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# Poverty Law And Civil Procedure: Rethinking The First-Year Course

## **Cover Page Footnote**

The author thanks Oscar G. Chase, Matthew Diller, Jack H. Friedenthal, Stephen Loffredo, Florence Wagman Roisman, and David Super for wise comments, and Emily Bloomenthal, Maria Campigotto, Rebekah Cook-Mack, A.J. Martinez, and Lindsey Weinstock for excellent research assistance. Appreciation also goes to John Easterbrook for administrative support and to Linda Ramsingh for library assistance. Finally, thanks go to Paul Carrington for sharing his unpublished manuscript, "Class Struggle in Civil Procedure: A Dialogue."

## POVERTY LAW AND CIVIL PROCEDURE: RETHINKING THE FIRST- YEAR COURSE

*Helen Hershkoff\**

The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons.<sup>1</sup>

This Essay explores whether and how to integrate issues of poverty and inequality into the standard first-year course on civil procedure. I do not write on an empty slate: conferences and journals have devoted time to this question, which implicates some of the foundational issues of procedural justice.<sup>2</sup> At least one commentator posits that civil procedure, unlike constitutional law, “is not seen as a natural hotbed of ideological controversy,” and so offers a neutral territory for the exploration of social justice concerns.<sup>3</sup> My view is somewhat different. Precisely because civil procedure connotes a neutral framework for dispute resolution, some colleagues might see efforts to integrate a poverty perspective into the

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1. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 8 (Patterson Smith Publishing Co. 1972) (1919).

2. See, e.g., Soc’y of Am. Law Teachers Teaching Conference, *Class in the Classroom*, Susan Becker & Paul Carrington, Workshop on Civil Procedure (Oct. 15, 2004), available at <http://www.saltlaw.org/teachingconference2004.htm> (select “Conference Program” hyperlink to view list of workshops) (last visited Apr. 21, 2007); Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242, 242 (2004) (presenting “the case for raising issues of race, as well as class and gender, in the civil procedure survey course”).

3. Johnson, *supra* note 2, at 243-44; see also David M. Trubek, *The Handmaiden’s Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROBS. 111, 114 (1988) (exploring the conventional distinction between procedure and substance and the notion that procedure is a “transparent medium—one that does not add or subtract anything”).

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first-year course as an example of special pleading in a system that ought to value impersonality, impartiality, and the separation of law from politics.<sup>4</sup> The proposed approach therefore demands some justification—quite apart from social justice concerns that might motivate fellow travelers.<sup>5</sup>

Support for the project can be drawn from both the goals of legal education and the role of lawyers in a democratic society. First, asking students to assess the current civil justice system from the perspective of poverty and inequality comports with the basic aims of the first-year curriculum: to learn to think critically about legal arrangements and to assess dispassionately whether existing rules promote the stated goals of fairness and efficiency for all litigants. Second, placing procedural rules in a social context helps students recognize that procedural rules, like all legal rules, result from political choices that cannot be separated from social values.<sup>6</sup> Finally, at a time when dissatisfaction with the justice system runs high,<sup>7</sup>

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4. See HERVÉ MOULIN, *FAIR DIVISION AND COLLECTIVE WELFARE* 1 (2003) (“Justice is blind, and fairness requires anonymous rules of arbitration.”); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 *UCLA L. REV.* 474, 476 (1985) (referring to the “prevailing ideology of advanced capitalism—legal liberalism” as grounded on the premise that law can be divorced from politics); see also Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 *S. CAL. L. REV.* 799, 802 (2003) (suggesting that discussions of class in any legal context appear to be “uncomfortably radical”).

5. See *Students and Lawyers, Doctrine and Responsibility: A Pedagogical Colloquy*, 43 *HASTINGS L.J.* 1107, 1107 (1992) (“Over the past few years, legal educators have been involved in a growing debate over the responsibility of law schools to promote social justice within the profession. Some institutions have failed to respond to the debate.”); see also Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 *U. PA. L. REV.* 2237, 2246 (1989) (discussing the relation between social justice and the Federal Rules of Civil Procedure).

6. See Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 *TEX. L. REV.* 929, 948 (1983). Graham writes:

For anyone who is concerned with justice, the most salient feature of contemporary American society is the wildly unequal distribution of wealth and power. Only the complacent or the ideologically blinded can avoid the issue of the complicity of rules of procedure in fostering inequality. But this is ultimately a question of values, of choosing sides in a deeply political struggle—it cannot be answered by “scientific” methods. To come down on the side opposing the status quo is not simply to take up arms against very powerful interests, it is also to abandon the posture of political neutrality that many proceduralists see as their sole claim to authority.

*Id.* See also Jay Tidmarsh, *Pound’s Century, and Ours*, 81 *NOTRE DAME L. REV.* 513, 534 (2006) (positing that “there is no such thing as a baseline ‘neutral procedure’”).

7. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 *DENV. U. L. REV.* 77, 102 (1993) (acknowledging “hostility toward lawyers,” “discomforts of the increasing legalization of society,” and a “system of civil justice . . . beset by many problems”); see also Wendy Bay Lewis, *Lawyer Jokes, Lies and Name-*

training our students to think about possible improvement is a worthy and even essential component of a law school's mission. As Liam B. Murphy explains, "the responsibility that people have in respect of justice must be to support and bring about just institutions . . . . Since institutions are not agents and don't actually have any responsibilities at all, it is only people who can ensure that institutions satisfy principles of justice."<sup>8</sup>

Part I of the Essay sets out a thematic framework for a "standard" civil procedure first-year course that connects constitutional and non-constitutional principles to concerns of poverty and inequality. Part II offers a repertoire of doctrines, cases, and statutes, largely taken from a traditional civil procedure casebook ("the Casebook"),<sup>9</sup> which can be used to illustrate these themes. One might legitimately question whether the formal rules of civil procedure hold any significance for the poor, given the trend toward "consensual" procedural rules, alternative dispute resolution, and a general inability of under-resourced litigants to adjudicate meritorious claims.<sup>10</sup> However salient this criticism, the first-year curriculum emphasizes adjudication as a public process subject to procedural rules, and I draw my examples from the traditional set of materials. Part III briefly concludes by linking the justification for the proposed approach with the broader mission of legal education.

### I. USING ISSUES OF CLASS AND POVERTY LAW TO EXAMINE PROCEDURE'S CORE CONCEPTS

Kevin R. Johnson observes, "[f]or many students, Civil Procedure is the first—and thus a very important—exposure to constitutional law in law school."<sup>11</sup> The civil justice system is one of the major public arenas in which constitutional questions are raised, litigated, and resolved. It is also an arena defined and framed by constitutional understandings. Examining the relation between

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*Calling: Public Attitudes Toward the Legal System*, 29 MONT. LAW. 10, 13 (2004) (referring to "a growing atmosphere of scorn for the legal system" in the United States).

8. Liam B. Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 271 (1999).

9. My examples come from the casebook co-authored by Jack H. Friedenthal, Arthur R. Miller, John E. Sexton, and myself, JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* (9th ed. 2005) [hereinafter FRIEDENTHAL ET AL., *CIVIL PROCEDURE*], called by one commentator "perhaps the leading casebook in the field, as well as one of the most traditional." Johnson, *supra* note 2, at 242.

10. See generally Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005) [hereinafter Resnik, *Procedure as Contract*] (describing the trend).

11. Johnson, *supra* note 2, at 244.

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civil procedure and wealth disparities allows students to consider the ways in which constitutional doctrine shapes the administration of civil justice and affects the legitimacy and efficiency of the processes used. United States procedure also builds on non-constitutional concepts—in particular, the adversary system and the principle of transsubstantivity<sup>12</sup>—that can be better understood from the perspective of poverty and inequality.

### A. Civil Procedure, Constitutional Values, and Party Wealth

Litigation is not just a contest between two opposing private parties. It also is a state-sanctioned process that uses public money and is subject to constitutional constraints.<sup>13</sup> Within this public law framework, at least three important constitutional values animate civil procedure: due process, equality, and rights to association and expression.<sup>14</sup> Nevertheless, the civil procedure canon includes very few constitutional decisions and of these only a handful accords any significance to the effect of wealth disparities on dispute resolution processes. This absence of “constitutional civil procedure”<sup>15</sup> comports with the Court’s general unwillingness to treat poverty as a suspect trait or to accord heightened scrutiny to wealth classifications.<sup>16</sup> Introducing issues of poverty and inequality into the standard course broadens students’ conceptual framework and allows them to evaluate not only the operation of specific procedural rules, but also the overall design and assumptions of the civil justice system.

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12. For more on the concepts of adversarialism and transsubstantivity, see discussion *infra* Parts I.B.1 and 2.

13. See FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 2 (“Courts draw on public power to resolve controversies.”).

14. To this constitutional trio one might add the Seventh Amendment commitment to jury trial rights. See discussion *infra* Part II.F; see also OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 55-56 (2005) (“It is not hard to see how the historic American attachment to the jury is bottomed on core American values. It is quintessentially an egalitarian, populist, antistatist institution.”).

15. See John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579 (1984).

16. See Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1284 (1993) (“The Court’s willingness to endorse, in the name of democracy, any legislative burden imposed on the poor has handed the elected branches a carte blanche to deal with a politically dispossessed minority.”). Constitutional doctrine on this point has not changed since Loffredo wrote in 1993.

1. *Due Process and the Poor*

Commentators associate a “due process paradigm” with many aspects of procedural justice: access to the courts, government accountability, and individual fairness.<sup>17</sup> Consistent with a due process perspective, the Casebook asks the students: “What is the test of a good system of procedure? One answer is: *Does it tend to lead to the just and efficient determination of legal controversies?*”<sup>18</sup> Introducing issues of poverty and inequality into the discussion allows students to evaluate the governing paradigm and to consider ways in which it might be adapted in light of social conditions.

Wealth clearly affects a litigant’s ability to access the civil justice system, to prosecute or to defend claims, and to leverage the courts for political expression. Because due process is a flexible doctrine that looks to all facts and circumstances, doctrinal space exists for considering the effects of wealth disparities on the civil justice system and for taking positive steps to remove barriers to court access. Looking at the Court’s due process cases from almost forty years ago,<sup>19</sup> commentators thought they saw a trend toward giving “even the economically weaker party . . . a real, rather than a merely illusory, opportunity to be heard”<sup>20</sup>—what Hans Smit called “a potentially revolutionary development.”<sup>21</sup> That development proved to be stillborn: the Court’s approach to the Due Pro-

17. See, e.g., BARBARA ALLEN BABCOCK, TONI M. MASSARO, & NORMAN W. SPAULDING, *CIVIL PROCEDURE: CASES AND PROBLEMS* 1 (3d ed. 2006) (“Due process, both as aspiration and method, is at the heart of our study of procedure.”); see also Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 *STAN. L. REV.* 1275, 1276 (2005) (explaining that litigation involves multiple purposes, including helping to achieve “democratically chosen ends of equality, dignity, autonomy and fundamental fairness”).

18. FRIEDENTHAL ET AL., *CIVIL PROCEDURE*, *supra* note 9, at 3. Samuel Issacharoff explicitly links this question to the Due Process Clause: R

Despite their different origins and forms, the constitutional command of due process and the specific rule applications of civil procedure not only embody many of the same objectives, they turn out to use the same tools. Both are placeholders for an animating conception of fairness that stands behind any system of process.

SAMUEL ISSACHAROFF, *CIVIL PROCEDURE* 1 (2005).

19. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 70 (1972); FRIEDENTHAL ET AL., *CIVIL PROCEDURE*, *supra* note 9, at 221. R

20. Mauro Cappelletti, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends*, 25 *STAN. L. REV.* 651, 689 (1973).

21. *Id.* at 689 (citing *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 790 (M. Cappelletti & D. Tallon eds., 1973) (quoting statement by Hans Smit)).

cess Clause typically ignores the adverse effects of wealth. Instead, in determining what process is “due” in any particular case, the Court is guided by a principle of proportionality that seeks to balance three separate factors to reach an efficient result:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>22</sup>

The Court’s emphasis on cost-benefit analysis arguably comes at the expense of other aims and purposes<sup>23</sup>—what Frank I. Michelman calls “dignity values, participation values, deterrence values, and . . . effectuation values.”<sup>24</sup> For some commentators, the Court’s singular emphasis on efficiency undermines democratic principles and negatively affects the interests of under-resourced claimants.<sup>25</sup>

Students may be surprised to learn that the Court does not typically apply the Due Process Clause to remedy the adverse effects of poverty on the administration of civil justice. For example, the Court has upheld filing fees that prevent a party from petitioning for bankruptcy<sup>26</sup> or from seeking review of an adverse welfare decision,<sup>27</sup> striking down court-imposed fees only when they prevent the dissolution of marriage<sup>28</sup> or bar review of a court determination of parental unfitness.<sup>29</sup> Moreover, the Due Process Clause has not

22. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 241 n.1.

23. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 321 (2004) (referring to accuracy and participation as values that inform procedural justice); see also FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 3-4 n.1; Graham, *supra* note 6, at 944 (positing that instrumentalism “permits the claim that procedure is simply a value-free technique for reaching ends that are beyond the domain of procedure and thus need not concern the proceduralist”).

24. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights-Part I*, 1973, DUKE L.J. 1153, 1172-77.

25. See generally Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 349 (1990) (suggesting that an emphasis on efficiency threatens democratic values and minority rights).

26. See *United States v. Kras*, 409 U.S. 434, 448-49 (1973).

27. See *Ortwein v. Schwab*, 410 U.S. 656, 659-61 (1973).

28. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (finding a due process violation on the ground that the state monopolizes all processes aimed at the creation or dissolution of marriage).

29. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996).

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been read to require the assignment of counsel to indigent defendants other than when “the litigant may lose his physical liberty . . . .”<sup>30</sup> As one commentator warns: “Increasingly, due process is returning to its individualist roots—protecting those who have property from losing it, but failing to protect those who do not have property as it is traditionally defined.”<sup>31</sup>

## 2. *Equal Protection and Wealth Disparities*

The requirement of equal protection likewise provides opportunities for discussing the effect of wealth disparities on the operation of civil procedure. Justice Ruth Bader Ginsburg observes:

“Equal Justice Under Law” is etched about the U.S. Supreme Court’s grand entrance. It is an ideal that remains aspirational. Thanks in part to efforts by lawyers, race, gender, and other incidents of birth no longer bar access to justice as they once did. It remains true, however, that the poor, and even the middle class, encounter financial impediments to a day in court. They do not enjoy the secure access available to those with full purses or political muscle.<sup>32</sup>

Inequality as an economic term embraces a variety of concepts that point to different constitutional concerns. Some commentators equate inequality with impoverishment and focus on the ways in which resource insufficiency might bar or impede a poor person from participating in the market, in politics, and in court.<sup>33</sup> For others, inequality refers to income differences that distort democratic life by generating comparative advantages for the wealthy.<sup>34</sup>

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30. *Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18, 25, 32 (1981) (remitting to the trial court’s discretion “the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings” as depending on the specific facts of each case).

31. Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 *DENV. U. L. REV.* 9, 14 (1997).

32. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 *WASH. U. J.L. & POL’Y* 1, 2 (2001); see also Robert Hornstein, Daniel G. Atkins, & Treena A. Kaye, *The Politics of Equal Justice*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 1089, 1090 (2003) (“That the need for equal justice remains unmet for millions of poor Americans cannot seriously be refuted.”).

33. See, e.g., Susan R. Jones, *Abolishing Poverty in Our Lifetime*, 15 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 164, 165 (2006) (discussing impoverishment as a “trap” that produces “vulnerability, powerlessness, and lack of access to markets”).

34. See, e.g., Alan B. Krueger, *Inequality, Too Much of a Good Thing*, in *INEQUALITY IN AMERICA: WHAT ROLE FOR HUMAN CAPITAL POLICIES?* 1, 11-20 (James Heckman & Alan B. Krueger eds., 2003) (providing reasons “for U.S. public policy to try to restore a more balanced distribution of income in the country”).

As with due process, equal protection in the procedural context stands for a number of discrete but overlapping concerns: the provision of formal opportunities to access the courts; the availability of resources needed to make meaningful use of the adjudicative system; and the need for consistency in the decisions of judges and other legal decision-makers.<sup>35</sup> Disparate or inadequate resources impact a party's competitive position relative to an opponent.<sup>36</sup> They also may make it impossible to hurdle state-imposed filing fees, to retain a lawyer, or otherwise to access the civil justice system.<sup>37</sup> The phenomenon of "repeat players" in the court system creates still other troublesome concerns.<sup>38</sup> Yet even during the heyday of the Warren Court, the Equal Protection Clause was rarely deployed to remediate problems of inequality in the civil litigation setting;<sup>39</sup> the Court's use of rationality review is famously fatal to any claim of unconstitutionality regarding economic classification.<sup>40</sup> With rare exceptions, constitutional doctrine thus embraces rule formalism, criticized by some as "a legal equality that conceals practical domination."<sup>41</sup> Consistent with this view, procedural rules that exclude, burden, or otherwise disadvantage individuals on the basis of wealth are accepted as constitutional,

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35. See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1867-68 (2002) [hereinafter Rubenstein, *The Concept of Equality*] (referring to "equipment equality," "rule equality," and "outcome equality"). Bruce L. Hay earlier referred to concepts akin to rule equality and outcome equality as "sorting effects" and "process effects." See Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803, 1806 (1997).

36. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2087 (1989) [hereinafter Carrington, *Making Rules*] ("A stronger party can gain a great advantage particularly if the adversary has few resources to invest in the dispute. '[M]ight,' as Dickens had it, has the means of 'wearying out the right.'" (quoting CHARLES DICKENS, *BLEAK HOUSE* 2 (1956))).

37. See Kenneth Einar Himma, *Towards a Theory of Legitimate Access: Morally Legitimate Authority and the Right of Citizens to Access the Civil Justice System*, 79 WASH. L. REV. 31, 32 (2004) (presenting a general theory of access to the civil justice system); see also John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923) (discussing financial barriers to court access).

38. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98-104 (1974) (enumerating the advantages that accrue to repeat players in litigation).

39. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1461-63 (2d ed. 1988) (discussing cases dealing with equal access to litigation opportunities).

40. See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136-37 (1999) (discussing federal rationality review).

41. Peter Gabel, Book Review, 91 HARV. L. REV. 302, 315 (1977).

despite the practical denial of equal access or equal outcomes.<sup>42</sup> By introducing issues of poverty and inequality into the discussion, students can better explore the differing conceptions of equality that motivate procedural justice and the ways in which the current system conforms or diverges from a principle of “equality before the law.”<sup>43</sup>

### 3. *Association, Expression, and the Poor*

The First Amendment embraces rights of speech and association that potentially inform the design of civil procedure rules. The First Amendment values support private as well as public well-being: “individual self-fulfillment,” “attainment of truth,” “securing participation by the members of the society in social, including political, decision-making,” and “maintaining the balance between stability and change in the society.”<sup>44</sup> As Justice Harlan has explained, litigation is a form of expression protected by the First Amendment that includes not only the right “to advocate,” but also the right to join with others “in an effort to make that advocacy effective” and “to join together for purposes of obtaining judicial redress.”<sup>45</sup> However, the standard metaphor for the First Amendment—the “marketplace of ideas”<sup>46</sup>—tends to ignore the effects of poverty on the enjoyment of expressive rights.<sup>47</sup> One commentator observes, “[i]n the marketplace . . . ‘money talks.’ No model has replaced this one in the United States, and, in fact, in contrast to other liberal, capitalist, and democratic societies in Europe, the power of free speech has increasingly been used to pro-

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42. See Richard L. Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1024 (1998) (stating that proponents of liberal theory are “surprised that formal equality before the law, symbolized by blindfolded justice, does not translate into equal access or outcomes”).

43. Cappelletti, *supra* note 20, at 689.

44. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 878-79 (1963).

45. NAACP v. Button, 371 U.S. 415, 452-53 (1963) (Harlan, J., dissenting) (internal citations omitted).

46. See *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). But see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) (“The ‘marketplace of ideas’ is an empty forum for those lacking basic communicative tools.”).

47. See Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 898 (1991) (suggesting that the inexact fit between begging and First Amendment values “stems from an insufficient regard for the economic constraints on the ways in which the poor can and do express themselves”).

tect those individuals and corporations already strongest in our society.”<sup>48</sup> Students can be asked to consider the ways in which the Court’s hands-off approach to wealth in the First Amendment context affects the adjudicative process and shapes the role of litigation in democratic life.

### B. Adversarialism, Transsubstantivity, and Litigant Capacity

Poverty and inequality also provide an important perspective from which to examine two key non-constitutional features of United States procedure: adversarialism and transsubstantivity. The Casebook puts the adversary model front and center. Students read on the first page: “Civil disputes in the United States are largely resolved by courts according to adversarial principles of justice—the idea that individual litigants should have autonomy in shaping lawsuits and in moving claims to their ultimate resolution.”<sup>49</sup> The Federal Rules of Civil Procedure feature transsubstantivity as a guiding principle. Federal Rule 1 establishes that the rules “govern the procedure in the United States district courts in *all* suits of a civil nature,” and Federal Rule 2 further establishes “one form of action to be known as ‘civil action.’”<sup>50</sup> Nevertheless, the principle of transsubstantivity draws fire from critics, such as William N. Eskridge, Jr., who insist that procedural rules “ought not always be transsubstantive, but . . . [rather] must be tailored to different types of litigation.”<sup>51</sup>

#### 1. Adversarialism and Litigant Capacity

The adversary system—called the “American approach to adjudication”<sup>52</sup>—assumes “that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and pas-

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48. David Abraham, *Liberty Without Equality: The Property-Rights Connection in a “Negative Citizenship” Regime*, 21 LAW & SOC. INQUIRY 1, 60-61 (1996).

49. FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 1.

50. FED. R. CIV. P. 1 (emphasis added); FED. R. CIV. P. 2.

51. William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 949 (1989). By contrast to the federal system, many state systems include courts of limited jurisdiction with specialized procedural rules. *See, e.g.*, DAVID D. SIEGEL, NEW YORK PRACTICE 19 (4th ed. 1999) (explaining that the Surrogate’s Court Procedure Act “is profuse in procedural detail; thus, although the CPLR applies in the court, it is less needed there than in the courts that try the usual civil actions”).

52. *See generally* STEPHAN LANDSMAN, ABA SECTION OF LITIG., READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1988); *see also* CHASE, *supra* note 14, at 47-71 (associating a distinct form of adversarial justice with “formal, official, American adjudication”).

sive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.”<sup>53</sup> Commentators associate the adversary system with values central to American legal culture: individual autonomy, personal freedom, efficiency, and accurate decision-making.<sup>54</sup> The adversary model builds on a number of interlocking assumptions: that participants are rational, competent actors; that disputants have access to resources in the form of both dollars and power; that their attorneys’ interests match their own; and that competition will lead to the truth.<sup>55</sup> Above all, disputants are assumed to possess high levels of litigative capacity—what scholars since Frank I. Michelman have called the “equipage” needed to participate fully in the adjudicative enterprise.<sup>56</sup> Equipage includes resources to obtain counsel, to pay filing fees, to hire experts, to develop electronic databases for discovery, and the like.<sup>57</sup> To these we might add educational levels that allow an individual to understand the legal process, income levels that afford sufficient time and wherewithal to devote to litigation, and status levels that grant the confidence needed to challenge established norms or to defend one’s own actions.

Equipage inequality challenges the assumptions on which the adversary system rests. Marie A. Failing and Larry May observe, “the poor do not arrive before judicial tribunals on an equal footing with the non-poor adversaries they sometimes face. This is especially true with regard to their obtaining competent and zealous

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53. LANDSMAN, *supra* note 52, at 2.

54. See STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 22-25 (2006). Judith Resnik refers to the “etiquette” of the civil justice system:

Civil litigants are free to find lawyers (or not) and then to make their way through the adversarial processes as best they can, on their own. These premises are deeply entrenched within United States culture, generated from the mix of capitalism, individualism, attorney entrepreneurialism, ambivalence about regulation, readings of constitutional text, history and happenstance. *Laissez-fair lawyering* and *unaided access* are my shorthand.

Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2130 (2000).

55. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 513 (1986) [hereinafter Resnik, *Failing Faith*].

56. Michelman, *supra* note 24, at 1163; see also Rubenstein, *The Concept of Equality*, *supra* note 35, at 1867-68 (associating equipage equality with the adversary system and “the idea that . . . acceptable outcomes are produced by a . . . battle between equally armed contestants”).

57. See Rubenstein, *The Concept of Equality*, *supra* note 35, at 1867-68 n.9.

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legal representation.”<sup>58</sup> As documented by many observers, including the American Bar Association, individuals who are poor or even middle class often lack essential litigant capacity;<sup>59</sup> nor do private or public resources adequately fill the gap. Justice Ruth Bader Ginsburg reports that “the U.S. record of legal assistance for the less wealthy is decidedly mixed,” pointing to the fact that the United States has “the highest concentration of lawyers in the world [yet] meets less than 20% of the legal needs of its poor citizens, and not two-thirds of the needs of its middle class.” In addition, spending for legal services in the United States, she says, compares unfavorably to that by other democratic nations.<sup>60</sup> The gap between the theory and practice of adversarial justice has caused some commentators to criticize United States procedure as “potentially unfair”:

As a system dependent on private lawyers for implementation, the adversarial process can and does benefit wealthier litigants who are able to afford more investigation and a more skilled and also more expensive lawyer. Those who cannot afford a lawyer must represent themselves in court or utilize the increasingly limited free legal services.<sup>61</sup>

The potential unfairness goes beyond the individual interests of affected claimants. Rather, wealth distinctions are said to undermine the capacity for robust adversarial advocacy from which the adjudicative process draws its authority and transformative power.<sup>62</sup>

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58. Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 12 (1984).

59. See, e.g., Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 93 (2000). The American Bar Association has identified serious gaps in the legal resources available to the poor and even the middle class. See ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY, EXECUTIVE SUMMARY (1996), available at <http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf> (last visited Apr. 21, 2007).

60. Ginsburg, *supra* note 32, at 10-11. The English civil legal aid system, established in 1949, was effectively abolished in 1999. See NEIL ANDREWS, ENGLISH CIVIL PROCEDURE: FUNDAMENTALS OF THE NEW CIVIL JUSTICE SYSTEM 220 (2003). Support for government-sponsored legal assistance has declined in other industrial countries as well. See *id.* at 221 (stating that “Sweden in 1997 decided that private legal expenses insurance should be given priority over State support for civil claims through legal aid”).

61. SUBRIN & WOO, *supra* note 54, at 24; see also Resnik, *Failing Faith*, *supra* note 55, at 517 (“When gross imbalances are commonplace and patent, a belief in adversarialism has a hollow ring.”).

62. Daniel Markovitz, *Adversary Advocacy and the Authority of Adjudication*, 75 FORDHAM L. REV. 1367, 1390-92 (2006).

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Although the adversary model functions as a legitimating myth in the United States, many commentators would agree that it no longer descriptively maps federal procedure, which increasingly depends on managerial judging<sup>63</sup> and other practices associated with civil law systems.<sup>64</sup> Moreover, the adversary model invites criticism as an anachronistic approach that is “obviously maladapted to a modern, interdependent, flexible complex industrial system.”<sup>65</sup> Integrating concerns of poverty and inequality into the analysis allows students to develop a deeper understanding of the adversarial process and its relation to contemporary demands.

## 2. *Transsubstantivity and Economic Disparity*

The principle of transsubstantivity holds that procedural rules should be uniform regardless of the substance of the dispute, the identities of the parties, and the social stakes for the public at large.<sup>66</sup> Some commentators see transsubstantivity as essential to maintaining the neutrality and impartiality of civil process: the requirement of generality removes procedural rulemaking from politics and insulates civil procedure from special interest domination.<sup>67</sup> Moreover, the requirement of transsubstantivity is said to

63. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376-78 (1982).

64. See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999) (arguing that in the area of mass litigation, the United States justice system has slipped toward the “inquisitorial” model associated with civil law countries). Ellen E. Sward writes, “[a]dversarial adjudication is often defined in tandem with its antithesis, inquisitorial adjudication.” Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312 (1989). The formal boundary between the common law and civil law systems is open to question. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1187 (2005) (“The models of adversarial and inquisitorial systems of justice are precisely that—models to which no actual legal system precisely corresponds, since all legal systems combine both adversarial and inquisitorial elements.”).

65. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19, 44 (David M. Trubek & Alvaro Santos eds., 2006).

66. See Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 829 n.176 (1991) (explaining that “[t]he accepted premise of the Federal Rules of Civil Procedure is that they are rules of general applicability, without regard to kinds of cases or litigants; thus, they transcend particular substantive law applications”).

67. See Graham, *supra* note 6, at 945 (acknowledging the view that the “lack of uniformity is a threat to the claim that procedure is a value-free science”); see also Carrington, *Making Rules*, *supra* note 36, at 2068 (concluding that “judicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future”).

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help facilitate social change by providing a shared “framework of existing procedural norms” within which reform litigation can take place.<sup>68</sup> Others, however, criticize the fairness and efficiency of transsubstantive rules. Robert Cover famously observed:

It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.<sup>69</sup>

Whether transsubstantivity any longer describes United States procedure can be questioned, given such developments as “a bewildering array of local rules, standing orders, and standard operating procedures,”<sup>70</sup> as well as privately negotiated contract provisions that alter the terms of public procedural codes.<sup>71</sup> Carl Tobias thus posits that the reality of federal procedure “is rapidly undermining the theory that the Federal Rules are transsubstantive,” while the practice of legal scholarship is “increasingly discredit[ing] the related idea that procedure can be applied without fully considering its substantive impacts on particular rights or specific groups.”<sup>72</sup> Pointing to the decline in transsubstantivity, some commentators suggest the need to establish special procedures for cases involving the poor—whether alternative dispute resolution, small claims courts, or streamlined procedures—in order to reduce cost and to ensure the quality of decision-making.<sup>73</sup> Already, the Eastern Dis-

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68. Hazard, *supra* note 5, at 2247.

69. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718, 732-33 (1975).

70. Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 *NOTRE DAME L. REV.* 693, 715 (1988).

71. See David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 *U. RICH. L. REV.* 1085, 1103 (2002) (arguing that the judicial enforcement of pre-litigation agreements “that vary established judicial procedures defeats the goal of uniformity by allowing for privately tailored procedure for individual suits”).

72. Carl Tobias, *The Transformation of Trans-Substantivity*, 49 *WASH. & LEE L. REV.* 1501, 1508 (1992); see also Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 *IOWA L. REV.* 1269, 1280-85 (1997) (associating procedural change and local variation with the end of the New Deal consensus).

73. Compare Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 *REV. LITIG.* 113, 130 (1994) (suggesting “that special rules for smaller cases might be the reform of choice”), with Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 *FLA. ST. U. L. REV.* 1, 24

trict of New York assigns a specific magistrate judge to handle cases filed in forma pauperis.<sup>74</sup> Although justified by the prospect of efficiency and expertise,<sup>75</sup> rules that channel poor people's claims to specialist courts or to assigned judges could distort decision-making or give the appearance of second-class justice.<sup>76</sup> Questions of institutional design thus provide an important window into the idea of transsubstantivity and whether procedural rules ought to adjust for wealth.

## II. SELECTED CIVIL PROCEDURE TOPICS AND CONCERNS OF CLASS AND POVERTY LAW

The preceding Part highlights procedural themes that can be more critically understood from a perspective of poverty and inequality. This Part connects these themes to selected doctrinal areas that typically are covered in the basic course and that can be used to explore the animating concepts. The examples are drawn from the Casebook and are intended merely to illustrate and not to exhaust the field. Many important topics are not covered, such as the financing of civil litigation, the structure of the legal profession, and the *Erie* doctrine.<sup>77</sup> Although there is no standard civil proce-

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(1987) (criticizing a proposal to establish a Social Security Court as a smokescreen for the desire to develop pro-government precedent).

74. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475 (2002) (describing the Eastern District of New York's approach to pro se cases).

75. *Id.* at 497, 499-500 ("The Eastern District of New York's model for managing pro se litigation uses the tools of centralization and specialization in an effort to promote the fair and efficient processing of claims by unrepresented litigants.").

76. See Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 439 (raising and responding to concerns about specialist courts).

77. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). To these topics one might add the rules enactment process, which fits comfortably in an introduction to the course or as part of the unit on the *Erie* doctrine. As Stephen N. Subrin and Margaret Y.K. Woo observe,

[W]hen the Federal Rules of Civil Procedure finally became law it was the result of a liberal, Democratic, New Deal mentality; many of the new rights were made possible by a Democratic controlled Congress and a liberal Supreme Court. In some ways, the backlash has been the opposite, partially the result of laissez-faire, conservative, Republican political powers that seek smaller government and less litigation.

SUBRIN & WOO, *supra* note 54, at 56. Currently, some commentators criticize the rule-making process for affording insufficient attention to lay interests and for privileging elite legal views. See RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 611 (5th ed. 2003) (summarizing criticisms). By locating the federal rules in their explicit political context—the rule-making process itself—students are in a better analytic position to assess the structural biases that these rules might reflect. See Stephen B. Burbank, *Aggregation on*

ture curriculum, these choices reflect fairly recurring practices in first-year courses.<sup>78</sup>

### A. Personal Jurisdiction

Students often find personal jurisdiction doctrine to be obscure or impenetrable. The Court's approach to personal jurisprudence, built on the Due Process Clause, asks whether a defendant's contacts with the forum state justify the exercise of adjudicatory authority.<sup>79</sup> I raise here two doctrinal issues: how to treat a contract between an out-of-state and an in-state resident for purposes of minimum contacts analysis; and the significance of forum-selection clauses in routine consumer contracts. Discussing the Court's approach from the perspective of poverty or inequality frames the material in a provocative and interesting way that also highlights structural biases in the doctrine.

*Burger King*, a staple case of the first-year curriculum, focuses on whether a commercial contract in a dispute involving a long-term franchise relationship creates a "substantial connection" between a non-resident defendant and the forum state as to justify the court's exercise of personal jurisdiction.<sup>80</sup> Justice Stevens, in dissent, found "a significant element of unfairness in requiring a franchisee to defend a case [involving a dispute about a franchise agreement] in the forum chosen by the franchisor," emphasizing the disparity in resources between plaintiff and defendant and the lack of notice provided by a boiler-plate forum provision that left defendant "financially unprepared" for litigation in a court outside his home state.<sup>81</sup>

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*the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1925 (2006) ("Because avowedly procedural rules may have either substantive purposes or substantive effects, consideration should be given to the political legitimacy of the process by which they are formulated or applied and of the actors who are formulating or applying them.").

78. See Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. LEGAL EDUC. 311, 312 (1999) (questioning whether there is a "traditional curriculum" in civil procedure).

79. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 76, 78 (stating that due process requires that "in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice") (internal citations omitted).

80. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 108.

81. *Burger King*, 471 U.S. at 487-89 (Stevens, J., dissenting); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 114-15.

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Some analysts read Justice Brennan's majority opinion as allowing for the exercise of jurisdiction even if the contract involves modest financial stakes or represents the defendant's only physical contact with the state.<sup>82</sup> One commentator warns:

Of continuing concern is the scenario raised by the court of appeals in *Burger King* and underlying the buyer/seller cases. The court of appeals argued that allowing jurisdiction over the defendants in *Burger King* would also allow the exercise of jurisdiction over "out-of-state consumers to collect payments due on modest personal purchases" and "sow the seeds of default judgments against franchisees owing smaller debts." One wonders whether Sears, Roebuck and Company can gain jurisdiction in the northern district of Illinois over its nonresident consumer buyers who have a revolving charge account with the company and who contemplate a long-term relationship with Sears, and whether Sears can strengthen its case merely by including choice-of-law language in its contractual agreements with such customers. The Court's answer to this concern was only that it was not adopting a per se rule . . . .<sup>83</sup>

Although the minimum contacts test is highly fact specific, *Burger King* raises concerns that the Court's approach more generally affects forum location in consumer credit disputes between lesser resourced individuals and corporations.

The emergence of "Contract Procedure,"<sup>84</sup> especially the increasing trend toward choice-of-forum clauses in small stakes consumer contracts,<sup>85</sup> potentially further exacerbates the jurisdictional difficulties that under-resourced individuals face. Choice-of-forum clauses translate into important litigation advantages for the corporate party that typically drafts the provision. The consumer finds herself having to defend or to initiate a claim in a distant forum at great expense and inconvenience, and during settlement talks pre-

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82. See Duncan E. Barber, *Minimum Contacts in Single Contract Cases: Burger King Has Its Way*, 1986 BYU L. REV. 505, 509 (1986).

83. Pamela J. Stephens, *The Single Contract As Minimum Contacts: Justice Brennan "Has It His Way,"* 28 WM. & MARY L. REV. 89, 111 (1986) (internal citations omitted).

84. See Resnik, *Procedure as Contract*, *supra* note 10, at 598 (using "the word 'contract' . . . to refer both to government-based encouragement of dispute resolution through contract and to government enforcement of parties' agreements to contract out of litigation").

85. See Theodore Eisenberg & Geoffrey P. Miller, *The Market for Contracts* 8-9 (New York Univ. Law Sch. Law & Econ. Research Paper No. 06-45, 2007), available at <http://ssrn.com/abstracts=938557>.

dictably faces a discount in the value of her claims.<sup>86</sup> As Linda Mullenix comments:

Forum-selection clauses radically change and upset the traditional calculus of personal jurisdiction by shifting the forum advantage in favor of defendants. Here, the usual personal jurisdiction dilemma is reversed: these provisions enable the defendant to hale an unwilling and unsuspecting plaintiff into a distant, foreign forum (or forfeit the plaintiff's cause of action). Yet, because personal jurisdiction jurisprudence has always been defendant-oriented, even to the exclusion of the plaintiff's role in the litigation, no due process rights or review attach to the assertion of personal jurisdiction over a plaintiff.<sup>87</sup>

Commentators frequently justify the privatization of procedure on grounds of efficiency and autonomy, without regard to their distributional consequences.<sup>88</sup> Introducing concerns of poverty and inequality into the discussion allows for a more critical examination of this important trend.

## B. Subject Matter Jurisdiction

Students sometimes perceive the topic of subject matter jurisdiction, especially the federal grants of diversity and of "arising under" jurisdiction, to be arcane, confusing and of merely technical significance.<sup>89</sup> Every litigator knows, however, that the decision to sue in federal or state court can generate dispositive effects. "Choice of forum can mean joyous victory or depressing defeat. A wrong selection and it's enemy territory: a jurisdiction where the prevailing law, available remedies, courtroom procedures, and juror attitudes are inimical to your client."<sup>90</sup> The formal distinctions between state and federal court systems are familiar: "Federal judges enjoy life tenure and sit with juries selected from a broader

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86. See Edward A. Purcell, Jr., *Geography As a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 455 (1992).

87. Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 363 (1992).

88. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 447 (2004) (arguing that if parties to a contract both agree to have a private system resolve contractual problems that may arise, "it must make each of them better off"); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 51-52 (1992) (positing the desirability, despite rights-based criticisms, of enforcing forum-selection clauses).

89. See Georgene Vairo, *Foreword, Forum Selection Development Symposium*, 37 LOY. L.A. L. REV. 1393, 1400 (2004) (stating that "it is well-known that the law of federal courts and jurisdiction is quite confusing and difficult to understand").

90. Gita F. Rothschild, *Forum Shopping*, 24 LITIG. 40, 40 (Spring 1998).

geographical area than most state tribunals. Most importantly, federal judges are appointed; since many state judges are elected, state judges are thought to be more susceptible to political pressure and local biases than federal judges.”<sup>91</sup> Commentators from Justice Story to Burt Neuborne have questioned whether the state courts enjoy parity with those of the Article III system and, if not, the ideological valence of any structural biases.<sup>92</sup>

Whether to proceed in state or in federal court can be a question of particular importance to indigent individuals. Even at this early stage in their legal education, students can profitably discuss how differences in appointment processes, jury pools, government resources, and caseload pressures might be expected to affect judicial decision-making on issues concerning the poor. They also can consider whether structural differences between the state and federal courts may translate into discrete but consistent ideological differences in judicial decision-making, or whether the question of parity is in fact contingent and dependent on historical context.<sup>93</sup> Finally, students can consider the policy choice of maintaining the federal courts as a small elite corps and the possible implications of this decision for the poor.<sup>94</sup>

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91. FRIEDENTHAL ET AL., *CIVIL PROCEDURE*, *supra* note 9, at 252.

92. See Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing, in part, differences between state and federal courts that might structurally affect the adjudication of claims involving the poor).

93. See William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 600 (1999) (asking whether the civil rights bar’s earlier preferences for Article III courts “simply reflect short term trends”); see also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988) (“I fear that the debate over parity is permanently stalemated because parity is an empirical question—whether one court system is as good as another—for which there never can be any meaningful empirical measure.”).

94. Paul D. Carrington asks, as part of a provocative dialogue about “class struggle in civil procedure”:

Is it not true that the federal judges would not like to have their jurisdiction extended to include all the humdrum matters that are now in state courts because it would deprive them of their elite status to become involved in such routine? Why their whole claim to class authority would be lost if their precious federal commission were shared with the people who presently staff the state courts. It is snobbery that sustains the limitations on federal jurisdiction.

. . .

The federal courts are just the flagship of the national elite of the bar, as they gradually diminish the power of local lawyers and local judges, while making it appear that they are so solicitous of local prerogatives.

Paul D. Carrington, *Class Struggle in Civil Procedure: A Dialogue* 13, 34-35 (unpublished and undated manuscript, on file with author).

Turning to the scope of federal jurisdiction, the Court's approach to "arising under" jurisdiction under 28 U.S.C. § 1331—as set out in *Merrell Dow*,<sup>95</sup> *Grable*,<sup>96</sup> and *Empire HealthChoice*<sup>97</sup>—looks, in part, to the nature of the federal interest at stake in the dispute and whether that interest is sufficiently important or substantial to warrant provision of a federal forum. Over time, the Court has shaped "arising under" jurisdiction in order to protect national markets and to support regulatory uniformity.<sup>98</sup> By contrast, at least since the end of the Warren Court, federal jurisdiction has not been thought necessary to protect the poor or to encourage civil rights enforcement. To the contrary, as Matthew Diller observes:

[T]he federal courts have become inhospitable to claims of poor people. Poverty litigators in federal court are confronted with a battery of jurisdictional and other technical defenses, the judiciary's deference to administrative agencies, and a judiciary appointed by Republican presidents committed to making sure that the judicial activism of the 1960s does not recur.<sup>99</sup>

The role of the federal courts in protecting the poor thus provides important insight into the appropriate reach of § 1331 jurisdiction.

Diversity jurisdiction also can be better understood from the perspective of wealth and poverty. Conventional wisdom associates diversity jurisdiction with the need to protect out-of-state re-

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95. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 806 n.2 (1986) ("Several commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake."); *see also id.* at 814 n.12; FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 284 n.12.

96. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005); JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, & HELEN HERSHKOFF, 2006 CIVIL PROCEDURE SUPPLEMENT FOR USE WITH ALL PLEADING AND PROCEDURE CASEBOOKS 506, 509 [hereinafter FRIEDENTHAL ET AL., 2006 SUPPLEMENT] ("It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

97. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121, 2137 (2006); FRIEDENTHAL ET AL., 2006 SUPPLEMENT, *supra* note 96, at 477, 484 (characterizing the claim in *Grable* as one in which the federal "question qualified as 'substantial'").

98. *See, e.g.*, Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1356 (2006) (arguing that the Court's recent § 1331 decisions seek to "capture the considerable benefits that flow from national regulatory uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation").

99. Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1420 (1995).

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sidents against in-state bias; the literature also emphasizes the historic aim of protecting creditors against populist state judges and pro-debtor rules.<sup>100</sup> Congress' decision to shift multi-state class actions into the federal courts, despite the absence of complete diversity between the plaintiffs and the defendants, recasts this set of issues in an important and contemporary context that potentially pits large corporations against tort plaintiffs who may be relatively under-resourced.<sup>101</sup> As during the *Lochner* period, some commentators criticize extending a federal forum because it arguably advantages big business at the expense of financially weak plaintiffs.<sup>102</sup> On the other hand, interstate class actions may be said to deserve a federal forum "because they implicate interstate commerce, invite discrimination by states against outsiders, and tend to cultivate bias against large business enterprises."<sup>103</sup> As with § 1331, the evolving nature of diversity jurisdiction reflects social values that implicate the accessibility of federal courts for claimants with limited financial resources. The Casebook invites students to consider what types of cases should be heard in the federal courts.<sup>104</sup> The answer to that question surely involves some consideration of whether federal courts have a significant role to play in resolving legal questions that touch on poverty and inequality.<sup>105</sup>

100. See FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 249-51 (summarizing the literature). R

101. For a summary of recent legislation, see Gregory P. Joseph, *Federal Class Action Jurisdiction After CAFA*, EXXON MOBIL AND GRABLE, 8 DEL. L. REV. 157 (2006).

102. See Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in CIVIL PROCEDURE STORIES 21, 27-32 (Kevin M. Clermont ed., 2004); see also Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 992 (2005) (positing that "[i]n the first decade of the twentieth century . . . the Plessy Court . . . was often a tool of big business and the 'moneyed classes'"); JoEllen Lind, *"Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 718 (2004) (criticizing the extension of a federal forum to multi-state state law tort class actions).

103. Victor Schwartz, Mark A. Behrens, & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 486 (2000); see also FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 253. R

104. FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 280 n.4. R

105. In this context, the students might consider this comment by Edward A. Purcell, Jr.:

If the question of jurisdictional limitation requires us to make political judgments, then the fundamental question is not what cases should be taken from the federal courts but what cases are most essential to send to them. . . . I suggest that the best answer for the present and foreseeable future is that the federal courts should concentrate on those important cases where there is a drastic inequality of social resources between the parties, where ordinary

### C. Notice and the Opportunity to be Heard

Many civil procedure courses also include some coverage of the leading “notice and opportunity to be heard” cases.<sup>106</sup> Early due process decisions of the Warren Court involved poor people or workers who found their possessions or salary taken by court order before any hearing on the merits was even scheduled.<sup>107</sup> Kevin R. Johnson observes:

A case evaluating the constitutionality of a Florida prejudgment remedy law, *Fuentes v. Shevin*, an early decision in the line of cases leading up to *Connecticut v. Doehr*, allows the class to imagine what it would be like for Margarita Fuentes—a poor Latina, disadvantaged in multiple ways—to have a sheriff barge into her home to repossess a stove and stereo purchased on the installment plan. It calls forth a discussion of how issues of race, class, and gender intersect in U.S. society. Importantly, Fuentes may not have been a deadbeat who would or could not pay her bills; she paid her installments until a dispute arose over the servicing of the stove.<sup>108</sup>

“Notice” cases also potentially involve the interests of the poor. Some attention can be paid to the rules of service of process and how they have been adapted to protect poor litigants against the abuse of “sewer” service, used to trigger default judgments based

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individuals confront centers of institutionalized power and wealth. Such cases would include, preeminently, cases where individuals confront the power of government and government officials, especially those of the states, in cases under the Bill of Rights, the Fourteenth Amendment, and the national civil rights laws. It would also include cases—even cases based on diversity of citizenship—where private individuals confront the power of national corporations in actions where the stakes of the suit or the conditions of its litigation are such that the corporate parties have particular opportunities or special incentives to utilize the vast and unequal social resources they command.

Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations from the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 25 (2002-2003).

106. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1 (1991) (opportunity to be heard); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (notice).

107. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 70 (1972); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 221 (“Firestone instituted an action in small-claims court for repossession of both the stove and the stereo, claiming that Mrs. Fuentes had refused to make her remaining payments. Simultaneously with the filing of that action and before Mrs. Fuentes had even received a summons to answer its complaint, Firestone obtained a writ of replevin ordering a sheriff to seize the disputed goods at once.”).

108. Johnson, *supra* note 2, at 249-50.

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on false affidavits of service.<sup>109</sup> Another important issue concerns the effectiveness of notice and whether the recipient's special circumstances—poverty, mental disability, or imprisonment—count in the due process calculus. The Casebook asks the students to consider what method of notice is reasonable “when the government needs to contact homeless individuals who lack a permanent residence or a fixed address.”<sup>110</sup> This unit in the Casebook closes with a discussion of the values that the due process notice requirement is intended to serve: concerns of poverty and inequality illuminate this issue in important ways.<sup>111</sup>

#### D. Joinder and Class Actions

Not all first-year civil procedure courses, especially those that are only four credit hours, have time to devote to joinder rules and class actions. Courses that cover these topics, however, can meaningfully explore how procedural design impairs or facilitates the vindication of rights of under-resourced litigants. The class action device, which authorizes group litigation on a theory of interest representation, highlights the importance of procedure as a way to effectuate specific substantive norms that might otherwise go unenforced.<sup>112</sup> Over time, Federal Rule of Civil Procedure 23 has played a critical role in enabling indigent individuals who “are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive,”<sup>113</sup> to seek judicial relief. For at least the last decade, however, Congress has limited the right of poor people to use the class action to mount constitutional and other legal challenges.<sup>114</sup> In particular, lawyers whose work is funded in whole or in part by the Legal Services Corporation are barred from representing indigent clients in class action litigation.<sup>115</sup> The exclusion of a category of

109. See generally *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 212.

110. FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 194 n.10.

111. *Id.* at 195 n.12.

112. See Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 75 (calling Rule 23 “inherently ‘transsubstantive’”).

113. Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941); see also FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 660-61.

114. See John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 455 (1997).

115. See, e.g., FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 664; Ilisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Consti-*

litigants from an important procedural opportunity raises significant questions for discussion.

### E. Pleading, Motions to Dismiss, Discovery, and Summary Judgment

Some procedure courses open with the topic of pleading and motions to dismiss; others begin with the study of jurisdiction and the *Erie* doctrine. At either stage in the course, integrating the perspective of poverty and inequality will enhance critical understanding of the Federal Rules of Civil Procedure. The drafters of the Rules did not explicitly consider the effect of impoverishment on the practice of litigation.<sup>116</sup> Nevertheless, the decision to adopt a regime of notice pleading was intended “to focus litigation on the merits of a claim”<sup>117</sup> and “to facilitate a proper decision on the merits.”<sup>118</sup> Simplified pleading is presumed to have an equalizing effect on judicial access in cases involving under-resourced litigants.<sup>119</sup> As Geoffrey C. Hazard, Jr., explains:

The Federal Rules have been an effective instrument of social justice because they reduce the barriers to the formulation and proof of claims against the existing systems of authority. Formulation of new theories of legal rights is simpler, virtually by definition, under a pleading system that is not constructed in terms of old legal categories, as was code pleading and common law pleading. Proof of new theories of liability likewise is simpler with the aid of comprehensive discovery.<sup>120</sup>

Notice pleading “[n]ot only . . . check[s] the consequences of attorney disparities, . . . [it] also facilitates the pursuit of certain lawsuits, cases that are primarily prosecuted by less advantaged parties against those with greater resources.”<sup>121</sup> Admittedly, some com-

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*tutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693.

116. See Resnik, *Failing Faith*, *supra* note 55, at 513-14 (observing that the drafters did “not speak of the individuals . . . without resources who lack attorneys”).

117. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 519.

118. *Swierkiewicz*, 534 U.S. at 514 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). *But see* *Bell Atlantic Corp. v. Twombly*, 550 U.S. —, 127 S. Ct. 1955 (2007) (urging as “best forgotten” the *Conley* pleading standard that a complaint should not be dismissed unless “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”) (internal citations omitted).

119. See Rubenstein, *The Concept of Equality*, *supra* note 35, at 1879.

120. Hazard, *supra* note 5, at 2246 (internal citations omitted).

121. Rubenstein, *The Concept of Equality*, *supra* note 35, at 1879-80 (citing JAMES FLEMING, JR. ET AL., CIVIL PROCEDURE § 3.1, at 140 (4th ed. 1992), who references tort claims, toxic tort claims, and products liability claims).

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mentators offer less cheerful assessments of notice pleading. Even in a simple case—“‘ordinary,’ ‘routine,’ ‘run of the mine,’ ‘garden variety’ (pick your metaphor),” says Judith Resnik—an injured person’s inability to secure legal advice may prevent a meritorious claim from being presented to the court.<sup>122</sup> Moreover, although the Court has limited trial courts from using their discretion to impose heightened pleading requirements outside of specific substantive areas, it nevertheless has encouraged resort to “summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later”<sup>123</sup>—trends that impact court access. In addition, the sanction power poses special difficulties for certain types of claims—particularly civil rights claims—that the poor might allege, such as challenges to regulatory classifications or efforts to propose a change in existing law. Although federal judicial use of Federal Rule of Civil Procedure 11 as a sanctioning device has apparently declined since the 1993 amendments, at least one analyst finds an increased number of sanctions imposed as a matter of inherent judicial authority: “[c]ivil rights plaintiffs are still targeted for Rule 11 sanctions more frequently than other litigants in the federal courts, and they are actually sanctioned at a much higher rate than any other category of litigant.”<sup>124</sup> The effect of pleading rules on judicial access for the poor provides an important evaluative perspective on the current system of procedural rules.

### F. Trial by Jury

Trial by jury holds iconic status in procedural history.<sup>125</sup> Civil jury trials also are a lightning rod for public criticism.<sup>126</sup>

122. Bloom & Hershkoff, *supra* note 74, at 482-83 (citing Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 969 (2000)).

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123. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 520-21 n.2; see also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1011 (2003).

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124. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 3 (2002); see also FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 576 n.5.

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125. See FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 894 (referring to “the revered status of jury trial at common law”).

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126. *Id.* (summarizing Chief Justice Burger’s criticisms of the civil jury).

[B]ecause civil verdicts actually entail a reallocation of resources within society, affect the availability and price of products and services, and serve as a ‘yardstick’ for negotiated outcomes in civil litigation, civil jury decisions have a broader impact [than criminal jury decisions] and can motivate political counterattacks by threatened interests.<sup>127</sup>

Concerns about the jury typically relate to its representativeness of the community, its competence to assess complex factual questions, and its efficiency as a lay decision-maker. Juror demographics affect the analysis; empirical studies focus on the effect of race and wealth on juror performance and jury outcomes. Theodore Eisenberg and Martin T. Wells observe: “Lawyers have definite views about the relationship between demographics and juror performance. Race, income level, and urbanization are thought to relate to juror behavior.”<sup>128</sup> They add that the view that “jurors’ demographic characteristics substantially influence case outcomes . . . suggests that the merits of cases are subservient to the personal characteristics of jurors”—an idea that threatens the integrity of the legal system.<sup>129</sup> Their research suggests that poverty levels, at least in state courts, affect the size of tort awards, although “poverty is likely not the only factor at work.”<sup>130</sup> By introducing concerns of poverty and inequality, the class can more critically understand public attitudes toward the jury.

### G. Res Judicata and Collateral Estoppel

Civil procedure courses often include some discussion of res judicata and collateral estoppel. These doctrines generate complex consequences in administrative challenges to the denial of government benefits. Administrative Law Judges typically make initial determinations in such cases, and their decisions may have legal or

127. Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77, 87 (1994).

128. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1840 (2002).

129. *Id.* at 1842.

130. *Id.* at 1869; see also Michael J. Saks, *Trial Outcomes and Demographics: Easy Assumptions Versus Hard Evidence*, 80 TEX. L. REV. 1877, 1885 (2002) (“[I]f one thinks that the ‘Bronx effect’ is that communities with more poor and minority residents—regardless of who serves on the juries in those communities—will be more sympathetic and generous to plaintiffs, that is a hypothesis that Eisenberg and Wells’s data can and do test.”); cf. Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 27, 51-52 (2003) (“The results indicate that awards fall (or increase only moderately in the federal data) with white poverty rates but increase dramatically with black poverty rates.”).

factual consequences that a poor person does not expect.<sup>131</sup> The threat of preclusion is heightened in cases in which the claimant is not represented. Jon C. Dubin has written extensively on this issue with respect to federal disability benefits, emphasizing the special difficulties that pro se litigants face in avoiding the loss of federal claims that could have been, but were not, litigated in the administrative setting:

Because of the emerging application of issue exhaustion in social security cases, a growing number of claimants are being denied the opportunity even to have a day in court to vindicate their legal rights on the basis of a procedural technicality—the failure to have formally raised and preserved legal issues and arguments in the previous “informal” adjudicative proceedings.

This new “kafkaesque” trap for the unwary has particularly troubling consequences for unrepresented and underrepresented claimants. Since bar admission is not required for representation at administrative proceedings, many law offices—particularly financially strapped legal services offices—cover a large portion of their public benefits adjudications with paralegals and reserve their lawyers for court proceedings on judicial review. In addition, a significant portion of low-income claimants simply cannot obtain access to a representative and have to appear pro se.<sup>132</sup>

Although preclusion is justified as a neutral doctrine that seeks to achieve efficiency, its application can tend to cut off judicial access for those, like the poor, who lack adequate counsel and cannot meaningfully assess the consequences of litigation choices.

## H. Alternative Dispute Resolution

Finally, many civil procedure courses close the semester with a discussion of alternative dispute resolution (“ADR”). ADR initially appeared as an alternative to the adversary process in the expectation that using informal procedures would reduce costs, increase access, and nurture autonomy. Commentators, however, increasingly question whether ADR makes good on its promises, especially in cases involving the poor, women, and minorities. Some commentators question the fairness of using mediation in

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131. For a description of Administrative Law Judges and how the terms of their office differ from those of Article III judges, see FALLON ET AL., *supra* note 77, at 46-47.

132. Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289, 1293-94 (1997) (internal citations omitted).

family disputes where one party, typically the woman, has less financial power; they also see “mandatory” ADR (used as an adjunct to judicial proceedings) as inconsistent with the theory of voluntarism that justifies alternative dispute processes.<sup>133</sup> On the other hand, ADR may, in certain settings, offer transformative possibilities for affected individuals—the human rights community’s use of reconciliation proceedings in nations making the transition from authoritarian regimes offers an important example. The relative merits of ADR for the poor and marginalized can be explored through discussion of *In re African-American Slave Descendant’s Litigation*, in which the court denied plaintiffs’ motion to appoint a mediator in a case seeking relief against corporate defendants for injuries resulting from slavery in the United States.<sup>134</sup>

### III. CONCLUSION

The concept of neutrality often is said to be the hallmark of procedural legitimacy. Detached from any principle or party, objectivity lends normative value to the adjudicative enterprise.<sup>135</sup> Introducing issues of poverty and inequality into the procedure curriculum may be said to violate this core requirement. But we do not need to invoke the Legal Realists to know that an essential feature of a public judicial system is its accessibility to all claimants.<sup>136</sup> As J.A. Jolowicz writes, “it is of little value to have a sys-

133. See Carol Lefcourt, *Women, Mediation and Family Law*, 18 CLEARINGHOUSE REV. 266, 269 (1984) (“The unequal financial and social power of men and women makes mediation an unfair means of resolving family-related disputes. Women do not have equal bargaining power and cannot assert equal power in an informal setting unrepresented by counsel.”); see also FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 1233; Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986) (warning that ADR could reduce important rights, including those to child-support awards, to “a mirage”); Andrew R. Imbrogno, *Arbitration As an Alternative to Divorce Litigation: Redefining the Judicial Role*, 31 CAP. U. L. REV. 413, 429-30 (2003) (“As a group, women are more likely to be characterized by economic disempowerment than men . . . . Not only does this give cause for concern about the willingness with which some women enter into arbitration agreements, it is also cause for concern about the substantive results women achieve through arbitration.”).

134. 272 F. Supp. 2d 755 (N.D. Ill. 2003); FRIEDENTHAL ET AL., CIVIL PROCEDURE, *supra* note 9, at 1228.

135. See, e.g., Brian Leiter, *Objectivity, Morality, and Adjudication*, in OBJECTIVITY IN LAW AND MORALS 66, 79 (Brian Leiter ed., 2001).

136. Cappelletti, *supra* note 20, at 688 (“Clearly, courts and court procedures . . . can no longer be instruments suitable only for the protection of privileged elites. They must embrace the entire society. Thus, one essential—possibly the essential—feature of a really modern system of administration of justice must be its effective, and not merely theoretical, accessibility to all.”).

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tem of judicature with carefully formulated guarantees, if none but the rich can afford to make use of it.”<sup>137</sup> The concerns of the poor are not simply one of a number of perspectives from which to assess the existing legal system. Rather, without locating civil procedure in its political, social, and economic context, one cannot meaningfully determine whether the rules provide effective, and not merely theoretical, access for all claimants. Unless we want our teaching “to ratify the world ‘as is’”<sup>138</sup>—and so to encourage uncritical acceptance of existing legal arrangements—the first-year course by necessity must provide a conceptual framework that includes poverty and inequality as factors for evaluation.

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137. *Id.* at 688-89 (quoting John Anthony Jolowicz, *Fundamental Guarantees in Civil Litigation: England*, in *FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION* 142 (M. Cappelletti & D. Tallon eds., 1973)).

138. Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *ASIAN L.J.* 65, 69 (2003).

