

1 *Introduction*

Professors Owen Fiss of Yale and Ernest Weinrib of Toronto have engaged in a provocative debate about adjudication. Fiss argues that adjudication must respond to the political and sociological realities of modern society and adjust its focus away from correcting discrete acts of wrongdoing between individuals and towards achieving greater compliance with public standards. The paradigmatic lawsuit for him is a case brought by a group, one that results in a judge's issuing a series of detailed 'structural' injunctions designed to manage and eventually reform a public institution such as a school, hospital, or prison so that it comes closer to the standards set out in the Constitution or other public laws.¹ Weinrib argues that the very nature of private law is its ability to rectify identified acts of wrongdoing and correct the harms that one party causes to another. Thus, the paradigmatic lawsuit for him is the simplest of torts actions: one individual seeks correction for the damage that he or she received through the wrongful negligence of another.² If courts

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† A review of *Procedure* by Robert M. Cover, Owen M. Fiss, and Judith Resnik (Westbury: Foundation Press 1988) pp. v, 1876; *Canadian Civil Procedure Cases and Materials* (3d ed.) by Garry D. Watson, W.A. Bogart, Allan C. Hutchinson, and Robert J. Sharpe (Toronto: Emond Montgomery Publications 1988) pp. iii, 897 (hereinafter the third edition of *Canadian Civil Procedure*); and *Canadian Civil Procedure Cases and Materials* by Garry D. Watson, Stephen Borins, and Neil J. Williams (Toronto: Butterworths 1973) pp. v, 856 (hereinafter the first edition of *Canadian Civil Procedure*).

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¹ Owen M. Fiss *The Civil Rights Injunction* (Bloomington: Indiana University Press 1978); Fiss 'Foreword: The Forms of Justice' (1979) 93 *Harv. LR* 1; Fiss 'The Social and Political Foundations of Adjudication' (1982) 6 *Law and Human Behaviour* 121; Fiss 'Two Models of Adjudication' in Robert A. Goldwin and William A. Schambra (eds) *How Does the Constitution Secure Rights?* (Washington: American Enterprise Institute for Public Policy Research 1985) 36

² Ernest J. Weinrib 'Toward a Moral Theory of Negligence Law' (1983) 2 *Law & Philosophy* 37; Weinrib 'Causation and Wrongdoing' (1987) 63 *Chicago Kent LR* 407; Weinrib

abandon their task of correcting the wrongs that one party causes to another, they will pursue instrumental and distributive strategies that are best left, for reasons of institutional competence and democratic theory, to legislatures and agencies.

The arguments made by these scholars in their recent exchange in the pages of this *Journal*³ lie at the heart of their accomplished work in legal theory. One interesting aspect of their debate is that they each claim that their theory holds up in practice as well as philosophy. For Fiss, courts have always been engaged in the task of implementing public values; for Weinrib, corrective justice explains the traditional institutional and doctrinal elements of private law adjudication, particularly tort law.⁴ Taking both at their practical word, I will directly assess not the theoretical merits of their positions but rather the light they can shed on the institutional and cultural structure of adjudication and alternative forms of social ordering in Canada and the United States. More concretely, I will examine the role that an introductory course on legal procedures has played and should play in legal education in both countries.

To this end, I will examine a recent, influential American book called *Procedure*, which provides an introduction to the theories and functions of litigation in the United States. The book is designed to challenge the place of traditional civil procedure courses in the first-year curriculum and rejects the assumption that adjudicatory procedures should be studied as a neutral framework for the resolution of simple disputes in private law. *Procedure* holds out a vision of adjudicative procedure as a flexible instrument to achieve reform for disadvantaged groups in the name of the public values of all forms of law. It is used in a few American law schools as the basis for an introductory course dealing with procedural issues in private, administrative, criminal, and constitutional law. With its emphasis on the procedure needed to vindicate group claims and to implement constitutional values, *Procedure* seems *prima facie* to be worthy of consideration in the Canadian context.

Before the importation of *Procedure* is advocated, however, a home-

'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Lj* 949; Weinrib 'Liberty, Community, and Corrective Justice' (1988) 1 *Can. J. of Law & Jurisprudence* 3; Weinrib 'Understanding Tort Law' (1989) 23 *Valparaiso LR* 485; Weinrib 'Aristotle's Forms of Justice' (1989) 2 *Ratio Juris* 211

3 Fiss 'Coda' (1988) 38 *UTLJ* 229; E. Weinrib 'Adjudication and Public Values: Fiss's Critique of Corrective Justice' (1989) 39 *UTLJ* 1

4 Fiss 'The Law Proclaimed' in Frank E. McArdle (ed.) *The Cambridge Lectures 1985* (Montreal: Les Editions Yvon Blais 1987) 103; E. Weinrib 'The Intelligibility of the Rule of Law' in Allan C. Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell 1987) 59

grown alternative should be considered. A third edition of *Canadian Civil Procedure* has recently been published and is used in many introductory courses in civil procedure in Canadian common law schools. In its own way, this Canadian book is as much a breakthrough as its more voluminous American counterpart. Although based on teaching materials first published in 1973, the third edition of *Canadian Civil Procedure* integrates the various concerns of contemporary legal theory with the traditional approach of guiding students through the phases of the civil action, paying special attention to the adversarial system and pre-trial rules that shape disputes for adjudication. In its opening chapters, an attempt is made to place civil litigation in its legal, political, social, and economic context.

II *The Fiss/Weinrib debate*

In his 1987 Cecil Wright Memorial Lecture, Owen Fiss ventured beyond his critique of Ernest Weinrib's theory of corrective justice to make a broader point that Canadian legal culture is characterized by a traditional view of litigation as the settlement of disputes arising from discrete acts of wrongdoing. This view of law is consistent, and indeed, in Fiss's opinion, even influenced by Weinrib's theory.⁵ Fiss's characterization of Canadian legal culture is troubling at a time when courts and litigation are assuming important roles in Canada's political life. With the Charter, has not Canada's legal culture shifted away from Britain and towards the United States? Yet Fiss suggests that the Canadian understanding of adjudication is still well behind the times, 'more English than American, more private than public, more oriented toward automobile accidents than the pursuit of equality.'⁶

No doubt Fiss underestimated some public law dimensions of Canadian litigation in the age of the Charter.⁷ However, those with a passing familiarity with American procedural innovations, or better still, with *Procedure*, will find it difficult to dispute that he has a point about the present ability of litigation in Canada to achieve the type of structural reform he envisages American courts accomplishing. For example, stricter Anglo-Canadian pleading rules requiring specific factual allegations may inhibit novel legal claims that demand wide-ranging discovery

⁵ Fiss 'Coda,' supra note 3

⁶ Ibid.

⁷ These include broadened standing, use of summary application procedures and social science data in Charter litigation, and increased interest group litigation and intervention. See generally R. Sharpe (ed.) *Charter Litigation* (Toronto: Butterworths 1987).

to reveal complex patterns of causation.⁸ The procedural conservatism of the Canadian judiciary has prevented the judicial development of the class action as an effective means to stimulate reform litigation.⁹ Even if a judicial willingness to make procedural innovations in the absence of comprehensive legislation existed, formidable impediments produced by traditional Anglo-Canadian cost, fee, and financing structures would deter most plaintiffs from advancing innovative claims on behalf of diffuse groups.¹⁰ These procedural features, as well as the role played by workers' compensation and other legislative and administrative machinery that preclude civil actions, help explain why there has been little Canadian experience with public interest litigation.

On the constitutional side, litigation concerning conditions in custodial institutions in Canada has been successful in dealing with traditional problems of due process for the individual but not in achieving systemic reform.¹¹ Although some Canadian courts have undertaken the diffi-

8 The stricter Canadian system of fact pleading may allow almost as much room for creative pleaders to reach the discovery stage as the more minimal American system of notice pleading. See Holmsted and Watson *Ontario Civil Procedure* (Toronto: Carswell 1989) 25 17. Nevertheless, recently developed requirements for greater specificity under the American system of notice pleading have generated concerns about disproportionate effects on public interest litigants, who must often base their pleadings on guesswork and intuition because they generally lack the resources to obtain information without discovery. Stricter Canadian rules may very well have similar effects. See Tobias 'Public Law Litigation and the Federal Rules of Civil Procedure' (1989) 74 *Cornell LR* 270, at 296-301; Carter 'The Federal Rules of Civil Procedure as a Vindicator of Civil Rights' (1989) 137 *U. Penn. LR* 2179; Marcus 'The Revival of Fact Pleading under the Federal Rules of Civil Procedure' (1986) 86 *Columbia LR* 411.

9 *Naken v. General Motors of Canada Ltd.* (1983) 144 DLR (3d) 385 (SCC)

10 See Ontario Law Reform Commission *Report on Class Actions* (Toronto: Queen's Printer 1982) c. 17; Ontario Law Reform Commission *Report on the Law of Standing* (Toronto: Queen's Printer 1989) c. 6; J.R.S. Prichard 'A Systematic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of the Substantive Law' (1988) 17 *J. of Legal Studies* 451; W. Bogart 'The Lessons of Liberalized Standing' (1989) 27 *Osgoode Hall LJ* 195, at 205-6

11 In part because of procedural resistance. See *Re Maltby et al. and Attorney General of Saskatchewan* (1982) 2 CCC (3d) 153 appeal quashed on grounds of mootness (1984) 13 CCC (3d) 308 (Sask. CA); *Collin et al. v. Kaplan* (1982) 1 CCC (3d) 309 (Fed. TD) (problems of standing). In part because of resistance to the substantive claims. See *Piche v. Solicitor-Gen. Can.* (1984) 17 CCC (3d) 1 (Fed. TD) (double bunking, no violation of s. 12) *R. v. Olson* 62 OR (2d) 321 (CA) aff'd [1989] 1 SCR 296 (segregative isolation, no violation of s. 12). In part because of alternative administrative avenues of reform. See Correctional Services of Canada *Mission Statement* (Ottawa: Supply and Services 1989); Task Force on Federally Sentenced Women *Creating Choices* (Ottawa: Supply and Services 1990). Compare with *R. v. Gamble* (1988) 45 CCC (3d) 204 (SCC) (innovative use of habeas corpus); *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985) 19 CCC (3d) 195 appeal quashed 41 CCC (3d) 287 (SCC) (right to counsel at prison disciplinary hearing).

cult task of structural reform in order to implement language rights,¹² they seem to be more comfortable with suggestions to legislatures that they, not the courts, implement the complex remedies required by new constitutional rights.¹³ This may be related to the retention of the traditional position that courts should not make coercive equitable orders against the Crown.¹⁴ Likewise, Canadian courts have not used masters or judicially enforced consent decrees to administer complex remedies. If Canadian proceduralists do not devote nearly as much attention to the public law model of courts engaging in structural reform, the reasons may be related to the relative absence of raw material as much as to any acceptance of Weinrib's understanding of adjudication over that of Fiss.

Fiss's attack on the Canadian legal system leaves him vulnerable to a counter-assault disputing the ability of the American political system to implement public values. Fiss fails to note that the shortcoming of Canadian litigation is at least partly compensated by the ability of Canadian political and social processes to implement reforms. Ian Scott, then attorney general of Ontario, may, in Fiss's opinion, be a 'Robert Kennedy of the North'¹⁵ tragically harnessed by a horse-and-buggy vision of adjudication, but that did not stop him from introducing legislative and administrative reforms whenever he could persuade his colleagues in Cabinet. Given Canadian traditions of parliamentary government, it is much easier for attorneys general to implement public values than their American counterparts.¹⁶ Likewise, the willingness of Canadian governments to refer structural reform matters to judges in reference cases or to commissions of inquiry should not be ignored, even if their findings sometimes are. The mandates and range of participants in both refer-

12 *Manitoba Language Reference* [1985] 1 SCR 721 (judicial schedule for the translation of unilingual laws); *Marchand v. Simcoe County Board of Education* (1987) 61 OR (2d) 651 (HC) (structural injunction requiring equalization of facilities in a minority language school)

13 For examples of the use of judicial declarations that declare a state of affairs to be unconstitutional but then indicate that it is up to the legislature, not the courts, to remedy the situation, see *Re Education Act (Ontario) and Minority Language Rights* (1984) 10 DLR (4th) 491, at 547 (Ont. CA); *Badger et al. v. A.G. (Manitoba)* (1986) 32 DLR (4th) 310, at 312-14 (Man. CA); *Dixon v. British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247, at 279-84 (BCSC); *Mahe v. The Queen* [1990] 1 SCR 342 at 392-3. On the prevalence of this technique, see generally Roach 'Reapportionment in British Columbia' (1990) 24 *UBC LR* 79, at 98-100.

14 Ontario Law Reform Commission *Report on the Liability of the Crown* (Toronto: Queen's Printer 1989) 50-3

15 Fiss 'Coda,' supra note 3 (1988) 38 *UTLJ* 229, at 231

16 On the tortuous path of the Civil Rights Act of 1964 through the American political system see Charles Whalen and Barbara Whalen *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (New York: Mentor 1985).

ence cases and commissions of inquiry would make the most activist of American judges blush. The viability of the Canadian political process is a matter of pride and opportunity for many Canadian commentators who reject Fiss's vision of adjudication,¹⁷ and even for those who believe that courts should play a greater role.¹⁸

In turn the Canadian political process makes the limited role courts will play under corrective justice easier to tolerate. Ernest Weinrib as a Canadian citizen applauds the role of the Canadian state in providing social welfare, medical and insurance benefits for the injured, and criticizes the parsimony of the American social security system.¹⁹ He has argued that the policy-driven, distributive, and public law character of American tort law is related to 'the ineffectiveness of the legislative process, the consciousness of the revolutionary origins of legal order, the modeling of adjudication on the interpretation of a constitution continually beset by crisis'; the preservation in Canada 'of a more pristine conception of private law' is related to 'the sustained liberal and even social democratic influence on the political process and by a conservative tradition that encouraged the realization of the public good through state action.'²⁰ The Canadian reluctance to rely on courts for social justice

17 In Canada that includes influential commentators on the left who see the Charter and increased litigation as a threat to democratic means of reform. See A. Hutchinson and P. Monahan 'Democracy and the Rule of Law' in Hutchinson and Monahan (eds) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell 1987) 59; P. Monahan *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell 1987); A. Petter 'The Politics of the Charter: Lessons From the Early Charter Cases' (1986) 8 *Supreme Ct LR* 473; A. Hutchinson *Dwelling on the Threshold* (Toronto: Carswell 1988) c. 7; and M. Mandel *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson 1989).

18 William Bogart, a Canadian supporter of public law litigation, has noted that while in America courts 'to the praise of supporters and the scorn of critics alike' have taken the lead in matters of social change and the protection of minorities, in Canada such reforms 'have been, by and large, the work of legislatures.' W. Bogart 'Questioning Litigation's Role - Courts and Class Actions in Canada' (1986-7) 62 *Indiana LJ* 665, at 666. He has suggested that public law litigation and legislative reform may be complementary. 'Enlarged standing and revamped cost rules should not be part and parcel of extravagant claims for the judicial role.' W. Bogart 'The Lessons of Liberalized Standing?' (1989) 27 *Osgoode Hall LJ* 195, at 207.

19 Weinrib has written a letter to the editor of the *New York Times* complaining that '[t]he callous and niggardly response of the world's richest democracy to the tragedies of sickness and disability means that often the injured person must seek compensation in tort or not at all. The courts are then tempted to produce what the political process has withheld, and tort law becomes an instrument of policy for achieving such goals as loss spreading, resource allocation and the redistribution of wealth from the deeper pocket.' Weinrib 'Liability Law Beyond Justice' *New York Times* 16 May 1986.

20 Weinrib 'The Insurance Justification and Private Law' (1985) 14 *J. of Legal Studies* 681, at 685

fits most comfortably within the broad structure of Weinrib's thought. Adjudication serves the corrective task of rectifying discrete wrongs between individuals by restoring the status quo ante of existing distributions. The prior distribution of resources between groups is left to the legislative process.

It is understandable why Fiss did not celebrate the Canadian attraction to legislative and administrative means to implement public values. Fiss's view of the judiciary as the body institutionally suited to give meaning to public values makes him suspicious of the use of negotiation designed to produce consent and accommodation in the political process.²¹ If pushed, Fiss might find support for his theory of adjudication in the practices of his homeland. 'Adjudication American-style' for him is a source of pride and a tribute to a particular national commitment to justice exemplified in *Brown v. Board of Education*. Should Fiss's suspicions about the legislative process be checked at the border? If so, does this lead Canadians to accept Weinrib's view of adjudication?

These questions cannot be adequately addressed without an appreciation of what Canadians have traditionally understood the role of adjudication and its alternatives to be. My working hypothesis is that the Canadian understanding of adjudication has been dominated by an implicit acceptance of many of the basic tenets of corrective theory, and that a corrective model of adjudication contrasted with the political alternatives of distributive justice retains a significant hold in the minds of many Canadian lawyers. In fleshing out this hypothesis, I will have to draw on the first edition of *Canadian Civil Procedure* as the earliest published example of traditional civil procedure that attempts to confine adjudication to the correction of discrete wrongs.²² Earlier work in civil proce-

21 Fiss 'Against Settlement' (1984) 93 *Yale LJ* 1073, at 1090; Fiss 'Out of Eden' (1985) 94 *Yale LJ* 1669; Fiss 'Justice Chicago Style' (1987) *U. Chi. Legal Forum* 1. Although Judith Resnik is somewhat less hostile to settlement, her work also defends adjudication. Resnik 'Failing Faith: Adjudicatory Procedure in Decline' (1986) 53 *U. Chi. LR* 494; Resnik 'Judging Consent' (1987) *U. Chi. Legal Forum* 43; Resnik 'The Domain of Courts' (1989) 137 *U. Penn. LR* 2219.

In contrast, the work of the late Robert Cover rejected the privileged position of the judge in giving meaning to public values. It recognized the ability of insular communities and redemptive movements to create their own public values, which were in turn threatened by the authoritative and 'objective' judicial adjudication of the dominant society. See Cover 'Foreword: Nomos and Narrative' (1983) 97 *Harv. LR* 4; Cover 'Violence and the Word' (1986) 95 *Yale LJ* 1601; and his posthumously published response to Fiss in *Procedure*, 729-30.

22 Until the book's publication in 1973 there was no commercially published casebook on Canadian civil procedure! Before that time civil procedure was dominated by practitioners who, according to folklore, taught the rules, often numerically. Even today civil procedure is taught as a first-year introductory course in only a few Canadian law schools, whereas it is a staple in the first-year curriculum in American schools. I sus-

ture was done by practitioners who may have had an even greater attachment to the corrective paradigm, but who unfortunately did not articulate their understanding of adjudication in a systematic fashion.

The work of Ernest Weinrib offers a refined understanding of corrective justice, one that grounds tort standards of liability in what for most lawyers is the unfamiliar ground of Kantian ethics,²³ and does not directly address the procedures of adjudication. Nevertheless a particular understanding of the procedures of adjudication and its alternatives forms the institutional foundation of Weinrib's corrective theory and the claim it makes to practical significance. Corrective justice claims to make sense of the traditional bipolar structure of civil adjudication in a way that no other theory of law can. Because only the plaintiff and the defendant are parties to the lawsuit, the only coherent option for the judge is to do justice by undoing the wrong one has caused to the other and to restore the status quo ante between the two parties without disturbing broader social distributions. The inherent structure of adjudication should make clear the folly of the pursuit of distributive strategies that speak only to one party and implicate many who cannot be heard within the confines of the lawsuit. Although he eschews interest in 'legal mechanics,' Weinrib must accept the procedural similarities between corrective justice and the individualistic bipolar model of dispute resolution that Fiss criticizes.²⁴

pect that practice-oriented courses share the corrective assumptions of the first casebook but would be considerably less self-conscious about policy and reform issues. Traditional American civil procedure casebooks may also reveal an implicit corrective paradigm. See Field, Kaplan, and Clermont *Civil Procedure* (5th ed.) (Westbury: The Foundation Press 1984).

²³ See generally Weinrib 'Law as a Kantian Idea of Reason' (1987) 87 *Columbia LR* 472 and Weinrib 'The Intelligibility of the Rule of Law' in Hutchinson and Monahan (eds) *The Rule of Law* (Toronto: Carswell 1987) 59.

²⁴ Weinrib cheerfully admits that his theory shares many of the procedural features of Fiss's model of dispute resolution, such as individualized party structure, transactional causation, and restorative remedies; but he then argues that these procedural forms are the perfect embodiment of a compelling substantive vision that integrates corrective forms with Kantian ethics.

Weinrib's theory of corrective justice is much less crude than Fiss's model of dispute resolution, in the sense that it does instruct judges how to resolve disputes. The Weinribian judge could not resort to coin flipping but would rather work out the moral requirements of universal personhood. See Weinrib 'Adjudication and Public Values: Fiss's Critique of Corrective Justice' (1989) 39 *UTLJ* 1. Contra Fiss 'Two Models of Adjudication' in Goldwin and Schambra (eds) *How Does the Constitution Secure Rights* (Washington: American Enterprise Institute 1985) 40. As suggested at the outset, I will deal with the procedural dimensions of Weinrib's theory of corrective justice, not its Kantian substance. Whether Weinrib is correct that Fiss has failed to offer an alternative to Kantian individualism must be left to other occasions.

The corrective model of procedure having been presented, the alternative of public law litigation will be examined. *Procedure* will be presented as a conscious rejection of the traditional corrective model in favour of a public law model that places courts on centre stage as the institution which can bring about structural reform for disadvantaged groups.²⁵ If the corrective model unduly restricts courts to the role of correcting discrete wrongs, the public law model is open to criticism for refusing to recognize the limits of the courts' capacity to reform complex democratic societies. In the age of the Charter it is especially important for Canadians to have a sense of the strengths, weaknesses, and cultural specificity of the public law model.

After evaluating the extremes of the corrective and public law models, I will explore the possibility of a constructive synthesis that does not limit adjudication to the correction of discrete wrongs but yet does not force all matters of political, social, and economic reform into the constraints of adjudication by courts. The question posed will be how far the third edition of *Canadian Civil Procedure* has gone towards synthesizing the corrective and public law models. This will be followed by speculation about an introductory course on legal procedures that rejects any dichotomy between adjudication by courts and other political and social forms of ordering.

A word of caution and some apologies are in order here. The casebooks reviewed are the product of collaborative efforts by scholars with distinctive views. On the basis of their scholarship as individuals it would be unfair to suggest that they share any one view of procedure or subscribe fully to the ideal corrective and public law models presented here.²⁶ Nevertheless the overall effect of how casebooks are structured

²⁵ The corrective and public law models that I identify bear some resemblance to the contrasting 'conflict resolution' and 'behaviour modification' models and to the contrasting 'dispute resolution' and 'enforcement' models previously identified by Kenneth Scott and Bruce Wildsmith respectively. See K. Scott 'Two Models of the Civil Process' (1974-57) 27 *Stan. LR* 937; B. Wildsmith 'An American Model of Civil Process in a Canadian Landscape' (1980) 6 *Dalhousie LJ* 71.

An important difference is that while the conflict or dispute resolution models focus on the resolution of the plaintiff's grievance, the corrective model explains why the plaintiff and the defendant are brought together in the lawsuit and treated equally under traditional rules. Likewise, although the behaviour modification or enforcement models share the public model's concern with making the defendant comply with public standards, the latter also accounts for the importance of group claims by plaintiffs. Thus, the corrective and public law models taken from the work of Weimrib and Fiss have greater powers to explain the complexity of litigation than those previously presented.

²⁶ I have suggested some of the differences between the individual scholarship of Cover, Fiss, and Resnik in the text at *supra* note 21. The Canadian quartet is no less diverse.

is too important to ignore. There is every reason to believe that a careful examination of teaching materials will reveal more about collective understandings than the work of individuals. Thus, with apologies to those individuals whose perspectives and dissenting voices will not be given their due, I will focus on the dominant paradigms that emerge from the casebooks reviewed.

III *The civil procedure of corrective justice*

The traditional civil procedure course did very little to place litigation in a broader context. Much was presented as a given, with historical accounts telling a story of progress to more efficient, centralized, and rational forms of adjudicative procedure. Highlights in this inevitable march of progress include the abolition of the forms of action, the merger of law and equity, and the development of simpler forms of pleading.²⁷ The merger of law and equity also purged the more authoritarian and subjective tendencies of the judicial activism of Chancery and Star Chamber and established the one-shot award of damages as the preferred remedy. Alternative paths for reform were ignored, as were the costs of the abandonment of particularistic procedures tied to the substance of the claims. The first edition of *Canadian Civil Procedure* included historical material, but it essentially told a story of progress that sanctified the existing procedures of adjudication.²⁸

William Bogart and Robert Sharpe have demonstrated more enthusiasm for public law litigation than their co-author Allan Hutchinson, who has championed democratic means of reform. Compare Sharpe 'Injunctions and the Charter' (1984) 22 *Osgoode Hall LJ* 473 and Bogart 'Standing and the Charter: Rights and Identity' in Sharpe (ed.) *Charter Litigation* (Toronto: Butterworths 1987) with Hutchinson 'Charter Litigation and Social Change: Legal Battles and Social Wars' in Sharpe (ed.) *Charter Litigation* supra and Hutchinson and Monahan 'Democracy and the Rule of Law' in Hutchinson and Monahan (eds) *The Rule of Law* (Toronto: Carswell 1987).

None of the four scholars have embraced corrective theory, with Hutchinson criticizing Weinrib's theory both on theoretical grounds and as being unresponsive to modern political and social contexts. See Hutchinson 'The Importance of Not Being Ernest' (1989) 34 *McGill LJ* 233.

My understanding of these two casebooks is undoubtedly influenced by my experience in Robert Sharpe's 1984-85 civil procedure class, which read a preliminary version of the third edition of *Canadian Civil Procedure*, and in Owen Fiss's 1987 procedure class, which read the galley proofs of parts of *Procedure*.

²⁷ Martha Minow has noted some similar understandings of legal change in the American civil procedure literature. See Minow 'Some Thoughts on Dispute Resolution and Civil Procedure' (1984) 34 *J. of Legal Ed.* 284.

²⁸ The first edition of *Canadian Civil Procedure* 12-35. Since its publication much revisionist procedural history has been written. See H. Arthurs *Without the Law* (Toronto: University of Toronto Press 1985); S. Yeazell *From Medieval Group Litigation to the*

The lack of a sense of historical contingency is congruent with the underlying theory of corrective justice and its claim to universal application. The confident essentialism of Weinrib's theory of corrective justice questions the relevance of extra-legal forms of scholarship that presuppose instrumental ways of looking at adjudication.²⁹ The earlier editions of *Canadian Civil Procedure* were similarly no home for the extra-legal forms of inquiry of so much modern legal scholarship.³⁰ The only piece of critical scholarship included was Jerome Frank's critique of the 'fight' theory of adjudication, and that was consistent with corrective theory because the answer to Frank's criticism of adversarial adjudication was simply to direct more issues to administrative agencies capable of pursuing the expert investigation that he thought was needed in modern society.³¹ The focus in the traditional civil procedure course was on understanding the procedures of adjudication on their own terms and not in the light of the shortcomings and contingency revealed by various historical, economic, or critical perspectives.

The internal perspective on procedural rules also meant that their effect on the substance of any particular law could be ignored. Because procedural rules purport to outline the fundamental elements of adjudication before courts, they were thought to be trans-substantive and neutral. If corrective procedures failed, then difficult problems, such as workers' compensation, could be routed into the legislative and administrative processes. This could be done without offering any description of the alternative processes because that was understood as a matter of politics separated from law. It could also be done without sacrificing the

Modern Class Action (Cambridge: Harvard University Press 1987); S. Subrin 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 *U. Penn. LR* 909; S. Subrin 'David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision' (1988) 6 *Law and History Review* 311; R. Bone 'Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules' (1989) 89 *Columbia LR* 1; D. Millan 'Positivism and the Historiography of the Common Law' [1989] *Wis. LR* 669.

²⁹ Weinrib 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale LJ* 949, at 1014-16

³⁰ In the first edition only fourteen articles are acknowledged, and, with the exception of readings from the work of Jerome Frank and Karl Llewellyn, all others were from standard English or American texts or doctrinal articles. See the first edition *Canadian Civil Procedure* vii. In contrast, in the third edition there are 68 acknowledgments of other texts. Work of scholars from the law and economics and the law and society schools are included, as are feminist and critical legal studies critiques of adjudication. See the third edition of *Canadian Civil Procedure* v-x.

³¹ An excerpt from Frank's *Courts on Trial* was included in the first edition of *Canadian Civil Procedure* 57-62.

trans-substantive nature of the procedural rules of litigation in the ordinary courts. In this way, the formalism of corrective justice was able to survive the onslaught of realist critiques in the teaching of civil procedure at a time when other subjects had to deal with the tensions the realists revealed. The phases of the civil action and its bipolar adversarial structure could still be presented as inevitable and neutral. The range of what was not studied just got larger.

In the corrective paradigm, lawsuits are portrayed as emerging from discrete events between individuals rather than from long-term conflicts between organizations and groups. The remedy is an act of rectification in the form of a one-shot award of damages and not an evolving and supervised process involving injunctive relief. The opening passage of the first edition of *Canadian Civil Procedure* economically establishes the corrective world-view of individualistic party structure, transactional causation, and restorative remedies: 'If a citizen is aggrieved at some loss or detriment that has been caused to him by the conduct of another, our legal system allows him to seek a remedy from a court'³² Thus the tone is set for the remainder of the casebook, and any more complex factual context than the run-of-the-mill traffic accident is presented as problematic. The possibility of expanding even that form of litigation to recognize the multicausal nature of accidents and the role played by manufacturers and governments in traffic safety was, of course, not explored.³³

The mediation of the bipolar party structure by insurers or other third parties is presented as problematic within the corrective framework

³² First edition of *Canadian Civil Procedure* 1

³³ This is not to disparage, as Fiss appears to do, the richness of traffic accidents as a forum for structural reform. Lawsuits should not always be levelled at the driver who 'causes' the harm but against other actors whose behaviour contributes to the damage sustained in the accident. See Hutchinson 'The Importance of Not Being Ernest' 34 *McGill LJ* 233, at 258-9; M.L. Friedland, M.J. Trebilcock, and Kent Roach *Regulating Traffic Safety* (Toronto: University of Toronto Press 1990).

Some of the possibilities for the expansion of litigation in the traffic safety context are presented in the third edition of *Canadian Civil Procedure*. Introductory overview materials are based on the case of *Starr v. Richardson House Ltd.*, in which a drunken patron sues the bar he was drinking in for the injuries suffered when he drove his automobile into a tree. In another case, *Phillips et al. v. Ford Motor Co.*, an auto company is sued for the production of a defective braking system. In order to engage in the complex fact finding often needed to discover bureaucratic nonfeasance, a master is appointed by the trial judge in the latter case. Although the case is followed by Chayes's classic article on the role of the judge in public law litigation, it also emerges as an object lesson for the need for a passive judge in the adversary system. The assessor is characterized by the appeal court as a 'partisan advocate' who adopts 'inquisitorial' as opposed to 'judicial' procedures and who has disturbed the traditional functions of pleadings by introducing new theories of liability. Third edition of *Canadian Civil Procedure* 141-6.

because it introduces problems of conflict of interest and strategic behaviour that would be avoided if the essential unity of the lawsuit between doer and sufferer was maintained.³⁴ A bipolar party structure is assumed; discovery is limited to parties and those adverse in interest, and a wider search for facts requires special justification.³⁵ Joinder is justified not with reference to the multi-causal nature of modern wrongs but rather by concerns about efficient dispute resolution and judicial economy. The focus is as likely to be on prohibiting the splitting of one dispute as on allowing the joining of related parties and claims. Finally, the parties are assumed to be individuals; in the first edition, class actions received no more than a passing mention³⁶ despite their extensive use in the United States at the time.

The adversarial system with its emphasis on party initiation and control allows the individualistic party structure to operate. Although Weinrib does not specify that an adversarial system would be integral to corrective justice, it is difficult to imagine two systems more compatible. If private law is designed to correct discrete acts of wrongdoing that infringe universal standards of personhood, it makes sense to rely on aggrieved individuals to prosecute their own claims. After all, it is only that person who will receive the restorative remedy that the courts can legitimately bestow. Collectively determined modes of prosecution are suspect because they risk deflecting attention from the rectification of wrongdoing to other social goals. Similarly, the overriding ethical teaching in traditional civil procedure is that the lawyer owes an almost unconditional loyalty to his or her client. While public law issues can be ignored in every other aspect of the traditional civil procedure curriculum, pride of place is given to the defence of those accused of crimes in the discussion of legal ethics. Defence advocacy and not the special obligations of the public prosecutor are stressed, so that the values of formal equality, individualism, and relentless loyalty to the client find their most natural home. The individualism of adversarial ethics may be tempered at times within the traditional model, but it is never placed in its political context or seen as contingent. The individualism of both adversarial

34 First edition of *Canadian Civil Procedure* 529-52. Traditional prohibitions against maintenance and champerty also were designed to prevent outside interference in bipolar disputes.

35 First edition of *Canadian Civil Procedure* 656-7

36 *Ibid.* 497. This shortcoming was remedied in the second edition by the addition of a section in the joinder chapter on class actions, starting with the traditional rule that class actions were not available on separate contracts when damages must be calculated individually. G.D. Watson, S. Borins, and N.J. Williams *Canadian Civil Procedure Cases and Materials* (2d ed.) (Toronto: Butterworths 1977) 5-82 to 5-110.

ethics and corrective justice need not be situated in the larger context of political history or theory if it is portrayed as simply the way adjudication operates.

Economic barriers to litigation are not presented as a major problem in the traditional civil procedure course.³⁷ The lack of concern about the economic resources of potential litigants mirrors the lack of concern with prior distributions of resources in corrective theory. The task of private law is only to restore the status quo ante; the justice of the pre-existing status is presumed. The justice of settlements can likewise be ignored because those who were really wronged will insist on their day in court, knowing that vindication will bring with it partial compensation for the cost of litigation under a system in which costs follow the event. Traditional cost rules reinforce the rectificatory morality of corrective justice by partially compensating the winning party for the expense of litigation and by penalizing those who falsely claim to have been wronged. The fact that these cost rules systematically deter those who wish to bring innovative claims³⁸ is not a problem if the matters being litigated are conceived to be easily identified acts of wrongdoing as opposed to complex conditions that are only in the process of being recognized as wrongful or even harmful. Worthy plaintiffs are expected to see their suits through on the corrective promise that they will be restored to their original position of (formal) equality.

Also reflecting an assumption that lawsuits would revolve around easily identified acts of wrongdoing was the requirement of specific accusations and notice in the conduct of litigation. In both the service of the initial process, the formation of the pleadings, and the conduct of discovery, emphasis is placed on informing the parties of the case they must meet. The idea of notice as constitutive of due process has its roots in a view of trials as involving accusations of discrete acts of wrongdoing.³⁹ Problems of indeterminate plaintiffs and defendants that now

37 A brief note on legal aid and prepaid legal services was provided in the first edition. A section entitled a critical analysis of the expense of litigation dealt mainly with the regulation of lawyers' fees, with only passing recognition of alternatives such as mass state adjudication in workers' compensation or no-fault insurance schemes. First edition of *Canadian Civil Procedure* 142-3, 151-2.

38 See *supra* note 10.

39 Notice is related to an individualistic adversary system and the existence of adjudication in the following statement: 'Under our adversary system method of litigation the court conducts no active investigation of its own but decides the case on what is put before it by the parties. Party presentation and definition of the controversy is the basis of our adversary system. The fair and orderly disposition of a case by this method requires due notice of the contentions to be made at trial so that the parties will have an opportunity to prepare and present matters in rebuttal or by way of excuse.' First edition of *Canadian Civil Procedure* 414.

present themselves in the toxic tort context are hardly imaginable in the traditional paradigm. Likewise, the conflict between notice and the prosecution of claims on behalf of diffuse groups was also repressed in the individualistic world-view of the corrective model. The counterpart of the requirement for specific notice of discrete wrongs is that the defendant is tried only on specific allegations; all else can be struck from the pleadings as 'scandalous' or 'embarrassing.'⁴⁰ This vision of due process follows Weinrib's theory in that corrective justice abstracts from the status, history, and resources of parties and places only the allegation of discrete acts of wrongdoing on trial. A broader view of the parties would implicate distributive strategies best left to the political arena.

The requirement of specific notice also reflects a view of a lawsuit as revolving around discrete events that can be categorized under determinate causes of action. Under Anglo-Canadian pleading rules⁴¹ it is assumed that the worthy plaintiff should be able, without the benefit of discovery, to state the material facts alleged and the remedy requested. The possibility that the litigant's information may be incomplete at this stage is admitted, but variance from the pleadings is an anomaly requiring the leave of the court and may not be allowed if the corrective mould is broken by adding new parties or causes of action.⁴² Those who wish to raise innovative legal claims face the burden of having to defend their cause of action before trial, perhaps exhausting their ability to have a trial.⁴³ These procedures may be 'eminently reasonable'⁴⁴ if the litigation is about a discrete and established wrong, but they hardly suffice if the wrong is a complex condition produced by organizations and regulatory neglect.

The principle of equal treatment of all litigants under procedural rules emerges as an important theme in the traditional civil procedure course, one that mirrors the emphasis on formal equality in corrective justice. As in corrective theory, plaintiff and defendant are conceived to be in a position of pre-existing equality before the dispute, and this is

⁴⁰ Ibid. 348-64

⁴¹ Third edition of *Canadian Civil Procedure* 374-5. See supra note 8.

⁴² There is much greater emphasis on the requirements of formal adequacy of pleadings and the procedure for amending pleadings in the first edition of *Canadian Civil Procedure* (312-475) than in the third edition (379-416).

⁴³ *Nelles v. The Queen in Right of Ontario* (1985) 51 OR (2d) 513 (Ont. CA) excerpted at 417-21 rev'd [1989] 2 SCR 170

⁴⁴ First edition of *Canadian Civil Procedure* 4, referring to challenging the substantive adequacy of a statement of claim. This procedure was subsequently described as the 'first weapon in the hands of your adversary' and as 'not only reasonable, but axiomatic.' Ibid. 295.

carried over to an insistence on equal procedural powers in the lawsuit despite any differences in status and resources between the parties. Thus, cost rules are two-way in that they subject both the plaintiff and the defendant to disincentives to sue. No thought is given to special structuring of either attorney fee or damage awards to encourage the prosecution of certain claims in the public interest. Similarly the rules of solicitor-client privilege would apply in the same manner to protect both the confidences of individuals and corporations. The disproportionate effect of such a 'two-way street' approach in shielding corporate operations from scrutiny did not merit any comment in the first edition, although it is presented as a problem in the third edition.⁴⁵ In general, the equal autonomy provided under procedural rules coupled with the unequal resources of the parties to utilize their formally equal procedural rights is presented as a problem only in the third edition of *Canadian Civil Procedure*.⁴⁶ The uncritical acceptance of the disparate results that unequal parties obtain from 'neutral' and 'equal' procedures in traditional civil procedure corresponds with the corrective model's implicit support of pre-existing distributions.

Within both the traditional model of civil procedure and the theory of corrective justice, it is assumed that remedies of rectification can be easily executed. For all its theoretical significance as the act that disengages the plaintiff and the defendant and returns them to the state of legal grace,⁴⁷ remedial problems have largely been ignored in Weinrib's theory of corrective justice. Weinrib stresses the importance of the damage award as an institutional feature of tort law and as the normative act of rectification and disengagement between the plaintiff and the defendant, but he is laconic on remedial details such as how damages should be calculated or whether his normative foundation would ever demand stronger remedies.⁴⁸ Similarly in the first edition of *Canadian Civil Pro-*

45 Ibid. 653-6; third edition of *Canadian Civil Procedure* 490-2, 502-3, 516-18

46 For example, the first edition includes this statement: '[O]ften the procedural rules are employed as weapons in the battle. Using procedural motions to increase an opponent's costs, to cause delay and to avoid any determination on the merits, are tactics as old as the adversary system itself.' First edition of *Canadian Civil Procedure* 64. This problem of advocacy, seemingly accepted uncritically in the first edition, is now explored critically in preliminary sections in the third edition (98-103).

47 Fiss 'Two Models of Adjudication' in R. Goldwin and W. Schambra *How Does the Constitution Secure Rights* (Washington: American Enterprise Institute 1985) 41-2

48 But see Weinrib 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale LJ* 949, at 978 n61 suggesting that there may be a place for injunctions in corrective theory. Given corrective premises it would, in my view, be difficult to justify injunctive intrusions in the absence of clear findings that one party was about to intrude or had indeed intruded on another's protected interest. A corrective injunc-

cedure, with the exception of a passing mention of the difficulty of collecting damage judgments,⁴⁹ remedial problems and complexities were ignored. If the pre-trial processes work properly as a funnel narrowing the issues for trial and specifying the 'proper' remedy, then there is no need to explore procedural innovations in distributing damage awards among groups or in formulating injunctions in response to complex conditions. There is an implicit assumption that rectification for discrete wrongs to individuals can be easily achieved through an award for damages.

In short many of the features of the traditional civil procedure course can be explained by reference to its implicit acceptance of corrective justice as the model of adjudication. The traditional course's lack of concern with broader questions of political, social, and economic justice or with the contingency of procedural rules mirrors much of the essentialism of Weinrib's theory. Procedural rules are presented as natural and neutral, and their failures in responding to modern conditions can be sidestepped by routing problems to the political arm of the state and into the contingent realm of distributive justice. A bipolar party structure based on equal treatment of the two parties and traditional cost rules matches the focus on restoring plaintiffs and defendants to their prior positions in corrective theory. The adversarial system based on party presentation and prosecution and emphasizing advance notice of all accusations is also compatible with the corrective model of a lawsuit as a contest between individual wrongdoers and sufferers about a discrete moral wrong that one has caused to the other. A lack of concern about complex remedial issues is justified by the assumption that the lawsuit can easily be terminated by an act of rectification in the form of damages. Finally, the constraints that bipolar procedures place on the substance of modern law are ignored in the traditional civil procedure course.

IV *The public law procedure of structural reform*

Procedure is, in many ways, the perfect antidote to the sense that corrective procedures are either essential to adjudication or neutral to substantive results. Despite its title, this innovative casebook is primarily concerned with substance and the procedure needed to vindicate the sub-

tion could, to use Fiss's nomenclature, be reparative and, in some clear cases, preventative, but never structural. Fiss *The Civil Rights Injunction* (Bloomington: Indiana University Press 1978).

49 First edition of *Canadian Civil Procedure* 70

stance of public laws, especially the American Bill of Rights. This orientation is apparent in its preface, which ends with a comment on the last chapter dealing with repetitive litigation:

[A]s in all the chapters, the concern is with the influence of context on rules, of preferences for and prohibitions against repetitive litigation linked to specific genres of litigation and to views of the moral worthiness of certain categories of litigants.⁵⁰

This stands in contrast to the first edition of *Canadian Civil Procedure*, which opened by separating substantive law from its concern, the neutral framework of procedural law:

If a citizen is aggrieved at some loss or detriment that has been caused to him by the conduct of another, our legal system allows him to seek a remedy in court. Whether or not the court will, in the circumstances, grant him that remedy is the concern of the substantive law – e.g. the law of torts, contract or property. In contrast, civil procedure is concerned with the process by which the aggrieved person brings his case before the court for adjudication.⁵¹

Procedure rejects the implicit formalism that allows traditional civil procedure to examine the forms and procedures of adjudication in a manner that is disengaged from the substance of particular laws and moral claims.

A brief outline of the content of *Procedure* is required because it is very different from traditional civil procedure materials. Students are not led through the stages of the civil action on the implicit assumption that the rules of adjudication are trans-substantive and neutral. Rather the focus is on how the values of different laws are promoted or frustrated through the procedural rules of litigation. This message is conveyed by a thematic organization highlighting a few extreme cases that cannot fail to convey, often quite dramatically, the substantive implications of procedural decisions.

The value of adjudicative procedures is explored in the first chapter through *Goldberg v. Kelly*,⁵² which discusses the requirements of constitutional due process before the state withdraws welfare benefits and affects the survival and dignity of the poor. The next chapter deals with the limits of the traditional bipolar party structure. The emphasis is not on third-party claims of insurance companies in accident cases but rather

⁵⁰ *Procedure* xi

⁵¹ *Canadian Civil Procedure* 1

⁵² 397 US 254 (1970) excerpted in *Procedure* 37–50

on the role of interest groups in a lengthy and complex case dealing with the desegregation of public schools and public housing in the Cooney Island district of New York City. The limits of the traditional bipolar structure are driven home in the third chapter, where Gary Gilmore is unconstitutionally executed because of a refusal to allow public interest standing. The problem of imbalance of resources between parties and the effects of the application of 'neutral' discovery and cost rules are examined in the fourth chapter through the prosecutor's constitutional duty to disclose evidence to the accused and the operation of one-way attorney fee awards in civil rights cases. The implications of choice of forum and the institutional structure of the judiciary are explored through a study of a hijacking trial in West Berlin by an American judge struggling to be free of the State Department's attempts to control the outcome. The termination of litigation is examined through an accused's attempt to withdraw a guilty plea entered to avoid facing the death penalty and Fred Korematsou's attempt, forty years after the event, to have his conviction vacated for violating an order that all persons of Japanese descent be excluded from the West Coast. At every turn, the authors of *Procedure* raise the substantive stakes as high as possible to highlight the effect that procedure has on substance.

In its quest to explore the substantive dimensions of procedure, *Procedure* does not stop at examining the pre-trial processes that shape a dispute for adjudication. It goes on to deal with issues of judicial decision-making traditionally left to courses on jurisprudence and remedies. Psychological issues in judging are explored in the context of a jury's decision to award Karen Silkwood's estate \$10 million in punitive damages for her exposure to plutonium nine days before her suspicious death. The problems of formulating and implementing a remedy are presented in an early chapter dealing with a structural injunction to reform segregated schools and public housing. This expanded focus reflects a concern about how the substance of the law is implemented and a rejection of the implicit formalism that makes such topics unproblematic in traditional civil procedure.

Much time and effort is devoted in *Procedure* to dispelling the corrective view of a typical lawsuit as being between two individuals. Plaintiffs, when they are not the real attorney general, are presented as private attorneys general seeking widespread reform on behalf of groups. The plaintiffs lawyers in *Goldberg v. Kelly* bring their action not primarily to achieve due process or the restoration of welfare payments for their clients but on the behalf of the dignity and position of all who receive welfare benefits. In fact the fates of John Kelly and other plaintiffs is so secondary that they are never revealed. Likewise, the claim of Karen

Silkwood's estate to punitive damages is not a demand for rectification, but rather a supplement to deficient regulation of the nuclear industry. At every turn students are invited to consider the larger social forces that plaintiffs and defendants represent.

The authors are aware that the move away from the individualism of the corrective model presents hazards as well as benefits. In examining topics such as the impact of attorney fees statutes on settlements, and the role that judges must play in protecting classes from their nominal representatives, *Procedure* is not naïve to the dangers that accompany litigation by representatives of groups.⁵³ Once the simple picture of a lawsuit between individuals is shattered, legal ethics become much more complex. *Procedure*, to its credit, leaves the defence advocacy paradigm of legal ethics well behind.

Although resort to public law cases can illuminate the effect that procedural rules have on substantive law, the book can be criticized for ignoring the procedural issues raised by discrete wrongs suffered by individuals.⁵⁴ Ironically, given its rejection of the formalist vision of traditional civil procedure, *Procedure* may have imposed its own brand of formalism in the name of public as opposed to private law. Students are trained in *Procedure* to see every case as a big one; litigants should be pulled by procedural design and substantive ambitions to represent larger social forces. There is little concern for the adjudicatory or administrative procedures that would handle fender benders.

The tensions between the use of adjudication or administration to protect individuals and to achieve broader structural reform is especially evident in the first chapter on the value of procedure. This chapter examines the rise and fall of the United States Supreme Court's due process revolution starting with *Goldberg v. Kelly* through the development of the *Mathews v. Eldrige*⁵⁵ criteria for the appropriateness of due process. The Supreme Court's decision in *Goldberg v. Kelly* not to require appointed counsel in hearings before the termination of welfare benefits is presented as a failing, despite legitimate concerns about the costs and benefits of this added procedural feature⁵⁶ or about the more general

53 *Procedure* 271-92; 514-37 (intra-class conflict in desegregation suits); 730-87 (section entitled 'the problems of agency: attribution and domination' involving lawyer-client relationships)

54 One of the authors has expressed concern about increased aggregation in the federal courts docket and the lack of concern over little cases despite the fact that most of *Procedure* is about 'big cases.' Resnik 'The Domain of Courts' (1989) *U. Penn. LR* 2219, at 2227-30.

55 424 US 319 (1976) excerpted in *Procedure* 112-22

56 J. Mashaw *Bureaucratic Justice* (New Haven: Yale University Press 1983)

effects that legalization has on welfare administration.⁵⁷ The case for lawyers is then driven home by using a case in which a prisoner was dragged unprepared and without counsel into a hearing to terminate her parental rights to her son.⁵⁸ The decision to terminate parental rights in *Lassiter* is horrifying, but it hardly provides a constructive vehicle for an evaluation of the problems raised by *Goldberg*. The termination of parental rights is simply too different a context from that of mass social welfare adjudication. Here the manipulation of context obscures rather than enlightens.

Likewise, those who see weaknesses in reliance on adversarial adjudication can justly complain of unfair treatment in *Procedure* because of insensitive manipulation of context. Carrie Menkel-Meadow's important article exploring the possible effects of women's voices in fostering a less adversarial and more integrative lawyering process is followed by an article on the adverse effects of mediation in wife abuse cases.⁵⁹ Pointing out the limits of non-adversarial processes is fair enough, but the fact that settlement is an inappropriate response to violence against women does not mean that it may not be appropriate in many other areas. When settlement is discussed again in the book, it is in the context of the dispute resolution processes of insular communities and the conflict between their values and those of due process and anti-discrimination. Robert Cover was extremely tolerant of alternative value systems and aware of the dangers of judicial attempts to delegitimize these systems;⁶⁰ his perspective, however, may be difficult to appreciate after over 1200 pages celebrating the more dominant values of due process and anti-discrimination. In short, the choice of contexts in *Procedure* highlights the weaknesses but not the strengths of non-adjudicatory methods of dispute resolution.

The integration of informal processes into adjudication fares no better than non-adjudicatory methods of dispute resolution. In the Coney Island desegregation case, a special master's attempts to use informal

57 Simon 'Legality, Bureaucracy and Class in the Welfare System' (1983) 92 *Yale LJ* 1198; J. Handler *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (New York: Russell Sage Foundation 1986). Briefly noted in *Procedure* 132-4.

58 *Lassiter v. Department of Social Services of Durham County, North Carolina* 452 US 18 (1981) excerpted in *Procedure* 134ff.

59 C. Menkel-Meadow 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's LJ* 39 excerpted in *Procedure* 959-5; L. Lerman 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' (1984) 7 *Harv. Women's LJ* 57 excerpted in *Procedure* 966-75.

60 See supra note 21. Cover's work is cited, but not excerpted, before the dispute resolution processes of the Chinese Benevolent Society, Indian tribal courts, and labour mediation are presented. *Procedure* 1372-1414.

means to devise a comprehensive remedy for segregation in both housing and schools are presented as a threat to the judicial task of independently and objectively giving meaning to public values.⁶¹ The master's report is criticized by all, denounced as a "voluntary," sugar-coating, negotiating approach' by a consultant for the NAACP⁶² and understandably rejected by the judge. The danger is that the use of negotiation and conciliation will be confused with its poor execution in this case. The master himself came to realize that a quick afternoon visit with some of the residents of the area was not the optimal technique for incorporating their perspectives in his plan.⁶³ The authors of *Procedure* are content to leave their students with this one disastrous example of the use of negotiation, despite the fact that all structural injunctions contain elements of a negotiated settlement in their reliance on the parties' submissions of plans and the need to gain the cooperation of the affected parties. If anything, the Coney Island experience underlines the impossibility of imposing meaningful remedies without the consent and cooperation of the parties affected. It suggests that the answers to the complexities of structural reform are likely to rely on better, not less, use of negotiation and settlement.⁶⁴

Procedure's defence of public law litigation and even of adjudication itself is increasingly out of step with the concerns of most American lawyers and policy-makers for efficient dispute resolution. The material in *Procedure* itself illustrates that the attempt to expand litigation away from the corrective paradigm is continually thwarted by the conservatism of the Burger/Rehnquist Court and by recent concerns about litigation strategies that prolong and expand disputes. It is ironic to find a fierce attachment to the corrective paradigm at the heart of American standing doctrine when, despite Fiss's criticisms of their corrective orientation, Canadian courts have at the same time broken ground in the development of public interest standing.⁶⁵ Similarly, despite American sophis-

61 Fiss 'Foreword: The Forms of Justice' supra note 1 'Objectivity and Interpretation' (1982) 34 *Stan. LR* 739; Fiss 'Justice Chicago Style' supra note 21

62 *Procedure* 298. Compare D. Bell 'Serving Two Masters: Integration Ideals and Constitutional Interests in Desegregation Litigation' (1975) 85 *Yale LJ* 470.

63 Berger 'Away from the Courthouse and into the Field: The Odyssey of a Special Master' (1978) 78 *Columbia L* 707 excerpted in *Procedure* 334

64 See [1987] *U. Chi. Legal Forum* for a symposium on the use of consent decrees in structural injunction contexts. Fiss's opposition to the trend to use consent decrees is contained in his keynote address 'Justice Chicago Style' at p. 1 of that volume.

65 Compare *Gilmore v. Utah* 429 US 1012 (1976) excerpted in *Procedure* 432-6 with *Minister of Justice of Canada v. Borowski* [1981] 2 SCR 575 excerpted in the third edition of *Canadian Civil Procedure* 677-84. The judicial expansion of standing in Canada has not prevented demands for legislative reforms to widen standing further. See Law

tication in the administration of class actions, individualistic assumptions about the need for notice to all parties can still stop litigation on behalf of diffuse groups dead in its tracks.⁶⁶

When American conservatives have not been imposing an individualistic corrective model on adjudication, they have been opposing adjudication itself. The promise of liberal pleading and discovery rules as the means to equalize parties has bogged down in concerns about their abuse.⁶⁷ Likewise, concern about delay has led to increasing use of pre-trial settlement procedures, summary judgments, and settlement inducing cost rules.⁶⁸ *Procedure* celebrated adjudication at a time when many Americans are fleeing from its costs. All in all, the authors are remarkably frank about the obstacles that their type of litigation faces. The fact that American courts are currently resisting the ambitions and costs of public law litigation is no need to disparage attempts to formulate and defend that alternative model. The book will have its greatest attraction for judicial romantics but the intellectual development of the public law model is necessary to provide even a credible threat of litigation on behalf of those who lack power outside of court.

Procedure has been criticized for its ahistorical qualities.⁶⁹ As with the above criticisms of its quixotic character, however, I think this one also underestimates the book's innovative strengths. It is true that *Procedure* does not include the standard Whiggish historical summary of inevitable progress to present-day procedural rules, but that omission is hardly a failing, especially in a book which contends that there is still a need for much reform. In its own way *Procedure* writes the history of its times by covering the rise and fall of public interest litigation in the post-*Brown v. Board of Education* era. Perhaps unintentionally, contingency is revealed by the contrast between the activism of the Warren Court and the

Reform Commission of British Columbia *Report on Civil Litigation in the Public Interest* (Victoria: Queen's Printer 1980); Ontario Law Reform Commission *Report on Standing* (Toronto: Queen's Printer 1989).

66 *Eisen v. Carsile & Jacquelin et al.* 417 US 156 (1974) excerpted *Procedure* 495-507

67 *Ibid.* 859-940

68 The literature on this retrenchment is voluminous. There is a current perception that the Federal Rules afford too easy access to courts. See Resnik 'Failing Faith: Adjudicatory Procedures in Decline' (1986) 53 *U. Chi. LR* 494 and various symposia examining the Federal Rules on the occasion of their 50th anniversary. See (1989) 137 *U. Penn. LR* 1873ff; (1989) 63 *Notre Dame LR* 597ff; (1988) 62 *St. John's LR* 399ff. An accessible and provocative survey is provided in Minow 'Some Realism about Rulism: A Parable for the Fiftieth Anniversary of the Federal Rules of Civil Procedure' (1989) 137 *U. Penn. LR* 2249.

69 William N. Eskridge Jr. 'Metaprocedure' (1989) 98 *Yale LJ* 945, at 954; Linda S. Mullenix 'God, Metaprocedure, and Metarealism at Yale' (1989) 87 *Mich. LR* 1139, at 1167-8

retrenchment of the Burger/Rehnquist Court, punctuated by the frequent and passionate dissents of the surviving members of the Warren Court. The seemingly neutral and apolitical character of the Federal Rules of Civil Procedure is unmasked in an appendix that details some of the political battles over recent amendments.⁷⁰ The absence of history fails *Procedure* not so much when the book looks to the past, but rather when it attempts, in Alexander Bickel's phrase, 'to remember the future.'⁷¹ Then the book can only hold out a vision of a revival of the golden age of the Warren Court and public law litigation.

The most troublesome feature of the public law model is not the resistance of those opposed to it, but rather its failings in the hands of those who are most sympathetic to its aspirations. It is only with respect to the manner in which the shortcomings of the golden age of public law litigation are confronted in *Procedure* that its quixotic and ahistorical qualities merit criticism. The grandeur and the tragedy of the public law vision is vividly displayed in the long second chapter dealing with the attempts of Judge Weinstein to confront the socio-economic problem of segregation in Coney Island. The public law procedure of structural reform requires a heroic judiciary,⁷² and Jack Weinstein is a prototype of the fearless and tireless judges who are required to make that system work. Yet in Coney Island, he appears to have stared the requirements of structural reform in the face and beat a rather inglorious retreat.

At first, Judge Weinstein followed the structural reform model by recognizing the sociological and economic reality that the segregation of the public schools could not be addressed apart from the problems of residential segregation. Eschewing the corrective model that would hold the school board responsible only for each increment of school segregation that it had 'caused,'⁷³ Judge Weinstein started the lawsuit with the intent to link segregation in public housing to the suit on behalf of the minority schoolchildren. To this end, he commissioned a housing and urban redevelopment expert as a special master to develop a comprehensive remedial plan to reform public services and housing in Coney Island. The master did develop a comprehensive plan, but one that was long on good intentions and short on genuine political accommodation.

⁷⁰ *Procedure* 1787-1824

⁷¹ Bickel *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press 1978) c. 4

⁷² Fiss *The Civil Rights Injunction* (Bloomington: Indiana University Press 1978) 90

⁷³ *Milliken v. Bradley* 418 US 717 (1974); *Dayton Board of Education v. Brinkman* 433 US 406 (1977). See generally Gewirtz 'Choice in the Transition: School Desegregation and the Corrective Ideal' (1986) 86 *Columbia LR* 728.

It was universally rejected by the many parties implicated by it. This was in large part because it contemplated the displacement of many minority residents to achieve greater integration in public housing even though they had not been effectively consulted. Faced with broad-based community resistance and the threat of appellate constraints on the breadth of remedial powers, Judge Weinstein retreated and ended up ordering only a magnet school plan. In the remedial order, he uncharacteristically relied on the limits of his judicial authority and confessed that '[t]he decretal tool is poorly designed for restructuring an entire community.'⁷⁴ It is tragic that such an epitaph for the structural reform vision had to be written by one of its heroes.

Even more depressing is the information that the authors include on the eventual fate of the magnet school plan. They include reports that Coney Island remains 'an urban wasteland, in which entire blocks lie rubblestrewn, empty and abandoned';⁷⁵ and that the magnet school for talented students, although integrated and hailed in the media as a success, is in fact internally segregated, with Black students being concentrated in nonacademic talent areas such as the arts and athletics.⁷⁶ The authors must be praised for their intellectual honesty in so frankly presenting the limitations of their vision. Unfortunately, however, this failure is not used 'to remember a different future' by considering alternatives, perhaps ones more sensitive to the priorities of the communities to be reformed and less reliant on heroic judges.

In the end, it is this lack of concern for alternative strategies that is, in my view, the major failing of *Procedure*. The tragic flaw of the book is its refusal to take its admirable concern with substance seriously enough to explore the possibility of abandoning adjudicatory procedures in some contexts in order better to implement the substance of the law. In this sense *Procedure* – for all its substance-driven energy and originality – seems constrained in its unexamined faith that adjudication is the best way to implement the broad range of constitutional values the authors so obviously cherish. The authors courageously push the limits of adjudication to the perilous peak that Judge Weinstein clung to on Coney Island. Perhaps fearing the collapse of this fragile high ground, they stubbornly refuse to look down into the less idealistic realm of non-adjudicative ordering.

Nowhere is the failing so glaring as in the first chapter on the value

74 *Hart v. Community School Board* 383 F. Supp. 769 (ED NY 1974) *Procedure* (Westbury: The Foundation Press 1988) 308

75 *Ibid.* 332

76 *Ibid.* 351–62

of procedure. *Goldberg v. Kelly*, establishing the entitlement of welfare recipients to pre-termination oral hearings and extolling the virtues of protecting a new property in state entitlements, is celebrated while subsequent cases are presented as a lamentable retreat from its ideals. Neither the cost-benefit considerations implicit in the majority's decision not to extend the right to appointed counsel to pre-termination hearings nor Justice Black's concern in dissent that procedural rights will curtail the provision of welfare are given their due. No evaluations of the impact of *Goldberg* on those it was designed to benefit are included; it is simply assumed that procedural rights will improve the position of disadvantaged groups. Despite the arguments that the due process and property rights orientation of *Goldberg* backfired in many respects, only a cursory survey of these 'anti-formalist' arguments are provided, and the authors seem content with suggestions that many of those who oppose the *Goldberg* vision may simply be opponents of welfare in disguise.⁷⁷ The world is not that simple nor are the benefits of adjudicative procedures and legalization so unambiguous. Despite the seemingly sceptical title of this chapter, the value of adjudicative procedure is never really questioned, and in this respect *Procedure* resembles the court-centred corrective formalism that it seeks to displace.

Procedure is an important book because it documents the way the procedures of litigation can be altered to allow litigants and courts to advance the public values of the Constitution and other laws. In its thematic organization and attention to context, the book serves as a significant intellectual and pedagogical challenge to the traditional method of following the pre-trial phases of a 'typical' civil action. One gets the sense that even if most proceduralists eschew its vision and use, they will never be able to look at the traditional paradigm in quite the same way. Unfortunately in its steadfast commitment to adjudication, *Procedure* ignores, and at times seeks to discredit, alternative methods to implement its chosen values even in the face of the formidable costs and failures of the public law litigation it celebrates. In the traditional corrective model, the focus on the form of adjudication obscures its impact on substance; in the public law model, the focus on substance obscures the limitations of adjudicative forms.

⁷⁷ There is some passing recognition of critiques of the effect of hearing rights on welfare administration but there is no excerpt from that literature. *Ibid.* 132-4. See J.L. Mashaw 'The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims' (1974) 59 *Cornell LR* 722; W. Simon 'Rights and Redistribution in the Welfare State' (1986) 38 *Stan. LR* 1431; M. Jackman 'The Protection of Welfare Rights Under the Charter' (1988) 20 *Ottawa LR* 257, at 290-8.

V *Canadian civil procedure and its distributive alternatives*

In the preface to the third edition of *Canadian Civil Procedure*, its authors state that '[w]ith a view to putting civil litigation in a broader perspective' they have considerably expanded the opening chapters to include new materials on 'alternative dispute resolution, law and economics and jurisprudence.' In the rest of the book, however, it is suggested that apart from doctrinal developments and changes in the rules 'the foundation provided by the earlier editions remains clearly apparent.'⁷⁸ In my view, the authors have met their stated ambitions and in places have exceeded them.

The greatest strength of this new edition closely mirrors the major weakness of *Procedure*. In its opening chapters, designed to place civil procedure in its political, social, and economic context, *Canadian Civil Procedure* considers the limitations of adjudicative procedures and entertains the prospects of other informal and administrative forms of ordering. Opening excerpts from law and society literature place adjudication in its proper context as an infrequently used form of social ordering. Next a reading from a leading Canadian administrative law casebook provides an overview of the multiplicity of agencies used to regulate modern society, each with its particular procedures.⁷⁹ A case dealing with a Charter challenge to a workers' compensation scheme raises the fundamental question of the costs, benefits, and protections afforded by civil litigation as opposed to alternative regulatory and compensatory schemes.⁸⁰ The problem of the chronic imbalance between infrequent and poor litigants such as injured workers and more wealthy repeat litigators such as employers is presented as a fundamental limit of adjudication and not simply as a consideration in favour of liberal pleading and discovery rules.

When dealing with external critiques of adjudication, the authors of *Procedure* must attempt to compress these insights into the reform of adjudicative procedures because of their commitment to such procedures. In contrast, the authors of the third edition of *Canadian Civil Procedure* are able to examine several external critiques on their own

⁷⁸ Third edition of *Canadian Civil Procedure* iii

⁷⁹ *Ibid.* 50-84

⁸⁰ *Piercey v. General Bakeries* (1986) 31 DLR (3d) 373 (Nfld SC TD) excerpted in the third edition of *Canadian Civil Procedures* 104-5. A similar case that could have been included is *Bhaudaria v. Seneca College* (1981) 124 DLR (3rd) 193 SCC in which the administrative machinery of human rights commissions and its requirements for mediation and education were held to preclude civil suits on the basis of the tort of discrimination.

terms. For example, the insights of feminist critiques do not have to be squeezed into the context of the perspective of the judge or into the discrete topic of settlement as they are in *Procedure* but can be allowed in an opening chapter to question the premises and assumptions of adversarial adjudication.⁸¹ Similarly, the problem of economic access to justice is not filtered into discussion of the disparate impact of cost or discovery rules but is considered in an opening chapter on the expenses of litigation and the alternatives of public and private funding of litigation.⁸² In short, the third edition of *Canadian Civil Procedure* is much more willing to consider resort to non-adjudicative strategies than *Procedure*.

The pluralism of the third edition of *Canadian Civil Procedure* may in no small part be related to the continued hold of the corrective paradigm of adjudication in Canada. Rather than depart from the corrective model inside the legal structures of adjudication, its premises can be accepted and its limitations avoided by the use of distributive strategies. Ernest Weinrib does this when he argues that in revealing the corrective logic of tort doctrine and adjudication he does not speak against the adoption of distributive strategies designed to pursue the instrumental goals of compensation and deterrence.⁸³ This option to direct problems into the realm of distributive politics fits into the casebook in an unsettling manner because there is little to explain in what circumstances adjudication should be abandoned.

The authors of the third edition of *Canadian Civil Procedure* are willing to question the value of adjudicatory procedures whereas the authors of *Procedure* seem to have an unyielding faith in them. Nowhere is this more evident than in their treatment of William Simon's important article 'The Ideology of Advocacy.'⁸⁴ Simon's article advances two major points that should disturb champions of adjudicative procedures. First, procedural rules create a sphere of autonomy and discretion that can often be used to defeat substantive justice. For example, the autono-

81 For example Carrie Menkel-Meadow's article on women's lawyering process in the third edition of *Canadian Civil Procedure* is included in the second chapter dealing with the adversary system and legal ethics, while in *Procedure* 959-65 it is not included in the opening chapter dealing with the value of procedure but rather at the end of a chapter dealing with strategic interaction and discovery problems. In *Procedure* some feminist perspectives are also addressed under the heading 'the powers and attributes of decision makers' and through a short story entitled 'A Jury of Her Peers.' *Ibid.* 1168-85.

82 Third edition of *Canadian Civil Procedure* 231-64

83 *Supra* note 2

84 [1978] *Wis. LR* 29 excerpted in the third edition of *Canadian Civil Procedure* 98-103 and in *Procedure* 632-3

my afforded by procedural rules 'enable people to frustrate enforcement by delaying and by imposing expenses on their adversaries.' Procedural options are 'exercised instrumentally in the pursuit of ... individual, subjective and arbitrary ends' and they can 'legitimate results which may be substantively wrong.'⁸⁵ Second, access to these procedural powers, while based on the premise of formal equality, is not actually available to all equally:

The advantaged can make far better use of their procedural discretion than the disadvantaged. They can engage in far more elaborate and sophisticated procedural strategies. They can use the procedural rules to increase the expenses of the disadvantaged in asserting their claims so that the latter must give up or compromise before their claims have been determined.⁸⁶

Simon's arguments are presented in a straightforward manner in the first chapter of the new edition of *Canadian Civil Procedure*. In contrast, a short excerpt of Simon's article is presented in *Procedure* at the start of the fourth chapter dealing with problems of strategic interaction. In *Procedure*, Simon's arguments are presented only as a practical problem to be dealt with by having procedural rules more carefully tailored to the substantive values at stake and to the unequal resources of various parties. Thus the fourth chapter of *Procedure* deals with reforms such as the elimination of filing fees for court cases, and the effect of discovery, costs, and attorney financing rules on parties with different levels of resources.

This is not to say that the internal reformist perspective of *Procedure* is unnecessary as an antidote to the corrective model's vision of an essential and neutral procedure of adjudication. The third edition of *Canadian Civil Procedure* can be criticized for not sharing the constant vigilance that is present in every chapter of *Procedure*. At the same time, however, *Procedure* can be criticized for obscuring the comprehensive critiques of adjudication that are presented in the opening chapters of *Canadian Civil Procedure*. What is needed is both the internal reformism of *Procedure* and the external critique of *Canadian Civil Procedure*. What is needed is a synthesis of the corrective and public law models.

Despite the receptiveness of its opening chapters to a full debate about the value of procedure, the third edition of *Canadian Civil Procedure* is not without its shortcomings. In following the traditional structure of the

⁸⁵ The third edition of *Canadian Civil Procedure* 100-1

⁸⁶ *Ibid.* 103

pre-trial phases of the civil action after its provocative opening chapters, the book misses some of the lessons of the limitations of the corrective model that are presented in *Procedure*. There is a tendency in the latter chapters to present procedural rules as a neutral forum for the adjudication of all disputes. Some attempts are made, however, to show the disproportionate effects of universal rules in different contexts, as for example when the traditional rules of attorney/client privilege shield from discovery many 'smoking gun' memos distributed in large corporations.⁸⁷ Public interest standing and intervention are also given careful attention.⁸⁸ By and large, however, the emphasis remains on a generic form of dispute resolution, disconnected from the substance of any law and from the actual effects of 'equal' application of discovery, cost, and settlement inducing rules on parties with unequal resources.

Although group litigation is not ignored as in the first edition, it remains a somewhat anomalous phenomenon. The issues of standing and class actions, which merit their own chapters and pervade many of the other chapters in *Procedure*, receive compact treatment as the last part of a chapter on joinder under the ominous heading of 'non-traditional aspects of expansion.'⁸⁹ The Supreme Court's decision in *Naken* demonstrating judicial reluctance to make procedural innovations to accommodate group litigation casts a pall over the class action section. Pride of place is then given to the Ontario Law Reform Commission's 1982 draft class action legislation. In typical Canadian fashion, there is faith that government will act on matters of law reform and not much discussion of what is to be done if the government does not respond.

The chapters on res judicata or on what the authors of *Procedure* more provocatively conceive as 'Anti-Procedure' are illustrative of the respective strengths and weaknesses of the two casebooks. The focus in the res judicata chapter of the third edition of *Canadian Civil Procedure* is on a doctrinal examination of the circumstances under which courts will prevent the relitigation of disputes and issues between parties. The problems of cause of action estoppel fit comfortably within a corrective framework because of its major aim of putting an end to disputes about discrete acts of wrongdoing. In a more complex world some boundary problems are bound to arise, but the values of finality and certainty are congruent with corrective theory. Collateral or issue estoppel become more problematic, particularly when the traditional Anglo-Canadian

87 Ibid. 490ff

88 Ibid. 674-707

89 Ibid. 674-733

requirement of mutuality between the parties bound in a subsequent action by the results of a first is challenged. Mutuality remains the doctrinal starting point in *Canadian Civil Procedure*;⁹⁰ departures are articulated by courts through the unhelpful language of their discretionary power to prevent abuse of process. The functional and contextual approach set out in the American *Parklane Hosiery* case⁹¹ is held out as the model for reform in the Canadian casebook while in *Procedure* it is the starting point. The question of when it would be unfair to bind a number of different defendants, including asbestos manufacturers and the social service bureaucracy, by the plaintiff's use of offensive estoppel is then explored in depth.⁹² The corrective model having been put to rest, a contextual examination of preclusion relates the merits of different substantive claims to the application of this procedural doctrine. For example, problems of waiver of rights to a trial are examined in the criminal plea bargaining context; the role of limitations periods and stare decisis is explored through the attempts to obtain reparation for the wartime banishment of Japanese-Americans; and the political questions doctrine is assessed through attempts to scrutinize the legality of the bombing of Cambodia.

Procedure examines in a sophisticated manner the wide breadth of preclusion issues that courts will face in private and constitutional law, but it never really grapples with the ultimate preclusion issue of when legislative and administrative schemes should preclude civil litigation. The political questions doctrine is presented through the vehicle of the debate between the 'principled' Gerald Gunther and the 'prudent' Alexander Bickel.⁹³ This will seem strange for many Canadians because our courts seem to have rejected the political questions doctrine and its binary choice between neutral principles and passive virtues in favour of an explicit dialogue between the courts and legislatures.⁹⁴ Once again,

90 *McIlkenny v. Constable of the West Midland* [1980] QB 283 (CA) aff'd [1982] AC 529 (HL) excerpted in third edition of *Canadian Civil Procedure* 576-89

91 *Parklane Hosiery Co. v. Shore* 439 US 322 (1979) excerpted in the third edition of *Canadian Civil Procedure* 589-93; excerpted in *Procedure* 1628-34. This is not to say that mutuality is alive in Canada but only that its conceptual ghost lingers. For an articulation of a sophisticated public law approach to the problem see G. Watson 'Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality' (1990) *Can. Bar Rev.* 623.

92 *Procedure* 1635-67

93 *Procedure* 1782ff

94 Although rejecting a doctrine of non-justiciable political questions as a matter of principle, Canadian courts have been comfortable with deference to the state in both determining liability and formulating remedies. Section 1 of the Charter and the operation of remedial discretion under Section 24 operate as formal channels for a dialogue between the courts and legislatures. See *Operation Dismantle Inc. v. The Queen*

what is needed is a synthesis of the contextual concern for reform of adjudication displayed in *Procedure* and the ability of *Canadian Civil Procedure* to deal with larger issues of institutional choice.

In its focus on the pre-trial procedures that prepare disputes for adjudication, the third edition of *Canadian Civil Procedure* does not introduce students to the issues in jurisprudence and remedies so prominent in *Procedure*. For example, there is no consideration of the jury as a legal institution, let alone the problems of perception, uncertainty, and perspective that are explored in a chapter of *Procedure* entitled 'The Problem of Judgment.' Likewise, the tensions in maintaining judicial independence that merit detailed exploration in *Procedure*⁹⁵ deserve no more than a passing mention in the Canadian casebook. This is troubling given that Canadian courts are now struggling with constitutional definitions of their own independence.⁹⁶ Little critical attention is devoted to the use of appeals or to the issue of when deference will be paid to the determinations of triers of fact.⁹⁷ Both casebooks deal with jurisdictional struggles between local, national, and international courts, but only *Procedure* avoids acceptance of a unitary and rationalized model of court structure and deals with the provocative possibility that 'jurisdictional redundancy' can have liberating effects on litigants and on the development of law.⁹⁸ As in traditional civil procedure, the procedural problems of formulating complex remedies are neglected in the new edition of *Canadian Civil Procedure* despite the fact that two of its authors recognize in their own work that the corrective assumption of easy rectification through the award of damages is not tenable in many circumstances.⁹⁹

(1985) 18 DLR (4th) 481 SCC; *Re Dixon and Attorney-General of British Columbia* (1989) 59 DLR (4th) 247 (BC SC); Roach 'Reapportionment in British Columbia' *supra* note 13.

⁹⁵ *Procedure* 1316-414

⁹⁶ *Valente v. The Queen* [1985] 2 SCR 673; *R. v. Beaugard* [1986] 2 SCR 56; *Mackeigan v. Hickman* [1989] 2 SCR 796. Canadians are only now beginning to study the judiciary as the third branch of government. See Peter H. Russell *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw Hill Ryerson 1987). It is hoped that recent scholarly developments such as Professor Russell's text can be integrated in subsequent editions of *Canadian Civil Procedure*.

⁹⁷ *Procedure* 1540-69

⁹⁸ Compare Robert M. Cover 'The Uses of Jurisdictional Redundance: Interest, Ideology, and Innovation' (1981) 22 *W. M. LR* 639 (excerpted in *Procedure* 1414-34) with J. Laskin and R. Sharpe 'Constricting Federal Court Jurisdiction' (1980) 30 *UTLJ* 283 (excerpted in the third edition of *Canadian Civil Procedure* 762-4, 774-6)

⁹⁹ R. Sharpe *Injunctions* (Aurora: Canada Law Book 1983); Sharpe 'Injunctions and the Charter' (1984) 22 *Osgoode Hall LJ* 473; W.A. Bogart 'Appropriate and Just: Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy' (1986) 10 *Dalhousie LJ* 81

It would be unfair to criticize the third edition of *Canadian Civil Procedure* too harshly for its failure to deal with aspects of judicial decision-making at the liability and remedy stage that are extensively covered in *Procedure*. The Canadian casebook endeavours only to cover the pre-trial process, and, at well under half the size of its American counterpart, it should not be faulted for some absences in coverage. Traditional civil procedure still casts a long shadow over what is considered relevant in the Canadian civil procedure curriculum, and the introduction of the opening perspective chapters is an important innovation.

The third edition of *Canadian Civil Procedure* remains a book that is heavily influenced by the corrective framework of its predecessors in both its traditional and innovative elements. In the traditional treatment of the phases of the civil action, the emphasis remains on litigating disputes between individuals over discrete acts of wrongdoing. To be sure, there is some recognition of the prospects for group and public interest litigation and the reform of some procedural rules that this type of litigation would require. Nevertheless, the challenges to the bipolar procedural model of corrective justice are muted compared with the frontal assaults launched in *Procedure*. The most innovative element of *Canadian Civil Procedure* is its willingness to entertain external critiques of adjudication, and in these preliminary sections there is a flight away from adjudication to the use of the administrative and legislative processes. This shift gives the book a somewhat disjointed quality, as the introductory chapters provide a glimpse of distributive alternatives to adjudication while the remaining 'core' chapters proceed on many corrective assumptions. Whether this divide between corrective adjudication and its distributive alternatives should be sustained in Canada can now be explored.

VI *Towards synthesis of corrective and public law models*

If the corrective model of adjudication dealing with discrete acts of wrongdoing is the thesis, and the public law model of structural reform is its antithesis, then what will be the synthesis, and what special claim might Canada have to breaking out of the dichotomies posed by these two competing models? A synthesis will, by definition, combine elements of both corrective and public law models but will produce something that is different and greater than its parts. A synthesis would also reject the competing theories' claims that their interpretation of the role of adjudication is the only legitimate one. Once this is done, we can look forward to a more particularistic shaping of procedures to suit the reality of different types of disputes and participants. Procedural form and

substance would be matched rather than studied in isolation. Corrective procedures could still be used to resolve disputes about discrete acts if the parties are prepared to assume the burdens of proving wrongdoing; but, without the hold of corrective theory, courts would be free to expand their horizons and procedures to deal with the complexity of modern conditions. Public law procedures would be available for litigation dealing with bureaucratic conditions and mass wrongs; however, without the assumption that only courts can give meaning to public values, this type of expensive and risky litigation would be seen only as a substitute for legislative and administrative failure. There would be room for creative cross-pollination between the procedures used in simple and complex court cases and in agencies, commissions of inquiry, legislatures, and informal forms of ordering. In short, a thousand procedural flowers could bloom and the law schools would teach not courses on the civil procedure of corrective justice or the public law procedure of structural reform but rather pluralistic and context-driven courses on 'procedures.' Such courses would expose students not only to the procedures they would experience as adversarial litigators but also to those they would experience in their roles as negotiators, mediators, advocates, and lobbyists.

A synthesis would not only facilitate the development of different procedures but also subject courts and alternative institutions to a more critical scrutiny than they would receive in either the corrective or public law models. Just as the public law model obscures the limitations of judicial reform in relation to other forms of ordering, the corrective model represses the deficiencies of the distributive alternatives it identifies. In Canada there seems to be little immediate danger of falling in the trap set by the public law model of devaluing or ignoring alternatives to litigation. Both the corrective foundations of our understanding of adjudication and the live prospects of more comprehensive legislative and administrative reforms will prevent exclusive reliance on litigation. The immediate danger, in my view, is that we will reject public law litigation without giving it a chance. Many are attracted to the seemingly easy division between corrective justice as the exclusive domain of the courts compared with more expansive strategies left to legislatures and agencies. An uncritical acceptance of this division risks disenfranchising those who cannot get past legislative and administrative gatekeepers, while a traditional approach to adjudication only aggravates their powerlessness by depriving them of a credible threat of judicial intervention. We should be concerned about reforming adjudication in the light of the lessons of *Procedure* without forgetting the limits of adjudication held out in the third edition of *Canadian Civil Procedure*. Both internal reform of

adjudicative procedures and external critique of their limitations are needed.

What might some of the steps be towards a synthesis of the competing corrective and public law models? One important step is to build on the diverse range of modern legal scholarship included in both *Procedure* and the third edition of *Canadian Civil Procedure*. It is a healthy development that procedural casebooks are including historical, economic, sociological, feminist, and critical perspectives. It indicates that proceduralists are at last abandoning the hope of neutral procedural rules and dealing with the implications of legal realism. These diverse perspectives will, however, only flourish in the procedural context if they are allowed to find their appropriate institutional homes and are not squeezed into some form of court-centred adjudication. This means expanding the range of public and private procedures to be studied in an introductory course on procedures. For example, case studies could reveal the complexity and contingency of historical, sociological, political, market, and informal processes. Neither the insights nor the aspirations of these new perspectives can be confined to the courtroom.

A complementary step towards a synthesis is to build on the insight in *Procedure* that greater attention must be paid to the importance of context and that the intellectual conceit of devising trans-substantive procedural rules should be abandoned. This insight should be pushed beyond the domain of reform of adjudicative rules so that the appropriateness of alternative forms of ordering in specific contexts can be examined. Thus the procedural rules of agencies, public inquiries, legislatures, and informal methods of dispute resolution would become an object of study in the first year of a legal education, and the contextual approach begun in *Procedure* would be taken to its natural conclusion.

Despite the continued hold on its corrective origins, the third edition of *Canadian Civil Procedure* seems closest to taking up this challenge, as it is willing to explore the desirability of non-adjudicative ordering. What is needed is a realistic examination of how people are treated in informal, administrative, and legislative forms of ordering. This is especially important if the distributive alternatives to adjudication are not to become idealized in the same manner as the authors of *Procedure* idealize adjudication as the optimal regulatory device. Critical scrutiny of alternative procedures that will no longer be dismissed under labels such as 'the political' or 'the private' may also stimulate concern about reforming adjudication to meet the challenges of the public law model. It is my guess that when a hard look is taken at the procedures of 'distributive' alternatives to adjudication, many will not be quite so willing to abandon the struggle to expand adjudication beyond the constraints of the correc-

tive model.¹⁰⁰ Only when we understand the disadvantages suffered by those who chronically gain no benefit in informal, legislative, and administrative processes will investment in a public law model of litigation seem necessary to most Canadians.

A synthesis of corrective and public law models has the potential not only to expand the field of study beyond adjudication but also to transform our expectations about adjudication. A thorough examination of non-adjudicative alternatives may provide inspiration and support for changing adjudicative processes beyond even the innovations of the public law model. For example, a greater appreciation of the benefits of administrative and legislative procedures may help dispel some of the suspicions, in both the corrective and the public law models, surrounding collective modes of prosecution and discretionary grants of procedural privileges. The fact that the expansion of standing and intervention in Canada largely rests on judicial discretion would be unsettling to both corrective and public law jurists. In the corrective model, standing revolves around a moral recognition of the suffering of wrongdoing. Even in the public law model, the effort has been to expand the legal test of standing, not to educate the judiciary to make more enlightened use of their discretion to allow claims and perspectives to be heard. The notion of judicial gatekeepers may not seem as dangerous after they are compared with legislative gatekeepers. A more unified vision of the adjudicative and legislative processes may also stimulate a greater tolerance for context specific expansion of standing and intervention rights by legislation¹⁰¹ and a rejection of the demand to universalize procedural rules across different contexts.

The problems of class actions may be seen in a different light after an appreciation of the broad range of legislative, administrative, and judicial procedures. Attention is paid in *Procedure* to some of the financing problems of class actions on behalf of diffuse groups, but the focus remains internal to the legal rules governing cost shifting between the parties. Without in any way diminishing the importance of reform of the cost rules to the feasibility of class actions, direct public funding such as

100 See P. Weiler 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *U. Mich. JL Ref.* 51, at 68-70 (noting effect of party discipline in a Parliamentary system on attaining legislative reforms).

101 See, for example, Intervenor Funding Project Act SO 1988 c. 71, which was enacted after courts refused to alter traditional cost rules to allow for the funding of interveners by those who make applications to environment assessment boards. The Act applies only to proceedings before a few boards and places requirements on interveners to represent the public interest and submit to auditing before they receive their ex ante 'costs' to finance their interventions.

is available under the Quebec legislation deserves greater attention.¹⁰² In Canada, the funding by governments of public interest litigation against themselves is accepted with a serenity that could not be found in the United States. The adversarial assumptions of the corrective model do not seem to apply in this aspect of Canadian political and legal culture. This may only be taken as a sign by corrective theorists that we have descended into the chaotic depths of politics, but this should not prevent attempts to bring fairness and accountability to the funding process. What is political need not be arbitrary and subjective, just as what is judicial need not be universal and neutral.

An understanding of the alternatives to class actions may also lead to greater acceptance of some of the more controversial aspects of judicial administration of class actions.¹⁰³ The Ontario Law Reform Commission has proposed that judges be empowered to consider the costs and benefits to the class, the courts, and the public of any proposed class action before the class is certified. This recognition of open-ended discretion troubles many working in either the corrective or the public law model, as do cost-benefit and other strategic considerations made by judges in the certification of classes and the distribution of awards.¹⁰⁴ An understanding of the alternatives to class actions may, however, make a formalized and accountable judicial decision on costs and benefits preferable to the informal decisions made by administrative and legislative actors. Likewise, the commission's proposal that the attorney general be able to take over class actions in certain circumstances would be viewed unfavourably by those who wish to retain the party autonomy that is celebrated in the corrective model. If class actions are to be effective, however, many of the legalistic guarantees of due process for the

¹⁰² An Act Respecting the Class Action SQ 1978 ss 17-19

¹⁰³ Ontario Law Reform Commission *Report on Class Actions* (Toronto: Ministry of the Attorney General 1982) 411-6. Under s. 6(1) of the draft bill contained in that report, a discretion is provided to deny certification to a class 'if, in the opinion of the court, the adverse effects of the proceedings upon the class, the courts or the public would outweigh the benefits to the class, the courts or the public that might be secured if the action was certified.' Under s. 14 of the draft bill the attorney general can take over the suit upon the consent of the representative plaintiff or at any time that the plaintiff does not fairly and adequately protect the interest of the class. In addition, under s. 12 the attorney general can intervene in proceedings 'concerning any aspect of the action that raises a matter of public interest.'

¹⁰⁴ Judge Weinstein's forcing of a settlement and his treatment of those who opted out of the class action in the Agent Orange litigation brings a sense of unease even to those who champion judicial activism in managing public interest litigation. See P. Schuck *Agent Orange* (Cambridge: Harvard University Press 1986); *Procedure* 337-41. Viewed from the perspective of how the legislative and administrative processes might have dealt with such a problem, Weinstein's 'rough justice' seems less problematic.

individual must be left well behind. If requirements for specific notice, costs, financing, and restorative remedies are to be abandoned in an effort to make class actions an effective regulatory instrument, then perhaps some cost-benefit threshold to obtain access and some loss of party autonomy are the price that must be paid.¹⁰⁵ There is a real danger that many public law performers want to partake of the benefits of representing the public interest but not of all its responsibilities.

Closer study of administrative, legislative, and informal alternatives to adjudication may also help break down perceived dichotomies between the 'private' desires of the parties and the 'public' ends of the law. This would lead to a greater willingness to consider the techniques of consent, compromise, and accommodation that are portrayed as the enemy of public values in Fiss's own work and, to a lesser extent, in *Procedure*. Empirical examinations of structural injunctions reveal judges operating in an environment that is constrained by institutional resources and the need to gain cooperation among the affected parties.¹⁰⁶ Judge Weinstein's experience in Coney Island underlines the importance of gaining the consent of the affected parties. To the extent that structural reform is to be praised for its grander ambitions, it may be necessary to accept that a loss of some of the autonomy of law is inevitable. It may be better to allow the needs and demands of the affected parties to shape the content of the law in those complex contexts that defy the application of corrective principles. Techniques such as the consent decree, which involves the judge in ratifying and supervising a settlement but avoids the need for authoritative determinations of liability and remedial responsibility, merit further study. Just as the guarantees against the misuse of discretion that can be provided in a simpler model must be sacrificed to the greater ambition of pursuing the public interest, so must the rigid notions of judicial independence and legal autonomy that both Fiss and Weinrib share.

Where does this leave the Fiss/Weinrib debate and how should that

105 Ontario Law Reform Commission *Report on Class Actions*, supra note 103, ss 16, 26, 27, 41, 42 contained in the third edition of *Canadian Civil Procedure* 727-33

106 R. Wood (ed.) *Remedial Law When Courts Become Administrators* (Amherst: University of Massachusetts Press 1990); L. Yackle *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (New York: Oxford University Press 1989); P. Cooper *Hard Judicial Choices* (New York: Oxford University Press 1988); C. Diver 'The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions' (1979) 65 *Va. LR* 43; H. Kalodner and J. Fishman (eds) *Limits of Justice* (Cambridge: Ballinger 1978); M. Harris and D. Spiller *After Decision: Implementation of Judicial Decrees in Correctional Settings* (Washington: National Institute of Law Enforcement and Criminal Justice 1976)

debate inform the teaching of procedures? The synthesis that I have called for is primarily concerned with developing a greater appreciation for the variety of institutions and procedures that are used to order society. At the same time, however, this broadening of the institutional base would seem to be necessary if a theoretical synthesis of the debate is ever to be achieved. Ernest Weinrib's theory of corrective justice brings people together only in its ability to repair the discrete wrongs they suffer as individuals at the hands of other individuals. Community is achieved within the narrow confines of the individualistic and bipolar procedures of adjudication. His perspective represses important aspects of group and social solidarity and would silence the judge and lawyer from addressing these important aspects of human life. Collective values are relegated to the contingent choices made by legislatures and agencies that are only partially constrained by democratic accountability and cannot be relied upon to represent the disadvantaged. Unlike its predecessors, the third edition of *Canadian Civil Procedure* no longer embraces the silence Weinrib's theory would impose on judges and lawyers. Yet its fight against corrective forms of adjudication is restrained in large part because of the attraction of alternative distributive schemes. The advantages of these schemes in articulating collective values should not be ignored, but a real danger exists of adopting an overly optimistic view of democracy and administration and a traditional and highly individualistic view of the function of courts.

On the other hand, Owen Fiss concentrates on the collective values of group and social solidarity to the extent of repressing concerns about the individual. His preoccupation with the judiciary as the source of public values troubles both those who wish to preserve the courts as places to protect individuals and those who believe that adjudication will often not be the best way to articulate group and social solidarity. It may be dangerous to rely on elected politicians to speak for all of our collective values, but it is no answer simply to rely on unelected judges for this task. Although some of Fiss's recent writings suggest an attraction to the use of the state to promote public values,¹⁰⁷ it is a monolithic and imperial procedure of adjudication by the judiciary that is celebrated in *Procedure*, not the various procedures of the different institutions that are available to pursue collective aspects of our identity. In the process, Fiss devalues non-adjudicatory means to achieve reform no less than

¹⁰⁷ Fiss 'Why the State?' (1987) *Harv. LR* 782; Fiss 'Free Speech and Social Structure' (1986) 71 *Iowa LR* 1405 (public subsidies to promote free speech); Fiss 'The Law Regained' (1989) 74 *Cornell LR* 245 (support of republican and feminist uses of the state)

Weinrib. A narrow focus on the courts may be forgivable in the America of Nixon and Reagan, but it should not be accepted in more fertile and tolerant political and social environments. *Procedure* offers, in a passionate and eloquent fashion, an attractive vision of litigation for collective values, but it does not leave the reader with faith that the courts can be relied upon to deliver the goods. This cul-de-sac seems peculiarly American, in both the grandeur of its aspirations and the tragedy of its implementation.

The institutional preoccupations that Fiss and Weinrib share are in the end as important as their theoretical differences. They have judges speak in different but equally privileged tongues that diminish alternative forms of social ordering. Given the important role lawyers play in resolving not only legal but social, economic, and political conflicts and the need to recognize our individual, group, and communal identities in all these decisions, legal education should no longer be constrained by the individualistic vision of corrective justice or the collectivistic vision of public law litigation. Neither should it promote comfortable dichotomies between the work of courts and that of legislatures and agencies because of the dangers they present for those who cannot benefit within the individualistic structures of corrective justice or win reforms in the political arena. A society that cannot imagine its disadvantaged going to court to achieve reform will have an impoverished sense of justice; one that relies on such Herculean efforts will have an illusory one.