that Will be," but "the shadows of things that May be, only."<sup>167</sup> Technology might improve to the point that disputes will be resolved quickly, cheaply, and accurately.<sup>168</sup> If technology can truly do so, perhaps procedural systems around the world will embrace it and uniformity will result. But this optimism is unfounded for the present time. In any event, the same technological advances are also likely to make non-adjudicatory resolutions quicker, cheaper, and better.

Judged by the number of transnational and domestic parties that, before or after entry, ultimately opt out of the American litigation system, dissatisfaction with the American procedural system runs high. Our present system responds poorly to the emerging needs of the transnational order. Domestic litigants desire quicker, cheaper, and better resolutions. The American trial system is increasingly marginalized. Procedural changes of the type that might really matter face constitutional, political, and cultural obstacles. And these pressures are only the first level of concern with our system. There are others.

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165 See, e.g., *Klein v. King*, 132 F.R.D. 525, 529 (N.D. Cal. 1990).

166 See Galanter & Cahill, *supra* note 155, at 1362 (exploring the effect of transaction costs on the likelihood of settlement).

167 CHARLES DICKENS, *A CHRISTMAS CAROL* 93 (Octopus Books 1980) (1843).

168 See Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516 (1998). On the other hand, unavoidable risks of technological advance are that technology might unacceptably increase the disparity between haves and have-nots and that its slickness can mislead unsophisticated factfinders. See TIDMARSH & TRANGSRUD, *supra* note 129, at 1338-47.

### B. Accountability in Rulemaking

As with competitive pressures, issues of accountability involve two strands. The first question of accountability is the tremendous de facto power wielded by the district judge—the anti-democratic underbelly of Pound's discretion. The second is the question of political influence over the rulemaking process. Although they appear to be rather different concerns, they derive from the common reality that procedural choices are inherently and intensely political.<sup>169</sup> They intertwine to pose a second set of concerns for the direction of the American procedural system.

To understand the interrelationship between these concerns, consider a 2 x 2 matrix containing two sets of variables relevant to the administration of procedural rules. The first set of variables concerns the two likeliest institutions in a modern democracy for making procedural rules: the legislature or the judiciary.<sup>170</sup> The second set of variables concerns the nature of the rules that are made: whether they permit the judge administering the case to exercise little or considerable discretion. The following matrix represents the possible combinations:

		<i>Rulemaker</i>	
		Legislature	Judiciary
<i>Nature of Procedural Rules</i>	Little Discretion	(1) Centralized democratic control of adjudication	(2) Mix of delegation and control; less democratic
	Considerable Discretion	(3) Mix of delegation and control; more democratic	(4) Decentralized; less democratic

Each box represents a particular possible attitude toward adjudication. Boxes (1) and (2) involve situations with hierarchical and cen-

169 See *supra* notes 97–103 and accompanying text.

170 The rulemaker could be the legislature or court itself, or it could be a committee or council established by the legislature or judiciary to promulgate the rules itself. The federal model is a hybrid solution. An advisory committee initially drafts recommended rules, and then passes the recommendations through a series of additional committees to the Supreme Court. The Court itself then promulgates the rules, but the rules do not become effective until Congress has had at least six months to consider them and enact legislation blocking their use in court. See 28 U.S.C. §§ 2072(a), 2073(a)–(b), 2074 (2000). Federal trial and appellate courts also have an opportunity to promulgate rules for their own courts, as long as they are consistent with the Federal Rules. *Id.* §§ 2071, 2077.

tralized control over the adjudicatory process (and, to the extent that procedure can influence outcomes, over adjudicatory results); boxes (3) and (4) represent the exercise of more diffused procedural authority. Conversely, boxes (1) and (3) involve more democratic control over the adjudicatory process (and, again, over the adjudicatory results of individual cases). Boxes (2) and (4) involve more insulation of adjudicatory results from direct democratic control, at least when the judiciary or the committee creating the rules is not elected.

In boxes (1) and (4), the tendencies tend to be self-reinforcing. In box (1), a system of limited delegation of judicial discretion reinforces the effort to maintain democratic control over the adjudicatory process. Conversely, in box (4), the devolution of discretionary procedural authority to trial judges reinforces the decentralizing delegation of rulemaking authority to the judiciary. Boxes (2) and (3), in contrast, keep the centralizing tendencies in procedural rulemaking and the extent of democratic influence over individual adjudication in tension with each other.

Locating a particular procedural system within one of these four approaches does not tell us very much about what the precise contours of a system's rules will be. Because the approaches are ideal models, nothing precludes an actual procedural system from containing elements of all four approaches. Nor do the models determine exactly how little or how much discretion judges should have. But the matrix does surface a critical question facing our system today: how much should the adjudicatory process (and the results it generates) be responsive to democratic control and the attainment of legislative, as opposed to judicial, policy objectives?

Seemingly unaware of the political dimensions of rulemaking (in both the systemic and the case-by-case senses), Pound saw no tension between a system of highly discretionary rules created by courts<sup>171</sup> and a robust democracy. Indeed, he thought that the move from box (2), in which American procedure was ensconced in the early twentieth century, to box (4), in which his own reform proposals were located, would bolster democracy; judges could better enforce the legislative will by having the discretion to tailor procedures in a way that achieved decisions on the substance, which was increasingly defined by legislation.<sup>172</sup> He opposed the move to either box (1) or box (3),

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171 Pound believed that the legislature should set only the broad outlines of procedure through a practice act that delegated responsibility for creating the rules to the court; he rejected the idea that the legislature could do the job as well or as quickly. He also thought that the rules themselves should provide considerable discretion to the judge on the ground. *See supra* note 64.

172 *See supra* notes 21–39 and accompanying text.

mostly because he doubted that the legislature could act quickly enough but also because he doubted a legislature's ability to make rules that were flexible enough to resist the inevitable tendency to formalism and to achieve merits-based decisions.<sup>173</sup>

We have adopted Pound's vision. Of course, some of the Federal Rules of Civil Procedure contain centralized directions from the Supreme Court (i.e., box (2)),<sup>174</sup> Congress is experimenting increasingly with detailed legislative control over procedural rules (i.e., box (1)),<sup>175</sup> and Congress has occasionally enacted loose, discretionary procedural standards (i.e., box (3)).<sup>176</sup> For the most part, however, our system delegates rulemaking authority to the judiciary,<sup>177</sup> and the rules then devolve considerable rulemaking power to the local judge.<sup>178</sup> As vast as the extent of this delegation to the local level appears on paper, it is even greater in reality. The justice meted out in the trial courts is the only justice that more than eighty-seven percent of litigants ever receive. As discussed above, four-fifths of all cases end in the district court after settlement, arbitration, or voluntary dismissal;<sup>179</sup> among the remaining one-fifth that result in a judgment, less than two-thirds reach the appellate stage.<sup>180</sup> Even of the roughly thir-

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173 See Pound, *Practical Program*, *supra* note 4, at 441–43; Pound, *Principles (Part I)*, *supra* note 4, at 403–07.

174 For instance, the rules of pleading allow for no deviation from the norm, although they do involve considerable discretion in applying their open-textured provisions. See FED. R. CIV. P. 8–9; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (holding that complaints filed under Title VII do not require “greater particularity” than “the ordinary rules” for pleading). Likewise, rules of mandatory disclosure and discovery usually operate within routine forms, see FED. R. CIV. P. 26(a)(1)–26(a)(3), 26(a)(5), 30–35, but even here, virtually every detail of the rules is subject to change if necessary, see FED. R. CIV. P. 16(c)(6), 26(f), 29.

175 See *supra* note 103.

176 See, e.g., 42 U.S.C. § 6972(b)(2)(E) (2000) (authorizing intervention of right on same discretionary terms as provided for in Rule 24(a)).

177 See *supra* note 170. Congress has constrained judicial rulemaking in various ways. The principal limitation is the Rules Enabling Act's requirement that procedural rules not “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b) (2000). Although this limitation seems to constrain rulemaking with overtly substantive preferences, the Supreme Court has held that Federal Rules with only “incidental effects” on substantive rights do not run afoul of § 2072(a). *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 553 (1991); *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). But see *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (suggesting that § 2072(a)'s limitation should caution courts away from an expansive interpretation of Rule 23).

178 See Shapiro, *supra* note 111, at 1975–78; *supra* note 72 and accompanying text.

179 See *supra* notes 154–55 and accompanying text.

180 The number is an extrapolation from data available at the federal level. In the twelve-month period ending September 30, 2004, 252,761 cases were disposed of by

teen percent cases that are appealed, sixty-one percent are terminated for procedural reasons without reaching the merits.<sup>181</sup> Of the cases that reach the merits on appeal (about eight percent of all claims filed in the district court), the structure of appellate review—deferring to trial judges on findings of fact unless they are “clearly erroneous”<sup>182</sup> and on matters of discretion in the absence of abuse<sup>183</sup>—results in only 11.1% being reversed and 3.0% being remanded.<sup>184</sup> Therefore,

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the district courts. REPORT, *supra* note 153, app., at 126–28 tbl.C, available at <http://www.uscourts.gov/judbus2004/appendices/C.pdf>. Assuming that the eighty percent figure for nonmerits determinations holds true, *see supra* text accompanying note 179, 50,552 cases would have been decided on their merits during this period. In the same period, 33,075 cases were appealed from the district courts to the courts of appeal (exclusive of the United States Court of Appeals for the Federal Circuit). REPORT, *supra* note 153, app., at 94–96 tbl.B-3A, available at <http://www.uscourts.gov/judbus2004/appendices/b3a.pdf>. Dividing this number by the approximated merits-based decisions yields an appeal rate of 65.4% of cases decided on their merits. Obviously, some of the appeals decided before September 30, 2004 were taken from cases decided before October 1, 2003, and some of the district court dispositions as of September 30, 2004, had not been appealed by that date. Therefore, these statistics provide only an approximate indication of the exact percentage of appeals taken.

Using an older but larger data set, Professor Eisenberg reported an appeal rate of 10.9% in all federal civil cases filed between 1987 and 1996. *See* Theodore Eisenberg, *Appeal Rates in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 663, 664 tbl.1 (2004).

181 The numbers are derived from the most recent data available for the federal courts. REPORT, *supra* note 153, app., at 100–03 tbl.B-5, available at <http://www.uscourts.gov/judbus2004/appendices/b5.pdf>; *see also id.* app. at 104–07 tbl. B-5A, available at <http://www.uscourts.gov/judbus2004/appendices/b5a.pdf> (breaking down nonmerits dismissals by type). Total dispositions of civil appeals (derived by adding together the numbers for U.S. prisoner petitions, other U.S. civil cases, private prisoner petitions, and other private civil cases) are 32,174. Total dispositions of civil appeals on their merits (derived by adding together the numbers for U.S. prisoner petitions, other U.S. civil cases, private prisoner petitions, and other private civil cases) are 12,494. Figures for the United States Court of Appeals for the Federal Circuit are not included in these numbers. *See id.*

182 FED. R. CIV. P. 52(a); *see* United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). Comparable protection for the factual findings of juries exists; neither the trial judge nor an appellate court can overturn a jury’s verdict unless “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party” on an issue and “a claim or defense . . . cannot under the controlling law be maintained or defeated without a favorable finding on that issue.” FED. R. CIV. P. 50(a)(1); *see* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000).

183 “Abuse of discretion” is the appellate standard applied to review discretionary decisions of a lower court. *See* ROWE ET AL., *supra* note 132, at 301; *cf.* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 666 (1978) (suggesting that an abuse of discretion occurs only when a judge decides against a “clear and indisputable” right).

184 The numbers are derived from the most recent data available for the federal courts. REPORT, *supra* note 153, app., at 100–03 tbl.B-5, available at <http://www.uscourts.gov/judbus2004/appendices/b5.pdf>.

the chance of staying in the game long enough to obtain on appeal an adjudicated "on the merits" decision different than the one a district court would dispense is about one percent.<sup>185</sup> Although it is interesting to concentrate on the work of the appellate and supreme courts, gazing at the tip of the pyramid ignores the enormous real-world power being wielded beneath them.

In many ways, the devolution of authority from central rulemakers to a dispersed magistracy makes sense in a system structured as we have structured ours. The American litigation system is among the most decentralized in the world. It spreads the adjudicatory functions of law-declaration among local trial courts, regional appellate courts, and central supreme courts. It places primary responsibility for the factfinding function at the trial level, subject only to limited review at higher levels;<sup>186</sup> and in a significant number of cases, it leaves the factfinding to a group of temporary citizen-adjudicators, the jury. It further decentralizes procedural power by placing important tasks such as claim selection, issue definition, evidence gathering, and evidence presentation in the hands of the parties and their lawyers. It also disperses authority through systems of coordinate state and federal courts with overlapping jurisdiction, and provides only limited opportunities for definitive determinations by the highest relevant judicial authority.<sup>187</sup> Devolution of significant

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[www.uscourts.gov/judbus2004/appendices/b5.pdf](http://www.uscourts.gov/judbus2004/appendices/b5.pdf). Total dispositions on the merits of civil appeals (derived by adding together the numbers for U.S. prisoner petitions, other U.S. civil cases, private prisoner petitions, and other private civil cases) are 12,494. *Id.* Total reversals (adding the same columns) are 1,390. *Id.* Total remands (adding the same columns) are 372. *Id.* Figures for the United States Court of Appeals for the Federal Circuit are not included in these numbers. *See id.*

185 Because the calculations in the text hinge on an extrapolation, *see supra* note 180 and accompanying text, the one percent figure is an estimate. But it accords with available data for earlier time periods. *See Eisenberg, supra* note 180, at 664 tbl.1 (reporting a comparable 1.3% reversal rate in federal civil cases decided between 1987 and 1996).

186 *See supra* note 182 and accompanying text.

187 The United States Supreme Court's docket is almost entirely discretionary, *see* 28 U.S.C. §§ 1253, 1254, 1257 (2000), and the Supreme Court has in recent years granted review in about one percent of the cases in its discretionary docket, *see* ROWE ET AL., *supra* note 132, at 21. Many state supreme courts maintain a similar discretionary docket. Moreover, although many states permit certification of legal questions to their supreme court, it is rarely invoked. *See* FALLON ET AL., *supra* note 44, at 1200-02; *id.* at 1202 n.8 (noting informal survey that found only twenty-four certifications from federal to state court in 2001). *But see* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76-78 (1997) (requiring certification of novel state law questions in a federal constitutional claim). Most diversity cases and cases decided in a court of a state

rulemaking authority to the local level (i.e., the “box 4” paradigm) is consonant with this non-hierarchical procedural approach.<sup>188</sup>

On the other hand, as the recent upsurge in legislative control over procedural questions shows, there are serious questions about the sustainability of Pound’s “box 4” paradigm. A predictable set of costs is associated with judicial discretion: expense, delay, unpredictability, and abuse of power.<sup>189</sup> Pound was aware of these costs a century ago,<sup>190</sup> and well before then, the criticisms of pre-Stuart English equity practice, with its similar emphasis on discretion over rule, ran in the same vein.<sup>191</sup> Less frequently mentioned is another cost: discretionary rules can cause similar cases to be resolved differently under different operative procedures.<sup>192</sup> As undesirable as this inequity might be on its own merits, it also means that, in every case, the issue of the procedures to be applied has the potential to become a contested matter.<sup>193</sup> Expense and delay are inevitable consequences—especially in an adversarial system in which the litigants naturally strive to secure all possible advantages.<sup>194</sup> Pound’s discretionary approach

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other than the state whose law applies likewise receive no definitive interpretation from the relevant state supreme court.

188 See DAMASKA, *supra* note 92, at 214–22 (discussing procedural attributes of such a decentralized approach in a *laissez-faire* state).

189 See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 417–31 (1982); Shapiro, *supra* note 111, at 1978 (noting “the oft-expressed concern that the cause of justice is not advanced by uncontrolled judicial power”); *id.* at 1995 (“Discretion can be quite dangerous, however, when it is unbounded. Judges are human and humans tend to abuse power when they have it . . . .”); Subrin, *supra* note 72, at 925. For a modern classic analyzing the benefits and costs of judicial discretion, see AHARON BARAK, *JUDICIAL DISCRETION* (Yadin Kaufmann trans., 1987).

190 See *supra* note 28 and accompanying text.

191 See 1 SIR WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 423–28 (1922). In the seventeenth century, with Bacon’s nascent effort to regularize procedural rules in 1618 and Nottingham’s recognition of *stare decisis* in 1676, equity became more rigid, operated like the common law (albeit with different procedures and rules), and lost its discretionary roots. See *id.* at 428; TIDMARSH & TRANGSRUD, *supra* note 129, at 38–47. Those discretionary roots, buried by more than two centuries of legalism, were what Pound hoped to uncover. See Pound, *Decadence*, *supra* note 6.

192 Burbank, *Complexity*, *supra* note 102, at 1474 (“Many of the Federal Rules authorize essentially *ad hoc* decisions and therefore are trans-substantive in only the most trivial sense.”); Shapiro, *supra* note 111, at 1978–79.

193 Of course, the procedural wheel is not reinvented in every case. But the Federal Rules invite lawyers and judges at least to consider whether it should be. See FED. R. CIV. P. 16(c)(12), 26(f), 29. Even if the lawyers and court make no changes in the default rules, considering the matter imposes significant costs.

194 Expense and delay are hardly unique to an adversarial system with considerable judicial discretion. Expense and delay were issues in Pound’s day, which primarily used an adversarial approach with only limited judicial discretion. See *supra* notes

did not curb the adversarial tendency toward gamesmanship, but rather gave it new meat on which to feed.<sup>195</sup>

On this view, the additional discretion we have given to judges as part of their case management authority is largely counterproductive. Empirical data back up this intuition. Most case management powers have little or no effect on the metrics of cost, delay, and participant satisfaction. The savings or reductions in delay that case management achieves in one case were often offset by increased expenses or greater delays of additional customized procedures in another.<sup>196</sup> One technique resulted in clear savings: early, firm deadlines.<sup>197</sup> But the operative word is *firm*. In order for this technique to be effective, deadlines need to be rigidly enforced—an insistence on technicality that is the antithesis of a discretionary procedural system.

Customizing rules for each case also raises a concern of great significance in a democratic society: the fear that judges will use their discretionary power, consciously or subconsciously, to tailor rules in a way that influences the outcome of individual litigation.<sup>198</sup> Given the result-influencing nature of procedural rules, the trial judge's discretion to tailor rules for individual cases is an inherently political power—the case-by-case corollary of the choice reflected in the Rules Enabling Act to delegate to the judiciary the political power to make

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46–48 and accompanying text. They are also common complaints in inquisitorial systems with judicial discretion. See Manuel Barrocas, *Europe: Summary*, in *ECONOMIC CONSEQUENCES OF LITIGATION WORLDWIDE* 137, 139–42 (Charles Platto ed., 1999); Keith Steele & Belinda Bell, *Asia Pacific: Summary*, in *ECONOMIC CONSEQUENCES OF LITIGATION WORLDWIDE*, *supra*, at 9, 13–18. My point is that the combination of adversarialism and judicial discretion creates particular kinds of costs that other approaches would not.

195 A sufficient proof of the point is to scan professional trade magazines and the proceedings of continuing legal education conferences, which are filled with lawyers' articles asserting how this technique or that device can create an advantageous outcome for certain classes of clients.

196 See JAMES S. KAKALIK ET AL., *AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (1996); Kakalik et al., *supra* note 107. According to these studies, various case management techniques tended to reduce time to disposition but then increase attorney hours. Only two techniques (early, firm trial dates, which are considered *infra* note 197 and accompanying text, and early management accompanied by discovery planning) resulted in reductions in time to disposition with no net increase in attorney hours. See also Galanter & Cahill, *supra* note 155, at 1388 (stating that decisions to settle are largely independent of judicial efforts to foster settlements).

197 KAKALIK ET AL., *supra* note 196, at 52–59. Savings in some cases are neutralized by extra expense in others. One exception is early, firm trial date, but note that this rigid approach is the opposite of discretion.

198 Fuller, *supra* note 90, at 381–87, 391; Resnik, *supra* note 189, at 424–31.



rules.<sup>199</sup> The “box 4” paradigm imposes only limited checks on the accountability of the trial judge. Not surprisingly, an important body of literature is now exploring the tension between judicial independence and democratic control that the delegation of procedural rulemaking has created.<sup>200</sup>

A related concern with the “box 4” paradigm is the ease with which nondemocratic shifts in political priorities can be accomplished. For Pound, the entire point of discretionary procedure was to shake off excessive legal formalism, to bring law and justice into accord, and—to use Pound’s aphorism again—to decide cases “on their merits.” He hoped that this approach would have useful side effects in terms of saving expense and shortening delay, but they were not the goals per se. Beginning in the 1970s, discretion began to be put to new purposes: to rein in adversarial practices, and to reduce expense and delay. To some extent this new direction was not inconsistent with Pound’s vision, but anyone who reads reported decisions should be struck by how modern judicial discretion, harnessed to reducing costs and delay, is remarkably un-Pound-like in spirit. Case management has taken on a life of its own, and dismissals for failure to abide by court-imposed scheduling deadlines, issue-narrowing requirements, and final pretrial orders fill the reporters.<sup>201</sup> Many cases are determined on the criteria of efficiency and obedience to judicial will rather than on their merits.

To some degree, this shift in the uses to which discretion has been put has resulted from legislative action,<sup>202</sup> but to a larger extent legislation has merely jumped on a train already engineered by judges, lawyers, and academics who were less politically accountable and who had become convinced that thoroughgoing “on the merits” decisionmaking created too many delays and cost too much money.<sup>203</sup>

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199 See Burbank, *Complexity*, *supra* note 102, at 1469–76.

200 Professor Burbank has recently written an excellent article, itself an important contribution to the literature, that contains citations to other works. Burbank, *Procedure*, *supra* note 102.

201 See, e.g., *Tower Ventures, Inc. v. City of Westfield*, 296 F.3d 43, 47–48 (1st Cir. 2002) (upholding dismissal with prejudice for failure to comply with a district court’s scheduling order); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340–41 (5th Cir. 2000) (upholding dismissal for failure to comply with pre-discovery orders requiring expert affidavits); *R.M.R. v. Muskogee County Sch. Dist.*, 165 F.3d 812, 818–19 (11th Cir. 1999) (upholding exclusion of a witness not listed in a pretrial order).

202 See, e.g., Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482 (2000)).

203 The beginning of the movement might be dated to 1976, when Chief Justice Burger’s keynote address to the Pound Conference, convened to mark the seventieth anniversary of Pound’s speech, took aim at the excesses of the modern adversarial

I do not claim that this shift lacked transparency; it was well documented in copious Advisory Committee notes. Nor will I claim here that the shift was unwise, even though the empirical data raise questions about whether the game has been worth the candle.<sup>204</sup> The point is that judges so easily converted Pound's animating procedural vision into something quite distinct. This fact tells a cautionary tale about the degree to which a procedural system in a democracy requires overt political oversight and accountability.

Therefore, a critical challenge in the delivery of civil justice is determining the proper degree of political control and accountability—both for the creation of the civil rules and for the judge's administration of those rules in individual cases.<sup>205</sup> The shift into a "box 4" procedural paradigm has imposed costs that lie at the heart of present dissatisfaction with the civil system, but it has also created a procedural system far more satisfying than its predecessors. Likewise, in American democracy, the lack of judicial accountability to popular will is problematic, but judicial independence is a treasured ideal. In balancing these concerns, some of us might legitimately believe that institutional competency and judicial independence should permit judges

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system. See Chief Justice Warren E. Burger, Keynote Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Agenda for 2000 A.D.—A Need for Systematic Anticipation (Apr. 7, 1976), in 70 F.R.D. 83 (1976), and reprinted in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23 (Leo Levin & Russell Wheeler eds., 1979). Others at the conference echoed his concerns. See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156–58 (1993) (noting the influence of this address). By the late 1970s, numerous calls for reform of civil procedure had begun to emerge, and the drumbeat continued throughout the next decade. See, e.g., AM. COLL. OF TRIAL LAWYERS, *RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION* (1981) (echoing the recommendations of the Pound conference), reprinted in 90 F.R.D. 207 (1981); THE BROOKINGS INST., *supra* note 159; NAT'L COMM. FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, *REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES* (1979) (making numerous recommendations for improving enforcement of antitrust, targeting, among other areas, judicial management and control, use of time limits, and control of discovery), reprinted in 80 F.R.D. 509 (1979); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981) (arguing that effective pretrial management by judges helped increase judicial productivity); Schwarzer, *supra* note 104 (arguing that the increased scope and complexity of civil litigation undermined the original goals of the Federal Rules of Civil Procedure and required active case management by judges).

204 See *supra* notes 196–97 and accompanying text.

205 Cf. Burbank, *Complexity*, *supra* note 102, at 1470 (“[S]o long as discretion dominates procedure, procedure will dominate substantive law.”).

to have even more discretion than they enjoy at present.<sup>206</sup> Others might wish for tight legislative control over procedure and short leashes for individual judges to depart from a set procedural menu.<sup>207</sup> Certainly, any significant shift out of the “box 4” paradigm can be only partially successful unless we also address the other decentralizing tendencies in our procedural system.<sup>208</sup> Selection of the proper paradigm also intermeshes with the ways in which we propose to resolve the civil system’s competitive pressures: ADR methods tend to be at least as discretionary as, and far more politically unaccountable than, the present “box 4” paradigm;<sup>209</sup> conversely, many foreign systems that have emerged from a totalitarian past justifiably take quite a jaundiced view of the “box 4” discretionary process.<sup>210</sup>

Striking the proper balance between accountability and independence is a question as central to procedural reform as the question about the content of the rules themselves. The answer to the former question will invariably influence the answer to the latter.

### C. Representation

A third set of pressures arises from the representative nature of American litigation. As with the problem of accountability, the pressures manifest themselves in both the broad and the particular. The broad concern involves the sacred cow Pound refused to touch: the fate of the adversarial system.<sup>211</sup> The adversarial system delegates to the parties critical adjudicatory tasks like gathering and presenting ev-

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206 See, e.g., Shapiro, *supra* note 111, at 1994–97 (stating that Rule 16 could have provided even more discretion to judges than it did).

207 Cf. Resnik, *supra* note 189, at 431–44 (evaluating various legislative solutions or changes in procedural rules to limit the need for case management); Jay Tidmarsh, *Unattainable Justice: The Forms of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1794–95, 1810–11 (1992) (evaluating arguments for more certainty and less discretion in complex cases).

208 See *supra* notes 186–88 and accompanying text.

209 The political unaccountability of ADR methods is a common criticism. See Fiss, *supra* note 91; Perschbacher & Bassett, *supra* note 91. But see Galanter & Cahill, *supra* note 155, at 1372–75, 1378, 1382–84 (suggesting ways in which settlement might increase moral and political awareness of participants); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004) (arguing that settlement can help moral and political development in ways that litigation cannot).

210 See Hazard, *supra* note 129. This jaundiced view helps to explain the slow development of interest in ADR methods in many other countries. See Karst, *supra* note 125, at 267–69 (describing the development of arbitration and mediation in Germany); Xavier Vahramian & Eric Wallenbrock, *France*, in INTERNATIONAL CIVIL PROCEDURE, *supra* note 125, at 213, 235–38 (France).

211 On Pound’s failure to consider the reform of the adversarial system, see *supra* notes 73–82, 104–08 and accompanying text.

idence, shaping legal claims, and developing legal and factual arguments; the parties typically delegate these tasks to their lawyers. Lawyers simultaneously must represent their clients' interests and, as officers of the court, the interests of the judicial system—all the while making a living for themselves and their families. In balancing these priorities, the American version of the adversarial system emphasizes loyalty to clients and to fees, which far outstrip loyalty to the justice system. This emphasis lies at the root of many of the least seemly features of American litigation—the constant grappling for adversarial advantage, the refusal to comply with the spirit (and sometimes the letter) of procedural rules, and the attendant expense, delay, and economic distortion involved in using the public good of adjudication for private gain.<sup>212</sup> The American “sporting theory of justice” is alive and well, and its stubborn refusal to fade away has led some reformers to call for significant tempering, or even for abandonment, of American adversarialism.<sup>213</sup>

This broad issue—the fate of adversarial process—finds manifestation in the particular issue of class action and other public law litigation. The issue can be encapsulated in a simple question: “Who is the client?” Or, put differently, who (or what) exactly does the lawyer represent? Developed in the nineteenth century, the adversarial system's ethical paradigm of representing a known individual with identified interests is inapposite.<sup>214</sup> Representation of large numbers of individuals and of institutions forces lawyers to balance interests that are typically not monolithic. Thus far, however, we have not developed an ethical language to think about lawyers' new roles.<sup>215</sup> Not surprisingly, we have also been unable to create an adequate systemic responses to the pressures of “polycentric,”<sup>216</sup> “sprawling,”<sup>217</sup> and “complex”<sup>218</sup> modern litigation.

Instead, courts have invented ad hoc, nonadversarial procedures to resolve complex disputes; lawyers, who often never meet the myriad clients they represent, must use sympathetic imagination to guide

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212 For an economic analysis of the inefficiencies that can arise when parties use the public good of adjudication to achieve private gain, see STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 265–70 (1987).

213 See, e.g., sources cited *supra* note 104.

214 See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 44–45 (1995).

215 Judge Weinstein's attempt to recast ethical rules on a communitarian and communicarian basis is the most serious effort to date. See *id.* at 46–117.

216 See Fuller, *supra* note 90, at 394.

217 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

218 On the multiple meanings of “complex” litigation, see Tidmarsh, *supra* note 207, at 1692–734, 1755.

their judgment about what their clients' interests are; clients have lost individualized "day in court" rights—such as the ability to decide whether, when, where, and against whom to bring suit—that are afforded to litigants in routine cases. Expenses in such cases can spiral into the millions of dollars;<sup>219</sup> the legendary delays of *Jarndyce and Jarndyce* can pale in comparison;<sup>220</sup> and the size of the plaintiffs' lawyers' interest in the case (in terms of both potential attorneys' fees and recovery of fronted litigation expenses) usually makes them the largest stakeholders in the outcome, thus distorting the lawyers' incentive to work in the clients' best interest.<sup>221</sup> Despite enormous intellectual energy poured into the question over the past fifty years, we lack consensus about the proper ways to respond to the (often simultaneously occurring) problems of whether and when to consolidate large numbers of dispersed victims and injurers, how best to handle vast

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219 See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1338–40, 1344–46 (E.D.N.Y. 1985) (awarding nearly \$1.4 million in expenses to plaintiffs' attorneys in a \$180 million class settlement involving 2.4 million plaintiffs), *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987).

220 The problem of lengthy litigation is especially problematic when a court must administer complex remedies. For instance, the remedial question had not been fully resolved in *Brown v. Board of Education* more than forty years after the case had been originally filed on behalf of Linda Brown, an African American schoolgirl in Topeka. She returned to federal court as a parent because she believed that vestiges of discrimination remained. See *Brown v. Bd. of Educ.*, 892 F.2d 851, 855 n.3 (10th Cir. 1989), *vacated*, 503 U.S. 978, *on remand*, 978 F.2d 585 (10th Cir. 1992), *cert. denied sub nom. Unified Sch. Dist. No. 501 v. Smith*, 509 U.S. 903 (1993).

*Jarndyce and Jarndyce*, of course, is the fictional, long-running suit in equity around which Dickens twists the plot of *Bleak House*. CHARLES DICKENS, *BLEAK HOUSE* (Dent 1907) (1853). People, including Dickens himself, have asserted that there was more truth than fiction in Dickens' description. *Id.* at xv–xvi.

221 See "Agent Orange," 611 F. Supp. at 1338–40, 1344–46 (awarding more than \$9.3 million in attorneys' fees in a \$180 million class settlement involving 2.4 million plaintiffs); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 638–40 & tbl.15 (2006) (stating that median recovery in state class actions removed to federal courts and remanded to state courts was \$850,000, median class contained 5000 members, median per capita recovery was \$350, and average attorneys' fee was thirty percent of the class recovery; median recovery in federal class actions removed to federal courts and not remanded was \$300,000, median number of class members was 1000, median per capita recovery was \$517, and median attorneys' fee was twenty-five percent of the class recovery). See generally Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) (describing ways in which economic and ethical incentives of plaintiffs' class action lawyers diverge from those of their clients); Note, *Risk-Preference Asymmetries in Class Action Litigation*, 119 HARV. L. REV. 587, 588 (2005) (discussing how divergent risk preferences for plaintiffs' class action lawyers and their clients affect the decision to settle).

quantities of information while streamlining issues for trial, and how best to deliver a meaningful adjudicatory remedy to the deserving.

The broad question of the fate of the adversarial system and the particular question of the future of complex litigation intermingle. Complex litigation presents a circumstance in which the adversarial system functions poorly, and the corrective remedy is the application of nonadversarial judicial power.<sup>222</sup> That the adversarial system does not perform well over a set of cases is unremarkable; no system can be expected to perform optimally in every setting. But complex litigation is pervasive in our society, touching the lives of millions of citizens each year and restructuring major governmental and private institutions.<sup>223</sup> If the adversarial system performs poorly in this central form of litigation, then we must consider reforms. Two options are evident. The first is to create a separate, nonadversarial (and perhaps nonjudicial) system for complex cases; such a system would establish a new form of dispute resolution, akin to equity's rise as a counterpoint to common law in medieval times. The second, more radical option is to pull the adversarial system up by the roots for all types of litigation, and to replace it with another model that better addresses the needs of complex cases while performing reasonably well in other cases as well.

Theory can help us to choose between these options. Writing just at the inception of the public-law-litigation phenomenon, Lon Fuller argued that only the first option was legitimate. Professor Fuller thought that the adversarial system was an optimal—and possibly essential—aspect of the form of adjudication.<sup>224</sup> Because the adversarial system, with its emphasis on affected individuals' participation in the decisionmaking process, was incapable of providing for such participation in "polycentric" disputes, Fuller thought that the form of

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222 For an extended proof of this proposition, see TIDMARSH & TRANGSRUD, *supra* note 129.

223 See Chayes, *supra* note 88, at 1284.

224 See Fuller, *supra* note 90, at 382–85. Because of the way in which this posthumously published article was edited for publication—by shoehorning into a hole in Fuller's text another article that Fuller had written about the adversarial system—it is not clear whether Fuller regarded adversarial process as merely optimal to adjudication or rather so essential to its very nature that nonadversarial process was inherently illegitimate as an adjudicatory process. See *id.* at 382 n.22. For a sensitive rendering of Fuller's theory of adjudication, which suggests that adversarialism might indeed have been essential to Fuller's view, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1301–10 (1995).

adjudication was unsuited to the resolution of such disputes.<sup>225</sup> The solution for polycentric disputes lay only in nonadjudicatory forms of dispute resolution—either in the political/administrative process or through contract.<sup>226</sup>

On the other hand, Pound fairly might be read to advocate the second option of eliminating the adversarial system altogether. Even in his own legal world, which involved the retrospective, dyadic disputes that the adversarial approach contemplated, Pound saw clearly the disadvantages of the adversarial process. Rather than following the logic of his diagnosis, Pound stopped short, and seemed to hope that other reforms to the procedural system would rein in adversarial zeal. Seventy-five years of experience with his system suggest that he was too optimistic about converting lawyers into officers of the court. To some extent, the fault might lie with judges who never fully internalized Pound's point to use procedural discretion only to achieve resolutions on the merits. But a greater problem has been the opportunity that loosely textured rules have given lawyers to maneuver and game in order to achieve the single-minded objective that all the sea changes in American procedural rules have never dislodged: victory for their clients.

Our procedural history also has something to say about the choice between creating differential rules for complex cases or abandoning the adversarial approach to adjudication outright. The common law developed distinct procedures for each writ, and equity developed still different procedures. The lack of uniformity among substantive areas, and the resultant complexity of the procedural system, was the equivalent of putting the adversarial inclination toward hyper-technical procedural enforcement on steroids. Although it took centuries to accomplish, the abolition of differential procedures and the creation of a "trans-substantive" procedural code are often regarded as the most successful dimensions of the Federal Rules.<sup>227</sup>

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225 To Fuller, "polycentric" disputes usually involved many parties, fluid interests, and no evidently correct legal principles that resolved the dispute. See Fuller, *supra* note 90, at 394–98. "Polycentric" litigation is sometimes used as a synonym for "complex" litigation. See Tidmarsh, *supra* note 207, at 1726–31.

226 Fuller, *supra* note 90, at 398.

227 See Shapiro, *supra* note 111, at 1973–78. "Trans-substantive" rules are rules that apply uniformly across substantive areas of the law. The common law writ system, with separate procedures for each form of action, and the equity system, with still different procedures for suits in equity, were not trans-substantive. One of the goals of the drafters of the Federal Rules of Civil Procedure was to make the rules trans-substantive, both by abolishing the distinction between common law and equity, see FED. R. CIV. P. 2, and (with a few exceptions) by making the same rules apply uniformly to all types of legal claims.

The idea of returning to the multiple forms of action that preceded the Rules commands no disciples.<sup>228</sup>

Indeed, history suggests that a dichotomy between the complex and the routine cannot in the long run be sustained. When the American system first confronted complex cases in the 1940s, a consensus emerged that this new type of litigation required the control of an "iron-hearted judge,"<sup>229</sup> a far more active figure than the judge of umpireal restraint. A procedural system that already devolved authority to the local level became the ready-made vehicle for the assertion of iron-hearted power. Interestingly, the original view was that judges should exercise their newly claimed authority by imposing hard-and-fast (i.e., nondiscretionary) rules to handle complex cases,<sup>230</sup> but that effort fell apart in the 1960s as judges began to realize that one size of procedural rule did not fit all.<sup>231</sup> Discretion again became the watch-

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228 The typical criticism is that the drafters failed to go far enough and accomplished only superficial trans-substantivity by vesting judges with discretion that made the rules appear uniform on paper even though the rules varied in practice from case to case. See Shapiro, *supra* note 111, at 1978. A few voices have questioned the very wisdom of the trans-substantive project, either because trans-substantivity masks substantive policy choices or because non-trans-substantivity creates a better fit between substantive policy and adjudicated outcomes. For a variety of criticisms and defenses of trans-substantivity, see Burbank, *Complexity*, *supra* note 102, at 1474–75; Carrington, *supra* note 162, at 2067; Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526–27, 547–48 (1986); Subrin, *supra* note 72, at 991. None, however, has advocated a return to the myriad procedural forms of the common law.

229 This phrase was coined in a 1951 speech given by Judge E. Barrett Prettyman, then a judge on the United States Court of Appeals for the District of Columbia. See JUDICIAL CONFERENCE STUDY GROUP ON PROCEDURE IN PROTRACTED LITIG., HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES (1960), reprinted in 25 F.R.D. 351, 384 (1960) [hereinafter HANDBOOK]. Judge Prettyman was the principal author of the document known as the *Prettyman Report*, which is often described as the opening salvo in the effort to apply case management principles to complex litigation. JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES (1951), reprinted in 13 F.R.D. 62 (1953); see *id.* at 66 (stating that adversarial presentation in complex cases "will result in records of fantastic size and complexity unless the trial judge exercises rigid control from the time the complaint is filed"); TIDMARSH & TRANGSRUD, *supra* note 129, at 926, 928.

230 The *Handbook* was the first manual of recommended judicial practices in complex litigation and the precursor to the *Manual for Complex Litigation* (first written in 1970 and now in its fourth edition). Although it couched its approach in the language of "recommendations," the *Handbook* had a fairly well defined and rigid approach to the way in which judges should handle protracted cases. See, e.g., HANDBOOK, *supra* note 229, at 377–98, 403–14.

231 The successor to the *Handbook* tended to take less definitive positions on the ways in which complex litigation should be managed by the judge. See MANUAL FOR



word, and judges exercised it in decidedly nonadversarial ways.<sup>232</sup> The pre-existing system of procedural discretion, which Pound had proposed to remedy a different ill, was turned toward the new end of addressing complex litigation.<sup>233</sup>

The rest of the story is well known. With the perceived success of greater judicial authority in complex cases, the line between the complex and the ordinary began to blur, and judges started to exercise more control over ordinary litigation.<sup>234</sup> The case management approach, which occupies a middle ground between the adversarial and inquisitorial models, now represents the state of the art in all American civil litigation.<sup>235</sup> It has closed the gap between the procedures used in routine cases and those used in complex ones.<sup>236</sup> Whether it takes centuries, as with common law and equity, or only decades, as with complex and routine litigation, the centripetal force of procedure makes it difficult for a single society to maintain differential procedural approaches in the long run.

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COMPLEX AND MULTIDISTRICT LITIGATION xix (1970) (“[F]lexibility should be the keynote in applying the suggestions contained in this *Manual*.”). This manual went through a number of interim editions, supplements, and a retitling to the *Manual for Complex Litigation*. By 1985, when the *Manual* was rewritten from stem to stern, the transformation from a one-size-fits-all code to a menu of discretionary procedural options was complete. See MANUAL FOR COMPLEX LITIGATION (SECOND) § 10 (1985).

232 For instance, judges claimed the power to choose the lead counsel for groups of clients. See *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773 (9th Cir. 1977). For a range of other judicial powers that depart from the adversarial ideal, see JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE* 201–69 (2002); Chayes, *supra* note 88.

233 This shift further documents the ways in which the judiciary can reorient a discretionary procedural system to accomplish new policy goals that it has established—without necessarily changing the underlying rules. See *supra* notes 201–04 and accompanying text. For the most part, the changes occurred under the auspices of the courts’ “inherent power.” See generally Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (analyzing claims of inherent judicial power in complex litigation and other contexts). Changes in Rule 16(c), such as the 1983 addition of a catch-all case management power for complex cases (now found in Rule 16(c)(12)), essentially confirmed pre-existing claims of power. FED. R. CIV. P. 16(c). See Shapiro, *supra* note 111, at 1992–93.

234 See Resnik, *supra* note 189, at 377–80.

235 See FED. R. CIV. P. 16; FED. JUDICIAL CTR., *MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION* 1–4 (1993); *MANUAL FOR COMPLEX LITIGATION (FOURTH)* 2 (2004) (“[T]he judge should not take the case from the lawyers, but rather provide guidance and direction, setting limits and applying controls as needed.”).

236 A gap still remains. Some case management techniques are likely to be useful only in complex cases.

The critical question is whether we should remain in case management's middle ground, whether we should continue the march away from the adversarial approach and toward the even more powerful judge of the inquisitorial system, or whether we should head back toward the adversarialism of our heritage. Wrapped up in this question is the question whether further moves away from adversarial process, which corresponds well to competitive American culture and to the American preference for limited judicial authority,<sup>237</sup> can be successful without changes in our national character.<sup>238</sup> Also wrapped up in this question is the constitutional issue of due process, and how much it permits departures from an adversarial approach to litigation.<sup>239</sup>

Finally, wrapped up in the question of adversarialism's future is the matter of handling complex cases—in particular, the mass torts that have consumed considerable intellectual energy in the so-far elusive search for a solution.<sup>240</sup> Perhaps the Holy Grail of complex litigation reform—a method that combines broad consolidation of similar claims with individualized adjudicatory treatment of each such claim, all accomplished in a manner that does not skew outcomes markedly in relation to outcomes achieved through routine methods of processing lawsuits—does not exist. The greatest lesson of complex litigation, however, is the understanding that no distribution of the adjudicatory roles of factfinding, fact gathering, and claim development is perfect. Every method—whether it be that of the adversarial method, the inquisitorial method, or some hybrid—has undesirable side effects. That reality highlights the next set of questions. What characteristics should the inevitably imperfect procedures embody: rough equality of outcomes among complex cases and between the complex and the routine; rough equality of procedural opportunity among complex cases and between the complex and the routine; efficiency and speed of resolution of myriad claims; accurate, “on the merits” adjudication of individual claims; or the opportunity of all in-

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237 DAMASKA, *supra* note 92, at 214–22; *see also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *YALE L.J.* 27, 30 (2003) (arguing for an emphasis on the traditional adjudicative judicial role as a response to modern procedural concerns).

238 *See supra* note 109 and accompanying text.

239 *See supra* note 95 and accompanying text. In the procedural context, “due process” is a phrase with multiple meanings. *See* TIDMARSH & TRANGSRUD, *supra* note 232, at 2–3.

240 *See* ADVISORY COMM. ON CIVIL RULES & WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION (1999).

dividuals to have their "day in court," represented by the lawyer of their choosing?

As a functional matter, a procedural system is likely to be most stable when its allocation of roles deals well with the disputes that a society thinks most important, and less perfectly suits the subset of cases that the society judges to be fairly unimportant. Therefore, considering whether our system should continue to pull slowly away from adversarial process forces us to think substantively as we think procedurally. Despite our modern inclination to cordon off procedure and substance,<sup>241</sup> the one cannot be considered apart from the other. On this matter, Pound was surely correct.

#### D. *Theorization*

In the end, none of the other pressures that our procedural system faces can be resolved without new ideas, or at least a recovery and reapplication of old ideas. But a fourth and final difficulty infects modern American procedure: lack of vigorous theoretical attention. Assume that the proverbial Martian came to Earth and asked us, "What is civil procedure about?" We would likely answer, "It is about the rules courts use to resolve civil disputes." But what if the Martian then said, "No, you misunderstand. What is civil procedure *about?*" How would we answer? What are the driving forces or ideas behind procedure? What theoretical concepts make it tick?

Procedural law is undertheorized. When I talk about undertheorization, I do not necessarily mean the lack of connection to the fanciest metaphysical construction or the most recent interdisciplinary insight that is removed by several levels of abstraction from the concerns of everyday litigators. Instead, I mean a connection to ideas that are deeper than the rules themselves. These ideas are guideposts that determine the skeleton of the procedural system; they are specific enough that, through the use of practical reason, they can help to put some flesh on the bones as well. As Pound would have appreciated, they spring from philosophy, political theory, economics, history, sociology, and other disciplines, as well as from lived experience. They provide a sense of purpose and direction for the rules we use; they have predictive force for how we should handle new procedural contexts; hopefully they exercise a moral suasion that make us believe that this approach is what we ought to be pursuing. Ideally, they connect to the ideas that drive the substantive law. Such ideas are not the sole determinants of a procedural system; they interact with history,

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241 See *supra* notes 8–10 and accompanying text.

tradition, and culture in a struggle for the dominant role in determining procedural rules.<sup>242</sup>

The dominant determinants of procedure today, as they were when Pound spoke, are history, tradition, and culture. Pound infused a new set of ideas that muscled into a dominant role; they moved the procedural paradigm markedly. Today “big” ideas have receded as a critical determinant of procedural rules. We have fallen into the habit of working mostly within the history, tradition, and culture of the paradigm that Pound gave us.<sup>243</sup> We do not ask, as Pound asked, what procedure should be *about*. We are on theoretical autopilot. We no longer have a theory of procedure adequate to today's needs.

The present American system rests on four theoretical foundations: “on the merits” decisions; decentralized decisionmaking (an idea broad enough to encompass both jury trial and judicial discretion); respect for individual autonomy (an idea that includes both adversarial process and equal rights of participation); and efficiency. To some extent the foundations are reinforcing, and to some extent they are in tension.<sup>244</sup> The weight we have placed on each foundation has shifted over time. “On the merits” decisions were a more dominant idea in the early years of the Federal Rules; consistent with the general rise in law-and-economics thinking, concerns for efficiency have asserted a stronger voice in the past quarter-century.<sup>245</sup> Despite these

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242 I do not wish to engage in the “chicken and egg” question whether history, tradition, and culture emerge from ideas, or ideas from history, tradition, and culture. My only claim is that ideas are distinct from the others, but interact with them to produce human actions.

243 More accurately, the present procedural paradigm has resulted from the interaction of Pound's ideas with prior historical, traditional, and cultural influences.

244 For instance, a decentralized form of adjudication and the adversarial system have evident reinforcing connections. See *supra* text following note 186. Likewise, the principles of efficiency and “on the merits” decisions have a close relationship. From an efficiency viewpoint, the costs of litigation are a form of transaction cost that act as a drag on the efficient working of substantive legal rules. As a general matter, the goal of an efficient procedural system is to keep litigation costs to a minimum. Litigation costs come in two types: the direct costs of litigation (attorneys' fees, court costs, and the like) and the indirect costs of erroneous decisions. The two types of litigation costs are often inversely related; as the amount of resources devoted to a case goes up, the chance of an erroneous decision goes down, and vice versa. See POSNER, *supra* note 116, § 21.1. Error costs are simply the flip side of deciding cases accurately. And deciding cases accurately is deciding cases “on their merits.”

As for tensions, one evident tension, which Pound emphasized, is the difficult relationship between the adversarial system and merits-based decisions. See *supra* notes 49–59 and accompanying text.

245 Among the significant changes that were made in the 1983, 1993, and 2000 amendments were those to Rule 11 (creating penalties for frivolous filings), Rules

shifts, we can clearly identify the core ideas of our system as the ones Pound identified a century ago. For the most part, the ideas are not deeply theorized.<sup>246</sup> With the exception of judicial discretion, Pound himself never defended any of these ideas with the theoretical rigor that he applied to his general theory of sociological jurisprudence. Those following after him have not done much better in justifying this approach.

The question is why we have held onto Pound's theoretical vision for so long. The remainder of Pound's jurisprudence was also highly influential—probably more influential than the ideas of any American lawyer or legal academic during the past century<sup>247</sup>—but it had run its course within twenty-five years.<sup>248</sup> By the time that the Federal Rules were enacted in 1938, the ideas driving substantive law had swept past Pound. That reality made the point of Pound's enterprise—meshing the substantive and the procedural into a unified whole that advanced the cause of sociological jurisprudence—obsolete before it had even begun. As substantive law has endured succeeding waves of new

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16(b)–(f) (expanding case management powers), Rule 26(a) (requiring various types of mandatory disclosure), Rule 26(b) (adding a proportionality requirement), Rule 26(f) (requiring discovery planning), Rule 26(g) (imposing sanctions for bad-faith discovery or discovery responses), Rule 30 (limiting number and length of depositions), Rule 33 (limiting interrogatories), and Rule 37(a)(4)(A) (requiring a good-faith conference as a precondition to obtaining sanctions on a motion to compel). *See infra* notes 294–96 (providing a timeline for these amendments). A driving motivation behind each of these changes was the desire to reduce expenses and delays in adversarial litigation.

246 Pound himself mentioned jury trials and efficiency only in passing, *see supra* notes 46–48, 80 and accompanying text, was silent about equal rights of participation, and was critical of adversarial process (even though he was willing to maintain it on changed terms), *see supra* notes 49–59 and accompanying text.

247 Making such a claim is subjective. I could make a comparable claim for Chief Justice Earl Warren and perhaps for a handful of other scholars or judges who came after Pound. But Pound certainly stands in rare company. A century later, it is easy to forget how much Pound dominated the legal landscape, and for how long. *See* Stephen B. Presser, *Foreword* to ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* vii, vii, xvi–xvii (Liberty Fund 2002) (1958).

248 The end of Pound's significant influence on American legal thought can be dated to 1931, when he clearly broke with the dominant legal realism. *Compare* Pound, *Realist Jurisprudence*, *supra* note 19 (summarizing and critiquing aspects of legal realism), *with* Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (criticizing Pound for his stance on realism). Pound continued to write prolifically, but his increasingly conservative turn often contradicted his earlier ideas and never had a significant influence on the direction of American law. *See* WIGDOR, *supra* note 3, at 257–75; Presser, *supra* note 247, at xv–xviii (arguing that Pound's later ideas still retain their validity and should now have a force that they did not enjoy at their own time).

ideas—realism, a return to doctrinalism, legal process, the rise of neo-conceptualist moral and economic theories, critical legal theory, the resurgence of pragmatism, and interdisciplinarity<sup>249</sup>—procedure has stayed the course set by Pound a century ago.

Nor is the procedural community engaged in efforts to discover or recover ideas that might relieve the pressures that the modern world has created for Pound's system. Rarely does our scholarship (and here I refer to the collective work of the academy, the bench, and the bar) reexamine the balance of foundational principles of civil procedure when it discusses how to handle this point or reform that matter; even more rarely does scholarship criticize the foundations of our system or suggest either new ideas or a new procedural paradigm.<sup>250</sup>

The result has been a reemergence of procedural formalism: the application of existing rules with little attention to the larger directions in law and society. Pound was aware that procedural rules required a certain formal dimension,<sup>251</sup> but he tried to integrate his substantive and procedural system to work in tandem to stamp out an excessively formal approach. And that fact is the larger point we now miss in Pound's insights. Pound promoted a single idea—discretion in both substantive rules and in procedural administration of those rules—as the antidote to the malaise of the legal world of the early twentieth century. But that world and its problems are not our world and our problems. We deserve a procedural system geared to our circumstances.

The modern grand theories of substantive law fail where Pound succeeded: They do not consider the procedural system that gives the theories their greatest effect.<sup>252</sup> Most of the great legal philosophers

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249 For descriptions of some of the jurisprudential movements up to 1980, see G. EDWARD WHITE, *TORT LAW IN AMERICA* (1980). On critical theory, see, for example, Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). On the resurgence of pragmatism in the 1980s and 1990s, see, for example, Symposium, *Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990). On the rise of interdisciplinary scholarship, see, for example, Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314 (2002).

250 Some procedural scholarship is theoretically sophisticated and potentially paradigm-shifting. See, e.g., DUE PROCESS: NOMOS XVIII (J. Pennock & J. Chapman eds., 1977); Mashaw, *supra* note 96; Michelman, *supra* note 96.

251 See *supra* notes 29, 63 and accompanying text.

252 The one exception is law-and-economics scholarship, which easily fits the minimization of litigation expenses and many other procedural issues into its larger jurisprudential world view. See, e.g., POLINSKY, *supra* note 164, at 135–46; POSNER, *supra* note 116, §§ 21.1–18. But even this scholarship has its imaginative limits. Economic analysis still tends to take as a baseline many of the major foundational principles of

of the past century devote scant attention to questions of procedure; and when they do, they typically discuss procedure at a level of platitudinous generality that concerns criminal more than civil procedure.<sup>253</sup> Pound is as responsible as anyone for this failing, because he convinced us that procedural rules were a matter of mere administration that could deliver justice seamlessly.<sup>254</sup> The failing is nonetheless unfortunate on two dimensions. First, procedural thought is deprived of a fertile source of ferment. Second, describing the optimal practical processes needed to administer a substantive theory helps us to take a fuller measure of the theory itself. Although an ideal substantive theory has intrinsic value, lawyers are people of the world, and a theory that cannot be practically applied serves as its own criticism in most legal circles. By neglecting procedure, modern jurisprudence neglects its opportunity to be efficacious.

To Pound's credit, he understood that procedure was *about* something important. It was a critical dimension of his larger theory of law, and was a central component of his program for systematic legal reform. We have lost that sense today. We remain mired in a procedural no-person's land. We continue to use a procedural system designed to fight a century-old jurisprudential war that no longer

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procedural law, and then either seeks to justify them in economic terms or suggests modest changes in rules. For instance, *Mathews v. Eldridge*, 424 U.S. 319 (1976), with its three-factor cost-benefit analysis for determining the constitutionality of taking away certain procedural protections, is often regarded as a high point in economic thinking about procedural questions. *Id.* at 335. But *Mathews v. Eldridge* accepted as given a baseline of adversarial process, and asked only whether departures from the baseline were constitutional; it did not arrange its three factors into a mathematically precise marginal-cost formula, nor did it purport to hold that the most efficient procedural system was constitutionally required. In other contexts, the Supreme Court has made clear that certain procedural protections are constitutionally required without regard to the arguable economic inefficiencies they create. *See, e.g.,* *Richards v. Jefferson County*, 517 U.S. 793 (1996); *Martin v. Wilks*, 490 U.S. 755 (1989); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

253 For two examples, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 72–103 (1985); RAWLS, *supra* note 83, at 54–60, 235–43. On questions of adjudication, Professor Rawls's work is heavily influenced by his colleague, Lon Fuller. *See* RAWLS, *supra* note 83, at 59 n.6, 235 n.20, 238 n.21; *see also* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 783–91 (1989) (comparing Fuller's and Rawls's views on the nature of the rule of law). Fuller was perhaps not a "great" legal philosopher, but he took procedural issues in the civil context seriously. *See* Fuller, *supra* note 90.

254 A related reason is that legal realism, with which Pound was loosely associated and which paid a great deal of attention to questions of law and adjudication, is not treated seriously by most contemporary legal philosophers. *See* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997).

rages.<sup>255</sup> Procedure is not oriented to present theoretical turns in substantive law. It is not deeply theorized as an independent value system. Until we see procedure as both a source of and a laboratory for important ideas, we cannot solve the other pressures that procedure faces.

### III. DIRECTIONS FOR PROCEDURAL REFORM

In his imaginative survey of human civilization, Alfred North Whitehead distinguished between Hellenic and Hellenistic eras in history. In the former, as in the early days of Athenian democratic culture, a brilliant new idea dawns; innovation, excitement, and reaching beyond known modes of discourse and structure abound. In the latter, as in the Middle Ages or the Renaissance, concentration, thoroughness, and scholasticism work the original idea into a detailed and specific set of institutions and structures—losing in the process the freshness of the original insight or the desire to strive toward even greater possibilities.<sup>256</sup> Whitehead argued that both types of creativity were necessary to progress, that Hellenic striving was generally superior to Hellenistic maintenance,<sup>257</sup> and that both were superior to listless times when societies pursued no creative ideals.<sup>258</sup>

Following Whitehead's distinctions here, Pound's 1906 speech and his work over the ensuing several years was our most recent period of procedural Hellenism. We became more Hellenistic as we moved from the establishment of the Federal Rules of Civil Procedure through the procedural reforms of the 1960s and early 1970s—trying to work out in more detail specific aspects of the original vision while counteracting the vision's side effects. By the 1980s our direction in procedure was no longer as clear. The costs of Pound's vision were becoming apparent. But we had no Hellenic moment—no new

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<sup>255</sup> Pound's war was intended to eliminate excessive formalism. See *supra* notes 14–15 and accompanying text. Advocates of some type of formalism remain. See Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988). Moreover, anyone who reads legal briefs and judicial opinions, especially at the trial level, can find a great deal of evidence of legal formalism's persistence in practice. But modern formalism operates in a very different way than formalism of a century ago. The adage that "we are all realists now," see Leiter, *supra* note 254, at 267 (discussing this "cliché"), conveys the truth that questions of fact and policy bear on our collective consideration about the arrangement and effects of legal rules, whether or not they rise to the surface in opinions and briefs.

<sup>256</sup> See ALFRED NORTH WHITEHEAD, *ADVENTURES OF IDEAS* 134–38 (1933).

<sup>257</sup> See *id.*

<sup>258</sup> See *id.* at 357–60.



idea—to inspire us. Instead, we tossed upon the ocean, buffeted in the 1980s by concerns for inefficiency and by disaffection with the sharp practices of a lawyer-driven, costly, and dilatory litigation system.<sup>259</sup> Political pressures to reform procedure to achieve short-term policy objectives blew in during the 1990s.<sup>260</sup> Transnational pressures<sup>261</sup> and the concern for the “vanishing trial”<sup>262</sup> brought water into the boat in the 2000s. Nonetheless, if I might extend the metaphor a last time, we are still afloat on Pound’s ocean. We cannot—or at least have not—imagined a fresher and better approach to procedure.

Like Pound’s 1906 speech, this Article has focused principally on diagnosis of present problems rather than the prescription for a new Hellenic moment. Although some of the rough outlines were already apparent in 1906, Pound left his prescription to future articles written over the next half-dozen years. I must also leave the bulk of the prescription to future work. But allow me to adumbrate a few of the central points of a new program for procedural reform. In many ways, they mirror those that Pound made—not at the level of detail, but at the level of structure and animating spirit.

#### A. *A New Merger*

When Pound spoke, the federal courts and the courts of most states operated with separate spheres of law and equity. An ancient peculiarity of English law transplanted to America, the separate systems had little justification in theory but deep-rooted standing in history. As a purely practical matter, the use of juries only on the common law side and the influence of canon law’s inquisitorial method on the equitable side generated vastly different procedural practices. In 1906, when Pound urged the abolition of the distinction, the procedural chasm between the systems had already broken down in some jurisdictions, and it was ripe to break down everywhere.<sup>263</sup>

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259 For some of the procedural changes developed in and since the 1980s, see *supra* note 106.

260 See statutes cited *supra* note 103.

261 See *supra* notes 120–48 and accompanying text.

262 See *supra* note 156 and accompanying text.

263 For instance, states that adopted code pleading typically merged the two systems and created a single set of procedural rules applicable to both law and equity (with due allowances, of course, for the peculiar needs of the jury in old common law actions). See FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 1.7 (5th ed. 2001). Even in jurisdictions in which the two forms of justice remained separate, the systems of procedure were drawing closer together. For instance, equity traditionally eschewed the common law’s preference for live testimony, relying instead on written deposition

A century later, the challenge is no longer to merge law and equity; that was done at the federal level in 1938.<sup>264</sup> Our challenge is greater. We must merge our present legal procedure with the “new equity”: the disputes that are resolved through alternate methods of dispute resolution. Just as equity arose in response to the failings of the common law—failings that were in their day almost entirely procedural in nature<sup>265</sup>—alternative methods of dispute resolution have arisen largely in response to perceived procedural deficiencies in the modern administration of legal rules.

The claim that ADR is mostly a response to procedural deficiencies might seem surprising at first blush. But if modern procedural rules delivered fast, cheap, and accurate results, and if courtrooms were available in unlimited supply, wouldn't the likeliest fatality be ADR? Four situations might arguably lead parties to sign an arbitration clause: (1) dissatisfaction with the substantive legal rule that will be applied in all relevant jurisdictions; (2) dissatisfaction with the substantive legal rule that will be applied in some of the relevant jurisdictions; (3) dissatisfaction with the procedures that will be applied in all relevant jurisdictions; and (4) dissatisfaction with the procedures that will be applied in some of the relevant jurisdictions. Assuming that the potentially aggrieved party has sufficient bargaining power, the second situation can be handled by a choice-of-law clause, and the fourth by a forum selection clause.<sup>266</sup> As for the first situation, if the

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testimony and documents for evidence. After the Equity Rules of 1912 that slightly post-dated Pound's speech, the federal courts generally heard the testimony of witnesses “orally in open court.” FED. EQUITY R. 46, 226 U.S. 661 (1912) (repealed 1938). For a brief discussion of the 1912 Rules, see *supra* note 4.

264 See FED. R. CIV. P. 2.

265 Sometimes the story is told that equity arose to redress the common law's substantive failings—for instance, by creating a law of trusts or by recognizing fraud as a contractual defense when the common law refused to do so. But this story incorrectly assumes that medieval lawyers thought in substantive terms. The reason that the common law failed to create trusts or recognize fraud as a defense was that common law judges refused to create forms or procedures to raise these issues. Thus, the impetuses for the rise of equity were the common law's increasing procedural rigidity and the limitation of the common law's procedures (especially the fallible jury). People did not perceive equity to be applying substantive rules that varied in any significant different way from those applied at law. F.W. MAITLAND, EQUITY 4–6 (A. H. Chaytor & W. J. Whittaker eds., 2d ed., 1936).

266 On the enforceability of a choice-of-law clause, see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Knott v. Botany Mills*, 179 U.S. 69 (1900). On the enforceability of a forum selection clause, see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Choice-of-law and choice-of-forum clauses can be negotiated in the same contract. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). If a party has sufficient bargaining power to obtain an arbitra-

legal norms are universally accepted, it is unlikely that an arbitrator will choose a rule of decision that varies significantly from the law.<sup>267</sup> Therefore, the principal reason for selecting a nonlitigated solution must be the perceived disadvantages (such as expense, delay, and unpredictability) of the litigation system's procedural rules. ADR must nevertheless be seen as a rebellion against the undesirable consequences of modern procedural rules, in the same way that equity was a rebellion against the undesirable procedural effects of the common law system.

The rise of ADR is the analog to the rise of equity in other ways as well. ADR promises a decision tailored to the exact facts (I am tempted to say "the equities") of each dispute. As a result, the decisions typically have little precedential effect in later circumstances—just as equity, with its mission to do "complete justice" between the parties, operated in its early centuries with little sense of *stare decisis*.<sup>268</sup>

One historical irony blunts the equity-ADR analogy. Equity arose in large measure from two causes—concern with juries and the *inflexibility* (along with the attendant effect of failing to reach the merits) of common law procedure.<sup>269</sup> Today, two of the principal reasons that parties opt for ADR are concern for juries and the *flexibility* (along with the attendant effects of costs and delay) of modern procedure. The analogy nonetheless holds, for, like equity, mediation and arbitration promise even more flexibility than the litigation procedures they replace. The one significant difference from equity, which is also the reason that the parties are willing to accept such additional flexibility, is that mediation and arbitration often employ sophisticated and expert decisionmakers. Expert decisionmakers possess the background knowledge to frame the dispute, often require only incremental disclosures of information in order to render a decision, and can ignore procedural niceties in favor of deciding the case on its merits.<sup>270</sup>

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tion clause, he or she presumably has the power to obtain a choice-of-law or forum selection clause.

267 See Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) (noting that eighty percent of domestic commercial arbitrators "thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing").

268 The concept of *stare decisis* did not become established in equity until 1676. See *Cook v. Fountain*, (1676) 3 Swans. 585, 36 Eng. Rep. 984 (Ch.); *supra* note 191 and accompanying text.

269 See *supra* note 265 and accompanying text.

270 See Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2341–42 (2004). Of course,

In a sense, expert arbitrators and mediators are the true descendants of the judges that Pound dreamed of educating—experts knowledgeable about the social sciences and business practices on which the resolution of disputes should turn.<sup>271</sup> Their control over both the establishment of the norms used to determine the dispute and the dispute resolution process provides the cohesive integration of substance and procedure that Pound sought for the litigation system. At least this is the theory, and perhaps also the practice on ADR's best days. Unfortunately, arbitrators and mediators do not always possess relevant expertise; and when they do, the fear exists that they can become captured by it. There is little doubt that a mediator with a career as a union negotiator will frame the discussions differently than the mediator with a career in management-side labor law. Likewise, there is reason to doubt the neutrality of securities arbitrators whose livelihood depends on arbitration clauses negotiated by the industry that establishes and supports their arbitration practices.<sup>272</sup> I do not mean to suggest an inherent bias in all ADR processes involving third-party neutrals, or to suggest that judges have no biases. Nonetheless, unlike litigation, the third-party mediator or arbitrator declares the behavioral norms, controls the procedure, and determines the facts. Not surprisingly, in many mediations and arbitrations, the principal fight concerns the identity of the mediator(s) or arbitrator(s)—precisely because everyone understands how important this preliminary decision is to the outcome.<sup>273</sup>

These concerns, which existed as well for Pound's ideal judge, distinguish both Pound's vision and ADR from traditional equity, in which the Chancellor typically did not possess relevant expertise. Despite this difference, we ignore the parallels between the rise of equity and the rise of ADR at our peril. As our ancestors painfully learned over the course of centuries, maintaining a system split between law and equity is disastrous and ultimately indefensible. Similarly, our procedural imagination must find ways to reach across the litigation-

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arbitrators do not always possess the relevant expertise. See *McDonald v. City of West Branch*, 466 U.S. 284, 290–91 (1984).

271 See *supra* note 18 and accompanying text.

272 Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 164–65 (2004).

273 In many mediation or arbitration agreements, each party chooses one mediator or arbitrator, and they then choose the third mediator or arbitrator jointly. In the event that the parties cannot agree, then upon agreement an external organization such as the American Arbitration Association can appoint the third neutral. See, e.g., AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES M-4, R-11 to R-17 (2005), available at <http://www.adr.org/sp.asp?id=22440>.

ADR divide, and to merge the best of both systems. One obvious subject for consideration is the creation of expert judges sitting in specialized courts, akin to Delaware's Chancery Court that deals with corporate litigation.<sup>274</sup> But that idea is only the tip of the iceberg.

Similar arguments might be made about the need to merge the procedural systems of various countries into a transnational procedural code. The "new equity" could describe the litigation systems of other countries—or at least a system of transnational procedural rules that seeks compromise between the American system and those of other nations. Thus far, however, the comparison between foreign or transnational procedural norms and English equity seems inapt. A set of transnational rules has just been adopted,<sup>275</sup> and it is far too early to say if these rules will pose a sufficiently strong counterpoint to the procedures used in litigation and international arbitration to be deemed a "new equity." These transnational rules contain studied ambiguities at critical points, a fact that understandably leaves room for each country to meld local practices into the rules but that makes less likely the near-term development of a single, coherent procedural alternative that can compete against American litigation in the way that equity competed against law.

An ambitious effort might be to seek a merger not just of litigation and ADR, but of litigation, ADR, *and* the procedural norms of other countries. Such triangulation requires immense imagination. In some ways, two systems will intractably be pitted against one; for instance, civil juries are often used in American litigation, but not typically in ADR or the litigation systems of foreign countries.<sup>276</sup> In other ways, each system is pitted against the other; for instance, American litigation creates significant opportunities to exercise discretion in ad-

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274 Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 708–15 (2002) (comparing Delaware's "high quality" Chancery Court to several other proposed or established tribunals with some business expertise).

275 See ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (Am. Law Inst. & UNIDROIT 2004).

276 On the use of juries in American litigation, see *supra* notes 140–45 and accompanying text. The only ADR technique that generally uses juries is the summary jury trial, which is a form of mediation (if nonbinding) or arbitration (if binding). Summary jury trial is rarely employed. See generally Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (noting infrequent use, and discussing benefits and drawbacks of summary jury trial). For the lack of juries in other legal systems, see *supra* note 140 and accompanying text.

ministering procedural rules,<sup>277</sup> ADR creates even more opportunities for the arbitrator or mediator to exercise both procedural and substantive discretion, and the litigation systems in much of the world deeply distrust judicial discretion in either procedural or substantive matters.<sup>278</sup> Moreover, creating a unified procedural system is more complex than resolving the discrete procedural components of juries, judicial discretion, discovery, joinder, and the like. Procedure is like a spiderweb, and a tug on one strand inevitably affects other strands as well.<sup>279</sup> The problem is made still more complex because common law and equity were two forms of litigation run under the auspices of a single government that was capable of collapsing them together with a stroke of the pen.<sup>280</sup> The same cannot be said of merging litigation and ADR, or merging the systems of the United States, Germany, and China.

My sense is that, for now, the best course is to concentrate our attention on the merger of litigation, mediation, and arbitration. The task, while hardly simple, is simpler. But any solutions that emerge from this effort must then be evaluated against the competitive pressures that such solutions will face from the international order.

### B. *The End of Juries?*

One of the matters on which ADR and foreign procedural systems agree is the refusal to use juries as factfinders. Even the American litigation system refuses to use juries in the significant percentage of cases that are equitable in nature. The most recent data on the infrequency of civil jury trial suggest a very limited role for juries even in cases in which they are nominally available.<sup>281</sup> And even in that tiny fraction of cases, strong jury controls exist to override unreasonable jury decisionmaking.<sup>282</sup> The trend line is clear. The civil jury is a

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277 See Mentschikoff, *supra* note 267, at 861; Rau, *supra* note 121, at 509 (noting that international "arbitrators are to be allowed a wide margin of creativity in resolving a dispute, or in devising a remedy, as long as they take care to deploy the right language").

278 See *supra* notes 209–10 and accompanying text.

279 I borrow the spiderweb analogy from Fuller's description of polycentrism. See Fuller, *supra* note 90, at 395.

280 See Act of June 19, 1934, Pub. L. No. 73-415, § 2, 48 Stat. 1064, 1064 (authorizing the Supreme Court to merge law and equity); FED. R. CIV. P. 2 (merging the two systems).

281 See *supra* note 156 and accompanying text.

282 See FED. R. CIV. P. 49(a)–(b), 50(a)–(b), 51, 59(a)(1); see also Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195 (2000) (examining the history of the power to comment); Jack B. Weinstein, *The Power and Duty of Federal Judges To Marshall and Comment on the Evidence in*

dyng institution in America, an unwelcome institution in other countries, and a banished institution in alternative methods of dispute resolution.

Despite his proclivity for tradition and organic growth, even Pound defended juries only tepidly.<sup>283</sup> The jury has been studied extensively since Pound's day, and like any human institution, it has its strengths and its weaknesses.<sup>284</sup> Whatever the jury's actual merits, negative perceptions about the jury's unpredictability linger among foreigners, domestic business interests, and portions of the public. In terms of people's willingness to accept adjudicatory outcomes, perceptions matter.

Writing on a clean slate, lawyers negotiating over the shape of a hypothesized procedural system would be unlikely to make jury trial a sticking point that would kill a deal. Jury trial would at most be a negotiating point, useful to secure a more favorable deal on other features that mattered more. Of course, we do not write on a clean slate. Federal and state constitutions present an important series of hurdles. Furthermore, because citizens' participation in democratic governance is a critical argument for the use of juries,<sup>285</sup> the conversation about the future of jury trial must expand beyond the shape of a procedural system to include the broader question of the scope of participatory rights in government. Finally, because juries are the most visible and symbolic manifestation of our system's commitment to decentralized adjudicatory (and governmental) power, any conversation about abolishing the civil jury must consider the cultural and political importance of decentralized decisionmaking. Of course, the abolition of juries does not end the American system's commitment to decentralization; other, more significant manifestations remain. Indeed, the most significant devolution of adjudicatory authority is not the jury; rather, it is our system's willingness to permit, and in recent

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*Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 163 (1988) (arguing for greater use of the judicial power to comment on the evidence as a jury-control device). See generally ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 243-317 (2001) (describing rules of evidence and various other procedural rules that control the jury's decisionmaking).

<sup>283</sup> See *supra* note 80 and accompanying text.

<sup>284</sup> For a brief summation of the jury's strengths and weaknesses as a decisionmaking institution, as well as a bibliography, see TIDMARSH & TRANGSRUD, *supra* note 129, at 1237-39. See also Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006) (evaluating jury's difficulties in understanding instructions).

<sup>285</sup> See JAMES GOBERT, *JUSTICE, DEMOCRACY AND THE JURY* 99-160, 223-24 (1997); NANCY S. MARDER, *THE JURY PROCESS* 10-17 (2005); WORLD JURY SYSTEMS, *supra* note 140, at 7-13.

years to foster actively, private forms of ADR that place decisionmaking about a dispute's resolution (or, in the case of arbitration, about the process for resolution) into the hands of the disputants themselves. If a merger of adjudicatory and ADR methods can compensate for the jury's decentralizing role in other ways, one argument for the retention of juries falls to the wayside.

I raise the possibility of eliminating the right to a civil jury trial with a heavy heart. I believe in juries, in the sincerity and quality of their work, and in the vital role they play in our democracy. But logic, not fond attachments, must underlie the reform of civil procedure.

### C. *The Fate of the Adversarial System*

Unlike his tepid defense of juries, Pound provided no defense of the adversary system; to the contrary, it was the most memorable foil of his 1906 speech.<sup>286</sup> Because he believed that other procedural reforms could temper the win-at-all-costs gamesmanship of this ancient institution, he never proposed its abolition—even though it seemed the most evident and logical prescription for his diagnosis of the ills of the American procedural system.<sup>287</sup> For the most part, Pound's bet did not pay off. Complaints about win-at-all-costs adversarialism still abound; and, due in part to new bodies of substantive law and the rise of mass injuries, the system is now more costly and prone to delay than Pound could have imagined. The marriage of adversarial zeal and loosely textured, wide-open procedural rules has required significant case management controls that have turned modern American litigation into a hybrid between adversarial and inquisitorial methods. Just as the trend line points away from jury trial, the trend line points away from a strong form of adversarialism.

As with civil juries, however, outright abandonment of the adversarial system presents a complicated picture. The constitutional pedigree of the adversarial system is not as unambiguous as that of civil jury trial, but aspects of the system find footing in the Due Process Clause.<sup>288</sup> Like the civil jury, the adversarial system constrains and decentralizes the power of the judicial branch, and has assumed a cultural significance in the American understanding of how litigation should work. Unlike the civil jury, an adversarial approach is used

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286 See *supra* notes 49–59 and accompanying text.

287 See *supra* notes 73–82 and accompanying text; see also Shapiro, *supra* note 111, at 1975–76 (noting that the drafters of the Federal Rules also had faith that the excesses of the adversarial system could be controlled).

288 See TIDMARSH & TRANGSRUD, *supra* note 232, at 2–3; *supra* note 95 and accompanying text.



both in American ADR methods and in other procedural systems in the world. Taken together, these facts make a case for maintaining some form of an adversarial approach to litigation.

Stripped of constitutional, cultural, and political overlays, the issue of the adversarial system's future is also a functional one. Adjudication has certain functions it must perform—principally, presentation of claims and defenses, issue definition, evidence gathering, marshaling of evidence and arguments, determination of law and facts, application of fact to law, declaring appropriate remedies, and ensuring compliance with those remedies.<sup>289</sup> Interwoven into the question of how to accomplish these functions is the question of who should accomplish them. The adversarial system allocates the first four functions to the parties (or, typically, their lawyers), and the latter four functions to the court (which, in the American version, sometimes redelegates the factfinding and application functions to the jury). In the inquisitorial approach, most or all of the first three functions are assumed by the court, with more limited input from the parties and their lawyers. No compelling a priori arguments demand the choice of one system over another.<sup>290</sup> Culture, tradition, and political allocations of responsibility have filled the logical void. Such factors are often the most difficult to reform or change.

Therefore, both in his strong critique of American adversarialism and in his unwillingness to do much about it, Pound may have been right. American legislatures seem unlikely to invest in the expanded and professionalized judiciary that the move to a purer form of the inquisitorial method would require.<sup>291</sup> It is far from clear that the American public would be willing to give up on the opportunity to retain a “hired gun” to protect an individual's interests, or that the Constitution would tolerate significant departures from the adversarial approach—especially when it is not certain how much more effective an inquisitorial approach will be.

At the same time, we need to be more realistic about what we can expect the adversarial system to do. Even in routine cases, the system

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289 See *supra* note 130 and accompanying text.

290 Fuller's work constitutes the most compelling argument for adversarial process. Fuller, *supra* note 90. On both descriptive and normative levels, however, his argument has been contested as a correct analysis of American litigation. See Chayes, *supra* note 88; Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). As telling, Fuller's argument illegitimizes the nonadversarial procedural systems of most of the non-Anglo-American world.

291 Cf. Langbein, *supra* note 79, at 848–55 (discussing the professional nature of the German judiciary)

provides less litigant control than the model suggests;<sup>292</sup> and in complex cases, litigant control over attorney behavior is virtually nonexistent. We must create an ethical system that realistically reflects the roles of attorneys and their clients.

Moreover, admitting that some form of modified adversarial system will be with us for the foreseeable future means that we need to consider other reforms that will make the system run more effectively. In routine cases, the adversarial system seems to run well enough; it runs into the greatest difficulty in large-scale litigation.<sup>293</sup> Thus, the mixture of wide-open joinder and the adversarial system, which has created intractable procedural and ethical issues, might need to be reconsidered. More generally, we need to rethink the place of judicial discretion in an adversarial system. The common law system showed the difficulties of the adversarial system hitched to rigid (and rigidly enforced) procedure, but the past seventy-five years have shown that hitching the adversarial system to a procedural system with discretionary rules of pleading, discovery, and joinder has not been entirely successful either. Recent reforms that have tried to make the marriage work have focused on increasing case management,<sup>294</sup> cutting discovery at the margins,<sup>295</sup> penalizing apparent frivolity in pleadings, mo-

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292 In reality, lawyers and clients in routine adversarial litigation have little contact, and clients report that they have little sense of control over their lawsuits. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89.

293 See Kakalik et al., *supra* note 107, at 636 ("Subjective information from our interviews with lawyers also suggests that the median or typical case is not 'the problem.' It is the minority of the cases with high discovery costs that generate the anecdotal 'parade of horrors' that dominates much of the debate over discovery rules and discovery case management.").

294 In 1983, amendments to the Federal Rules of Civil Procedure added most of the present Rule 16, explicitly conveying to judges significant case management powers. Amendments to Federal Rules of Civil Procedure (*1983 Amendments*), 461 U.S. 1095, 1100-03 (1983). In 1993, these powers were augmented. Amendments to Federal Rules of Civil Procedure (*1993 Amendments*), 507 U.S. 1089, 1116-18 (1993).

295 In 1983, amendments to the Federal Rules of Civil Procedure added a proportionality requirement to Rule 26(b). *1983 Amendments*, 461 U.S. at 1103-04. In 1993, this requirement was given its own section (Rule 26(b)(2)), certain forms of mandatory disclosure were either required or made optional (Rule 26(a)(1)-(3)), discovery planning became mandatory in many cases (Rule 26(f)), depositions were limited in number and duration (Rules 30(a)(2)(A), (d)(2)), and interrogatories were limited in number (Rule 33(a)). *1993 Amendments*, 507 U.S. at 1118-22, 1125-26, 1129, 1131-32, 1136. In 2000, the ability of federal district courts to opt out of the Rule 26(a)(1) mandatory disclosure requirement was eliminated, and Rule 26(b)(1) was narrowed to allow automatic discovery only for matters relevant to claims and defenses; discovery into matters relevant only to the subject matter of the

tions, and discovery,<sup>296</sup> and easing the standard for granting summary judgment.<sup>297</sup> But all of these reforms threaten to make the determination of cases on their merits less likely. Because the potential to thwart determinations on the merits is one of the principal arguments against the American adversarial system, these reforms are reinforcing one of the worst features of the adversarial system even as they seek to stamp out other evils.

In the end, it may be that the only alternatives to make the adversarial system work are either to limit the types of cases in which the system is used (for instance, just to fairly routine matters), or to create economic incentives that align the parties' interests with social goals (for instance, making each party pay for the discovery it requests or capping attorneys' fees and hourly rates in such a way that lawyers have little reason to churn cases). Pound noted the way in which economic incentives distorted the proper working of the adversarial system a century ago.<sup>298</sup> If the system can survive another century, we might need to become more serious about the reforming the economics of litigation and the education of lawyers.<sup>299</sup>

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lawsuit required a showing of good cause. Amendments to Federal Rules of Civil Procedure, 529 U.S. 1155, 1162–65 (2000).

296 In 1983, amendments to the Federal Rules of Civil Procedure expanded Rule 11 to create, for the first time, significant sanctions on pleadings, motions, and other papers that did not have a reasonable grounding in fact or law. The same amendments also created Rule 26(g), which is the rough equivalent to Rule 11 for discovery requests and responses. *1983 Amendments*, 461 U.S. at 1099–100, 1104. In 1993, the incentives for filing Rule 11 motions against opponents were limited in order to prevent sharp practices that had arisen as a result of unintended consequences in the 1983 version of Rule 11. But the core requirement that a pleading, motion, or paper have a reasonable basis was maintained and even expanded. *1993 Amendments*, 507 U.S. at 1111–14.

297 This easing was accomplished without a change in the Federal Rules; rather, in three cases decided in 1986, the Supreme Court softened three prior precedents that had collectively restricted the broad use of Rule 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . .”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

298 See *supra* notes 73–76 and accompanying text.

299 See John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 994–95 (1990).

#### D. *The Need for Ideas*

Great reform movements require the fuel of a pressing social need, the oxygen of optimism, and the spark of a great idea.<sup>300</sup> If the social need to reform the litigation system exists, then we also need a theory to create the optimism and spark the reform. In a sense, this entire Article has been about ideas—those that have worked and those that haven't over the course of the last century. The present need is to articulate a theory that can guide us into the future. A guiding theory does not necessarily mean a new theory. As we have seen, many of Pound's ideas were not new; rather, they were rediscoveries of ancient ideas applied to new social circumstances. But a theory of some sort is required. Reform without theory is likely to be pragmatic, incremental, and above all political—as those in power tweak the rules slightly in one direction or another. It is unlikely to meet the pressures of the future.

Let me suggest a couple of characteristics that a successful theory should possess. First, the theory should be simple and appealing. Pound's "on the merits" mantra is an example. It is hard to resist its fundamental truth. Indeed, today we look back over the centuries of prior legal practice and wonder how the legal system could ever have resisted this aphorism's beauty and simplicity. Of course, the devil with such simple theories is in their detail. But more subtle and complex ideas bear a heavy burden of persuasion. Many theories that can spearhead reform have a "but of course" quality to them.

Second, the theory should connect procedure and substance. As I have said, one of Pound's gifts as a legal philosopher was to see the entire legal system—from the loftiest jurisprudential ideals to the lowliest trial of a railroad accident—as an integral whole.<sup>301</sup> But Pound's great success was also his great failing: he created an integrated jurisprudential theory whose procedural half seemed so preferable to the past that it hung on even as his substantive half slipped from memory. The result is that procedure and substance have become disconnected.

As a result, one of two types of procedural theorizing now seems necessary. The first is to try again to unite substance and procedure. For instance, if economic efficiency should be the direction of the substantive law, then we should make procedural efficiency the guiding principle of our procedural system; if the substantive law aims to

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300 Whether the social need or the idea comes first is another "chicken and egg" question that need not distract us.

301 See *supra* notes 20, 37 and accompanying text.

achieve greater liberty and autonomy,<sup>302</sup> we should design the procedural system to vindicate these values instead. A second direction is to create a robust procedural theory whose norms operate independently of the substantive law, and with which the substantive law must seek accommodation. Various scholars have suggested a number of possible values that procedure might advance,<sup>303</sup> but, with the exception of Lon Fuller,<sup>304</sup> they have not attempted to sketch the full outline of the procedural system that might flow from these norms.

As I have suggested, the former approach—harnessing both substance and procedure in the same yoke—creates certain risks when procedure becomes the frictionless conduit for undesirable social policy.<sup>305</sup> Despite the danger, however, this approach seems the better alternative. Lawyers have no monopoly on excellent philosophical thought, or on sound economic policy. But we do have a millennium-long tradition of creating and administering adjudicatory structures. As Holmes observed, “The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.”<sup>306</sup> Insisting that substantive theory and policy integrate procedural theory and history perfects substantive law, and also respects the individuals who encounter substantive legal rules in adjudicatory contexts. The next great procedural theory must reconnect procedure and substance.

### CONCLUSION

Unlike Roscoe Pound, in 1906 James Andrews was a household name in legal circles. He was a well regarded lawyer from New York who was active in the profession. When Pound finished his “white flame of progress” speech, another New York lawyer, the inveterate legal reformer Everett P. Wheeler,<sup>307</sup> immediately moved that 4000

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302 As mentioned above, history, tradition, and culture must integrate with theory to shape a procedural system. See *supra* notes 242–43 and accompanying text.

303 See Allison, *supra* note 96, at 671–82 (listing six values); Michael Bayles, *Principles for Legal Procedure*, 5 *LAW & PHIL.* 33, 45–56 (1986) (listing nine values); Bone, *supra* note 96, at 919 (listing three metrics to evaluate procedural rules); Bush, *supra* note 96, at 905–20 (listing seven values). See generally TIDMARSH & TRANGSRUD, *supra* note 129, at 3–27 (discussing possible procedural norms).

304 See Fuller, *supra* note 90.

305 See *supra* text following note 87.

306 HOLMES, *supra* note 9, at 1–2.

307 Wheeler had been interested in issues of procedural reform since the 1890s, see Burbank, *supra* note 4, at 1041 n.108, 1045 n.126, and chaired a special ABA commit-

copies of the speech be printed and circulated among the bar and bench. The motion required unanimous consent. Andrews took the floor, decried Pound's "drastic attack," and offered "to show the *contrary of every one of the material positions taken in the paper*."<sup>308</sup> Andrews stymied immediate passage of Wheeler's motion, and forced the issue to be carried over to the business meeting two days later.

In Wigmore's recollection, "[t]he conservatives were hotly impatient to suppress the whole matter," and dominated the business meeting.<sup>309</sup> Andrews argued that the early twentieth-century American judicial system "is the *most refined and scientific system ever devised by the wit of men*," and thought Pound's attacks on the judiciary "unconscionable."<sup>310</sup> Another lawyer from Texas thought the speech was an effort "to destroy that which the wisdom of the centuries has built up."<sup>311</sup> Only Wheeler rose in defense of Pound. Wheeler ultimately agreed to amend his motion to refer the matter to the ABA Committee on Judicial Administration and Remedial Procedure. The "conservatives" stridently opposed even this motion, which nonetheless passed.<sup>312</sup> The reference led to the formation of a special ABA committee to study the "evils suggested in Mr. Pound's paper."<sup>313</sup> The rest, as we like to say, is history.

If Wigmore's account is true,<sup>314</sup> the reception to Pound's speech proves again the scriptural admonition about the prophet's difficulty

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tee that, in 1909, made a number of recommendations to reduce cost and delay, see Everett P. Wheeler, *The American Bar Association Recommendations as to Judicial Procedure*, 21 GREEN BAG 57 (1909). The recommendations bore "unmistakable evidence of the Pound influence." Justice Tom C. Clark, Address at the Proceedings Honoring Roscoe Pound (June 17, 1964), in 35 F.R.D. 247, 253 (1964); see Wheeler, *supra*, at 57 (stating that Pound's speech precipitated the formation of the special committee). In the early 1920s, although in failing health, Wheeler chaired an ABA committee that helped lead to passage of legislation limiting the Supreme Court's appellate jurisdiction and expanding its certiorari jurisdiction. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1668, 1674 (2000).

308 Wigmore, *supra* note 1, at 177 (internal quotation marks omitted).

309 *Id.*

310 *Id.* (internal quotation marks omitted).

311 *Id.* (internal quotation marks omitted).

312 *Id.*

313 Wheeler, *supra* note 307, at 57 (internal quotation marks omitted).

314 The accuracy of Wigmore's account, rendered thirty years after the fact, is uncertain. Pound's speech was published as part of the proceedings of the meeting. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 2, reprinted in 35 F.R.D. 273 (1964). Pound himself recalled far less strident opposition to his speech during the business meeting. The minutes of the meeting also suggest that the motion to refer the matter to the committee was not in doubt. Pound soon became a member of the ABA com-

in his or her own land.<sup>315</sup> Pound identified himself as a lawyer—a new kind of lawyer, no doubt, but nonetheless a professional whose first responsibility was to the profession and whose first obligation was the profession's improvement. With hindsight, we know that Pound's views carried the day—indeed, the century. But, in 1906, even he was unable to convince leading figures of the bar to recognize the seeds of change that had sprouted all around them, or to think imaginatively in light of the times.

Were that same young Pound alive today, he would still be identifying the seeds of social change, would still be dissatisfied with our procedural system, and would still wish to engage the academy and profession in the effort to imagine a procedural system capable of responding to the pressures of the present and the future—not a century-old past. Without question, Pound overplayed the strengths of his proposed solutions, and underplayed their weaknesses. His conservatism in matters touching on the legal profession blinded him to the logical endpoint of his own critique: the abandonment of adversarial process. As their unintended effects have become clear and new pressures have arisen, we have realized that Pound's concrete proposals for procedural reform are inadequate for our time. But Pound's insistence on examining the social consequences of legal arrangements remains as vital today as it was a century ago. Pound's greatest contribution—far more important than the principles and rules that Pound laid down for the historical times he faced—was his spirit of inquiry, of innovation, of integration of procedure and substance in the service of the common good.

So it must be for us. "The pure conservative," Whitehead once observed, "is fighting against the essence of the universe."<sup>316</sup> In other words, history no longer recalls James Andrews. History remembers Roscoe Pound.

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mittee to which Wheeler's motion was referred—suggesting that Pound was not the pariah described by Wigmore. James Andrews also served on the committee, which was already in the process of studying issues of expense and delay in American litigation. See Scott, *supra* note 4, at 1570–71. Wigmore, of course, was the preeminent scholar of the law of evidence, and seeing his credibility as an eyewitness come under attack presents a delicious irony.

315 See *Matthew* 13:57 (New Revised Standard Version) ("Prophets are not without honor except in their own country and in their own house.").

316 WHITEHEAD, *supra* note 256, at 353–54.