

Winter 2021

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Recommended Citation

Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261 (2021).

Available at: https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol48/iss2/4

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The Ideal and the Actual in Procedural Due Process

by NORMAN W. SPAULDING¹

Abstract

The law proceduralists write about and teach is nothing like what most ordinary Americans experience when they step into court. Indeed, the evidence shows that most Americans who have legal problems do not ever get to court, nor do they receive a meaningful alternative hearing. In this way both judicial and academic discourse on procedure, even among those who see glaring problems of access to justice, is idealized, abstract, and ossified—unconnected to the actual. This Essay describes the ideal/actual divide in procedure—the cognitive, doctrinal and ideological effects of lingering on the ideal side of it, and the forms of subordination perpetuated on the actual side. The Essay begins by turning away from the federal courts, which decide less than two percent of all cases in the United States, in order to examine a series of recent cases and reports on the actual administration of justice in state courts, in state and federal administrative agencies, and in private arbitration. These, after all, are the forums in which ordinary people experience the administration of justice. The examples to which the Essay points draw into relief the extent of the ideal/actual divide, the scope of procedural failure in these settings, and the profound consequences for vulnerable and marginal populations. The Essay closes by calling for a reconceptualization of both pedagogy and procedural doctrine from the perspective of the actual. First and foremost, the reality of how procedure works for ordinary people, including how it fails them, must be studied more closely, taught more frequently, and incorporated into debates about procedural reform.

1. © 2020. Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Stanford Law School, B.A. Williams College, J.D. Stanford Law School. This essay is dedicated to my former colleague, mentor, teacher, and coauthor Barbara Allen Babcock, 1938-2020, for whom the legitimacy of the law always turned on the experiences of ordinary people in the legal process. I am grateful to Ocean Lu, Ariella Park, and Hannah Schwarz for exceptional assistance with research.

Introduction

The field of procedure is in danger of slipping into a kind of formalist slumber. Most scholars who teach and write in the field consider ourselves, our classes, and our scholarship to be *quintessentially* realist—we seek to reveal the role of procedure in shaping substantive outcomes and we insist on attending to the subtleties of facts and design choices in dispute resolution. And yet the procedural law we write about and teach is nothing like what most ordinary Americans experience when they step into court. Indeed, the evidence shows that most Americans who have legal problems do not ever get to court, nor do they receive a meaningful alternative hearing. In this way the discourse of procedure, even among those who see glaring problems of access to justice, is idealized, abstract, and ossified—unconnected to the actual. As the country has become increasingly diverse, wealth disparities more acute, and a deep economic depression lies before us, this inattention to the actual is dangerous—a threat to the legitimacy of the field.

Part of the problem is that analysis of what is actually happening outside the federal courts in the forums where most ordinary Americans seek justice tends to begin and end with study of a handful of canonical procedural due process cases from the so-called “due process revolution” of the 1960s and 1970s.² Judge Friendly’s landmark article in 1975 on procedural due process and the administrative state crystalized the spirit of these cases, insisting that adjudications in which most ordinary Americans participate do not have to be, indeed, cannot be, designed like trials.³ The highly decentralized, participatory, time-consuming, attorney-run traditions of adversary adjudication have their place, he allowed, but not in run-of-the-mill cases in which things such as entitlement to Social Security benefits are determined. In a mass society there must be procedural tools for the mass processing of claims leavened by minimum guarantees of procedural due process (all bowdlerized, as it happens, from the gold standard of adversarial trial).⁴ These include, as every law student learns in first year procedure, and indeed

2. The early cases involved both administrative procedures deemed inadequately participatory and ex parte pre-judgment remedies in debtor-creditor disputes. On the administrative law side, see *Goldberg v. Kelly*, 397 U.S. 254 (1970). With regard to ex parte pre-judgment remedies, see *Fuentes v. Shevin*, 407 U.S. 67 (1972); see also *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). Both lines of authority relied heavily on two earlier decisions from the 1950s. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306 (1950).

3. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

4. See Norman W. Spaulding, *The Enclosure of Justice, Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311 (2012) [hereinafter *Enclosure*]; Norman W. Spaulding, *Due Process Without Judicial Process? Anti-Adversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249 (2017) [hereinafter *Due Process*].

instinctively seems to know, an impartial decision maker, the right to notice, and a meaningful opportunity to be heard before state action affects life, liberty, or property.

Scholarly responses to this approach to due process analysis have been sharply divided. On the left, the balancing test that accompanied the endorsement of mass processing by the Burger Court has been viewed as unduly obsessed with the accuracy and efficiency of government decisions and inattentive to other key due process interests (particularly the participation, equality, and dignity of individuals with claims against the state).⁵ The balancing test has also been viewed as a failure to the extent that it has resulted in denial of the right to counsel to those who cannot afford a lawyer in civil cases. In such cases, the stakes appear to be at least as high, if not higher, than in criminal cases where the Supreme Court has long held that state subsidized counsel is constitutionally required.⁶ But the Court adopted a strong presumption against the right to counsel in civil matters and has recently reaffirmed it.⁷ On the right, the balancing test has been subject to lacerating criticism for its malleability and subjectivity, even though an increasingly conservative Supreme Court has relied heavily on the test to favor the government's interests over the liberty interests of individuals caught up in the bureaucratic machinery of the state.⁸

Academic and classroom discussions thus tend to gravitate around two issues: whether certain key features of adversarial justice (such as access to a lawyer⁹) are constitutionally mandatory even though a full trial is not, and what exceptional government interests can justify dispensing with either notice or a hearing (or both).¹⁰ At the structural and normative level, this framing invites comparison between administrative processes (where mass

5. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 674 (2d ed. 1988); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication: in Mathews v. Eldridge Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

6. Compare *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding no constitutional right to counsel where termination of parental rights is at stake), with *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding constitutional right to counsel for defendant tried in a case where offense was punishable by imprisonment up to six months and/or a \$1,000 fine, and who was given a ninety day jail sentence).

7. See *Turner v. Rogers*, 564 U.S. 431 (2011) (upholding denial of counsel in civil contempt proceeding resulting in confinement for failure to pay child support where other procedural guarantees could ensure accuracy of contempt finding).

8. See, e.g., Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Richard Epstein, *No New Property*, 56 BROOK. L. REV. 747 (1990).

9. See *Turner*, 564 U.S. at 431; *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985); *Lassiter*, 452 U.S. at 18.

10. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Thomas, J., dissenting); *Sniadach*, 395 U.S. at 339 (citing cases in which exigent circumstances justify summary process).

processing is the rule), and the judicial process (where it is supposed to be a closely regulated exception). It also invites either lamentation on the “vanishing trial”—the remarkable late twentieth century decline in the number of cases disposed of by trial¹¹—or insistence on the imperatives of efficient administration of claims.¹²

But in most procedure casebooks, as in the literature more broadly, analysis of what is actually happening outside the federal courts in the forums where most Americans litigate is scant, and tends to conclude with debate about the canonical procedural due process cases.¹³ The vanishing trial theme continues through the study of the Federal Rules of Civil Procedure because many modern doctrines empower a judge to take cases away from juries and, increasingly, to dispose of cases before trial.¹⁴ Some of the challenges associated with mass processing of claims then resurface in the study of joinder and complex litigation. Remarkably, however, the study of how due process works outside the federal courts in the spaces where the vast majority of ordinary people encounter the administration of justice generally does not resurface.¹⁵ This is remarkable given that federal

11. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 530 (2004) (“The portion of federal civil cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002 . . . in every case category.”). On the deeper historical forces accompanying the disappearance of trial, see Spaulding, *Enclosure*, *supra* note 4.

12. Here the political alignment is not as clear as it sometimes seems, because the roots of the theory of due process justifying administrative mass processing of claims lie in the progressive New Deal project of displacing time-consuming, costly adjudication in conservative courts with rational, technocratic, efficient agency adjudication. Proceduralists trained to read the New Deal through the egalitarian aspirations of the drafters of the Federal Rules of Civil Procedure do not always take stock of this fact. See Spaulding, *Due Process*, *supra* note 4.

13. Personal jurisdiction is an exception, at least to the extent that attention is extended beyond the formal Fourteenth Amendment analysis to the nature of the specific state court system, any state law claims, and differences between state and federal courts. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915 (2011); *Asahi Metal Indus. v. Superior Ct.*, 480 U.S. 102 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

14. Most prominently, the motion to dismiss for failure to state a claim, which in its modern form gives a judge discretion to dismiss claims she finds implausible before discovery takes place, see *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and the motion for summary judgment, which in its modern form does not require defendants to submit evidence establishing their innocence on issues as to which the plaintiff bears the burden of proof at trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). On the judge’s power to take cases away from juries during trial, see *Galloway v. United States*, 319 U.S. 372 (1943) (upholding constitutionality of the directed verdict).

15. One exception is *Erie* doctrine, but *Erie* is usually taught and written about as an object lesson in judicial federalism, not an opportunity to closely examine state courts, and of course, what *Erie* requires is deference to state substantive rules of decision, not state procedural rules of decision. The edge cases dealing with the difference between the two offer a chance to consider state procedural rules and their operation in practice, but the literature—vibrant and important as it is—generally neglects this dimension. Removal offers another opportunity, but the reasons to

cases comprise *less than two percent* of all civil cases in the United States. For a few decades in the twentieth century there may have been parallels between federal procedural law and the procedural law of the states, but there are arguably more divergences than similarities now in some of the most consequential areas of pretrial litigation.¹⁶ Scholarly and pedagogic attention nevertheless remains fixed on federal litigation and the Federal Rules of Civil Procedure.¹⁷

This is most unfortunate. To begin with, it obscures the fact that even modern litigation in federal court increasingly looks more like administrative than adversarial adjudication. The fashionable term is “managerial judging,”¹⁸ but in truth it is bureaucratic management through and through. This turns the traditional understanding of the virtues and vices of courts as compared to agencies on its head. The expansive assertion of judicial authority to dispose of cases early and without trial also reflects the crushing docket pressure judges face as state and federal legislatures have failed, for decades, to fund courts and create new judgeships to match the number of case filings.¹⁹

More importantly, inattention to adjudication outside the federal courts obscures the magnitude of an alarmingly radical divide between ideal and

prefer federal or state court are often drawn from inference about strategic litigation preferences rather than actual evidence about why a specific litigant prefers state or federal court. Cf. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (Yale University Press 2000).

16. On the differences and similarities of federal and state procedure, see Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016) (pointing out similarities between federal and state procedure in practice); BABCOCK ET. AL, *CIVIL PROCEDURE: CASES AND PROBLEMS* 307–12 (6th ed. 2016).

17. There are some wonderful recent exceptions that are very much in harmony with the views we express here, at least in the attention they draw to the differences between state and federal court practices and the ways in which Supreme Court precedent has insulated procedural failure in state courts from review. See Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020); Diego Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018). In the pages that follow, this Essay not only reports data on state court practices, but these data are placed alongside evidence of procedural failure in administrative adjudication at both the state and federal level, and alternative dispute resolution systems such as arbitration. The goal is to develop a synthetic picture of adjudication.

18. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 375 (1982). See also Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017) (describing judge’s role in coordinating and reviewing settlements in class actions and MDL).

19. See Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, 143 DAEDALUS 96, 97 (2014) (“many years of tight and frequently declining funding have exacted a substantial toll on the capacity of our courts to function as they should”; gathering sources).

ordinary procedural justice. The concepts of procedural justice and the debates described above are in fact highly idealized. Isolated coverage of procedural failure in individual cases tends merely to reinforce idealism by promoting discussion about which elements of ideal procedure are most worthy of fidelity, most central to any project of rectifying the specific failing. Meanwhile, what most Americans experience is, in truth, nothing like what the models of either administrative or judicial process describe, and nothing like the design debates about procedure in the federal courts, whatever its defects may be. Procedural failure, moreover, is far from isolated. Indeed, in every area of adjudication outside the federal courts there is alarming evidence of failure, and the more marginal the relevant population of individual claimants, the more systemic the failure, the more inhumane the treatment of litigants appears to be, and the more demoralizing and compromising the position of judges and other decision makers.²⁰

This Essay describes the ideal/actual divide, the cognitive, doctrinal and ideological effects of lingering on the ideal side of it, and the forms of subordination perpetuated on the actual side. Sections I and II rely on a series of recent cases and reports on the actual administration of justice in state courts, administrative agencies, and private arbitration—the forums where ordinary people most commonly litigate.²¹ The examples are not comprehensive, and they must be read with an eye to the risks of selection bias and generalization. But they are sufficient to draw into relief the extent of the ideal/actual divide and the need for greater attention to the actual. In Section III, the Essay calls for a reconceptualization of both pedagogy and procedural reform from the perspective of the actual. First and foremost, the reality of how procedure works for ordinary people, including how it often fails them, must be studied more closely and taught more frequently. Second, the effects on marginalized and vulnerable populations in particular must be identified and the voices of these people must be heard in

20. None of this is to deny the problems that exist in federal litigation. Among the most disturbing, given the distinctive function of federal courts in the framework of judicial federalism, is that bureaucratic case-management techniques are complemented, in some areas of high-volume filings, by standards of review that sharply circumscribe the independent judgment a judge may exercise to resolve allegations that a state actor has violated federal constitutional rights of a litigant. These are particularly prevalent in litigation asserting that state actors have committed constitutional error (e.g., habeas, prison conditions, and §1983 officer and municipal liability suits). See ERWIN CHERMERINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017).

21. The studies and reports include: The Department of Justice's Report on the City of Ferguson, litigation brought against municipal courts around the country following the Ferguson Report, studies of state courts conducted by the National Center for State Courts, reports of the Office of Inspector General for the Department of Veterans Affairs, evidence of the role of immigration judges in removal and asylum proceedings, data on claims processing in the Social Security Administration, and studies of the rise of private arbitration.

conversations about procedural design. This is essential not only for deliberation on effective reforms but for building an inclusive concept of procedure equal to the needs of a diverse twenty-first century society and profession. The essence of procedural due process is a meaningful opportunity to be heard. That is as true for the democratic legitimacy of the classrooms where procedure is taught as it is for the spaces where adjudication occurs and the pages of law journals where procedure is debated.

I. What is Ideal Procedure?

Ideal procedure is an abstraction, divorced from the realities of litigation in the spaces most Americans experience them. First and foremost, it is Olympian. Analysis generally begins with and concentrates (obsessively) on decisions emanating from the United States Supreme Court and amendments to the Federal Rules of Civil Procedure promulgated by the Advisory Committee on Rules of Civil Procedure—a committee staffed through appointments made by the Chief Justice. Both the selection and interpretation of lower federal court cases, administrative agency decisions, and alternative dispute resolution cases are filtered through the lens of Supreme Court precedent even though in every important respect the Supreme Court is the most distant supervisor of the discretionary decision making and fact finding of federal and state trial courts, administrative agencies, arbitral fora, and mediations. The administration of justice in the state courts, if it is studied at all, is usually read comparatively through the lens of federal procedure, which serves as an ideal type defined by the Advisory Committee and the federal courts, or theories of judicial federalism.

Second, although empirical work is burgeoning in the field of procedure, it paradoxically amplifies this top-down interpretive approach by concentrating almost exclusively on measuring the effects of Supreme Court decisions and amendments to the federal rules. Outside the work of the National Center for State Courts, research on state courts pales in comparison to the outpouring of quantitative empirical work on federal topics such as new standards for the disposition of cases by motion to dismiss for failure to state a claim under *Twombly* and *Iqbal*, the summary judgment trilogy, the

1983 and 1993 changes to Rule 11, and changes to the regulation of discovery under Rule 26.²² Deep qualitative research is relatively scarce.²³

Third, the discourse of due process, and therefore of procedure in general, is framed by the structure of adversary trial even though trials occur in a vanishingly small number of cases—so few as to have rendered the state and federal constitutional right to a jury trial dead letter for most litigants.²⁴ Notwithstanding the centrality of the ideal of trial in the conceptualization of due process,²⁵ many judges have come to view their role as promoting, if not demanding, disposition before trial. As one federal judge famously observed “*a bad settlement is almost always better than a good trial.*”²⁶ Notice the contradiction—jury trial remains the gold standard of procedural due process, but it almost never happens, and judges believe they have succeeded in their role when trial is avoided. The important public purposes of trial are, as a practical matter, subordinated to the assumed benefits of private settlement and the efficiencies of pretrial disposition.²⁷ In this way jury trial is relegated to the purely ideal.

This is the height of procedural abstraction—a right central to the legitimacy of the administration of justice that almost no one ever gets to exercise. One might say, with one of the earliest critics of rights-talk, that our relationship to trial and other adversary procedures now reflects our status as “imaginary member[s] of an illusory sovereignty,” a relation that is “just as spiritual as the relations of heaven to earth.”²⁸ We are all potential jurors, but only in trials we know will never happen.

There are, of course, strong historical and practical reasons for this Olympian orientation. Most obviously, the bar exam tests federal procedure,

22. David Freeman Engstrom, for example, catalogues the outpouring of empirical work on plausibility pleading and its methodological limitations, in *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013). There are notable exceptions. See Andrew Hammond, *Poverty Lawyering in the States*, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 215 (Ezra Rosser ed., 2019); see also Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269 (forthcoming Winter 2020); Maureen Carroll, *Access to Counsel in Civil Rights Class Actions*, in CAMBRIDGE INTERNATIONAL HANDBOOK OF CLASS ACTIONS (Brian Fitzpatrick & Randall Thomas eds., forthcoming 2020).

23. There are some excellent exceptions here too. See, e.g., DEBORAH HENSLER, ET AL., CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION (2016); Hammond, *supra* note 22.

24. On jury trial in state and federal courts, see *supra*, note 10. On the right to jury trial in administrative proceedings, see *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (dissolving Seventh Amendment inquiry into Article III analysis).

25. See Spaulding, *Enclosure*, *supra* note 4.

26. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 4 (1992) (quoting *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985)) (emphasis added).

27. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

28. KARL MARX, *On the Jewish Question*, MARX AND ENGELS: 1843-1844 154 (1975).

so law students and law professors must attend to it at some level of specificity. Supreme Court decisions are controlling in federal courts under Article III and in state courts under the Supremacy Clause where federal law binds the states—so too, federal legislation sets the boundaries of subject matter jurisdiction in federal courts.²⁹ With respect to the FRCP, as with all twentieth-century codification movements (the Restatements, the Uniform Commercial Code, the Model Penal Code, the ABA’s Model Rules for professional responsibility and judicial ethics, the Federal Rules of Evidence) the Advisory Committee for Civil Rules aspired from the very beginning to generate federal rules that would serve as standards for adoption in the states. The goal of all codification movements is to distill the “best” rules and universalize them in the name of uniformity, interpretive clarity, and predictability.³⁰ But if there are egalitarian roots to this enterprise in the field of procedure (and there certainly are) there is also no mistaking the elements of centralized, elite, expert control—and these elements have permitted the egalitarianism of the rules to be undercut over time,³¹ subordinating the virtues of access, localism, decentralization, particularity, discretion, and even decision on the merits, to the demands of efficiency, predictability, and rational bureaucratic administration.

For empiricists, federal data are quite simply easier to come by and analyze systematically through PACER. As the National Center for State Courts describes, most state

case management systems were initially developed to schedule and record case filings and events (e.g., hearings and trials) and report the progress of the case through the system in general terms. Although some of these systems capture detailed case-level information, very few are programmed to extract and report that information in a format conducive to broader management-oriented and case propulsion perspective. A related issue is the lack of uniformity in the use of case definitions and counting rules. . . . Perhaps the largest hurdle . . . [is that] court organizational structures

29. On the adjudication of federal rights in state courts, see Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

30. On the history of the codification movement, see Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983 (2004); see also Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311 (1988). On the increasing disuniformity between procedure in federal and state courts, see Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018).

31. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005 (2016).

are the culmination of each state's unique legal history and efforts to improve the administration of justice.³²

Meaningful empirical studies of state courts can be conducted, but this work is far more time and resource intensive than studying federal court litigation. Generalizations across states also are harder to make. The epistemological consequences of this imbalance of attention are quite profound: because federal courts are easier to study, proceduralists appear to know more about federal litigation, and therefore have more to say about it, more to debate. Federal litigation feels more familiar, more "real," and hence more important, even though it represents a tiny fraction of the actual administration of justice.

This epistemological distortion is parlous, as the next section suggests, because evidence of procedural failure in state courts, administrative agencies, and alternative decision-making forums such as arbitration indicates that idealized conceptions and debates about litigation in federal court are, in fact, a world apart from the actual administration of justice. Even if there is and always will be a need to attend to federal procedural law, the case for the nearly exclusive attention it receives is weak. The next Section begins with evidence from the operation of state courts. The evidence from other forums, to which this Section turns thereafter, is equally important to a synthetic understanding of the problem of procedural failure.

II. Procedural Failure in the Actual Administration of Justice

The actual administration of justice plays out for the most part beyond the federal courts. In 2013, there were more than 16 million cases filed in state courts as compared to just 259,489 filed in United States District Courts.³³ That means federal cases comprised *less than two percent of all civil cases in the United States*. As Justin Weinstein-Tull trenchantly observes in a recent study, "Local courts are . . . overwhelmingly the point of contact between humans and our justice system."³⁴ There are also more than twice as many federal administrative law judges who perform "exclusively adjudicative functions" (1,584) as there are federal district court judges, and more than four times as many federal administrative judges

32. NATIONAL CENTER FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 7–10 (2015) [hereinafter LANDSCAPE].

33. LANDSCAPE, *supra* note 32, at 6 n.36. For a more recent overview of state courts' caseload, see COURT STATS. PROJECT NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS (2016), http://www.courtstatistics.org/_data/assets/pdf_file/0022/23818/ewsc-2015.pdf.

34. Weinstein-Tull, *supra* note 17.

(3,370)—administrative staff whose functions include both adjudication and other work.³⁵ Administrative agency judges (both ALJs and AJs) work in agencies across the federal bureaucracy.³⁶ The ALJs who work for the Social Security Administration alone handle more than twice as many hearings and appeal dispositions (more than half a million) as the *entire* number of filings in federal district courts each year.³⁷ The EEOC handles an average of 96,000 discrimination claims each year, and parallel state employment agencies handle a massive number of filings as well.³⁸ Only about two hundred filings with the EEOC result in federal litigation initiated by the agency each year (0.2% of all the claims filed), and few employees who receive a right to sue letter from the agency go on to sue on their own.³⁹ The agency's action is therefore functionally dispositive in the vast majority of cases. In arbitration, the story is not greater filings than in federal court, but rather claim suppression—the astonishingly low number of filings in consumer protection and employment law relative to the massive expansion of arbitration clauses in consumer and employment contracts over the last few decades.⁴⁰

35. RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 351 (7th ed. 2015).

36. Kent H. Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1645 (2016) (referring to ALJs and AJs as “the hidden judiciary,” judges who “mostly go about unnoticed” even though their numbers and caseloads are “substantially larger than Article III courts”) (internal citation omitted).

37. *Information about Social Security's Hearings and Appeals Process*, SOC. SEC. ADMIN., <http://www.ssa.gov/appeals> (last visited June 27, 2020).

38. Samuel Estreicher, et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 390 (2018).

39. *Id.* at 393 (noting that 84.1% of employees who filed with the EEOC “received right-to-sue letters with no benefits” and that just 18.7% of those employees go on to bring suit in federal court, making the agency's decision not to become involved dispositive in the vast majority of cases).

40. See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012). The Consumer Financial Protection Bureau found that from 2010–2012 the average number of individual arbitration claims filed before the American Arbitration Association (AAA) regarding credit cards, prepaid cards, checking accounts, and payday loans, was just 415. Whereas most credit cards, forty-four percent of insured deposits in checking accounts, and eighty-one percent of prepaid cards include arbitration clauses in their contracts. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 12–13 (2015), *Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 12–13* (2013), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. See also Ronald L. Seeber & David B. Lipsky, *The Ascendancy of Employment Arbitrators in U.S. Employment Relations: A New Actor in the American System?*, 44 BRIT. J. INDUS. REL. 719 (2016); Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011); Estreicher, *supra* note 38, at 383 (finding a total of less than 8,000 employment arbitration cases in the AAA database between 2012–2017).

This Section considers each forum for adjudication—state, agency, and arbitral—in turn.

A. State Courts

The first thing to appreciate about litigation in state court beyond the vast number of case filings relative to federal court, is that the subject matter and stakes of state and federal court cases are quite different, making the study of federal litigation a decidedly infelicitous proxy for American litigation writ large. Federal civil litigation is, for instance, heavily centered on torts and public law cases. In 2013, for instance, torts cases comprised twenty-five percent of federal filings (increasingly aggregated under multi-district litigation statute⁴¹), while public law cases (including civil rights (12%)), habeas (20%), social security appeals (7%), and antitrust (1%) comprised forty percent of the federal district courts' docket.⁴² Together these categories, along with labor and intellectual property cases, dominate the federal docket. The amount in controversy requirement for diversity jurisdiction ensures that the tort cases are relatively high value, and it is unusual, outside areas such as habeas petitions, prisoner civil rights, and social security appeals, for federal litigants to be unrepresented by counsel.⁴³

Along every material dimension—subject matter, amount in controversy, access to counsel, method of disposition, etc.—a radically different picture emerges from the 2015 *Landscape* study of state courts conducted by the National Center for State Courts.

[N]early two thirds (64%) were contract cases, and more than half of those were debt collection (37%) and landlord/tenant cases (29%). An additional sixteen percent (16%) were small claims cases involving disputes valued at \$12,000 or less

41. See 28 U.S.C. § 1407; Andrew D. Bradt and Theodore Rave, *Aggregation on Defendant's Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. Rev. 1251, 1257 (2018) (noting that MDL “very often . . . functions as a tight knit aggregation from which a global resolution emerges, whether by settlement or dispositive motion” and that “despite MDL’s surface level modesty, fewer than three percent of cases are ever remanded back to the courts where they were originally filed”).

42. FEDERAL JUDICIAL CASELOAD STATISTICS 2013, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013> (last visited June 30, 2020).

43. See Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1836 (2018) (finding that roughly nine percent to ten percent of nonprisoner cases, as averaged over several four-year time periods, were filed by pro se plaintiffs and even fewer involved pro se defendants).

Despite widespread perceptions that civil litigation involves high-value commercial and tort cases, only 357 cases (0.2%) had judgments that exceeded \$500,000 and . . . three-quarters (75%) of all judgments were *less than \$5,200*. . . . Only four percent (4%) of cases were disposed of by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97%) of these were bench trials, almost half of which (46%) took place in small claims or other civil cases A judgment was entered in nearly half (46%) of the cases, most of which were likely default judgments. . . . One of the most striking findings in the dataset was the relatively large proportion of cases (76%) in which at least one party was self-represented, usually the defendant. Tort cases were the only ones in which a majority (64%) of cases had both parties represented by attorneys.⁴⁴

As these data indicate, a typical state court case is a fairly low monetary value dispute in which the defendant is unrepresented, and the plaintiff secures a default judgment. Indeed, the “vast majority” are “debt collection, landlord/tenant, foreclosure, and small claims cases.”⁴⁵ Creditors, landlords, employers, and other people in positions of power are generally plaintiffs and prefer state courts “for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments.”⁴⁶ Moreover, securing judgments is a “mandatory first step to being able to initiate garnishment or asset seizure proceedings.”⁴⁷ In a word, the state courts are operating primarily as accelerated debt collection courts.

The conjunction of default judgments and individual defendants’ lack of counsel is particularly troubling from a due process perspective. It means that there is generally no merits review or adjudication to speak of—not only

44. LANDSCAPE, *supra* note 32, at iii–iv (emphasis added). For empirical analysis of state court caseloads in 2010, see NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS, COURT STATISTICS PROJECT (2012), http://www.courtstatistics.org/_data/assets/pdf_file/0021/29811/2010-EWSC.pdf. See also *id.* at 3 (finding two-thirds of state cases were processed in limited-jurisdiction courts); Weinstein-Tull, *supra* note 17, at 1042 (noting that more than half of local court cases filed in 2015 were traffic cases). Federal and state courts also diverge in the qualifications of judges. See *id.* at 1053 (“[T]wenty-six states allow non-lawyers to preside over limited-jurisdiction courts.”) (citing William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <https://www.nytimes.com/2006/09/25/nyregion/25courts.html>).

45. LANDSCAPE, *supra* note 32, at v. Appeals are also exceedingly rare. See Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUD. 100 (2015); Weinstein-Tull, *supra* note 17, at 1039–1040.

46. LANDSCAPE, *supra* note 32, at v.

47. *Id.*

no trial, but no merits determination *whatsoever*. And there are strong incentives for plaintiff creditors, employers, and landlords to cut corners in giving notice because, in the absence of defense counsel, the likelihood that “gutter service” will be challenged is low. As the *Landscape* study summarized: “Even if defendants might have the financial resources to hire a lawyer to defend them in court, most would not because the cost of the lawyer exceeds the potential judgment.”⁴⁸ For all of these reasons, the “idealized picture of an adversarial system in which both parties . . . can assert all legitimate claims is an illusion. The costs and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes.”⁴⁹

The *Landscape* study laid particular emphasis on the stark difference between what the data showed and the standard media-hyped conception of Americans as overly litigious, especially in the area of personal injury and product liability. But the real story, from the perspective of the actual, is the disturbing overlap between the data from the *Landscape* study and other evidence of procedural abuse in debt collection practices. A 2018 study estimates that “77 million Americans—one in three adults—have a debt that has been turned over to a private collection agency” and “in many state courts, debt purchasers file more suits than any other type of plaintiff.”⁵⁰ Creditors who secure a judgment can initiate court supervised “judgment debtor examinations” during which defendants are required to disclose information about their income and assets to satisfy the judgment. Failure to appear can have devastating consequences. In 44 states, judges—“including district court civil judges, small-claims court judges, clerk-magistrates, and justices of the peace—are allowed to issue arrest warrants for failure to appear at post-judgment proceedings or for failure to provide information about finances. These warrants, usually called ‘body

48. *Id.* at iv–v. For an example of the barriers that unrepresented tenants face in summary process eviction proceedings, see Esmé Caramello, et al., *Where A Lawyer Makes All the Difference—and Only One Side Has One*, 63 BOSTON BAR J. 1 (2019) (discussing procedural flaws in summary process evictions identified by Supreme Judicial Court of Massachusetts in *Adjartey v. Central Division of the Housing Court Department*, 120 N.E. 3d 297 (Mass. 2019)).

49. *LANDSCAPE*, *supra* note 32, at v.

50. AMERICAN CIVIL LIBERTIES UNION, *A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT* 4–5 (2018). The Covid-19 pandemic has only amplified the economic vulnerability of debtors. Mary Williams Walsh, *Federal Aid Has So Far Averted Personal Bankruptcies, but Trouble Looms*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/business/personal-bankruptcies-coronavirus.html> (“[E]ven if Congress extends the relief measures, they are a temporary salve that will do little to change the long-term patterns of income stagnation and indebtedness that have left American households so vulnerable to financial shock. Total household debt reached \$14.3 trillion in the first quarter of this year, according to the Federal Reserve Bank of New York—a record.”).

attachments' or 'capias warrants' are issued on the charge of contempt of court."⁵¹ In this way, the body of the debtor, the debtor's physical liberty, is converted into a surety on the debt by the law of procedure.⁵²

Courts may then use bail as leverage to force the debtor to pay the value of the civil judgment: "Once arrested, debtors may languish in jail for days until they can arrange to pay the bail. In some cases, people were jailed for as long as two weeks. Judges sometimes set bail at the exact amount of the judgment. And the bail money is often turned over to the debt collector or creditor as payment against the judgment."⁵³ As a lawyer engaged in debt collection against student loan debtors in Texas nonchalantly observed, "'It's easier to settle when the debtor is under arrest."⁵⁴

This is rough justice by any measure. Indeed, the report found that many of the people arrested for failure to appear at judgment debtor examinations "had no idea a warrant had been issued for their arrest."⁵⁵ They learned of the warrant and missed hearing at the time of arrest rather than through statutorily prescribed methods of notice for the hearing. When the underlying judgment is a default judgment, which the *Landscape* study suggested is common, collections are taking place using the court's compulsory power with no merits inquiry into the underlying debt, often against a *pro se* defendant. The post-judgment arrest for failure to appear at a judgment debtor examination may be the first appearance of the defendant in the entire proceeding. And all too frequently the "people who are jailed or threatened with jail . . . are the most vulnerable Americans, living paycheck to paycheck, one emergency away from financial catastrophe."⁵⁶ Many already rely on some form of public assistance such as "Social Security, unemployment insurance, disability benefits, or veterans' benefits . . ."⁵⁷

In addition to these questionable collection practices for *private* debts, some state courts have become quite aggressive about enforcing *court-imposed* fines and fees. A 2009 *Handbook* published by the National Center for State Courts describes proactive enforcement of unpaid court fines and fees as "a means of ensuring compliance with court judgments, thereby increasing public trust and confidence in the judicial system . . . [and]

51. AMERICAN CIVIL LIBERTIES UNION, *supra* note 50, at 6.

52. The roots of this debt collection procedure in western countries run at least as far back as Roman law. See JOE DEVILLE, *LIVED ECONOMIES OF DEFAULT: CONSUMER CREDIT, DEBT COLLECTION, AND THE CAPTURE OF AFFECT* (Routledge 2015) (describing Roman debt collection legislation providing that, after repayment periods failed, "the debtor's body could be held as forfeit for an outstanding debt").

53. AMERICAN CIVIL LIBERTIES UNION, *supra* note 50, at 6.

54. *Id.* at 7.

55. AMERICAN CIVIL LIBERTIES UNION, *supra* note 50, at 6.

56. *Id.* at 7.

57. *Id.*

increasing revenue.”⁵⁸ The *Handbook* acknowledged that sweeping cuts in court funding from state general revenue funds had amplified pressure on courts to expand and collect fines and fees. But the effect of more aggressive collection practices has been to compromise two traditional principles for the administration of justice: first, that courts preserve their independence, impartiality, and integrity in the eyes of the public by taking a relatively passive stance on enforcement of debts owed to the court, and second that equality and due process demand sensitivity to litigants’ actual ability to pay. Indeed, the *Handbook* explicitly warned that jailing people for failing to pay debts may not be cost effective (because the costs of incarceration can easily exceed the debts one hopes to collect) but it failed to reference the due process requirement of inquiry into a litigant’s ability to pay,⁵⁹ and it encouraged experimentation with “coercive measures”:

The perception among judges and court managers in many jurisdictions is that if their own locality is economically depressed, then many traffic and criminal defendants are unable to pay fines and fees, particularly in cases involving a mandatory fine or jail sentence. However, experienced collectors consistently assert that all but a very few defendants have greater resources for meeting their obligations than may be immediately apparent. Some “hard-core” defendants . . . will not pay their obligations . . . or will eventually be impossible to locate. However, a much larger percentage of defendants will pay all or part of the amount owed if 1) payment can be made without too much inconvenience, and 2) *increasingly coercive measures are applied by the collector.*⁶⁰

As we know from the Department of Justice’s *Report on the Ferguson Police Department*, in at least some jurisdictions overly “coercive measures” were vigorously pursued on terms that were also racially biased. The Ferguson Report’s findings on racially discriminatory policing have received widespread coverage. Less commonly noted are the Report’s findings on due process failures in the municipal court, particularly the ways criminal

58. JOHN MATTHIAS & LAURA KLAVERSMA, NAT’L CTR. FOR STATE CTS., CURRENT PRACTICES IN COLLECTING FINES AND FEES IN STATE COURTS: A HANDBOOK OF COLLECTION ISSUES AND SOLUTIONS I (2d ed. 2009) [hereinafter CURRENT PRACTICES]; *see also id.* at 5 (“Poor or haphazard enforcement reflects negatively on the courts and justice in general.”). The report goes on to stress the importance of procedural fairness and mentions payment plans and alternatives such as community service to payment of court fines and fees. *See id.* at 35, 42. But it also highlights Texas’ warrant system as “an extremely effective tool in encouraging compliance.” *Id.* at 57.

59. *See Bearden v. Georgia*, 461 U.S. 660 (1983).

60. CURRENT PRACTICES, *supra* note 58, at 12–13, 20 (emphasis added).

and civil procedure were intertwined in its debt collection practices. The municipal court not only failed to address stark racial disparities in policing,⁶¹ it imposed significant fees and other costs, and it regularly jailed city residents for failure to make payments when they did not have the means to pay, creating a vicious, racialized cycle of imprisonment for these debts.⁶²

The Department of Justice found other disturbing procedural irregularities in the courts. Notice of violations of the municipal code made it “difficult . . . to know how much is owed, where and how to pay the ticket, what the options for payment are, what rights the individual has, and what the consequences are for various actions or oversights.”⁶³ And because judges issue “rules of practice and procedure verbally and on an ad hoc basis,” litigants have no way of knowing what will happen when they do appear or how to assert their rights.⁶⁴ These are basic defects in providing constitutionally required notice.⁶⁵ The city also amplified the fees and charges associated with missed appearances by requiring “far more defendants to appear in court than is required under state law.”⁶⁶ Demanding that an individual “appear at a specific place and time to pay a citation makes it far more likely that the individual will fail to appear or pay the citation on time, quickly resulting . . . in an arrest warrant and a suspended license.”⁶⁷ The court also “impose[d] . . . fines without providing any process by which a person can seek a fine reduction on account of financial incapacity.”⁶⁸ These are straightforward abuses of the right to be heard.

Further, the court “treat[ed] a single missed, partial, or untimely payment as a missed appearance. In such a case, the court immediately issue[d] an arrest warrant without any notice or opportunity to explain why

61. CIV. RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 43 (2015) [hereinafter FERGUSON REPORT] (noting that “[a]ttempts to raise legal claims are met with retaliatory conduct” by municipal judges).

62. For example, ninety-three percent of people held in Ferguson at least two days, and in some cases more than seventy-two hours, before release were black. FERGUSON REPORT, *supra* note 61, at 60. *See also id.* at 43 (“[T]he municipal court does not generally deem the code violations that come before it as jail-worthy, [but] it routinely views the failure to appear in court to remit payment to the City as jail-worthy, and commonly issues warrants to arrest individuals who have failed to make timely payment. Similarly, while the municipal court does not have any authority to impose a fine of over \$1,000 for any offense, it is not uncommon for individuals to pay more than this amount to the City of Ferguson—in forfeited bond payments, additional Failure to Appear charges, and added court fees—for what may have begun as a simple code violation. In this way, the penalties that the court imposes are driven not by public safety needs, but by financial interests.”).

63. FERGUSON REPORT, *supra* note 61, at 44.

64. *Id.* at 45.

65. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950).

66. FERGUSON REPORT, *supra* note 61, at 48.

67. *Id.* at 48–49.

68. *Id.* at 53.

a payment was missed—for example, because the person was sick, or the court closed its doors early that day.”⁶⁹ And the city’s police department was used “in large part as a collection agency for its municipal court While issuing municipal warrants against people who have not appeared or paid their municipal code violation fines is sometimes framed as addressing the failure to abide by court rules, in practice, it is clear that warrants are primarily issued to coerce payment.”⁷⁰ After arrest, the court failed to credit or record a person’s time served, and it set bonds that often exceeded the amount owed to the court.⁷¹

If these failures of due process and equal protection seem more closely associated with criminal law than civil procedure, they should not.⁷² First, as the Department of Justice Report emphasized, many of the underlying citations that initiated the cycle of fines, fees, warrants, and arrest were for non-criminal municipal code violations.⁷³ Thus, criminal charges and confinement were used for *civil matters* unconnected to threats to public safety. Second, there is evidence that judges on the municipal court treated debtors as a valuable revenue source. As the Report summarized: “The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests.”⁷⁴ In this respect, Ferguson represents a particularly tragic example of municipal and judicial parasitism upon the very communities these institutions are supposed to serve—a perverse outcome of forcing state courts to operate on shoestring budgets that directly undermines public faith in the administration of justice.

Third, as with the collection of private debts discussed in the *Landscape* study above, a key procedural tool resulting in incarceration for failure to pay criminal or civil assessments in Ferguson was the use of civil contempt as the basis for issuing a warrant upon a resident’s failure to appear. Follow-on litigation in other jurisdictions reveals that municipal courts facing severe budget shortfalls have converted fines and fees into civil judgments in aid of their collection efforts, and some courts regularly fail to make the

69. *Id.*

70. *Id.* at 55–56. Imprisoning people for non-payment who do not have the means to pay is a clear violation of due process under *Bearden v. Georgia*, 461 U.S. 660 (1983). *Id.* at 57.

71. *Id.* at 60 (“Court records do not even track the total amount of time a person has spent in jail as part of a case. When asked why this is not tracked, a member of court staff told us: ‘It’s only three days anyway.’”).

72. FERGUSON REPORT, *supra* note 61, at 60.

73. *Id.* at 56 (“[T]he warrants issued by the court are overwhelmingly issued in non-criminal traffic cases that would not themselves result in a penalty of imprisonment.”).

74. FERGUSON REPORT, *supra* note 61, at 3.

constitutionally required inquiry into a person's ability to pay before punishing failure to appear with arrest and jail time.⁷⁵

This specific due process violation became especially draconian in Jennings, Missouri. The Jennings court conducted closed door, off record, mass hearings for primarily African American debtors who were held in jail in unconscionably filthy and degrading prison conditions for failure to pay court-imposed fines and fees. Court hearings for imprisoned debtors took place only once a week, forcing anyone who could not make payments to remain in custody, and at the hearings there was no constitutionally required inquiry into litigants' ability to pay. Debtors were verbally abused by their jailors and forced to bid their way out of unconscionable conditions of confinement even as new fines and fees mounted. The complaint described "overcrowded cells" in which:

impooverished people owing debts to the City . . . are denied toothbrushes, toothpaste, and soap; they are subjected to the stench of excrement and refuse in their congested cells; they are surrounded by walls smeared with mucus, blood, and feces; they are kept in the same clothes for weeks and without access to laundry . . . they step on top of other inmates whose bodies cover nearly the entire uncleaned cell floor, in order to access a single shared toilet that the City does not clean . . . they develop illnesses and infections in open wounds that spread to other inmates . . . they endure days and weeks without being allowed to use the shower; women are not given adequate hygiene products for menstruation . . . they are routinely denied vital medical care and prescription medication . . . they are

75. Ferguson and Jennings are egregious examples, but they are not wholly unique. One study found that although Ferguson stood out in the extent to which the *city* relied on fines and fees for the city budget, "there are other Missouri municipalities and other United States cities that rely more heavily on fines and fees as a percentage of their *court* budgets." U.S. COMM'N ON CIV. RIGHTS, TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 20 (2017). Moreover, as in Ferguson, race appears to be correlated with the imposition of high fines. "Among the fifty cities with the highest proportion of revenues from fines, the median size of African American population—on a percentage basis—is more than five times greater than the national median." *Id.* at 23 (quoting Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), <https://priceonomics.com/the-fining-of-black-america/>). See Kopf, *supra* ("When we began this analysis, we expected that fines would be correlated with income levels . . . [T]hat's not what we found The best indicator that a government will levy an excessive amount of fines is if its citizens are Black."). For examples of litigation challenging the procedural fairness of the enforcement of legal financial obligations in other jurisdictions, see *Cain v. City of New Orleans*, 327 F.R.D. 111 (E.D. La. 2018) (holding that New Orleans' court funding system, in which the judges who imposed fines and fees depended on that money for their own budgets, violated due process); *Complaint, Graff v. Aberdeen Enterprises II, Inc.*, Case No. 4:17-CV-606-CVE-JFJ, 2018 WL 4517468 (N.D. Okla. Sept. 20, 2018) (alleging unconstitutional reliance by the Oklahoma Sheriffs' Association and Oklahoma judges on fines and fees imposed on poor defendants).

provided food so insufficient and lacking in nutrition that inmates are forced to compete to perform demeaning janitorial labor for extra food rations and exercise; and they must listen to the screams of other inmates being beaten or tased or in shrieking pain from unattended medical issues . . . [;] jail guards routinely taunt impoverished people when they are unable to pay for their release . . . guards routinely laugh at the inmates and humiliate them with discriminatory and degrading epithets about their poverty and their physical appearance.⁷⁶

This is the actual, a world apart from our understandings about due process and human decency. Remarkably, the ideal existed right alongside this debased procedural system. If the debtor had the means to retain counsel, the same court promptly vacated any arrest warrants and conducted its process like the casebooks teach due process should work. Legitimate and dehumanizing procedures were thus dispensed by the same court for the same kinds of debts. Access to counsel, which turned heavily on class and race, determined which process a debtor received.⁷⁷

In jurisdictions where either private civil debts or legal financial obligations, or both, are collected using these techniques, and in those documented in the *Landscape* study showing how commonly local courts function as debt collection forums via default judgment against pro se litigants, ordinary Americans experience the administration of justice on terms that are utterly foreign to the standard pedagogy of legal education and the orientation of legal scholarship in the field of procedure.⁷⁸ Indeed, the lesson of the actual in *Jenkins* and other litigation following the revelations in Ferguson is that civil procedure and criminal punishment have become enmeshed in some jurisdictions in ways that not only trap low income people and people of color in a cycle of mounting debt, but also result in debtors' prison for both civil and criminal debts and disabling collateral

76. Complaint, *Jenkins v. City of Jennings*, Case No. 4:15-cv-252-CEJ (E.D. Mo. Feb. 8, 2015) ¶¶ 2, 4.

77. *Id.*; Campbell Robertson, *Missouri City to Pay \$4.7 Million to Settle Suit Over Jailing Practices*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/us/missouri-city-to-pay-4-7-million-to-settle-suit-over-jailing-practices.html>.

78. There are, of course, extraordinarily talented, dedicated judges all around the country working in the state courts. They too have been placed in impossible situations—having to balance their deep commitment to due process against staggering caseloads and shrinking budgets. My purpose here is not to criticize the judiciary or to overgeneralize from some of the most disturbing examples of procedural failure where individual courts or judges have gone astray. It is to state in a clear-eyed way the consequences of systematic defunding of the courts and policies that are dehumanizing for both litigants and judges. *Ferguson, Jenkins*, and other similar cases are wake up calls, and not just for experts in criminal law and procedure.

consequences. This not only perpetuates racial subordination and drives people into poverty, it can cause “profound estrangement” in its victims, undermining the legitimacy of courts in their eyes, and ultimately their faith in the rule of law.⁷⁹

B. Arbitration

One of the central findings of the *Landscape* study is that most cases are resolved before trial because the costs of litigation in state court exceed the value of the cases. The study notes that “[i]n some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.”⁸⁰ That is because “three quarters (75%) of all judgments were less than \$5,200.”⁸¹ In this way, ordinary people are simply priced out of litigation by the cost of filing fees, other litigation costs, and attorneys’ fees.

Although arbitration has long been promoted as a more cost-effective procedure, a similar problem surfaces there—boxing ordinary people out of both court and ADR. A *New York Times* investigation recently concluded that by including contract clauses that ban class actions and mandate arbitration, “companies have essentially disabled consumer challenges to practices like predatory lending, wage theft and discrimination.”⁸² A federal judge interviewed for the study commented that “[o]minously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach.”⁸³ Just as in the state courts, plaintiffs frequently cannot

79. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2057 (2017) (summarizing social science research showing that people of color are “subject only to the brute force of the state while excluded from its protection” and criticizing the narrow focus on the “legitimacy deficit” in legal scholarship on local law enforcement).

80. *LANDSCAPE*, *supra* note 32, at iv.

81. *Id.*

82. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *N.Y. TIMES* (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>; see also David Horton, *Infinite Arbitration Clauses*, 168 *U. PA. L. REV.* 633 (2020) (describing the use of infinite arbitration clauses, which contain broad language to mandate arbitration for any potential dispute that could arise between the parties and any related party in perpetuity). *But see* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 *CALIF. L. REV.* 1, 9 (2019) (noting that some enterprising plaintiffs’ lawyers have filed class action-style cases, bringing dozens or even hundreds of related arbitrations against the same company). However, arbitration “is not currently picking up the slack left by the decline of the class action . . . it is [] a pale substitute for the class action.” *Id.* at 51.

83. Silver-Greenberg & Gebeloff, *supra* note 82; see also Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 *N.C. L. REV.* 679, 696–97 (2018) (comparing claims in workplaces that do and do not require mandatory arbitration with class waivers, and estimating that mandatory arbitration agreements reduce employee claims by over 98%) *cf.* David Horton, *The Arbitration*

afford to pursue their claims in arbitration individually because the money value of their individual claims is simply too small relative to the cost of arbitration.⁸⁴

In addition to the costs of arbitration, and the fact that consumers and employees are often bound to arbitrate by contracts of adhesion,⁸⁵ there is evidence that arbitration procedures and adjudicators tend to favor the powerful companies that draft arbitration clauses into their contracts.⁸⁶ Of 1,179 federal class actions filed between 2010 and 2014 that “companies

Rules: Procedural Rulemaking by Arbitration Providers, 105 MINN. L. REV. (forthcoming 2021) (arguing that the “Arbitration Rules” differ from the FRCP because the Arbitration Rules are written in secret by for-profit corporations, vary by provider instead of being trans-substantive, and favor speed over precision).

84. The *New York Times* found that “between 2010 and 2014, only 505 consumers went to arbitration over a dispute of \$2,500 or less. Verizon, which has more than 125 million subscribers, faced 65 consumer arbitrations in those five years Time Warner Cable, which has 15 million customers, faced seven. One federal judge remarked in an opinion that ‘only a lunatic or a fanatic sues for \$30.’” Silver-Greenberg & Gebeloff, *supra* note 82; see also Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015) (“The empirical evidence also provides important insights as to why so few employees file claims in arbitration: (1) employees win less often and win less money in arbitration than in litigation; (2) attorneys are less willing to take employee claims that are headed to arbitration rather than litigation; (3) arbitration is not a hospitable venue for pro se employees; and (4) arbitration is being used to eradicate the class actions, collective actions, and even group litigation that are essential to many employees.”). Even when plaintiffs win their claims, they receive lower damages on average from arbitration cases that result in an award than they do in litigation cases that result in a verdict/judgment. Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375 (2018) (comparing securities industry arbitrations to employment cases that went to trial in federal court and finding that “[t]he securities industry awards had a mean of \$236,292 while the mean verdict/judgment in employment litigation cases was \$377,030.93.”); Mark Gough, *A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation*, ILR REV. (2020) (finding that employees who prevail in arbitration win an average of \$362,000, “significantly lower” than the \$678,000 average award for employees in state or federal jury trials, based on a survey of 1,200+ plaintiff-side employment attorneys).

85. See ALEXANDER J. S. COLVIN, ECON. POL’Y INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 2–3 (2018), <https://files.epi.org/pdf/144131.pdf>; Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121 (2019) (finding that 42% of employment contracts contain arbitration provisions in an analysis of 800,000 documents filed by public companies with the SEC); Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. 233 (2019) (finding that at least “826,537,000 consumer arbitration agreements were in force” in 2018 and that 78 companies in the Fortune 100 used class-action waivers and consumer arbitration agreements between 2010 and 2018).

86. Gough, *supra* note 84 (finding that the employee win rate in arbitration is 46%, lower than the 62% employee win rate in state or federal court); Silver-Greenberg & Gebeloff, *supra* note 82 (“Taking Wall Street’s lead, businesses—including obstetrics practices, private schools and funeral homes—have employed arbitration clauses to shield themselves from liability Thousands of cases brought by single plaintiffs over fraud, wrongful death and rape are now being decided behind closed doors. And the rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show.”).

sought to push into arbitration, *judges ruled in their favor in four out of every five cases.*⁸⁷ Other studies highlight a dramatic expansion in arbitration clauses in the employment setting and their effect on workers' access to court, particularly women and African American employees. By 2018, the "share of workers subject to mandatory arbitration had risen from just over 2 percent" in 1992 to more than 55 percent.⁸⁸ "Among companies with 1,000 or more employees, 65.1% have mandatory arbitration procedures. . . . Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration."⁸⁹ Significantly, "[a]rbitration is more common in low-wage workplaces. It is also more common in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers."⁹⁰

87. Silver-Greenberg & Gebeloff, *supra* note 82 (emphasis added); see also Samuel Streicher, et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 389 (2018) (noting that damage recoveries in arbitration may be lower because "relatively weaker claims—where claimants are unable to attract competent counsel—are more likely to go to an arbitration hearing on the merits than in litigation to verdict"). A more mixed story about the advantages of corporate defendants surfaces from a recent empirical study of arbitration outcomes between 2010 and 2016. See Chandrasekher & Horton, *supra* note 82. Significantly, as in civil litigation, the authors find that outcomes in arbitration turn heavily on whether the plaintiff has legal representation and that the cost of arbitration has been affected by recent reforms. *Id.* at 52 (finding that the average share of plaintiffs' arbitration costs was \$1,114); Alexander Colvin & Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, ILR REV. (2015) (finding that self-represented employees have worse outcomes—including settling less often, winning at hearings less often, and receiving lower damages—in a survey of employment arbitration outcomes from AAA over eleven years); cf. Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims be Fair? The Kaiser Permanente System*, 70 DISP. RESOL. J., no. 3 (2015). Employees and consumers are especially disadvantaged when they face corporations experienced in arbitration. Colvin & Gough, *supra*; David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 114–115 (2015) (concluding that "consumers facing high-level and super repeat-playing defendants are strongly disadvantaged in the arbitral forum relative to consumers facing one-shot defendants" after analyzing 4,839 cases filed by consumers with the AAA between July 2009 and December 2013). But they can level the playing field and increase their chances of success by hiring themselves a "repeat-playing" plaintiff's lawyer who is also experienced in arbitration. *Id.* at 58.

88. Colvin, *supra* note 85, at 1; see also Elizabeth C. Tippet & Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459 (2018) (finding that the prevalence of arbitration agreements and class action waivers increased from one-third of companies before 2012 to two-thirds of companies in 2016 following two landmark Supreme Court decisions affirming the enforceability of class action waivers in arbitration agreements).

89. *Id.* at 2.

90. *Id.*; see also Alexander J. S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3 (2019) ("It is the employers with the lowest paid workforces that are most likely to impose mandatory arbitration on their employees. This is a concern from a policy

Procedure scholars have paid close attention to the development of the Supreme Court's extratextual reading of the Federal Arbitration Act, the statute largely responsible for the displacement of adjudication by arbitration.⁹¹ Less attention has been paid, however, to the role that corporate attorneys representing banks and the Chamber of Commerce played in developing the legal analysis adopted by the Court,⁹² and to the class, gender, and race disparities in who is affected by the dramatic expansion of binding arbitration.⁹³ These disparities are particularly significant given the lack of transparency in arbitration. In the context of employment, for instance, companies can use the confidentiality of arbitration proceedings to "draw a heavy veil of secrecy around allegations of misconduct and their resolution The relative invisibility of particular disputes and their outcomes in arbitration . . . undermines the regulatory function of private enforcement actions, which serve not only as a dispute resolution mechanism, but also as an ex post alternative or supplement to ex ante prescriptive rules of conduct."⁹⁴

If there are advantages in an idealized conception of arbitration as compared to litigation (lower cost, faster disposition,⁹⁵ direct participation), it matters that these advantages have not been realized in the actual experience of ordinary people.⁹⁶ It also matters that the process defects fall disproportionately on already vulnerable and subordinated populations.

perspective because low paid employees are particularly vulnerable to infringements of their employment rights, with researchers having found widespread violations of wage and hour laws among these workers.").

91. See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016).

92. See Silver-Greenberg & Robert Gebeloff, *supra* note 82 (explaining corporate lawyers' and the Chamber of Commerce's lobbying activities against class actions).

93. Cf. Gilles, *supra* note 91, at 413 & n. 245.

94. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 681–82 (2018) (noting the difficulty of empirically examining internal arbitration procedures because procedures are not always standardized or published; emphasizing data showing that "the great bulk of disputes that are subject to mandatory arbitration agreements . . . simply evaporate before they are even filed" because of the costs and perceived barriers to recovery).

95. Cf. Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 8 (2011) (finding that arbitrations are taking longer now than they used to). But see Chandrasekher & Horton, *supra* note 82, at 51 (noting that arbitration is "almost certainly faster" than litigation). However, no study showing faster disposition rates in arbitration "attempts to control for the complexity of the cases that go to litigation as opposed to arbitration." Estreicher et al., *supra* note 84, at 382.

96. See Marissa Ditkowsky, *#ustoo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 83 (2019) ("Although arbitration proponents cite cost savings, speed, and efficiency, in reality the cost saving is minimal since arbitrators typically charge between \$750 and \$1,200 per day and hearings often experience delays in scheduling."); Raphael Ng'etich, *The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration*, 5 ALT. DISP. RESOL. 111 (2017) ("The current trend in arbitration indicates that arbitral proceedings are increasingly more expensive than

C. Administrative Adjudication

Litigation in court has been displaced not only by arbitration but also by the massive number of adjudications and claims processing that take place before administrative agencies and never reach a court on appeal.⁹⁷ Although agencies enjoy enormous flexibility in procedural design to permit them to balance enforcement priorities, resource constraints, and statutory mandates, evidence of both systemic bias and delay in flagship federal agencies is disturbing.⁹⁸ With respect to systemic bias, investigations by the *Wall Street Journal* and *New York Times* found that the Securities and Exchange Commission “prevails much more frequently—sometimes 100% of the time in a given year—in its in-house enforcement proceedings” before its own administrative law judges “than in court.”⁹⁹ The structural problem

litigation . . .”). *But see* Chandrasekher & Horton, *supra* note 82, at 52 (“Combining all case types and all providers, the average plaintiff’s share of arbitrators’ fees was a manageable \$1,114 Moreover, the median fee in the sample of all awarded cases is \$0”). However, the administrative costs of arbitration can make it overall more expensive than litigation. *Arbitration: Not Necessarily A Better Option Than Litigation*, BUS. LAW & TECH. GRP., http://www.btlg.us/News_and_Press/articles/arbitration.html (last visited Aug. 12, 2020) (“The cost of an administrative agent and the arbitrator can make simple matters much more expensive than litigation. The filing fee to a court is usually a one-time, upfront cost in the range of \$100–200. By comparison, arbitration filing fees are \$750 or more, with ongoing administrative costs, plus the cost of an arbitrator at a daily or hourly rate, in addition to the cost of your own lawyers and experts.”); Vincent J. Love, *Alternative Dispute Resolution for Accounting and Related Services Disputes*, CPA J., at 13 (2018) (“[A]rbitration can be costlier than litigation, as it typically requires higher filing fees than courts . . .”). The point is not that arbitration could not be designed to function fairly. *See* Morrison, *supra* note 87. *See also*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631, 1648–53 (2005) (summarizing critiques of mandatory consumer arbitration’s unfair impacts on individual consumers); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

97. Barnett, *supra* note 36, at 1652–53.

98. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 323–26 (1976) (challenge to accuracy of Social Security disability determination); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (challenge to accuracy of subversive classifications made by the Joint Anti-Fascist Refugee Committee); Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, n.20 (2018) (noting bias and political interference in Social Security Administration, Department of Agriculture, EPA, and NLRB adjudications).

99. Barnett, *supra* note 36, at 1645; *see also* Lucille Gauthier, *Insider Trading: The Problem with the SEC’s In-House ALJs*, 67 EMORY L.J. 123, 126 (2017) (“In the 2014 fiscal year, the SEC brought four out of five enforcement actions in administrative proceedings rather than in federal courts. Further, the SEC boasted a 90% win rate in administrative proceedings, and only a 69% win rate in federal court, from October 2010 through March 2015.”); Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 VILL. L. REV. 261, 286 (2017) (“Combined with the fact that the ALJs are SEC employees who lack Article III’s tenure and salary protections, the SEC’s recent success rate in administrative proceedings before ALJs versus that in federal district court at least arouses the perception of ALJs’ possible bias toward the SEC. It should also

in the eyes of critics is that “in the administrative setting adjudication is conducted and resolved by employees—often high ranking employees—of the very agency whose existence is justified by the need for regulation and which has decided to institute the particular regulatory proceeding in the first place.”¹⁰⁰ Moreover, in the SEC and other agencies “aberrations from adjudicatory neutrality” are not rare, and not merely “commonplace”; rather, they “represent the fundamental characteristics of the modern administrative process.”¹⁰¹

Whether any specific procedural “aberrations” violate the constitutional guarantee of due process and what reforms might eliminate them are hotly debated in the literature—so too is the question when Article III adjudication is constitutionally required.¹⁰² The primary concern from the perspective of the actual is that in the seventy years since the passage of the Administrative Procedure Act and implementation of its procedural safeguards, and in the forty years since Henry Friendly’s famous article calling for “experimentation” in procedural due process to deal with the demand for mass processing of claims in the modern bureaucratic state,¹⁰³ debate still rages in no small part because evidence of bias reinforces the criticism that the very structure of agency adjudication may be flawed. Critics insist there is “a built-in preference for the position taken by the very agency of which [the adjudicator] is a part.”¹⁰⁴

be noted that the SEC’s in-house success rate could give it increased leverage during settlement talks with defendants.”)

100. Martin H. Redish & Kristen McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 298 (2018).

101. *Id.* at 298–99. See also Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENGLAND L. REV. 417, 419 (2011) (examining how factors such as “lack of independence, limited opportunity for deliberate thinking, low motivation, and the low risk of judicial review . . . allow implicit bias to drive decision making” among immigration judges); Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, ROLL CALL (Oct. 29, 2019, 2:51 PM), <https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/>.

102. See, e.g., Barnett, *supra* note 36 (highlighting concerns with not just administrative law judges, but even more informally appointed administrative judges); Jerry 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*, 59 CORNELL L. REV. 772 (1974) (criticizing accuracy and due process failures in agency adjudication); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620 (2018) (surveying developments in administrative law through agency adjudication); David Ames, et al., *Due Process and Mass Adjudication*, 72 STAN. L. REV. 1 (2020) (analyzing decisional problems of the Board of Veterans Appeals). But see Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647 (2008) (discussing significant benefits of administrative adjudication).

103. Friendly, *supra* note 3, at 1291.

104. Redish & McCall, *supra* note 100, at 299.

The administration of asylum and other immigration claims offer a sobering example of process defects with grave human consequences.¹⁰⁵ Under both Republican and Democratic administrations, individuals who have already established a credible fear of persecution have been held in indefinite detention pending adjudication of their claims¹⁰⁶ and families have been separated.¹⁰⁷ Under the Trump administration's "Remain in Mexico" policy, thousands of asylum seekers have been forced to wait in Mexico under unsafe conditions that make it difficult to attend court, obtain assistance of counsel, or coordinate with retained counsel in the United States to assert the right to asylum.¹⁰⁸ "Tent courts" that rely on patchy teleconferencing technology to connect to remotely located immigration judges severely limit participation by litigants and public access.¹⁰⁹ The pressure to dispose of cases without a meaningful hearing is enormous, and comes not only from the sheer number of cases and the structurally deficient conditions in which hearings are supposed to take place, but from

105. Ming H. Chen & Zachary New, *Silence and the Second Wall*, 28 S. CAL. INTERDISC. L.J. 549, 561 (2019) ("[L]arge backlogs and processing delays in nearly every category of immigration benefit have developed[] to the point that Congress and advocacy groups say they have reached 'crisis levels (footnote omitted)' . . . [T]here has been a surge in case processing times by 46% over the past two fiscal years and a 91% increase since fiscal year 2014 These delays have led those seeking green cards or other benefits to be stuck in a legal limbo where they are vulnerable to the highly publicized increased enforcement initiatives of the Trump administration and being unable to utilize the many legal and social benefits that their immigration statuses would impart to them.").

106. Michael D. Shear & Katie Benner, *In New Effort to Deter Migrants, Barr Withholds Bail to Asylum Seekers*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/us/politics/barr-asylum-bail.html>.

107. See, e.g., Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, VOX (Aug. 14, 2018, 1:29 PM), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents> (describing family separation rates under the Trump administration); Jasmine Aguilera, *Here's What to Know About the Status of Family Separation at the U.S. Border, Which Isn't Nearly Over*, TIME (Oct. 25, 2019, 2:49 PM), <https://time.com/5678313/trump-administration-family-separation-lawsuits/> (same)[?]; Richard Gonzales, *Obama Immigrant Detention Policies Under Fire*, NPR (June 12, 2015, 5:57 PM), <https://www.npr.org/sections/itsallpolitics/2015/06/12/414023967/obama-immigrant-detention-policies-under-fire> (describing criticism of the Obama administration's family detention policies).

108. Priscilla Alvarez, *Confusion and Frustration in Tent Courts Along the Texas Border*, CNN (Sept. 21, 2019, 8:03 AM), <https://www.cnn.com/2019/09/21/politics/texas-tent-courts/index.html>. On the secrecy and inaccessibility of new "tent courts" being set up along the southern border to deal with immigration claims, see Manny Fernandez et al., *The Trump Administration's Latest Experiment of the Border: Tent Courts*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/us/border-tent-courts-asylum.html>.

109. On the effects of teleconferencing in immigration removal proceedings, see Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933, 941 (2015) (detainees "forced to pursue a case over a video screen often appear bewildered or confused . . . [and] may be less likely to understand their rights . . . less likely to request a court continuance to find a lawyer"; their diminished participation and diminished access to counsel can result in a higher risk of deportation).

appointments and promotion procedures adopted by the Department of Justice in order to induce the speedy denial of claims.¹¹⁰

With respect to delay, although agencies are touted for their superior efficiency relative to litigation in court, agency adjudication has become notoriously slow in agencies where ordinary people seek to secure public entitlements.¹¹¹ In addition to the public scandal regarding more than 125 day backlogs in processing hundreds of thousands of benefits claims at the Veterans Administration,¹¹² a September 2015 Office of Inspector General Report showed that of 800,000 indefinitely stalled veterans' benefits claims, more than 300,000 were claims filed by veterans who had died waiting for an answer from the agency.¹¹³ In 2017, the *Washington Post* reported that in

110. Andrew R. Calderón, *New Asylum Cases Swamp Border Courts*, ABA JOURNAL (Sept. 20, 2019, 1:00 PM), <https://www.abajournal.com/news/article/new-asylum-cases-swamp-border-courts> (“These new cases are being assigned to judges under pressure to complete cases quickly, in places where migrants have little hope of finding lawyers. On average, migrants wait nearly three years for their cases to be completed, due to an unprecedented backlog, and this fiscal year, the denial rate for asylum claims reached 48%. But for people waiting across the border in Mexico, speed is critical. They are in dangerous places . . . that the U.S. Department of State has deemed unsafe for U.S. travelers.”). See also Marissa Esthimer, *Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point?*, MIGRATION POL’Y INST. (Oct. 3, 2019), <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point> (“With a backlog of slightly more than 1 million removal cases as of August 2019—a number that has quadrupled over the past decade—the courts have been unable to keep pace with enforcement and policy shifts funneling more noncitizens into the system and the changing nature of migration at the Southwest border.”). Class action procedures have been developed in some agencies to handle the demand for mass processing of certain kinds of claims, but they are rarely used. Michael Sant’Ambrogio & Adam Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1600, 1659 (2017) (noting that although sixty-nine agencies and two Article I courts have rules that permit some form of aggregation or consolidation, only twenty-eight had reported decisions involving use of class actions, and only 11 had decisions involving consolidation). The authors concede that in some areas of administrative adjudication aggregation and consolidation as solutions to mass processing entail serious costs that can be effectively mitigated only for certain kinds of claims. *Id.* at 1687 (“[A]gencies that award indivisible relief or large volumes of similar types of claims are particularly ripe candidates for aggregation.”). They are even more skeptical about the promise of the kinds of “informal aggregation” that have been used in the asylum context. *Id.* at 1664 (pointing to “surge courts” established in West Texas as an example of informal aggregation).

111. Michael Sant’Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 458 n.149 (2019) (“[S]ignificant delays in agency adjudication, particularly in large benefits programs, are notorious and persistent.”).

112. Leo Shane III, *VA: Claims Backlog Is Better, But Is Never Going Away*, MIL. TIMES (Dec. 29, 2015), <https://www.militarytimes.com/veterans/2015/12/29/va-claims-backlog-is-better-but-is-never-going-away/>.

113. VA OFFICE OF INSPECTOR GEN., *Veterans Health Administration: Review of Alleged Mismanagement at the Health Eligibility Center* 9 (2015), <https://www.va.gov/oig/pubs/VAOIG-14-01792-510.pdf>; see also Natsumi Antweiler, *Creating an Unprecedented Number of Precedents at the U.S. Court of Appeals for Veterans Claims*, 60 WM. & MARY L. REV. 2311, 2318–19 (2019) (“The VA claims processing system’s backlog totals 900,000 claims across the United States, and continues to grow In total, the average time between the claim’s initial filing to the ultimate disposition can take between five to seven years.”); Hugh B. McClean, *Delay, Deny, Wait Till They*

the past year 10,000 people had died while awaiting adjudication of Social Security disability benefits appeals.¹¹⁴ As of March 2019 in the 169 cities where the Social Security Administration provides hearings for benefits claims the wait for a hearing averages 15.5 months—it is under twelve months in less than a dozen of those cities, and in only one is the wait time less than eleven months.¹¹⁵

Kafkaesque problems of delay with the administration of veterans and social security benefits warrant close scrutiny because these programs are designed to assist people in periods of extreme vulnerability, they require the adjudication of massive numbers of claims on an annual basis, and they were at the center of the Supreme Court's endorsement of a flexible approach to procedural due process in the administrative state in the 1970s and 1980s.¹¹⁶ Tragically, flexibility has not produced the intended benefits (innovation, efficiency, and avoidance of adversarialism).

Although far less attention has been paid to state level agencies, especially state agencies that displace litigation in court, the problems of delay and bias appear to be just as acute there. Workers compensation bars eligible employees from suing in court for their work-related injuries in exchange for health and disability insurance benefits paid by their employer while they recover. In many states, however, cost-cutting reforms over the last two decades have significantly diminished employer premiums, mainly by introducing procedural barriers such as time-consuming audits, secondary review, and reversal of doctors' recommendations for the treatment of

Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System, 72 SMU L. REV. 277, 284–85 (2019) (“In all, it can take up to seven years to appeal a claim to the Veterans Court. Additional delays can extend this time period another two years While this statistic may seem low, the Government Accountability Office reviewed data from fiscal years 2010 to 2015 and found that the VA denied 43% of veterans' initial claims Given the high remand rates of the Board and the Veterans Court, the data suggests that a significant number of claims that may have been decided in error will never be reviewed.”).

114. Terrence McCoy, *597 Days. And Still Waiting*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/sf/local/2017/11/20/10000-people-died-waiting-for-a-disability-decision-in-the-past-year-will-he-be-next/?utm_term=.7a077e115a89; see also Ryan Weitendorf, *Give Grandma Her Day in Court: in Defense of Competitive Selection of Administrative Law Judges for the Social Security Administration*, 27 ELDER L.J. 455, 460–461 (2019) (“Over 900,000 people have been waiting more than 600 days for an ALJ to rule on their claim for Social Security benefits (footnote omitted). In 2017, this resulted in more than 10,000 people dying while waiting for a ruling on their adjudication (footnote omitted).”).

115. *Average Wait Time Until Hearing Held Report (For the Month of May 2020)*, *Hearings and Appeals*, SOC. SEC. ADMIN. (last visited June 28, 2020), https://www.ssa.gov/appeals/DataSets/archive/01_FY2020/01_May_NetStat_Report.html. There are of course even more extreme examples involving the weaponization of delay in the Trump administration's approach to immigration enforcement.

116. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985).

workers. North Dakota's Workforce Safety and Insurance Agency—the state's only workers' compensation insurance company—relies on out-of-state physicians working for private companies to review disputed insurance benefits claims.¹¹⁷ These out-of-state doctors “reversed the recommendations of workers' physicians 75 percent of the time.”¹¹⁸ The agency's own medical director resigned after protesting that the “agency's lawyers overrode valid medical opinions and diagnoses to beat back the appeals of injured workers.”¹¹⁹ In California, a 2012 law allowing retroactive review of past benefit decisions resulted in denial of ongoing medical treatment in ninety-one percent of the cases reviewed, more than twice the denial rate for patients with ordinary health insurance.¹²⁰ One state workers' compensation judge who retired after twenty-two years on the bench observed that “[t]he only interest that's being protected here is industry [Workers] are losing their voice” in the process.¹²¹

Together with procedural concerns in arbitration, the evidence from administrative adjudication indicates that some of the most important alternatives to trial are not functioning fairly. Indeed, the more marginalized the relevant population involved, the more severe the procedural defects and abuses appear to be.

III. Conclusion

If there was an actual revolution in procedural due process in the mid-twentieth century, it has been undermined by significant counter-revolutionary forces. No modern court system and no alternative adjudicative body appears to have the structure and capacity to efficiently, accurately, and fairly adjudicate the claims that regularly arise in the lives of ordinary people who appear before it.¹²² The values that animate procedural

117. Michael Grabell & Howard Berkes, *The Demolition of Workers' Comp*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/the-demolition-of-workers-compensation>.

118. *Id.*

119. *Id.*

120. Grabell & Berkes, *supra* note 117.

121. *Id.*

122. Even the lower federal courts face staggering caseloads, resulting in diminished opportunities to be heard, a disturbing gap between outcomes in published and unpublished opinions, and a rise in case management doctrines that diminish the incidence of trial and upset the traditional division of labor between judges and jurors. *See, e.g.*, JOE CECIL & DONNA STIENSTRA, FED. JUD. CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (1993), https://www.ncjrs.gov/pdffiles1/Digitization/100178_NCJRS.pdf (describing the growth of motions screening practices in federal appellate courts); Robert M. Tata, *Still The Fastest Justice Anywhere*, LAW360 (June 17, 2014), <https://www.huntonak.com/images/content/3/6/v3/3631/Still-The-Fastest-Justice-Anywhere.pdf> (noting the difference in time interval to trial between the U.S. District Court for the Eastern District of Virginia, 11.1 months,

due process are not dead, but the divide between ideal and actual procedure today has become dangerously wide.

Quite obviously, procedural failure cannot be understood if it is not studied. Counter-revolutionary forces in the enforcement of basic due process rights in particular need to be more closely examined. These include the effects of draconian funding cuts to state courts and to public service organizations that provide access to counsel,¹²³ failure to create enough seats on the state or federal bench to enable judges to provide due process in each and every case they handle,¹²⁴ a spectacular failure on the part of the organized bar to meet the need for legal representation among middle and low income Americans, a long-standing, well-funded ideological assault on access to justice and the adversary system led by organizations who stand to gain by suppressing the claims of ordinary people, and a liberal assault on adversary adjudication led first by New Deal lawyers supremely confident in the capacity of administrative agencies, and then followed by a generation of liberal ethicists and proceduralists who attacked the adversary system as rigged for the benefit of lawyers and inferior to alternatives.¹²⁵ The Supreme Court's increasingly cramped view of both due process and the right to trial under the Seventh Amendment is relevant, but this factor has so monopolized attention of proceduralists as to have obscured analysis of these other forces and the startling consequences for ordinary people litigating outside federal courts.

with Western District of New York, 67.1 months); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (noting a "60% decline in the absolute number of trials since the mid 1980s"); see generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the Litigation Explosion, Liability Crisis, and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (discussing procedural developments that have prioritized speedy pretrial disposition); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012) (same).

123. On the direct costs to litigants in delay, overburdened courts and increased filing fees arising from budget cuts during the Great Recession, see Heather Rogers, *Business-Killing Cuts to State Courts*, CAL. BAR J. (Nov. 2012), <https://www.calbarjournal.com/November2012/TopHeadlines/TH1.aspx>; NAT'L CTR. FOR STATE CTS., COSCA BUDGET SURVEY RESPONSES, <https://cdm16501.contentdm.oclc.org/digital/collection/financial/id/182>. On the hiring freezes, layoffs, reduced hours of operations, increased fees, closure of courts and consolidation, and reduced salaries, see Daniel J. Hall, *Reshaping the Face of Justice: The Economic Tsunami Continues*, NATIONAL CENTER FOR STATE COURTS (2011) https://www.ncsc.org/_data/assets/pdf_file/0021/15870/hall.pdf. More broadly, see MICHAEL D. GREENBERG & SAMANTHA CHERNEY, RAND CORP., DISCOUNT JUSTICE: STATE COURT BELT-TIGHTENING IN AN ERA OF FISCAL AUSTERITY (2017). On diminished funding for legal services, see David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209 (2003).

124. The federal judiciary has not increased in size since the 1990s and has developed and increasingly relied on motions screening procedures to avoid oral argument in many cases. The process dates to the late 1960s in the Fifth Circuit Court of Appeals but has expanded dramatically over the last two decades. CECIL & STIENSTRA, *supra* note 122 at 2–6.

125. Spaulding, *Due Process*, *supra* note 4.

The concrete human effects of these forces need to be better understood, and not just within the traditional, relatively antiseptic framework of aggregate efficiency and accuracy. Doctrinal and quantitative empirical research needs to be complemented by rigorous qualitative work—“thick description” in the anthropological sense—to surface the social costs of procedural failure paid by those who suffer from it. For too many Americans the status quo is nothing short of dehumanizing. Trying to manage wage garnishment, property seizure, driver’s license suspension, and even arrest in the enforcement of private or public debts—debts the legitimacy of which is open to doubt because there has been no adjudication of the merits—not only undermines faith in government, it exacerbates financial insecurity and, when arrests occur, separates families. To present one’s case without the benefit of an advocate, or even a competent translator, is to be rendered helpless while one’s rights are before the court.¹²⁶ Trying to stay afloat while waiting months or years for a disability benefits decision is itself disabling.¹²⁷ And having to abandon arbitration altogether or arbitrate before a biased decision maker after being barred from court—all on the fiction that a contract of adhesion expresses one’s ‘preference’ for alternative dispute resolution—more closely resembles the Queen’s justice in *Alice in Wonderland* than the rule of law.¹²⁸ In a word, ordinary people are being driven “to the wall.”¹²⁹

Nor can these procedural failures be cured unless they are taught. The distortions of procedural idealism can only be corrected by introducing students, unblinkingly, to the actual. Indeed, remedies can best be forged by lawyers who are trained in classrooms that are themselves consistently inclusive of the experiences of ordinary people in the courts. Teaching procedural rules of decision divorced from the experience and testimony of those who have to live with them is trafficking in the very denial of a meaningful opportunity to be heard that due process is supposed to provide. Students should be invited to see procedure from the perspective of those who live with it and see its on the ground realities, not just the perspective of those who design procedure, and all too often fall into the armchair abstractions of procedural idealism. For realists, the actual is not a supplement or complement to the doctrine, it *is* the doctrine in every meaningful sense of the term. It is what the courts do in fact.

126. LAURA ABEL, BRENNAN CTR. FOR JUST., LANGUAGE ACCESS IN STATE COURTS 3–5 (2009) (noting widespread failure to provide interpreters in civil cases).

127. So too is trying to access any court that has not been designed to accommodate people with disabilities. See *Tennessee v. Lane*, 541 U.S. 509 (2004).

128. We suspect the pressures of mass processing of claims are also demoralizing for the judges, administrators, and alternative decision makers charged with handling excessive dockets.

129. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969).

A virtue of this approach in an increasingly diverse twenty-first century classroom and an increasingly diverse twenty-first century profession is that the subject of procedure could begin to model the kind of diversity, emotional intelligence, and cultural competence that women students, students of color, first generation and low income students, and other minorities have long been calling on law schools to provide—one that models the highest professional standards of intellectually rigorous adversarial exchange on cases and controversies. Another virtue is that the local is where the interactive relationship between substance and procedure (and between fact and law) is most dynamic, most illuminating, and most determinative of both outcomes and the perceived legitimacy of those outcomes. It is local knowledge, cultures, and practices that render any rule of procedure—no matter how distant its source—interpretable. Parochial and often deeply situational facts also invest procedure with power differentials that may dwarf those of substantive rules of decision. If lawyers and judges need abstract principles against which to measure any individual process, they surely also need this acute sensitivity to local knowledge that proceduralists are uniquely positioned to teach.

Finally, the field of procedure needs a genealogy of both summary and suspended process in the United States—a history that uncovers the impulses that tend to make certain populations targets of summary and suspended process. This history might help us understand, as in *Jenkins*, how judges, lawyers, and other officials who both espouse and regularly follow basic principles of due process in some contexts can deviate so sharply and callously from it in others. To more fully appreciate how and why this occurs, we need research that probes beyond the efficiency demands associated with crowded dockets,¹³⁰ and beyond the historical consciousness of the progressive movement’s achievements in the adoption of new Federal Rules of Civil Procedure in 1938 and the Warren Court’s due process revolution, to some of the darker pathological forces that have motivated procedural “reform” in this country.

One critical starting point is the Fourteenth Amendment’s imposition of equal protection and due process guarantees on the states. Every state constitution both before and after the Civil War contained a guarantee of due process of law. The Fourteenth Amendment became necessary to prevent state governments in the South, run by unreconstructed former Confederate leaders, from using procedural “innovations” to disenfranchise, intimidate, dehumanize, and systematically deny newly freed African Americans due

130. Though, as Maggie Gardner has shown, docket pressure is a gravely serious issue—increasingly a threat to the fairness and accuracy of even federal trial court decision making. See Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. (forthcoming 2020).

process of law.¹³¹ White supremacy, summary procedure, and suspension of due process of law went hand in hand.¹³² Leaving this history out of the procedure canon obscures the actual and its deviations from the ideal. It also obscures the substance-procedure hydraulics of many canonical cases and the scope of procedural failure.¹³³

This reorientation from the ideal to the actual in procedure's empirical methods, pedagogy, and historical consciousness is overdue. And it should take place before and as a condition of attempting to decide what elements of ideal procedure, especially the gold standard of jury trial, should continue to inform due process analysis. The hope, to be sure, is that this reorientation will reaffirm the virtues of the adversary system and draw the actual costs of its alternatives into sharper relief. Short of full adversary procedures, the default presumptions in favor of ex ante notice and a meaningful opportunity to be heard must not be balanced away under the test set out in *Mathews*. The most basic contradiction of the ideal/actual divide in procedure is that although it is black letter law that these default presumptions can only be set aside in the face of exigent circumstances,¹³⁴ they are set aside on a daily basis in run of the mill cases involving no exigency because the party who is deprived of due process is charged with raising and demonstrating the very procedural defects she is suffering. A defect in notice or the quality of the hearing means all too often that, by definition, the party will not be aware of her procedural due process claim, or unaware until the damage to adjudication of the merits is done. The problem is not the existence of the right, or its ambiguity at the margin, but the unique relationship between the common form of its violation and the pathway for asserting that fact—all too often, the form of violation destroys the path to a remedy for ordinary people.

Similarly, the tragedy of *Lassiter v. Department of Social Services* lies not only in its evisceration of access to counsel in civil cases (if the interests

131. The turn to summary process extended well into the Jim Crow period. See Norman W. Spaulding, *The Impersonation of Justice: Lynching, Dueling, and Wildcat Strikes in Nineteenth Century America*, in ROUTLEDGE RESEARCH COMPANION TO LAW AND HUMANITIES IN NINETEENTH-CENTURY AMERICA (Simon Stern & Nan Goodman eds., 2017) (discussing the expansion of lynching and the response of some elite lawyers to make the criminal justice system more summary and punitive, not, in the first instance, toward those responsible for lynchings, but for those who were targeted by them).

132. Cases such as *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), suggest that the problem of procedural exceptionalism was not unique to reconstruction laws.

133. Canonical cases in which class, gender, disability, and race intersect with procedural law include *Pennoyer v. Neff*, 95 U.S. 714 (1878); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Conley v. Gibson*, 355 U.S. 41 (1957); *Iqbal v. Ashcroft*, 556 U.S. 662 (2009); *Martin v. Wilks*, 490 U.S. 755 (1989); *Curtis v. Loether*, 415 U.S. 189 (1974); *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Scott v. Harris*, 550 U.S. 372 (2007); *Galloway v. United States*, 319 U.S. 372 (1943); *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

134. See *supra* note 10.

of a mother against termination of her parental rights by the state are not strong enough to warrant assistance of counsel, precious few property and liberty interests in civil cases will be weighty enough to make counsel constitutionally mandatory under *Mathews* balancing), nor in the fact that the Court blinked at the lower court's racialized and gendered treatment of Ms. Lassiter.¹³⁵ The enduring contradiction of the case is that it left the burden on unrepresented litigants to surface procedural defects rising to the level of due process violations while inviting reviewing courts, even on a record manifestly shaped by procedural error, to retrospectively conclude that a lawyer could not have made a difference as long as the correct substantive outcome appears to have been reached. There may be other valid reasons to conclude that counsel should not be provided in such cases, but a more imperious abstraction from the concept of a meaningful opportunity to be heard than this is difficult to imagine.

The predicament created by these approaches to the constitutional minimum standard for due process is of course deepened by the severe budget crises courts have weathered over the last three decades as state legislatures have increasingly forced courts into a fee for service self-funding model. Courts are struggling to stay afloat. But if desperately needed funding for the judiciary is to increase, judges, lawyers, and legal academics must be prepared to promote the virtues of due process with a degree of conviction some appear to have lost at the turn of the century. If the bench and bar do not support procedural fairness and access to the adversary system, if they treat litigation as an anachronism of our common law heritage and uncritically endorse procedural innovation, legislators can hardly be expected to make the funding of courts a fiscal priority.

Of course, even if substantial funding increases were approved by the political branches, the demand for mass processing of claims will remain. Indeed, the standard for due process of law will be tested in fundamentally new ways as the next wave of procedural reform animated by technological advances in artificial intelligence crests.¹³⁶ Engineers are already touting the transformative promise of disruptive innovation in access to legal services, and some legal experts appear eager to endorse the outsourcing that this technology enables—replacing the authority of judges and lawyers with a new elite of software coders and their promises about algorithms and machine learning.¹³⁷

135. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). See Brooke D. Coleman, *Lassiter v. Department of Social Services: Why is it Such a Lousy Case?*, 12 NEV. L. REV. 591 (2012).

136. Norman W. Spaulding, *Is Human Judgment Necessary? AI, Algorithmic Governance, and the Law*, in THE OXFORD HANDBOOK OF ETHICS OF AI (Dubber, et al. eds., 2020).

137. See, e.g., Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1142 (2019) (“[T]here should be little conceptual reason to balk at applying [AI] technology to AI judges[.]”).

The call for procedural justice innovation in zones where procedural backlog, lack of resources, and due process deficiencies are most stark has grown loud enough to persuade key regulators and the bar.¹³⁸ A note of caution from the perspective of the actual seems warranted: artificial intelligence (AI) innovations that do not enhance notice and the right to a meaningful opportunity to be heard, and systems designed without carefully structured input from and accountability to the populations they purport to serve, are likely to reproduce the very problems of access to justice they purport to solve. Ordinary people will face new forms of even more “enclosed,” centralized, anti-democratic procedure.¹³⁹ Cheap, accessible, efficient dispute resolution systems that are also secret, biased, under-participatory, unaccountable, and intrusive on the privacy of low income and vulnerable populations might finally achieve mass processing, but only by privileging efficiency over accuracy, fairness, participation, and dignity. Proceduralists ourselves stand to be marginalized by these AI alternatives, as may entire segments of the legal profession. If we do not abandon the ideal for the actual, we will have earned this fate.

138. Lyle Moran, *California Bar Gives Approval to Broad Sandbox Approval*, ABAJOURNAL (May 15, 2020, 10:33 AM), <https://www.abajournal.com/news/article/california-bar-gives-approval-to-broad-sandbox-proposal>.

139. See Spaulding, *supra* note 136; Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J. L. & HUMAN. 311, 340–41 (2012).