

# Book Reviews

## Metaprocedure

*Procedure.* By Robert M. Cover\*, Owen M. Fiss\*\* & Judith Resnik.\*\*\* *New York: The Foundation Press, 1988.* Pp. xxv, 1877. \$43.00.

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In January 1966, John Kelly was the victim of a hit-and-run accident that left him disabled. He began receiving Home Relief, a form of public assistance administered by the State and City of New York in August of the following year. Mr. Kelly then resided at the Broadway Central Hotel, but in December his public assistance caseworker directed him to move to the Barbara Hotel. With misgivings, Mr. Kelly did so, but subsequently left the Barbara because he feared being victimized by drunks and drug addicts. He moved into a friend's apartment. On January 8, 1968, Mr. Kelly learned that his caseworker had determined that he was no longer eligible for public assistance, apparently because he had violated his caseworker's direction to reside at the Barbara Hotel. On January 8 and again on January 16, Mr. Kelly sought an explanation from his caseworker at the Gramercy Welfare Center in New York City. Both times his caseworker refused an interview. Prevented from working by his

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disability, and now without any source of income, Mr. Kelly relied on the charity of friends to survive. He also brought a lawsuit challenging the legality of his termination.

That lawsuit, *Goldberg v. Kelly*,<sup>1</sup> reached the Supreme Court, which held that the State had violated Mr. Kelly's procedural due process rights. The Court's opinion broadly defined "property" rights protected by the due process clause to include government entitlements, and ruled that when the government sought to deprive Mr. Kelly of such property rights, due process required a prior hearing at which he might personally confront the evidence against him. Although later decisions have narrowed the sweep of *Goldberg's* reasoning,<sup>2</sup> it remains a much-discussed decision in the fields of constitutional and administrative law. Oddly, civil procedure teachers in the 1970s pretty much ignored the case.<sup>3</sup>

Except for Professors Robert Cover and Owen Fiss. They used *Goldberg v. Kelly* as the focal point for their fall 1974 course in Civil Procedure at the Yale Law School.<sup>4</sup> Around this case they assembled a set of badly xeroxed teaching materials exploring the values served by procedure and the structures underlying it. The materials included hundreds of pages of procedural due process opinions and articles about them, relegated the Federal Rules of Civil Procedure to a secondary role and excluded altogether such pedagogical chestnuts as *Sibbach v. Wilson & Co.*,<sup>5</sup> *Pennoyer v. Neff*,<sup>6</sup> and *Erie Railroad v. Tompkins*.<sup>7</sup> While the materials and the instruction did not ignore procedural rules and their interaction, the focus was larger. Why is procedure important (if at all)? What does fairness mean? Can procedural rules encourage better substantive results? And so on. Because the materials looked beyond the four corners of procedural doctrine, Fiss' fall 1975 class dubbed the course "Metaprocedure."<sup>8</sup>

Fiss and Cover worked on the materials for more than a decade, and

1. 397 U.S. 254 (1970). My account of Mr. Kelly's case is taken from his complaint, whose factual allegations were not denied in the litigation.

2. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

3. *Goldberg* is not reprinted, excerpted, cited or mentioned in any of the leading civil procedure casebooks published since 1970. (Caveat: J. CHADBOURN, L. LEVINE & P. SCHUCHMAN, *CASES AND MATERIALS ON CIVIL PROCEDURE* (2d ed. 1974), includes Supreme Court decisions citing *Goldberg*, but has no independent citation.)

4. See Fiss, *Tribute to Robert M. Cover*, 96 YALE L.J. 1717 (1987). I understand that Professor Abram Chayes of the Harvard Law School, and perhaps other procedure teachers, also used *Goldberg* in their courses in the 1970s.

5. 312 U.S. 1 (1941).

6. 95 U.S. 714 (1878).

7. 304 U.S. 64 (1938).

8. I was a student in that class. Richard Cornish was the first person to use the term (to my knowledge), and we all adopted it immediately, as did the amused instructor when he got wind of it. Fiss now says that we devised the term for the course "to distinguish it from real procedure," Fiss, *supra* note 4, at 1717, but my recollection is that a good many (I think most) of us thought that his course was "real procedure," the commonsensical approach to the topic, and that the courses starting with *Pennoyer v. Neff* or *Sibbach v. Wilson & Co.* were strange.

Professor Judith Resnik joined the team in the early 1980s. The product of their collaboration is the most important procedure casebook, and one of the most important procedure books, in thirty-five years. Cover, Fiss and Resnik's *Procedure* is an intellectual Mardi Gras—a joyous, outrageous, intense feast of ideas that seeks to revolutionize the subject.<sup>9</sup> Emphasizing the intellectual and socio-political structures of procedure rather than its nuts and bolts, Cover, Fiss and Resnik propound a radically new way of teaching procedure to students. This, in turn, entails new ways of thinking about the value of procedure. The casebook is an important synthesis of the authors' view of adjudication as a public event rather than simply a means of resolving private disputes. It is a key contribution to the emerging jurisprudence of the post-legal process era. This review will explore the implications and limitations of metaprocedure as a way of thinking about pedagogy, adjudication, and law.

#### I. THE PEDAGOGY OF PROCEDURE: FROM PHASES OF A LAWSUIT TO METAPROCEDURE

*Procedure* offers a revolutionary approach to the teaching of that subject to first-year students. The authors' approach may be understood as an alternative to, and an evolution beyond, the traditional pedagogy embodied in *Materials for a Basic Course in Civil Procedure*, a casebook published in 1953 by Professors Richard Field and Benjamin Kaplan.<sup>10</sup> The Field and Kaplan book was itself a seminal modern effort to provide a coherent intellectual structure for the first-year procedure course,<sup>11</sup> and it has been a great success. Not only has it gone through five editions (Professor Kevin Clermont was added as a co-author beginning with the fourth), but it has set the tone and agenda in procedure casebooks for an entire generation.<sup>12</sup> All but one of the procedure casebooks available in the 1980s are structurally similar to Field, Kaplan and Clermont.<sup>13</sup>

Three closely interrelated ideas are prominent in the Field and Kaplan pedagogy of procedure. First, the book and the instruction were organized

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9. The authors' agenda is not stated explicitly in the casebook, and the arguments I draw from the book are in some degree speculative, or at least my own interpretation. That interpretation is informed, however, by the authors' general writings on the subject, which are collected and synthesized in *Procedure*.

10. R. FIELD & B. KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (1953).

11. Field and Kaplan were the first to organize a casebook around the Federal Rules of Civil Procedure and thereby to provide a coherent framework of rules to discuss procedural issues. For leading casebooks before Field and Kaplan, see P. HAYS, *CASES & MATERIALS ON CIVIL PROCEDURE* (1947); A. SCOTT & S. SIMPSON, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* (1950).

12. See J. CHADBOURN & A. LEVIN, *CASES AND MATERIALS ON CIVIL PROCEDURE* (1961); J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE: CASES AND MATERIALS* (1968) (dedicated to Field and Kaplan); D. LOUISELL & G. HAZARD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE—STATE AND FEDERAL* (1962).

13. The one exception, in my view, is P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION* (3d ed. 1983).

around the "Phases of a Lawsuit."<sup>14</sup> Like earlier casebooks, Field and Kaplan focused on the nuts and bolts of procedural doctrine and arranged the doctrinal materials (rules and appellate decisions) in roughly the order in which they would be implicated in a lawsuit. Unlike earlier casebooks, Field & Kaplan sought to bring greater intellectual coherence, even elegance, to the study of procedure by concentrating on a "single, modern system of procedure," namely, the Federal Rules.<sup>15</sup> This was their second organizing principle. Indeed, Field and Kaplan contrasted the reformist policy of the Federal Rules with their common law and code antecedents, subtly suggesting a whiggish view that we had progressed to a grand set of "rules of more or less general application."<sup>16</sup> Their book is suffused with the notion that the Federal Rules represent some kind of apotheosis of procedure. Nonetheless, Field and Kaplan did not abandon a critical stance, though their critique is an internal one and focuses on the margins (the core is fine). Thus, their third central idea is that the rules and doctrine must be constantly reexamined and improved, so that they work better to subserve the dispute-resolution goals of procedure.<sup>17</sup>

Field and Kaplan's three pedagogical ideas have dominated the teaching of first-year procedure for the last thirty-five years. Developments in legal theory and education have undermined the cogency of these ideas, however, and have paved the way for new approaches to teaching procedure. One significant development has been the establishment of clinical programs at most law schools. Clinical education has demonstrated that real case studies—such as the Buffalo Creek litigation<sup>18</sup>—are better tools than appellate decisions for teaching the doctrine and mechanics of procedure. Using vivid and detailed stories of what happened in a dramatic litigation and providing students with copies of the actual litigation documents, case studies stimulate student interest in procedure and form the basis for enjoyable and demanding drafting and simulation assignments.<sup>19</sup> These outside assignments can be used in a procedure course to teach basic doctrine—the phases of a real, ongoing lawsuit—freeing up class time to discuss larger conceptual issues.<sup>20</sup>

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14. Field and Kaplan's first chapter is entitled "Phases of a Lawsuit," a 150 page gallop through a typical civil lawsuit. The remainder of the book is a more leisurely doctrinal survey of the issues raised in this initial chapter. R. FIELD & B. KAPLAN, *supra* note 10.

15. *Id.* at ix.

16. *Id.* at 3.

17. *Id.* at x (instruction should instill in students a "feeling of personal responsibility for the fair and efficient running of procedural machinery").

18. Its story is told in G. STERN, *THE BUFFALO CREEK DISASTER* (1976). Professors Lawrence Grosberg, James Flanagan and others have developed materials, a book of litigation documents, and videotapes that can be used by teachers to integrate the litigation into their teaching of doctrine (pleading and discovery especially).

19. A former clinical studies professor, Resnik has developed drafting and simulation exercises to use in conjunction with the Cover, Fiss and Resnik book. Fiss has developed a computer game (The Coney Island Game) that teaches discovery rules in a rigorous and wonderful way.

20. The existence of clinical programs may also make it less necessary for first-year procedure to

Another important development, the increased reliance on extra-legal arguments in legal scholarship, offers procedure teachers more intellectual options for exploring these larger issues. Law is no longer considered the "autonomous discipline" it was when Field and Kaplan were writing.<sup>21</sup> For example, if one posits that fairness and efficiency are the goals of procedure,<sup>22</sup> modern scholars would be inclined to consult the impressive body of pertinent extra-legal scholarship bearing on those goals, including philosophy and ethics, psychology, economics, and social and political theory.<sup>23</sup> The greatest strength of Field and Kaplan—its tight internal rigor and comprehensive analysis of legal doctrine—has become a weakness.

Finally, we have lost Field and Kaplan's satisfaction with the Federal Rules. This "failing faith" is due not only to an accumulation of examples where the Rules do not work very well, but also to a sense that there are structural reasons why they will never completely succeed.<sup>24</sup> Many procedure scholars now share the view that we cannot understand the Rules without understanding their interrelationship with structures of social and economic oppression, human psychology, and economic incentives. Furthermore, we believe that procedural rules ought not always be transsubstantive, but that they must be tailored to different types of litigation. With their pride in the grand generality of procedural rules, Field and Kaplan are now often irrelevant to the cutting edge issues in procedure. Talk of reforming Rules and doctrine is no longer confined to marginal matters, and scholars are openly relying on vastly different models—including the civil law inquisitorial approach and communitarian approaches—to urge more fundamental reshaping of civil procedure.<sup>25</sup>

emphasize the doctrinal mechanics of litigation by providing an alternate means for students interested in litigation to pick up those skills. On the other hand, professors in clinical programs appreciate, and may expect, first-year procedure to give students at least some initial nuts-and-bolts training.

21. See Posner, *The Decline of Law as an Autonomous Discipline: 1962-87*, 100 HARV. L. REV. 761 (1987).

22. See, e.g., FED. R. CIV. P. 1; R. FIELD & B. KAPLAN, *supra* note 10, at 4.

23. For some especially notable examples of such interdisciplinary borrowing, see Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CONN. L. REV. 1115 (1987) (psychology); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (sociology); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC'Y REV. 63 (1974) (organization theory); Posner, *Economic Approaches to Legal Procedure & Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) (economics); Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) (economics); Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 29 (philosophy); Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978) (social science); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) (probability theory); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1987) (cognitive and language theory).

24. See, e.g., Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) (excerpted pp. 1814-24); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (excerpted pp. 660-73); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (excerpted pp. 941-49).

25. See, e.g., Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE

These developments in legal education have made procedure teachers increasingly restive with the Field and Kaplan approach, and we have responded by opening up the first-year procedure course to simulations and case studies, discussions of constitutional due process, and law review articles bringing the insights of anthropology, feminist theory, critical legal studies, economics, and human psychology to bear on issues of procedure.<sup>26</sup> Cover, Fiss and Resnik have drawn from these responses and have created a casebook for the procedure teacher whose failing faith extends to the Field and Kaplan approach. The pedagogical decisions made by the authors radically depart from the traditional teaching strategy for civil procedure.

The most important decision is to focus on themes and structures of procedure, rather than the history and mechanics of doctrine. The authors made a conscious decision not to organize the material linearly; they do not march the student through the phases of a lawsuit.<sup>27</sup> Instead, the book's seven chapters explore larger conceptual themes: the value of procedure; the nature of adjudication, and different paradigms of what we might consider "typical" adjudication; the ways in which different people and institutions are treated when they are parties in an adjudication; the opportunities and incentives for strategic behavior by parties in a lawsuit, and ways to deal with it; the process of decisionmaking and its uneasy relationship to rationality; the sources of judicial power and the rationales for the apportionment and sharing of that power among federal and state courts in our federal system; and the reasons why we may forego procedure. While the major doctrinal issues are in the book, somewhere,<sup>28</sup> they do not dictate the flow of the book and are not covered in great detail.

Additionally, the authors do not give the Federal Rules of Civil Procedure the deferential, if not canonical, treatment they are accorded in traditional casebooks. *Procedure* subjects the assumptions of the Federal Rules to skeptical analysis. An essay at the end of the book, playfully titled "Appendix: On Reading the Rules," is a probing critique of the way the Federal Rules are made and of their pretension to transsubstantive applica-

L.J. 480 (1978); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (excerpted pp. 950-59); Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627 (1973) (excerpted pp. 1373-82); Resnik, *supra* note 24.

26. See, e.g., R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* (1979) (collection of law review articles to supplement procedure casebooks).

27. "Our twin goals are to provide appreciation of and insight into both the theory and practice of procedure—insights often obscured by a linear organization and by the reading of appellate opinions." P. xi.

28. See pp. 1-8 (overview of phases of a lawsuit and applicable Federal Rules), 61-99 (complaint, preliminary relief), 478-537 (class actions), 612-30 (ancillary and pendent jurisdiction), 826-59 & 895-940 (discovery), 1101-16 (evidence), 1134-45 (failure to state a claim, summary judgment), 1185-90 & 1207-24 (jury trial), 1434-61 (personal jurisdiction), 1474-89 (*Erie*), 1550-54 (appellate review), 1568-69 (directed verdict, judgment n.o.v.), 1684-87 (res judicata, collateral estoppel), 1787-94 & 1810-14 (Rules Enabling Act).

tion.<sup>29</sup> Indeed, the book is not at all limited to civil procedure. Although civil issues receive the greatest attention, the authors complement them with comparisons to rules of criminal and administrative procedure.<sup>30</sup> At many points where the Federal Rules are applicable, the authors invite the student to understand that there are alternative ways of regulating the procedural issue at hand—with reference to administrative or criminal procedures, to the procedures followed by different cultures, or to some hypothetical procedural structure suggested by extra-legal theory. The perspective of the book is relentlessly inquiring and reformist.

The focus on structures of procedure and the reformist stance are necessarily accompanied by the further decision to rely much less on appellate decisions than has any previous casebook in procedure, and much more heavily upon case studies, excerpts from transcripts, and articles,<sup>31</sup> not to mention the marvelously apt illustrations that dot the book.<sup>32</sup> This decision opens up the course beyond doctrine and provides students materials which can be used to question doctrine and to discuss the big themes around which the book is organized. It also makes available to students vivid and multifaceted materials that can enrich class discussion.

An overview does not begin to capture the intellectual excitement of the Cover, Fiss and Resnik pedagogy. The best feature of the pedagogy is its insistence that teachers and students think through the big issues of procedure. This is apparent in the first chapter, which uses *Goldberg v. Kelly* as a way of analyzing “the value of procedure.” Why should the government have to provide Mr. Kelly with a hearing before it takes away his welfare benefits? Given the facts of the case, surely one reason is to avoid erroneous decisions, since the deprivation in that case was abrupt and questionable. A prior hearing for Mr. Kelly probably would have prevented a needless and terribly hurtful government action. But, as dissenting opinions argued, how can we be certain that a prior hearing for all the Mr. Kellys will not increase the overall error rate by allowing “undeserving” recipients to remain on the welfare rolls? Although the Court did not discuss this argument, its response probably would have been that due

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29. Pp. 1787–1824.

30. “Because the issues central to procedure—the values to be implemented, the remedial capacities of courts, the permissible range of party structure, the relationship among decisionmaking centers—are common to all kinds of litigation, we have not limited our concerns to a single context, be it civil, criminal or administrative.” P. vii.

31. “We have also departed from the often exclusive reliance, typical of many casebooks, upon court (usually appellate court) opinions. In our view, these pedagogic methods fail to capture both the complex theoretical problems of procedure and the fascinating dynamics of litigation.” P. xi.

32. Not to be missed: Sir Joshua Reynolds’ *Justice* (p. ii); a photograph of the Hotel Granada (p. 80) accompanying the *Goldberg* materials; a view of Mark Twain Junior High School (p. 269) and of Judge Weinstein (p. 274), the two central figures in the Coney Island Desegregation Litigation; my favorite, Gary Gilmore’s haunting self-portrait in a letter to his mother (p. 431); and a photograph of an American child of Japanese descent, with a military police officer, on his way to a detention camp in 1942 (p. 1748), a lawless detention upheld by the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944).

process is more than a cost-benefit calculus. Is that response persuasive?<sup>33</sup> What other values might be served?

One other value might be to assure an individual participation in decisions affecting him or her, thereby enhancing the legitimacy of the ultimate decision. One might wonder, however, whether an unsophisticated person without aid of counsel will be able to participate meaningfully.<sup>34</sup> Even so, there may still be a dignitary or empowerment value to the required procedure. As a society we are concerned about the way we treat individuals, and we are willing to go the extra procedural mile for the victimized. The procedures tell the victim that he or she is not powerless, and remind the bureaucrat of the human gravity of his or her decisions. But a hearing where Mr. Kelly is marginalized by petty bureaucrats may not serve this value. Ultimately, one might conclude that any value for procedure is contingent upon the social and economic context. It may be that the most we can say about giving Mr. Kelly more procedural protection is that it ought to be part of a cluster of social reforms seeking to empower those in Mr. Kelly's position.<sup>35</sup>

Such discussions are pedagogically fundamental. If law school is to be more than a trade school, and is to provide our students with intellectual challenge and vision, we law professors ought to raise meta-questions about the values of procedure. When better to raise them than at the very beginning of the students' education?<sup>36</sup> And what better vehicle than *Goldberg v. Kelly*?<sup>37</sup> The facts of the case are dramatic, and likely to engage students intellectually. A case evaluating constitutional arguments, *Goldberg* is particularly self-conscious about the value choices it is making, and about the constitutive significance of those choices. As the first case in a line of decisions which explore the reach and limits of procedural due process, *Goldberg* helps students to see how the law develops from case to case, and how changing political values affect that process.<sup>38</sup> If we as procedure teachers want to make our subject one that engages students and demands intellectual effort from them, chapter one of the Cover, Fiss and Resnik casebook is a terrific start.

The riposte to this aspiration, of course, is that before the students can fly with the metaproceduralists, they must learn to walk with the nuts and bolts. The authors are not insensitive to this problem. Their solution is

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33. The book develops this theme through analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which reinterpreted *Goldberg* as a cost-benefit case. See pp. 112-32.

34. See pp. 134-57, reproducing and analyzing *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981).

35. Pp. 132-34.

36. It is widely accepted that students at most law schools are less engaged by their classes (i.e., don't do the reading) after the first year. Hence, the intellectual agenda of the first year is critical, if we expect to have an intellectual impact on most of our students.

37. I actually prefer *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), reprinted pp. 134-55.

38. See *supra* note 2 (cases narrowing *Goldberg*).



to provide ample factual detail and to build doctrine as well as theory around those facts. Therefore, chapter one contains copious excerpts from the litigation documents in *Goldberg v. Kelly*, including the complaint and applications for a temporary restraining order and preliminary injunction (and affidavits).<sup>39</sup> The materials at once show the students what documents they might be expected to draft in litigation, and enrich the discussion of the Court's decision by giving students a more detailed version of the facts and procedural background.<sup>40</sup> In short, metaprocedure does not mean that the teacher must neglect doctrine, only that doctrine need not monopolize class time.

Every chapter is like the first, starting with an interesting and factually rich case study<sup>41</sup> and using the case study as an introduction to a cluster of doctrines and structural themes. In this way, the book is one intellectual feast after another. While these merits make *Procedure* essential reading for every teacher of the subject, it is not so clear that many will adopt the book for instruction of first-year students (parts of the book would work well in an advanced seminar on metaprocedure). Most procedure teachers using the traditional approach are relatively happy with it and will be reluctant to throw over a fairly successful approach for something so different.<sup>42</sup> And so risky. Metaprocedure can be the best intellectual experience a law student can have, but it can also engender complaints and dissatisfaction on the part of students who have a rulebook mentality.

Also, alas, there are a few pedagogical problems with *Procedure* even on its own terms. It is quite long, and somewhat underedited.<sup>43</sup> Weighing in at 1824 pages of text (almost a record), the book is impossible to cover in a year-long course, much less the truncated semester-long procedure course taught at many law schools.<sup>44</sup> The sheer length of the excerpts and

39. Pp. 53-104.

40. My description of Mr. Kelly's plight, text preceding note 1, was taken from the *Goldberg* complaint, reproduced pp. 61-72.

41. For example, chapter three, on parties, starts with the Supreme Court's decision not to allow the ACLU and Bessie Gilmore to present arguments to the Court concerning the execution of her son, Gary (pp. 429-46). In a dramatic touch, the book reproduces, in the original handwritten form, the correspondence between Gary Gilmore and the civil libertarians seeking to prevent his execution, which is more eloquent than a thousand pages of legal briefs (pp. 429-37). Chapter two, on the forms of adjudication, concentrates on the Coney Island school desegregation litigation (pp. 227-351). This is an excellent case study, because it reveals the promise and the frustrations of such institutional litigation.

42. On the other hand, many teachers have already abandoned the traditional approach and have developed their own materials. The best example is the "Creekie Movement," a veritable sect of procedure teachers who integrate the story of the Buffalo Creek disaster litigation into the courses. Apart from using counsel's story of the case, G. STERN, *supra* note 18, teachers use the Creek litigation documents, videotape simulation exercises (such as mock Creek depositions), and movies about the community in the wake of the disaster. The Creek materials can themselves be a way of doing metaprocedure.

43. Many of the articles and case studies could have used more editing and editorial summary. The biggest editing mistake, in my view, is reproducing 57 pages of the plaintiff's closing argument in *Silkwood* (pp. 990-1047). It is painfully boring.

44. The authors, I hope with tongue-in-cheek, say that "[a] year is needed to complete the book; in semester courses selections from the chapters enable consideration of all the central issues of proce-

the nonsequential coverage of doctrine pose a risk of confusing first-year students and overloading them with information.<sup>45</sup> The problem of length and undercrediting may be ameliorated, because the instructor can edit out things he or she does not find useful and can lecture to fill in doctrinal gaps.

A more fundamental problem is the book's anti-historicism. Its focus on the "here and now" and its neglect of background and evolution are striking. Almost everything excerpted in the book—cases, articles, even statutes—is recent, post-dating *Goldberg v. Kelly*. The authors snub such useful historical materials as the history of pleading, the evolution of law and equity,<sup>46</sup> and the background of federal subject-matter jurisdiction. The book boils down into capsule summaries the historical twists and turns of the *Erie* and personal jurisdiction cases.<sup>47</sup> This apparent anti-historicism is troubling, because the evolution of rules and doctrine is essential to understanding them, and even to reforming them. Legal reasoning itself is a dynamic interaction between a present controversy and historical texts (statutes, cases, rules),<sup>48</sup> and students lose this rich tradition if argument is limited to current justifications for doctrine.

Notwithstanding these difficulties, the pedagogy of metaprocedure—with a focus on the structures of procedure, a globally rationalist and reformist perspective, and liberal use of comparative and extra-legal materials—will and ought to have a central role in first-year procedure courses. There are many ways to do this without giving up the advantages of a more historical and doctrinal coverage. Assuming a year-long course, I have found that a most successful agenda is one that draws from the strengths of *traditional procedure*, with its emphasis on history and step-by-step development of doctrine, and of *metaprocedure*, with its intellectual excitement and reformist vision, and of *clinical procedure*, with its practical focus on a vivid litigation experience.<sup>49</sup> One might begin with a case study of the Buffalo Creek litigation, which gets the students excited about procedure and gives them a snapshot of the dynamics of a

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ture." P. xi. Given the conceptual difficulty of the material, the care with which the intellectual debate needs to be developed, and the slow process of teaching first-year students legal reasoning, these are unrealistic goals for any but the most gifted instructor.

45. For example, the *Goldberg* litigation materials confront students with issues of subject-matter jurisdiction, the convening of a three-judge court, requests for class action treatment, and preliminary and declaratory relief, not to mention the complicated interaction between state and federal welfare rules. None of these issues is central to the agenda of chapter one, and so none is treated in detail. Yet students will wonder about them, and the more compulsive students will actually try to figure them out (often with disastrous results).

46. It is boiled down on p. 191.

47. Pp. 1435-42 (personal jurisdiction from *Pennoyer* to *World-Wide Volkswagen*), 1474-89 (*Erie* to *Hanna*).

48. For elaboration, see Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

49. This paragraph describes the way I have been teaching first-year procedure for the last six years, except that I became a Creekie only this year. I believe that something like this approach is a successful accommodation of the various pedagogical goals discussed in this review.

civil lawsuit. Once the students have an understanding of what a lawsuit entails, turn to several introductory issues of metaprocedure, such as the value of procedure and the requirements of fundamental fairness (chapter one of the Cover, Fiss and Resnik book). Then go through the phases of a lawsuit in the order desired, at each point integrating history, Rules and doctrine, and the meta-issues of fairness and value. Use the Buffalo Creek litigation as the basis for nuts-and-bolts exercises (drafting a complaint and answer, conducting discovery, and doing mock settlement negotiations). In the last month of class, return to metaprocedure, this time challenging the private dispute-resolution view of adjudication assumed in the Buffalo Creek litigation book and posing as an alternative the Cover, Fiss and Resnik view of adjudication (chapter two of their book). Their reconceptualization of adjudication is the most exciting intellectual contribution of the book, and to it I now turn.

## II. THE IDEOLOGY OF ADJUDICATION: FROM DISPUTE RESOLUTION TO PUBLIC VALUES

Oddly enough, for a casebook, *Procedure* may exercise just as much, if not more, influence on the scholarship of procedure as on its pedagogy.<sup>50</sup> Complementing the book's pedagogy is its reconceptualization of "adjudication." In summary form, the authors' position is that adjudication is best viewed not as private dispute resolution, but rather as a process by which public rights are determined and articulated. This is a fascinating vision of adjudication, with potentially radical implications for procedural doctrine.

By their assumptions about typical lawsuits, and the way they approach doctrine, traditional casebooks have assumed and perpetuated what might be called the "Hobbesian Paradigm" of adjudication, under which the role of adjudication is to resolve disputes between isolated litigants.<sup>51</sup> The paradigm depends on three structural axioms. First, the parties are treated as discrete individuals, each represented by counsel whose job is zealously to protect the interests of the client.<sup>52</sup> This is the "private rights axiom."

50. For example, chapter five, on decisionmaking and judgment, offers materials on psychological decisionmaking that might be used to rethink rules of evidence, burdens of proof, and regulation of attorney behavior.

51. See, e.g., R. FIELD & B. KAPLAN, *supra* note 10, at 1 ("the task of courts in civil cases is to decide specific disputes brought before them by people who cannot or will not settle their controversies by themselves"); D. LOUISELL & G. HAZARD, *supra* note 12, at 1 ("A lawsuit is a process by which a court resolves a controversy between people over some matter.").

52. "The typical civil case is initiated and carried on by a [private] person who seeks redress for some wrong alleged to have been committed against him by another." R. FIELD & B. KAPLAN, *supra* note 10, at 1. Traditional casebooks start with a hypothetical lawsuit that is a simple diversity case between two individuals, and use that as the anchoring example from which their analysis of the phases of a lawsuit proceeds. E.g., J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 12, at 4-18 (Aikens is run over by Beasley but sues Cecil, who owns the car); D. LOUISELL & G. HAZARD, *supra* note 12, at 1-2 (Smith buys rifle from Jones, and rifle explodes).

Second, the structure of the adjudication is triadic: counsel for the two (or more) parties are in an adversarial position and engage in argumentative combat, with the judge sitting above it all as an umpire.<sup>53</sup> This is the "triadic axiom." Third, at the end of the adversarial contest, the judge (or a jury) will finally and authoritatively declare the rights and duties of the parties. Remedies, if awarded, will seek to return the parties to a position of repose and security.<sup>54</sup> This "security axiom" grows out of the Hobbesian Paradigm's belief that a central role of government is to limit the possibilities for disorder.

Traditional casebooks were not uncritical of the Hobbesian Paradigm, but their critique was typically an understated and marginal one.<sup>55</sup> What Cover, Fiss and Resnik have done in chapter two is to assemble the leading critiques of the Hobbesian Paradigm (many written by the casebook authors),<sup>56</sup> and to propose an alternative model. Through a case study of the Coney Island Desegregation Litigation,<sup>57</sup> the authors provide evidence that the axioms of the Hobbesian Paradigm are not universally valid, and may be inverted.

To begin with, the private rights axiom seems inapplicable to the Coney Island Litigation.<sup>58</sup> The parties were groups, not individuals: plain-

53. "A distinctive element of the procedure for resolving legal controversies is the *adversary system*. This element is indeed central to the whole subject, and unless it is understood it becomes well nigh impossible to explain, much less to justify, most of our procedural law." J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 12, at 1; see R. FIELD & B. KAPLAN, *supra* note 10, at 166-69, reproducing L. Fuller, Problems of Jurisprudence 706-08 (temp. ed. 1949) (judge reacts to initiatives of the parties and seeks to discover "the most effective and least disruptive" way to resolve the controversy); D. LOUISELL & G. HAZARD, *supra* note 12, at 39-55, 1290-97 (lawsuit is nothing but a partisan battle to settle a private dispute).

54. See F. JAMES, CIVIL PROCEDURE 2 (1965) ("procedure should yield final and lasting adjudications so that people may enjoy the maximum of repose and security").

55. The 1953 edition of Field and Kaplan, for example, included criticisms of the way the adversary system operated. R. FIELD & B. KAPLAN, *supra* note 10, at 169-76, 181-83. The 1984 edition of Field, Kaplan & Clermont has a fair amount of material questioning the generality of the Hobbesian Paradigm, reflecting the growing literature on the subject. R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 253-66 (5th ed. 1984) (problems with the adversary system); *id.* at 266-98 (alternatives to the adversary system); *id.* at 1172-89 (class actions and public litigation). Unhappily, the authors compress most of the excerpted materials virtually beyond recognition. For example, the extraordinary and complex Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) is boiled down to less than a page in the casebook. R. FIELD, B. KAPLAN & K. CLERMONT, *supra*, at 249-50.

56. See Chayes, *supra* note 55 (excerpted pp. 389-402); Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (excerpted pp. 403-14); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter *Forms of Justice*] (excerpted pp. 383-87); Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121 (1982) [hereinafter *Foundations of Adjudication*] (excerpted pp. 219-26); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982) (excerpted pp. 415-27).

57. Pp. 227-370.

58. While there is nothing new about litigation that affects large numbers of people, see S. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987), desegregation litigation such as the Coney Island Case has stimulated academics to identify "group" or "public rights" as something more than just an aggregation of individual rights. See, e.g., Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

tiffs were children attending the Mark Twain Junior High School, which they alleged was segregated by race; defendants were the Community School Board of Brooklyn, School District #21 and its members; third-party defendants were the Mayor of New York and the Chancellor of the Board of Education of the City of New York. It makes a difference, and better reflects sociological reality, to see these parties as groups rather than as a collection of individuals. As groups, the parties litigated not only for the present membership, but also over the rights and duties of future members.<sup>59</sup> As groups, the parties' interests were not exogenously defined, since the views and interests of the parties changed as the litigation progressed.<sup>60</sup> As groups, the parties' positions tended to be defined in terms of public interest, rather than just a congeries of private interests. The Coney Island Litigation became a struggle among various conceptions of what solution to segregation was in the public interest, rather than just a battle among private interests.

Nor did the triadic axiom hold up in the Coney Island Litigation. There was some adversarial clash before Judge Weinstein found Mark Twain to be segregated, but the bulk of the case was devising a remedy for the segregation, and that phase was not triadic. Different defendants disagreed with one another as to a proper remedy, and plaintiffs' proposed remedies were disputed by intervening plaintiff groups. The judge openly recognized the sprawling nature of the dispute (even specific parties were not sure of their own positions) and appointed a special master to devise a plan. The special master talked with everyone involved, and the discussions not only helped him frame his own views, but altered the views of some of the parties.<sup>61</sup> The special master's report itself became the subject of fierce debate among the parties, and the judge ultimately accepted only part of it. The triad became the "polycenter,"<sup>62</sup> and public officers (the judge and the special master) were important participants in the dynamics of the litigation.

The least valid axiom for the Coney Island Litigation, as for most desegregation litigation, was the security axiom. There could be no "return" to the original state, because the plaintiffs were alleging that it was itself structurally illegal. Nor did the remedy promise repose or security for the litigants, since plaintiffs were seeking a structural injunction that would

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59. If desegregation of Mark Twain were ordered, its main benefit would inure to future students there, not the present ones, and the duty to implement such a plan would fall upon future members of the School Board, not the ones originally sued.

60. The best example is that of the defendant School Board, whose membership started out with heterogeneous views, and whose collective position and attitude shifted over the course of the lawsuit. Pp. 333-34.

61. See pp. 310-41 (analysis of the litigation, in retrospect, by the special master).

62. M. POLANYI, *THE LOGIC OF LIBERTY* (1951), introduced the idea of polycentric disputes, in which resolution requires treatment of several different variables, usually over a period of time. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978), developed the idea as a limitation on adjudication, which Fiss, *Forms of Justice*, *supra* note 56, at 39-43, sharply criticizes.

change a lawless context into a just one, and to transform relationships in a publicly desirable way. For this type of lawsuit, the focus is an ongoing process of change (the court's order sets structural forces in motion), not a return to the status quo or the creation of a new repose.

As the Coney Island case study reveals, the Hobbesian Paradigm does not adequately describe desegregation cases, which fit a new "*Brown* Paradigm" of group rights, judicial involvement in a polycentric dispute, and ongoing transformation of the status quo. *Procedure* suggests, further, that the collapse of the Hobbesian Paradigm extends well beyond desegregation and institutional reform litigation. For example, although one can analyze *Goldberg v. Kelly* as a Hobbesian case, it fits the *Brown* Paradigm somewhat better.<sup>63</sup> Even in tort and contract cases the assumptions of the Hobbesian Paradigm often do not apply. Litigants rarely represent just themselves or their exogenously defined interests. For example, the government is the most frequent single litigant, and part of the job of the government lawyer is to represent the overall public interest, which might change in response to the litigation.<sup>64</sup> As complex litigation and class actions have grown more prominent, the interaction among the parties has become more politically charged, and the need for judicial management more apparent, especially when there are resource and distributional inequalities among the parties. Even the simplest litigation transforms the status quo, and probably ought to transform what is often an unfair and oppressive status quo.

The Cover, Fiss and Resnik materials might be read to suggest, as Fiss has explicitly argued previously,<sup>65</sup> that the general lesson we should draw from the growing relevance of the *Brown* Paradigm is that adjudication should not be viewed as the resolution of disputes, but instead as the process by which we develop and articulate "public values." Fiss contends that the Hobbesian dispute-resolution vision of adjudication is wrongly indifferent to (constitutional) values that transcend the interests of individuals, ignores the public nature of the judge (a state official and a member of a coordinate branch of our government), and assumes that the natural

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63. While Mr. Kelly certainly had a real private interest in asserting his right to a prior hearing, he and his co-plaintiffs were essentially asserting the group rights of welfare recipients, not just in New York but nationwide, and not just present but future recipients. The defendants were public officials and institutions, and they too represented broader public interests, of other institutions and future officials. Although the lawyers for the various parties took opposing positions on many issues, the lawsuit in fact impelled New York to rethink its policies for terminating welfare recipients. The purpose, and result, of the adjudication was not to return Mr. Kelly to the status quo ante, but to transform public attitudes and policies toward the marginalized members of our society.

64. In *Goldberg v. Kelly*, the State changed its position (and its welfare policies) in the course of the litigation, just as the School Board did in Coney Island. Especially when one party is a governmental entity—an institution with public obligations—the litigant's "interest" may change over time in response to debate and politics.

65. See Fiss, *Forms of Justice*, *supra* note 56; Fiss, *Foundations of Adjudication*, *supra* note 56.

state of society is either just or tolerably unjust (hence, making a return to the status quo desirable).<sup>66</sup>

A fascinating application of Fiss' public values thesis relates to the settlement of civil lawsuits,<sup>67</sup> a policy strongly supported by the Supreme Court and the alternative dispute resolution (ADR) movement. ADR argues that formal dispute resolution is too expensive and too divisive a way to resolve disputes. These arguments are most persuasive—if one agrees with the Hobbesian Paradigm that adjudication is only the resolution of private disputes. Fiss argues that the goal of adjudication is justice and not mere efficiency, or even repose. Hence, private "settlement" is not an appropriate way to end adjudication, especially for those cases where there are significant distributional inequalities, where it is hard to get true consent because the parties are social groups, where the court needs to supervise the parties after judgment, or where there is a social need for an authoritative interpretation of law.<sup>68</sup>

Like his public values thesis generally, Fiss' anti-settlement thesis seems inapplicable to most lawsuits.<sup>69</sup> Recent studies (included in the Cover, Fiss and Resnik casebook) suggest that the "typical" lawsuit in our modern procedural system still seems to be one where a few parties are fighting over money, usually \$10,000 or less, and counsel for each side is prepared to spend perhaps thirty hours on the case.<sup>70</sup> Were nine out of ten lawsuits like this to be settled, we should not be greatly disturbed. On the other hand, Fiss' thesis seems valid for that not insubstantial number of cases involving group or public rights. Adjudication of such cases ought to be in the formal court system, and judges should not be so eager to press the parties to settle their cases. Indeed, even when the parties come before the judge with a stipulated settlement, the judge has a continuing public duty to scrutinize the settlement to assure that it is not unjust.<sup>71</sup>

The authors themselves are divided over the cogency of Fiss' public values thesis,<sup>72</sup> but seem to agree that more is going on in many adjudications than just dispute resolution, and that the choices made by the judge—especially those labeled procedural or jurisdictional choices—must often be evaluated by standards of public justice, and not by private conve-

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66. Fiss, *Foundations of Adjudication*, *supra* note 56, excerpted at pp. 220-24.

67. See pp. 588-612, 706-30, 1571-1620.

68. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (excerpted pp. 719-28).

69. See McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

70. Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 84 (1983) (excerpted pp. 198-209).

71. This is not unlike a judge's duty to scrutinize a plea bargain in a criminal case to determine whether the defendant truly and freely consents to it, see FED. R. CRIM. P. 11, or a judge's duty to scrutinize the settlement of a class action to assure its fairness to the class members, see FED. R. CIV. P. 23(e), or the analogous duty to examine the settlement of a government antitrust lawsuit to determine whether the settlement is in the public interest.

72. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 43-44 (1983); pp. 729-30 (unpublished note by Cover responding to Fiss).

nience or mere efficiency. That is, "public rights" are often involved in adjudication. When that is the case, courts have an obligation to mold procedural requirements to meet public needs.

Such a public rights thesis is a powerful instrument for criticizing current procedural doctrine. Consider, for example, the law of standing, a major theme of chapter three. In *Gilmore v. Utah*,<sup>73</sup> the Supreme Court vacated its earlier stay of an execution of Gary Gilmore by the State of Utah, on the ground that Gilmore had waived his rights to challenge the death penalty. Gary Gilmore had, in fact, repeatedly expressed a desire to face the execution. In upholding the penalty, though, the Court rejected the petition of Bessie Gilmore, Gary's mother, to challenge the legality of the Utah death penalty (about which there was substantial question)<sup>74</sup> on the ground that she had no "standing" to question the execution of someone else.<sup>75</sup> Whatever questions conventional doctrine might pose regarding the Court's action in this case,<sup>76</sup> the public rights thesis would object to the Court's pretense of ducking the hard substantive issue (the constitutionality of Utah's death sentence statute) by denying Bessie Gilmore—or any other member of the public—standing. Indeed, the authors make a point of including the contrapuntal *Commonwealth v. McKenna*,<sup>77</sup> where the Supreme Court of Pennsylvania took up a similar challenge to the Pennsylvania death penalty, raised by *amici* and not by the defendant, because it felt a duty to "consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be normal procedure."<sup>78</sup>

Chapter three also takes up issues surrounding the assertion of group rights by representatives. A key case is *Eisen v. Carlisle & Jacquelin*,<sup>79</sup> in which the Supreme Court held that Federal Rule 23(c)(2) requires actual notice to be given to all members of a Rule 23(b)(3) class action who can be identified with a reasonable effort. The decision would be uncontroversial, except that the notice requirement killed the class action. The class consisted of over three million odd-lot securities customers, who claimed that defendants violated the antitrust and securities laws by monopolizing and overcharging for their services. Class members had average claims of about \$70. Because there were so many members and because their individual stakes were so small, the notice requirement rendered the class action unmanageable, and the Court directed that it be dismissed. A central concern raised by the holding in *Eisen* is the Court's

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73. 429 U.S. 1012 (1976) (excerpted pp. 432-36).

74. *See id.* at 1017-18 (White, J., dissenting).

75. *See id.* at 1013-17 (Burger, C.J., concurring); *id.* at 1017 (Stevens, J., concurring).

76. *See id.* at 1017-19 (White, J., dissenting); *id.* at 1019-20 (Marshall, J., dissenting); *id.* at 1020 (Blackmun, J., dissenting).

77. 476 Pa. 428, 383 A.2d 174 (1978) (excerpted pp. 446-52).

78. *Id.* at 439, 383 A.2d at 180 (p. 449).

79. 417 U.S. 156 (1974) (excerpted pp. 495-507).



treatment of the class action as simply a congeries of individual lawsuits, for which actual notice is the normal, constitutionally required practice.<sup>80</sup> The Court, in other words, accepted the Hobbesian assumption that the lawsuit involves discrete unconnected private rights, and from that assumption concluded that rights can only be grouped together in a class action when it would be more efficient to do so. Looking at the lawsuit from the public rights perspective renders the Court's action more problematic. The three million customers, as well as future customers, have a public right to defendants' compliance with statutory duties of fair dealing. Because individual litigants had insufficient incentives to pursue their rights, a class action aggregating their claims made sense. To eviscerate the class action by strict application of a procedural rule is just as wrong in *Eisen* as the Court's refusal to consider the third-party arguments was in *Gilmore*.<sup>81</sup>

Obviously, the Cover, Fiss and Resnik thesis that procedural rules should be tailored to protect public rights has broad application, beyond the few examples mentioned here. Consider its application to issues involving the ability of the government to sue to protect the disadvantaged,<sup>82</sup> rules of subject-matter jurisdiction in complex cases,<sup>83</sup> statute-based rules which create barriers to adjudication for the poor,<sup>84</sup> statute-based rules providing counsel fees to encourage certain types of litigation,<sup>85</sup> sanctions against parties violating the discovery rules,<sup>86</sup> and so on. For all of these issues, beliefs about the role of adjudication are often critical in determining what rules should be applied, and how they should be applied. Cover, Fiss and Resnik persuasively argue that present application of procedural rules by the courts often rests on unarticulated, discredited Hobbesian assumptions. Application of procedural rules would be quite different if judges and others were persuaded of the public rights thesis, or Fiss' more ambitious public values thesis. I now turn to a more elaborate exploration of that thesis.

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80. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (excerpted pp. 479-86).

81. This assumes that enforcement by private lawsuit, in addition to government enforcement of the securities and antitrust laws, is better than enforcement by the government alone.

82. See *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) (excerpted and analyzed pp. 538-45); cf. *Estelle v. Justice*, 426 U.S. 925 (1976) (government as intervening party) (excerpted pp. 546-49).

83. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (excerpted and analyzed pp. 613-30).

84. See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (excerpted and analyzed pp. 650-58); *Boddie v. Connecticut*, 401 U.S. 371 (1970) (excerpted and analyzed pp. 636-44).

85. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (excerpted and analyzed pp. 691-706). But see *Marek v. Chesny*, 473 U.S. 1 (1985) (excerpted and analyzed pp. 706-19).

86. See *In re Professional Hockey Anti-Trust Litig.*, 63 F.R.D. 641 (E.D. Pa. 1974), *rev'd*, 531 F.2d 1188 (3d Cir. 1976), *rev'd sub nom.* *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam) (all three opinions excerpted pp. 896-922).

### III. THE JURISPRUDENCE OF ADJUDICATION: FROM PROCEDURALISM TO NORMATIVISM

The Cover, Fiss and Resnik casebook avoids explicit discussion of jurisprudential issues,<sup>87</sup> but the authors' public rights thesis, and Fiss' public values thesis, cannot be appreciated without understanding the book's jurisprudential context. Again, the story commences in the fifties. In the same period in which Field and Kaplan published their procedure casebook, Professors Henry Hart and Herbert Wechsler published the first edition of *The Federal Courts*,<sup>88</sup> and Professors Hart and Albert Sacks were pulling together their magisterial materials on *The Legal Process*.<sup>89</sup> These works, particularly that of Hart and Sacks, made procedure the central topic of legal thinking for a generation, and an understanding of their intellectual agenda helps place Cover, Fiss and Resnik in the "post-legal process" jurisprudence<sup>90</sup> to which they are contributing.<sup>91</sup>

American legal thought faced a crisis in the 1940s. On the one hand, the legal realists in the 1920s and 1930s had debunked arguments resting upon "natural law," the theory that legal obligations must be accountable to reason or moral imperative.<sup>92</sup> The realists uncoupled law (especially judicial decisions) from any effort to discern metaphysical "truth."<sup>93</sup> Their moral skepticism, coupled with their commitment to representative democracy, led most of the realists to accept "positivism," the theory that law should be obeyed because it is the command of the legitimate sovereign. On the other hand, this almost casual postivism ran against the grain of much traditional American jurisprudence and seemed hard to defend in light of the events in Europe. If law were nothing but the commands of

87. For example, the authors include as an excerpt from William Simon's *The Ideology of Advocacy*, 1978 WIS. L. REV. 29 (pp. 632-33), only his simple description of the "ethics of advocacy," and omit the impressive jurisprudential analysis by which Simon tears apart the "ideology of advocacy."

88. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

89. H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958).

90. Eskridge & Frickey, *Legislation Scholarship & Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

91. For important analyses of legal process thought from a history-of-jurisprudence perspective, see Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); see also Peller, "Neutral Principles" in the 1950s (fall 1988 draft).

92. I am using "natural law" in its broad sense, not that preferred by early natural law philosophers (e.g., Aquinas), who necessarily linked it to "divine law" or even "the law of human nature." Natural law is a term that since has been used to characterize approaches to legal reasoning that appeal to "principles," see R. DWORKIN, *LAW'S EMPIRE* (1986); R. DWORKIN, *A MATTER OF PRINCIPLE* (1985), or reasoned policies. See, e.g., Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

93. My favorite debunker is Judge Learned Hand, who said apropos of procedural issues: Now a law-suit is an undertaking designed to settle a dispute. . . . Let us at the outset disabuse ourselves of the notion that we are engaged in an impartial and disinterested inquiry into objective truth. . . . Our results have no general significance whatever, we merely reach a passing accommodation which may be altogether foreign to any permanent answer. Address by Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, Ass'n of the Bar of the City of N.Y. (Nov. 17, 1921).

the sovereign, were the Nazi decrees not "law"? This was a hard notion to accept, and prominent jurists in the 1940s argued for fresh interest in the morality of law.<sup>94</sup>

Hart and Sacks' legal process theory was a synthesis that satisfied these antipodal jurisprudential desires by creating a proceduralist framework whereby positivist commands would in the ordinary course be assuredly just and reasonable. Thus, the legal process materials accepted the fundamental positivist premises that government is an essentially contractarian enterprise reacting to the problems of private parties<sup>95</sup> and that "a decision which is the duly arrived at result of a duly established procedure for making decisions . . . 'ought' to be accepted as binding upon the whole society. . . ."<sup>96</sup> Yet Hart and Sacks also repeatedly affirmed the notion that "[l]aw is a . . . purposive activity, a continuous striving to solve the basic problems of social living,"<sup>97</sup> and stressed the duty of officials to engage in "reasoned elaboration" to solve those problems.<sup>98</sup> This owes much to natural law.<sup>99</sup> Recognizing that positivist commands might clash with this natural law goal, Hart and Sacks urged the importance of procedural safeguards. "A procedure which is soundly adapted to the type of power to be exercised is conducive to well-informed and wise decisions. An unsound procedure invites ill-informed and unwise ones."<sup>100</sup>

Intimately related to proceduralism was Hart and Sacks' concept of adjudication, which similarly reveals both positivist and natural law elements. Hart and Sacks saw courts "as places of initial resort for solving

94. L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 *Geo. L.J.* 493 (1942).

95. In classic Hobbesian fashion, chapter two of the Legal Process materials concerns "The Role of Private Ordering and Some of Its Problems," a philosophical antecedent to the rest of the book on government's role in solving controversies private parties could not resolve. In a like fashion, chapter three concerns "The Courts as Places of Initial Resort for Solving Problems Which Fail of Private Solution."

96. H. Hart & A. Sacks, *supra* note 89, at 4-5.

97. *Id.* at 166. "It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or to agree exactly how it should be phrased." *Id.*

98. In resolving uncertainty through the exercise of discretion the official "must elaborate the arrangement in a way which is consistent with other established applications of it. And he must do so in the way which best serves the principles and policies it expresses. If the policy of the specific arrangement is open to doubt, the official should interpret it in the way which best harmonizes with more basic principles and policies of law." *Id.* at 165; *see id.* at 174-75 (general prohibition in American law against "arbitrariness").

99. The materials at various points reveal the influence of Professor Lon Fuller, a colleague of Hart and Sacks at the Harvard Law School. Fuller believed that law had to be "purposive" (presumably embodying a rational, humane purpose) and in that way accountable to human reason. Works relied on by Hart and Sacks include L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); L. Fuller, *The Forms of Adjudication* (draft circulated in the 1950s). Published the same year that Hart and Sacks put out their tentative edition was the celebrated Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958), a leading statement of modern (nontheistic) natural law.

100. H. Hart & A. Sacks, *supra* note 89, at 173.

problems which fail of private solution."<sup>101</sup> Essential to adjudication is the "authoritative determination by the deciding tribunal imposing a solution upon the parties to a dispute" and the reasoned justification of that decision "by reference to impersonal criteria of decision applicable in the same fashion in any similar case."<sup>102</sup> Hart and Sacks recognized that adjudication is more than just dispute resolution, however. "Adjudication in its normal operation is at once a process for settling disputes and a process for making, or declaring, or settling law. Normally, also, law-settlement is a by-product of dispute-settlement."<sup>103</sup> Two huge chapters of the legal process materials are dedicated to the exploration of rational judicial lawmaking. On the other hand, Hart and Sacks favored only "interstitial" lawmaking by judges and argued that judges are not institutionally competent to make polycentric decisions affecting groups of people.<sup>104</sup>

The legal process synthesis I have drawn from Hart and Sacks also characterizes the 1953 edition of Field and Kaplan, albeit less explicitly. Indeed, this synthesis provides an unstated working assumption for procedure books (and especially casebooks) since the 1950s: The study of procedure is central to understanding law, because rational procedures facilitate the ability of positive law to be implemented in a way consistent with reason and natural law. The Cover, Fiss and Resnik casebook is influenced by the Hart and Sacks tradition, because it too emphasizes the importance of rational procedures to achieving reasonable results. But *Procedure* is a departure from earlier casebooks, especially Field and Kaplan. Cover, Fiss and Resnik are jurisprudentially uncomfortable with Hart and Sacks' concessions to positivism. The working assumption of the Cover, Fiss and Resnik book is not *proceduralism*, the notion that good procedures are presumptive evidence of good results, but is instead *normativism*, the notion that good results (substantive justice) are presumptive evidence of good procedures.<sup>105</sup>

What troubles Cover, Fiss and Resnik about proceduralism is that its emphasis on process threatens to sanction unjust results and to submerge critical debate over substantive justice. A proceduralist mentality would be

101. *Id.* at 366 (chapter title).

102. *Id.* at 664-65.

103. *Id.* at 662.

104. *Id.* at 669:

Adjudication of disputes about managerial decisions involving the selection of a course of action for the future from among many possible courses is not ordinarily satisfactory, if it is feasible at all, because of the numerous variables to be taken into account and the impossibility of developing generally applicable premises of reasoning with reference to which the variables can be judged.

See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (circulated in draft form in the fifties).

105. Professor Alex Aleinikoff suggested the term "normativism" to me in his comments on this review. The generalization in text is, of course, never explicitly set forth in *Procedure* itself. I make the generalization based upon my conversations with the authors, my experience in Fiss' procedure class in 1975, and my reading of the casebook in light of the authors' earlier scholarship.

sympathetic to the Court's denial of relief in both *Gilmore* and *Eisen*, for example. In both cases, claimants were asking the Court to create special rules, which the Court refused to do, in the name of procedural regularity. Cover, Fiss and Resnik are hostile to this approach, to the extent that the general procedural rule stands in the way of normatively correct results.

The gulf between the proceduralism of Hart and Sacks and the normativism of Cover, Fiss and Resnik is, to some extent, a generational gulf. The morphogenesis of legal process theory came in the 1940s, with the realist-natural law debate. The morphogenesis of post-legal-process theory came in the 1960s, with the lessons of structural reform litigation. This litigation grew out of *Brown*, which was itself a subtle challenge to legal process ideals. Most legal process thinkers ignored *Brown*,<sup>106</sup> or even criticized it for its failure to find a text-based constitutional argument or a "neutral principle" to justify its invalidation of state-sanctioned segregation.<sup>107</sup>

Indeed, *Brown* is a shattering moment for legal process' insistence on judicial neutrality. In a formal sense, the old separate-but-equal rule was a "neutral" rule, because it treated whites and blacks "equally"—they theoretically got the same schools, facilities, and so forth. But *Brown* showed us that what is stated as neutral may in fact be heavily biased, because of the social context. In a society where one race held the money and the power and the reins of government, separate but equal was not a very neutral policy, for it was obviously one mode by which existing white elites subjugated black citizens, and pacified poor white citizens. The social context of *Brown* flips the entire legal process/positivist metaphor for adjudication as the way by which our society avoids the "disintegrating resort to violence."<sup>108</sup> Apartheid itself was violence against blacks, both symbolically and physically. Before *Brown*, white supremacists could and did enforce segregation in the (state) courts, whose judgments were enforceable through the sheriff's office. Hence, in a very real sense, adjudication was part of positive law's violence against black citizens. This state-sponsored violence was in no way ameliorated by its procedural regularity, and *Brown* teaches that meticulous procedures cannot validate morally squalid decisions.

The lessons of *Brown*—the legitimacy of public values as a source of law, the ambiguity of neutrality, and the violence of proceduralism—have become a battleground for the jurisprudential soul of legal process theory.<sup>109</sup> Cover, Fiss and Resnik—and other academicians of the post-

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106. It is noteworthy that in the several thousand pages of their materials, Hart and Sacks never mention *Brown* (decided four years earlier). Even Fuller did not focus on *Brown* in his articles on natural law and adjudication.

107. E.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

108. H. Hart & A. Sacks, *supra* note 89, at 4.

109. Some conservative process theorists still deny the validity of *Brown*, and the sweep of its

*Brown* Era—reject the legal process effort to “explain” *Brown* under proceduralist assumptions. For them, *Brown* is the starting point, not the permissible exception, and its central lesson is the normativity of law, the ability of law to address issues of moral right and justice. The test of a good legal rule is its normative correctness, not its procedural pedigree.

The Cover, Fiss and Resnik book is the first procedure text devoted to the lessons of normativism. This is one reason the book starts with the due process cases, in which justice values trump positive law and procedural rules are argued in the context of socially progressive goals. *Goldberg v. Kelly* itself is a good example of natural law reasoning, similar to *Brown*. The same positive law that gave Mr. Kelly his welfare benefits also circumscribed those benefits with the procedures the Court invalidated.<sup>110</sup> The “is” was very clear, yet there was a strong sense of “ought” that led the Court to invalidate New York’s procedures. A positivist could defend the Court’s action if it had been based upon a dispositive, clear constitutional text, or upon some neutral principle, but it was not. What the Court considered “crucial” to the case was the “immediately desperate” plight of the welfare recipient who *may* have been wrongfully terminated, and the public values underlying our nation’s welfare system.<sup>111</sup> The three dissenting Justices correctly recognized this as deeply inconsistent with traditional legal process concepts of adjudication.<sup>112</sup>

There are other normativist features of *Goldberg v. Kelly*, relating to the injustice of denying Mr. Kelly the benefits at all (assuming his factual complaint was correct). If Mr. Kelly received his post-termination hearing, and was still denied his benefits, we should want to know why. Was there bias? Did he get his point of view across effectively? The more we explore his case, the more unhappy we are with procedural solutions to social problems. The law cannot pretend to be neutral by providing homogenized procedures that have a malignant social impact, and unjust re-

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lessons. These writers have exhausted the term judicial activism and for the most part remain a marginalized group. A far more popular strategy is to limit the jurisprudence of *Brown* to desegregation and “related” cases. This is not hard to do, for what moral proposition is more widely accepted than the wrongness of apartheid? And from a positivist legal process perspective, legalized segregation was particularly invidious because blacks were excluded from the political process and so could not be said, in any meaningful sense, to have consented to the arrangement. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL SYSTEM* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980).

110. Indeed, the Court seemed to move toward this sort of reasoning, starting with *Board of Regents v. Roth*, 408 U.S. 564 (1972), through *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion), and *Bishop v. Wood*, 426 U.S. 341 (1976). But that movement was halted in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

111. *Goldberg*, 397 U.S. at 264. The Court continued:

From [the system’s] founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.

*Id.* at 264-65 (footnote omitted).

112. See *id.* at 273-75 (Black, J., dissenting); *id.* at 283-84 (Burger, C.J., dissenting); *id.* at 285 (Stewart, J., dissenting).

sults simply cannot be legitimated by just procedures. Indeed, one way to read the Court's opinion in *Goldberg* is as an assurance of minimally decent support for the disadvantaged, many of whom are marginalized because of economic structures for which the state is responsible.

Just as *Brown* cannot be cabined, neither can *Goldberg*, if one believes it is correct. Cover, Fiss and Resnik provide many more examples of supposedly neutral rules that are oppressive when viewed in social context, particularly in their violence to the poor, and of procedural cases where the real issues are those of substantive justice.<sup>113</sup> By constitutionalizing procedure, opening up the inquiry to social context and issues of Right, and debunking mere proceduralism, the authors invite the student of law to consider natural law modes of reasoning. This move is significant pedagogically, and jurisprudentially, for it signals a departure from legal process orthodoxy. But then the question is: Upon what criteria is this explicit normativism based? Where does it lead us? Two different jurisprudential directions for it are suggested in the oeuvre of Cover, Fiss and Resnik, all of whom draw upon the legacy of *Brown*. One direction is a modified positivism, in which courts (creatures and promulgators of positive law) consider natural law arguments and conceptions of justice shared by our interpretive community. A second direction would be one more clearly in the natural law tradition, in which the critical battles for substantive justice are fought outside of the government.

Fiss' proposition that "[a]djudication is the social process by which judges give meaning to our public values"<sup>114</sup> sounds like natural law, but Fiss has spilled much ink in the last decade defending this idea in legal process and positivist terms.<sup>115</sup> Similarly, Resnik sets forth in the argot of legal process her faith that formal adjudication serves profoundly important values.<sup>116</sup> Fiss and Resnik owe a great deal to legal process positivism, because they have chosen to follow the Hart and Sacks lead in seeking progressive law through the positive organs of government. In this, of course, they can draw upon one lesson of *Brown*—the ability of *courts*, an arm of the state, to enforce legal rights and Right and, indeed, to transform society through formal adjudication.

This debt to legal process, however, does not mean that Fiss' public values thesis is completely reconcilable with that school. The central legal

113. Particularly apt are the materials on the costs of adjudication, and how they fall with particular weight upon the poor. Pp. 634–784.

114. Fiss, *Forms of Justice*, *supra* note 56, at 2.

115. Fiss, *The Varieties of Positivism*, 90 *YALE L.J.* 1007 (1981), distinguishes "ethical positivism," which simply describes the difference between what law "is" and what it "ought" to be and "in no way favors the 'is,'" from "cognitive positivism," which "does favor the 'is.'" Fiss' own academic agenda seems similar to the one he attributes to a reform-minded ethical positivist: "[W]e need [to] assume, first, that the scholar aspires to make law more just, to close the gap between 'ought' and 'is,' and second, that the scholar believes that the path of the law . . . is amenable to reason." *Id.* at 1011.

116. *E.g.*, Resnik, *supra* note 56, at 380–82, 424–31, 445 (criticizing excesses of judicial management).

process objection to Fiss' public values thesis, developed in the context of institutional structural reform litigation, is that it is beyond the "competence" of the judiciary. This objection breaks down into three interrelated arguments. First, in a positivist democracy the legislature is the primary lawmaking institution, and courts should be confined to making interstitial law. The broad lawmaking assumed by Fiss' public values thesis would seem to violate our (constitutional) preference for democratically accountable lawmaking. Second, by calling upon courts to articulate and apply public values in complex situations, Fiss' thesis necessarily involves courts in dealing with polycentric problems which they are not capable of solving. Even when courts retain jurisdiction over the problem for a period of time, it is difficult for judges to untangle the interconnected web of variables implicated in such problems. Although Professor Abram Chayes suggested a decade ago that courts would show unexpected skill in dealing with polycentric problems,<sup>117</sup> the troubling mistakes and frustrations of structural litigation have been well-documented.<sup>118</sup> Third, anything beyond interstitial lawmaking threatens us with judicial fiat, the imposition of the personal preferences of unelected officials. "Public value" is a spongy term,<sup>119</sup> for one scholar's public value is another scholar's rent.<sup>120</sup> By making judges the arbiters of public values, Fiss' system is open to charges of judicial tyranny.

By and large, Fiss answers these positivistic objections on their own terms, but recently he has moved toward more explicit natural law arguments. Consider Fiss' responses to the three versions of the competence argument. In response to the constitutional structure argument, Fiss posits that courts must "be seen as a coordinate source of government power with their own sphere of influence," and their own lawmaking power. "The judicial role is limited by the existence of constitutional values, and the function of courts is to give meaning to those values."<sup>121</sup> Hence, Fiss correctly suggests, positivism in no way requires a single sovereign voice to issue law, and our constitutional tradition of shared lawmaking power

117. Chayes, *supra* note 55, at 1307-09.

118. Indeed, the Cover, Fiss and Resnik book is quite candid about the problems with polycentric problem-solving in the Coney Island Litigation. Second thoughts by the special master (pp. 310-41) and the judge (pp. 365-70), as well as independent observations by the authors (pp. 351-65), suggest that the Coney Island Litigation was shackled by the perceived inability of the court to do anything about housing policy and patterns and that integration at Mark Twain has not eliminated problems of stereotypes and segregation.

119. See Fiss, *Forms of Justice*, *supra* note 56, at 1 ("The values that we find in our Constitution—liberty, equality, due process, freedom of speech, no establishment of religion, property, no impairments of the obligation of contract, security of the person, no cruel and unusual punishment—are ambiguous.").

120. Affirmative action is a good example of this phenomenon. See Eskridge, *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 334-37 (1988).

121. Fiss, *Forms of Justice*, *supra* note 56, at 11; see Fiss, *Foundations of Adjudication*, *supra* note 56.



among the legislative, executive, and judicial branches supports ample constitutional lawmaking, and policy-bending, authority for courts.<sup>122</sup>

Fiss concedes that courts will make mistakes in structural litigation and that courts are severely limited in their ability to solve polycentric problems. But he responds to the instrumentalist critique by observing that "two further factors must be introduced into the analysis: the value of a successful performance, and the success rate of alternate institutions performing comparable tasks."<sup>123</sup>

Somewhat ironically, Fiss' response to the personal preference critique of his public values thesis has changed over time. In 1979, Fiss argued that the judicial "office is structured by both ideological and institutional factors that enable and perhaps even force the judge to be objective—not to express his preferences or personal beliefs."<sup>124</sup> Because judges must make decisions and listen to a variety of perspectives, and assume responsibility for their judgment with reasoned justifications, they are most likely to have good reasons for decisions, reasons that transcend their personal preferences.<sup>125</sup> More recently, Fiss has argued that an important constraint on judges is their participation in a professional "community of interpretation," in which adjudication is an extended conversation by judges with other jurists (including appellate judges), lawyers, legislators, and scholars.<sup>126</sup> This is a fascinating move in the direction of natural law: official state prescriptions are not the sole source of law, and the judge's decision may not be "law" if rejected by the professional interpretive community.

Fiss' reliance on a community of legal interpretation has brought him nothing but trouble, however. Literary theorist Stanley Fish has claimed that conventions of interpretation are not constraining because they can be and are routinely manipulated.<sup>127</sup> Professor (now Dean) Paul Brest expressed a widely shared concern that such a narrowly defined community of interpretation is itself problematic, because of its narrow class, racial, and gender composition, not to mention its professional ties to the status

122. I have supported Fiss' response through a textual and historical analysis of the Constitution in Eskridge, *supra* note 48, at 1498–1503. It is noteworthy that Fiss has not explicitly relied upon the "republican" tradition which apparently influenced our Constitution and which is more ambivalent about positivism. Compare Fiss, *Forms of Justice*, *supra* note 56 and Fiss, *Foundations of Adjudication*, *supra* note 56, with M. SEIDMAN, G. STONE, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* (1987); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); and Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

123. Fiss, *Forms of Justice*, *supra* note 56, at 32; see also Eskridge, *supra* note 120, at 301–09.

124. Fiss, *Forms of Justice*, *supra* note 56, at 12–13.

125. *Id.* at 13–14.

126. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); see S. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 210–14 (1985).

127. Compare Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) with Fiss, *Conventionalism*, *supra* note 126. See also Hutchinson, *Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850, 863–73 (1985).

quo.<sup>128</sup> Nor do Fiss' co-authors offer him much comfort. Resnik is more cautious in her claims for normativist adjudication, reflecting a pragmatic ambivalence toward judicial power, and her awareness that power can be either heroic or grotesque, depending on the holders and the circumstances.<sup>129</sup> Cover, too, lacks Fiss' faith in the ability of judges to achieve justice consistently and posits a strikingly different vision of law and community.<sup>130</sup>

Cover's disagreement with Fiss and his positive vision of law suggest a more explicitly natural law direction for post-legal process thought. Cover posits a normative universe of right and wrong, of lawful and unlawful, that is hardly exhausted by the statist "paraphernalia of social control" of which judges are central figures.<sup>131</sup> "The normative universe is held together by the force of interpretive commitments—some small and private, others immense and public. These commitments—of officials and of others—do determine what law means and what law shall be."<sup>132</sup> Hence, for Cover the creation of law ("jurisgenesis") "takes place always through an essentially cultural medium" of discussion, experience, sharing, and disputing among members of the community. The state has no monopoly on jurisgenesis, nor does any particular group in our society—indeed, many insular groups create their own special law. Instead, the state is more likely to destroy law (it is "jurispathic"), because its interest in social control impels it to choose certain legal interpretations and suppress other interpretations.

Cover's world of thriving jurisgenerative communities of interpretation is one of rich and amazing natural law. Its view of adjudication is a renunciation of positivism, whether of the strong Hobbesian sort, or the liberal positivism of Hart and Sacks, or even that of Fiss and Resnik. Like Fiss and Resnik, Cover finds the dispute-resolution justification for courts pedestrian and old-fashioned. But Cover's critique takes a striking twist, for he claims that courts exist because our pluralistic society has too many communities of interpretation—too much law. "Courts, at least the courts of the state, are characteristically 'jurispathic,' " created "to suppress law, to choose between two or more laws, to impose upon laws a hierarchy."<sup>133</sup> Like Fiss and Resnik, Cover believes in public values—he calls them *no-*

128. Compare Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 770-73 (1982) with Fiss, *Objectivity and Interpretation*, *supra* note 126.

129. See Curtis & Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987); Resnik, *supra* note 56.

130. Cover, *supra* note 72.

131. *Id.* at 4.

132. *Id.* at 7.

133. *Id.* at 40; see *id.* at 53 ("Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronted with the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest."); see also Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

mos. Unlike Fiss and Resnik, Cover believes that courts are not the creators of public values and, in fact, that they typically are the enemy.

Cover's view of the jurisprudential nature of courts receives powerful support from the Cover, Fiss and Resnik book. While the book starts with *Goldberg v. Kelly*, in which the Court aligned itself *against* the violence of the state bureaucracy, the book's cases can be read to suggest that *Goldberg* was an aberration. In case after case, the Court has retreated from the natural law justice of *Goldberg* to the safe harbors of legal process positivism: The state position is usually endorsed in essentially positivist legal process terms.<sup>134</sup> Shockingly typical of the retreat is the Court's decision in *Lassiter v. Department of Social Services*.<sup>135</sup> Abby Gail Lassiter was the mother of five children. In 1976, she was convicted of second-degree murder and sentenced to prison. The Durham County, North Carolina Department of Social Services two years later petitioned the state court for termination of Ms. Lassiter's parental rights to her fourth child, William. Ms. Lassiter was unable to obtain an attorney from her prison cell, and at her termination hearing she represented herself. Very badly. Ms. Lassiter engaged in rambling and irrelevant arguments, failed to see hearsay problems with the testimony elicited by the state, and thoroughly antagonized the presiding judge.<sup>136</sup> The state was successful in terminating her parental rights to William.

The issue before the Court was whether or not Ms. Lassiter could lose her parental rights without being provided with counsel by the state, as is required in criminal cases before a prison sentence can be imposed. The Court held that no counsel was necessary. The Court engaged in a utilitarian balancing test to determine whether the "costs" of providing counsel in these cases would exceed the "benefits."<sup>137</sup> Although the Court found the balance to favor provision of counsel, it started with a presumption

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134. The Burger Court's retreat from *Goldberg* procedural due process is a central theme of chapter one (pp. 112-79). See *supra* note 2. The central case study in chapter two—the Coney Island Desegregation Litigation—might not have been possible after the Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), which the authors duly note (pp. 350-51). Chapter three on parties and participation focuses on the Court's backward turn on issues of standing, see *Gilmore v. Utah*, 429 U.S. 1012 (1976) (pp. 429-53); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (pp. 454-68), and representation, see *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974) (pp. 495-509); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (pp. 509-13). Even the recent cases that open up the process do so begrudgingly, see *Dunlop v. Bachowski*, 421 U.S. 560 (1976) (pp. 570-81), and without any commitment. Chapter four on strategic interaction assembles a broad range of the Court's recent decisions which are insensitive to the poor's inability to obtain effective access to the legal system. See *Evans v. Jeff D.*, 475 U.S. 717 (1986) (pp. 733-50); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (pp. 650-58); *Marek v. Chesney*, 473 U.S. 1 (1985) (pp. 706-19); *Morris v. Slappy*, 461 U.S. 1 (1983) (pp. 768-79). Chapter seven on anti-procedure includes several of the Court's decisions making it more likely that unsophisticated persons will waive their rights of access. See *Kramer v. Chemical Constr. Co.*, 456 U.S. 461 (1982) (pp. 1588-1600); *Wainwright v. Sykes*, 433 U.S. 72 (1977) (pp. 1601-17); *North Carolina v. Alford*, 400 U.S. 25 (1970) (pp. 1573-80).

135. 452 U.S. 18 (1981).

136. See, e.g., *id.* at 55 n.24 (Blackmun, J., dissenting) (quoting the judge: "I wish you [Ms. Lassiter] wouldn't talk like that it scares me to be in the same room with you.").

137. *Id.* at 27-33 (opinion of the Court).

against providing counsel when a physical liberty interest is not involved and found the balance insufficient to offset that presumption. Justice Blackmun's dissenting opinion used the balancing test to argue against creating the initial presumption and for counsel in all cases.<sup>138</sup> A second dissent, by Justice Stevens, argued that deprivation of parental rights is similar to deprivation of physical liberty and, thus, that a cost-benefit balance is irrelevant and counsel must be provided in all cases.<sup>139</sup>

*Lassiter* epitomizes the conservative, anti-normativist nature of legal process decisions. The Court admitted that "[i]nformed opinion" and justice require counsel for an indigent woman seeking to retain ties to her child, yet fell back on the tired positivist distinction between the Right and the law.<sup>140</sup> The Court's balancing process was blatantly statist: The Court created a new presumption to avoid protecting a liberty interest that seems no different from physical liberty, and proceeded to balance away Ms. Lassiter's dignity as well as her rights. Justice Blackmun's dissenting opinion suggests a parallel between the Court's and the trial judge's victimization of Ms. Lassiter.<sup>141</sup> Yet even his eloquent opinion is in some ways unprogressive, for it objectifies and balances the human relationship, treating the parent-child bond like a commodity. Only Justice Stevens' dissent recognized the horror of the Justices' utilitarian analysis and its result.

Cover, Fiss and Resnik would all recognize *Lassiter* as horrifying. Fiss seems to expect judges to do better, but the evidence is that *Lassiter* is the norm and *Goldberg* the aberration.<sup>142</sup> Cover's insight is that however wonderful the Warren Court might have been, jurisgenesis must regard the judiciary with suspicion. If courts are—as Fiss is fond of saying—coordinate branches of the state, how can we expect courts to stand in opposition to the state on a regular basis? Fiss' answer, I gather, is that the post-New Deal state is a potentially powerful affirmative force for social justice.<sup>143</sup> This seems sound as a theoretical matter, but is not always borne out in practice. Government as an affirmative force has been diluted by the recent trend of appointments to courts and agencies. While Fiss may hold out hope for a reversal of this trend, others are skeptical.

Cover's skepticism about statism is an idea whose time has come, and it will surely have a profound effect on post-legal process thought, pushing it in anti-positivist directions.<sup>144</sup> The lesson Cover draws from *Brown* is

138. *Id.* at 35, 38–57 (Blackmun, J., dissenting).

139. *Id.* at 59–60 (Stevens, J., dissenting).

140. *Id.* at 33–34 (opinion of the Court).

141. *Id.* at 57–58 (Blackmun, J., dissenting).

142. See the cases assembled *supra* notes 2 & 134.

143. See Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

144. For discussions of the natural law movement in the new legal process, see Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 70 (1988); Eskridge, *The Jurisprudence of Statutory Interpretation* (draft Jan. 1989) (on file with author); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

not the centrality of courts, but instead the centrality of “redemptive constitutionalism.”<sup>145</sup> What eliminated state-sanctioned segregation was not the Supreme Court, but an ongoing interpretive community (or perhaps several communities) of parents, civic activists, ministers, lawyers, academics, lobbyists, and journalists, who associated formally and informally to transform themselves and to transform the social and political world that was (and to a great extent remains) morally wrong. To be sure, state actors—judges, legislators, Department of Justice lawyers (including Fiss)—were important participants, but the central participants were the people whose sense of moral outrage led them to violate the positive law by sitting in at segregated lunch counters, to march with Dr. King against the commands of municipal ordinances and state judicial decrees, to demonstrate with the Student Nonviolence Coordinating Committee, and to serve jail time for nonviolent but disruptive activity (as Cover did). The legal victories were important, but not as important as the creative disruption of racist rules of social control, the community’s implementation of remedial plans, and the private discussions and cooperation that actually accomplished social progress, inch by painful inch.

The larger interpretive and implementive communities spawned by the civil rights movement are one model for the post-legal process reconstruction of American jurisprudence and law.<sup>146</sup> This is a model that owes much to the Cover, Fiss and Resnik casebook. Like traditional theory, normativism emphasizes the importance of structuring institutional arrangements and procedural rules to facilitate just results. Unlike traditional theory, normativism is pessimistic that just results will necessarily flow from good procedures, and understands that justice involves a broader social transformation, perhaps of the sort where state activity is not appropriate (Cover) or sufficient (Fiss and Resnik).

### CONCLUSION

Bob Cover died in 1986. His collaboration with Owen Fiss and Judi Resnik on *Procedure* will be a significant part of his intellectual legacy. The qualities that I find prominent in the book are qualities that characterized his work and his life: commitment to intellectual inquiry and candor, even when they lead in unpleasantly surprising directions; the centrality of justice, as a way to think about our common humanity; and a skepticism about the shrouds of positivism, such as procedure, neutral principles, the idea of the state as all that stands between us and disorienting violence.

The most pervasive quality in the book, however, is its intense intellec-

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145. The term is from Cover, *supra* note 72, at 33.

146. See McDougall, Interpretation, Implementation and the Search for Community (draft summer 1988) (on file with author).

tual debate and aspiration. The debate among Cover, the natural law anarchist; Fiss, the Great Society statist; and Resnik, the feminist progressive, is a central debate for the post-legal process era. There is a charming passage about halfway through the book that brings a fragment of the debate to our attention quite explicitly. Fiss suggests that Cover's *nomos* is a misplaced romantic longing for a more peaceful existence, a world without social strife and painful inequality.<sup>147</sup> Cover responds that, in his faith in courts to do justice, "it is Fiss not Cover who is the romantic here," since the Court's natural law activism in support of racial justice "was temporary and accidental; that it is already changing and will soon be a romantic memory of the sublime sixties."<sup>148</sup>

The truth is that Fiss and Cover and (to some extent) Resnik are all romantics. The book they have produced is nothing if not a romantic view of how procedure might be taught to first-year students, why adjudication might be seen as something more than private dispute resolution, and what law might be if we commit ourselves to understanding its human complexity and frequent oppressiveness. A romantic vision of pedagogy, scholarship, and law itself can be dismissed as unrealistic, mushy, and impractical. Or it can be a source of inspiration and interconnection as something to which we aspire but might never reach.

The best legacy of a romantic is the vivid image, the inspirational idea, the creative argument. In his collaboration with Owen and Judi, Bob Cover has blessed us with such a legacy.

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147. P. 729 (citing and quoting Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985)).

148. P. 730 (quoting an unpublished note written by Cover and discovered after his death).