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Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture

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DUE PROCESS WITHOUT JUDICIAL PROCESS?: ANTIADVERSARIALISM IN AMERICAN LEGAL CULTURE

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> *[T]he real realm of injustice is not in an amoral and prelegal state of nature. It does not appear only on those rare occasions when a political order wholly collapses. It does not stand outside the gate of even the best of known states. Most injustices occur continuously within the framework of an established polity with an operative system of law, in normal times. Often it is the very people who are supposed to prevent injustice who, in their official capacity, commit the gravest acts of injustice, without much protest from the citizenry.*[1]

I. THE SOURCES OF ANTIADVERSARIALISM

For decades now, American scholars of procedure and legal ethics have remarked upon the death of the jury trial. If jury trial is not in fact dead as an institution for the resolution of disputes, it is certainly "vanishing."[2] Even in complex litigation, courts tend to facilitate nonadjudicative resolutions—providing sites for aggregation, selection of counsel, fact gathering, and finality (via issue and claim preclusion)—rather than trial on the merits in any conventional sense of the term.[3] In some high-stakes criminal cases and a fraction of civil cases, jury trial will surely continue well into the twenty-first century. Wall-to-wall media coverage of the more sensational of these will continue as well; Americans have a very long and

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1. JUDITH N. SHKLAR, THE FACES OF INJUSTICE 19 (1990).

2. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

3. Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015) (noting an increased rate of multidistrict litigation relative to class actions).

deeply ingrained habit of treating trials as a form of public entertainment.[4] But as a widespread legal and cultural *practice*—one that people experience as active participants, and one that plays a fundamental role in the administration of justice—jury trial is indeed vanishing.

Some scholars view the disappearance of jury trials in civil cases as a Seventh Amendment crisis, the product of a gradual but systematic and unconstitutional redistribution of decision-making authority from juries to judges over the last 175 years.[5] Judges, on this account, are not only "managerial"[6] but increasingly *imperial*.[7]

On the other hand, legal historians remind us that even at its apogee in the nineteenth and early twentieth centuries, jury trials accounted for around one-third of dispositions in the state courts.[8] Long before the Federal Arbitration Act and more recent innovations, private settlement and alternative mechanisms for dispute resolution played a more significant role than the lore surrounding jury trials would suggest.[9] We also know that concerns about the cost and delay of litigation animated well-founded and vituperative criticisms of the adversary system from the very earliest days of the republic. These critiques motivated the exploration and endorsement of alternatives.[10] And we know that Americans have a deep, sometimes quite baleful, commitment to vigilantism and other forms of self-help.[11]

Still, there is more than a little truth in the judicial imperialism critique. Settlement and alternative dispute resolution have become default modes of disposition. Judges not only defer to these alternatives and use pretrial procedures to promote them, they increasingly *force* parties to use them and have, for the most part, blinked at commentary revealing evidence of profound defects in them.[12] Nor is there any gainsaying the gradual

4. On the popularity of trials as entertainment in early American history, see CARL R. LOUNSBURY, THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY 5 (2005). On trials and American popular consciousness, see Carol J. Clover, *Law and the Order of Popular Culture*, *in* LAW IN THE DOMAINS OF CULTURE 97, 110 (Austin Sarat & Thomas R. Kearns eds., 2000).

5. *See generally* SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016).

6. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

7. *See, e.g.*, Scott v. Harris, 550 U.S. 372 (2007); *see also* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?:* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

8. *See* Galanter, *supra* note 2, at 465 (gathering civil trial data); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

9. *See generally* Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423 (2009).

10. Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983, 991–92 (2004).

11. Norman W. Spaulding, *The Impersonation of Justice: Lynching, Dueling, and Wildcat Strikes in Nineteenth-Century America*, *in* THE ROUTLEDGE RESEARCH COMPANION TO LAW AND HUMANITIES IN NINETEENTH-CENTURY AMERICA (Nan Goodman & Simon Stern eds., 2017).

12. *See, e.g.*, Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Vaden v. Discover Bank, 556 U.S. 49 (2009); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998); Gilmer v. Interstate/Johnson Lane Corp.,

reallocation of authority from jury to judge through the expansion of procedural tools that enable judges to remove cases from the jury during trial and to dispose of cases before trial by substituting the judge's assessment of the facts for the jury's.[13] The heady days of jury supremacy at the founding of the republic—when both questions of law and fact were within their purview and when trial before a new jury was the primary appellate remedy—are so distant as to seem part of an altogether foreign regime of dispute resolution.

But the imperialism critique frequently misses the extent to which skepticism about the adversary system is itself rooted in Jacksonian populist and New Deal progressive political movements. Nineteenth-century populists loathed the intricacies and elitism of common law adjudication.[14] The codification movement they supported was directed at creating a more democratically legitimate and responsive system of substantive and procedural law—a system in which access to law would not depend on access to counsel.[15] As my colleague Amalia Kessler has shown, some communities explored radical alternatives to the adversary system.[16] Jury trial may have many democratic virtues, but in the eyes of antebellum populist reformers, it came along with heavy antidemocratic baggage.

Modern proceduralists often celebrate the development of the Federal Rules of Civil Procedure (FRCP) and the innovations Dean Charles Clark built into the framework of the rules to make federal litigation more accessible to ordinary litigants (through the merger of law and equity, the short, plain statement rule for pleading, open-handed discovery, liberal joinder, etc.).[17] But, in their pedagogy and research agendas, proceduralists focus intensely and almost exclusively on the bare fraction of civil cases

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500 U.S. 20 (1991); *see also* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 82 (noting that judges impose mediation on litigants). For a summary of the standard critiques of alternative dispute resolution, see Carrie J. Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES (James D. Wright ed., 2015); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 87 n.1 (2012) (gathering commentary); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES: DEALBOOK (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [perma.cc/6JKA-4ZZM]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [http://perma.cc/MH64-DJW9].

13. On the expansion of summary judgment and judgment as a matter of law, compare Celotex Corp. v. Catrett, 477 U.S. 317 (1986), with Galloway v. United States, 319 U.S. 372 (1943), and Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). On screening complaints for "plausibility" based on trial judges' "common sense," see Ashcroft v. Iqbal, 556 U.S. 662, 664, 670 (2009).

14. Spaulding, *supra* note 10, at 986–87.

15. *See generally* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

16. *See* Kessler, *supra* note 9, at 449.

17. *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

decided in federal courts, leaving largely unexamined the norms and rules governing the tens of millions of cases affecting the lives of ordinary Americans in state courts and state and federal agencies.[18] Moreover, proceduralists typically fail to read Dean Clark's innovations against a larger backdrop of hostility to the courts among New Dealers and perhaps especially among the New Deal lawyers who would rise to the bench and elite positions in the executive branch.[19]

That hostility was real. *Lochner*-era laissez-faire jurisprudence and judicial procedures, such as the antistrike injunction that had been used to thwart the labor movement, were fresh in their minds.[20] The issue was not just the lingering effect of reservations among Justices of the U.S. Supreme Court in the 1930s regarding the Article I Commerce Clause powers of Congress to respond to the Great Depression.[21] There was a broader feeling, sharpened by the antistrike injunction experience, that the adversary system itself (in its ethics, its procedures, and in the professional identity of lawyers) was an obstacle to sensible democratic governance and progressive reform.[22] To read the FRCP in context, then, is to remember that Congress passed the Rules Enabling Act[23] in the same year that it passed the Securities Exchange Act of 1934[24] ("the 1934 Act") and a year before it passed the National Labor Relations Act.[25] These statutes express the deeper vision of New Deal reformers, one in which litigation would be reduced to a subordinate role in American law. Law in the first instance was to be generated, interpreted, and applied to social action in and through administrative agencies, not courts.

Both pieces of legislation established a new executive branch agency designed to regulate an area of primary economic action.[26] The Securities and Exchange Commission (SEC) and the National Labor Relations Board (NLRB) were authorized to promulgate rules, investigate violations, initiate enforcement actions, and, in some cases, to be the court of first instance.[27] Together with the Securities Act of 1933 ("the 1933 Act"), the 1934 Act was read to permit private rights of action, which require an Article III

18. Even in administrative law, the actual mechanics of administration are often ignored in favor of abstract constitutional and theoretical inquiry. There are, of course, notable exceptions. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014).

19. *See generally* PETER H. IRONS, THE NEW DEAL LAWYERS (1982).

20. *See generally* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

21. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

22. These ideas are distilled in the quintessential New Deal lawyer-turned-judge Jerome Frank's lacerating critique of the adversary system. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

23. Ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

24. *See* Securities Exchange Act of 1934, ch. 404, § 3, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d).

25. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

26. *Id.*; *see also* 15 U.S.C. § 78d.

27. 15 U.S.C. § 78d; 29 U.S.C. §§ 151–169.

forum for adjudication,[28] but the core work of enforcement, particularly the calibration of enforcement policy, was supposed to rest squarely with the agency.[29] The 1933 Act complemented this agency-centric regulatory approach through information-forcing disclosure provisions refined by agency rulemaking.[30] The hope and expectation was that the act of registration and preparation of associated securities disclosures would have deep behavioral consequences in the financial markets. From a structural and regulatory standpoint then, judicial enforcement was tertiary to disclosure and the agency's policy-based rulemaking. No one imagined that judicial enforcement would be unnecessary, but there is a fundamental difference between the structure of the 1933 and 1934 Acts on the one hand, and, legislation that merely establishes substantive rights or regulatory limits while leaving enforcement to private actors and the Department of Justice (DOJ)—a court-centric approach.[31]

The very highest ambitions of the New Deal reformers to circumvent judicial review are apparent in the operation of the NLRB.[32] Established to protect the rights of workers to form unions and engage in collective bargaining, the NLRB is composed of five members appointed by the President, with the advice and consent of the Senate, to five-year terms.[33] Initial adjudications of labor disputes are conducted before administrative law judges with appeals to a three-member panel of the Board.[34] The NLRB's general counsel is responsible for filing complaints either on her own initiative or after receiving allegations of unfair labor practices from employees.[35] Fearful that the work of the NLRB would be undermined by unsympathetic judges, the NLRB very quickly developed a set of practices that diminished the likelihood that its adjudications would be subject to judicial review.[36] As Peter Low and John Jeffries note:

> Interestingly, although the NLRB also has rule-making authority, it is notoriously reluctant to use it. Despite repeated pleas from judges, practitioners, and academics, the Board consistently eschews formal rule-making in favor of case-by-case adjudication. The reasons for this practice may be many, but one factor repeatedly cited by experts is the agency's desire to insulate itself from effective judicial review by submerging its judgments in the facts of particular cases. Perhaps not entirely unrelated is the widespread perception that NLRB adjudication is ideological and politicized, characterized by sharp swings in enforcement

28. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983).

29. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841 (2009).

30. 15 U.S.C. §§ 77a–77aa.

31. Reconstruction enforcement legislation of the 1860s and 1870s is a paradigmatic example of this court-centric approach. *See generally* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW (1982).

32. This example is drawn from PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 320–24 (5th ed. 2004).

33. 29 U.S.C. § 153.

34. *Id.* § 160.

35. *Id.*

36. LOW & JEFFRIES, JR., *supra* note 32, at 321.

> perspective as annual presidential appointments remake the Board's composition.
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> Obviously, the [NLRB] fall[s] very far short of the model of judicial independence established by Article III. Indeed, the Board's structure suggests, and the history of the National Labor Relations Act confirms, that the Board was not intended to provide impartial, apolitical adjudication of labor disputes. Instead, it was created to enforce certain policy objectives and constituted so that the President, acting with the advice and consent of the Senate, can assert relatively short-term political control over Board membership.[37]

There is a right of appeal to the U.S. courts of appeal if a party believes the NLRB's decision to be erroneous, but by nesting its legal conclusions and policy judgments in the facts of individual cases, the NLRB reduces the likelihood of reversal on appeal.[38] That is because the standard of review requires heightened deference as to questions of fact under *Crowell v. Benson*,[39] and *Chevron, Inc. v. Natural Resources Defense Council*[40] requires deference with respect to reasonable agency constructions of organic statutes.[41] To be sure, the Board has no substantive power to coerce compliance. But if aggrieved parties facing these deferential standards of review comply rather than appeal to the federal courts, the Board's decisions are final.

Thus, judicial review in the ostensibly more independent federal courts is merely a potential, and almost always post hoc, intervention.[42] Law either operates in the absence of adjudication as regulated entities conform to standards set by Congress, or it takes effect through non-Article III adjudications that are responsive to enforcement priorities set by agency policymakers and the President. This is law before the courts, law outside the courts, law unhinged from the adversary system and its traditional forum.

If the NLRB's adjudication practices and avoidance of formal rulemaking are somewhat unique, if most agency adjudication and rulemaking follows the pathways of notice and comment that enable judicial review under the Administrative Procedure Act, the NLRB example is nevertheless a powerful reminder of the New Deal reformer's first principles: their confidence in, and elevation of, extrajudicial process; their suspicion of the adversary system and its traditional forum; and their sense of how far the interpretation and application of law needed to be removed from traditional structures of adjudication to make New Deal political priorities real in the lives of workers and consumers.

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37. *Id.* at 321–22.
38. *Id.* at 321.
39. 285 U.S. 22 (1932).
40. 467 U.S. 837 (1984).
41. *Id.* at 844.
42. The intervention is post hoc because the NLRB's submersion of rulemaking in adjudication effectively circumvents the structure of notice, comment, and judicial review of agency rulemaking embedded in the Administrative Procedure Act. 5 U.S.C. § 706 (2012).

The point of all this is not that proceduralists have been wrong to insist upon the egalitarian ambitions of Dean Clark or the generous construction of the FRCP by the New Deal Supreme Court relative to the Rehnquist and Roberts Courts. Those ambitions were real. But New Deal innovations in the federal law of procedure must also be interpreted against the backdrop of a far broader political and legal project *explicitly* dedicated to the displacement, if not the subordination of, the adversary system. Indeed, New Deal reformers, drawing upon standards of internal administrative law that run back to the earliest days of the republic, built the modern regulatory state on an altogether different theory of the administration of justice.[43] Rational, scientific expertise was to drive not only the resolution of political questions into specific policy objectives and associated legal rules but also the resolution of discrete disputes about the application of policy to the facts of social and economic life. America was to become a republic of experts in which policy would be established and implemented by empirically informed, politically responsive technocrats.[44] The bench and bar were not only to rely upon these technocrats and defer to their judgment but to celebrate the virtues of avoiding adjudication in court.[45] Indeed, elite New Deal lawyers were among the principal architects of the alternative theory and leaders in its implementation in the agencies and Congress.[46]

As importantly, at least some of the Advisory Committee's most significant innovations in procedure, most obviously the incorporation of broad open-handed discovery, can be read as disfavoring trial by providing for the disclosure of evidence on terms that encourage settlement and summary judgment. It seems likely that discovery practice—vexed as it has become and desperate as modern courts and the Advisory Committee have been to restrain it[47]—has played an important role in diminishing the perceived need for trial.[48] Notably, in the briefing for *Hickman v. Taylor*[49]

43. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 218, 251, 279 (2012).

44. *See* H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 41 (1981) ("The scientific 'expert' thus became the central figure in Frankfurter's plan for government: it was the expert who would study society, accumulate facts, draw conclusions, and educate the public as to the rational necessity of those conclusions. Frankfurter's was thus a philosophy that was both elitist and democratic: elitist in its demand for expert knowledge; democratic in its faith that the public at large was educable."); *see also* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 200 (1982).

45. On the use of standing doctrine to insulate New Deal agency action, see Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine?: An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010); Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 179 (1992).

46. *See generally* IRONS, *supra* note 19. Progressives also played a larger role than has traditionally been assumed in the development of arbitration as an alternative to trial in the early twentieth century and in the drafting and passage of the Federal Arbitration Act. *See generally* Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940 (2015).

47. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560 n.6 (2007).

48. Richard Marcus, *The Story of Hickman: Preserving Adversarial Incentives While Embracing Broad Discovery*, *in* CIVIL PROCEDURE STORIES 307, 310 (Kevin M. Clermont ed., 2004).

before the Supreme Court, it was *progressive* labor lawyers who argued that the new discovery rules were "*written with a view toward eliminating the adversary system*."[50] In the new discovery rules, they saw yet another New Deal displacement of the adversary system intended to level the playing field between large, information-rich defendants and the injured employees who sued them. Corporate defense counsel, who typically enjoy early access to relevant witnesses and documentary evidence, would be obliged to disclose their findings to promote "[m]utual knowledge of all the relevant facts."[51] In creating the doctrine of work product protection, the Court squarely rejected the argument that the discovery rules were designed to eliminate the adversary system.[52] But it did so not because it could locate a decisive rebuttal in the FRCP or the Rules Enabling Act.[53] To defend work product protection, the Court turned to a Burkean theory that adversary traditions could not be set aside by mere implication.[54] The "historical and the necessary way in which lawyers act within the framework of our system of jurisprudence," Justice William Murphy wrote for the majority, could not be upset by the discovery rules.[55]

Finally, it must be said that while progressive academics have long decried the barriers to access to counsel for low-income Americans, legal ethics scholars who share that concern have, for more than four decades, spearheaded a comprehensive assault on the adversary system and the moral integrity of the legal profession.[56] The ethicists' critiques are rivaled only by a public relations and lobbying campaign of the corporate bar and its clients designed to convince the American people (and sitting judges) that jury trial is corrupt because it provides windfall gains to plaintiffs' lawyers and litigants with frivolous claims.[57] Legal ethics scholars generally have

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49. 329 U.S. 495 (1947).

50. Marcus, *supra* note 48, at 307 (emphasis added) (quoting Petition and Brief of the United Railroad Workers of America, C.I.O., for Leave to File the Same, Amicus Curiae at 2, Hickman v. Taylor, 329 U.S. 495 (1947) (No. 47)).

51. *Hickman*, 329 U.S. at 507.

52. *Id.* at 507–09.

53. *See id.* at 505.

54. *See id.* at 518–19.

55. *Id.* at 511.

56. *See* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (Deborah L. Rhode ed., 2000); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 67–68 (1988) (describing faith in the adversary system as grounded in "superstition" and arguing that it is not "capable of underwriting institutional excuses for lawyers" to avoid the requirements of common morality); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 33–34 ("[T]o take the value of individuality seriously would require the abandonment of the Ideology of Advocacy and of legal professionalism. Indeed . . . respect for the value of law itself may require the repudiation of legal professionalism.").

Even among progressive lawyers of color, especially those concerned with legal ethics, the traditional principal-agent structure of the attorney-client relationship, the traditional use of the courts in the civil rights movement, and even cause lawyering more broadly have been subjected to withering criticism. *See, e.g.*, GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

57. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 121 (2000) (describing distorted media coverage and political debate regarding

been concerned with *precisely* the opposite substantive issue—that windfall gains go to the "haves" at the expense of the "have-nots"[58]— but both sides are convinced that the adversary system is deeply flawed and that adversary values inhibit the proper resolution of disputes.

Should we really be surprised that jury trial has been withering away in this inhospitable climate? Responsibility for the current state of affairs certainly cannot be said to rest exclusively with the corporate bar or the increasingly imperious disposition of the judiciary. Once the field of view is expanded, it seems clear that a surprisingly broad consensus (at the very least, a convergence of superficially opposed forces) has supported the retreat from jury trial and indeed the adversary system as a whole.[59]

My purpose in this Article is not to offer a hackneyed plea in defense of jury trial and the adversary system. Whatever might be said in its defense, no claim can be made that jury trial is the best manner of resolving every dispute, nor even that jury trial is the appropriate default. Although jury trial should remain the yardstick against which alternatives are assessed in due process analysis,[60] Judge Henry J. Friendly was right that "common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues."[61] The number of disputes that raise "adjudicative issues" is so vast as to make trial-type hearings a practical impossibility. Moreover, fully transsubstantive procedural rules drawn from trial practice and extended to every dispute would destroy the flexible, efficient, and purposive interpretation and application of law in the many areas where it is obviously appropriate. We have always relied upon more efficient alternatives in appropriate settings, and quite properly so.

Instead, in the pages that follow, I take up examples in which sworn officers of the court (judges, prosecutors, city attorneys, court clerks, and elite lawyers at the DOJ) have responded to bureaucratic imperatives by

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civil justice); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 451–52 (2004). On the Chamber of Commerce's public relations campaign regarding what it calls "lawsuit abuse," see U.S. CHAMBER INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/ (last visited Mar. 25, 2017) [http://perma.cc/CTM8-3HPA].

58. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209 (2003).

59. Powerful material forces have also contributed to the disappearance of the jury trial. Most obviously, the size of the judiciary did not grow to match the number of case filings in the mid- and late twentieth century, creating seemingly inexorable pressure to use and expand procedural tools for pretrial resolution, promote settlement, and shuttle cases out of the courts and into alternative fora. One report concluded that

> the number of pending cases per sitting [district court] judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992–2007. A judge in 1992 had an average of 388 pending cases on his or her docket. By 2012, the average caseload had jumped to 464 cases—a 20 percent increase.

ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS 5 (2013), http://www.brennancenter.org/sites/default/files/publications/Judicial%20Vacancies%20Report%20Final.pdf [https://perma.cc/WA9C-JAH6].

60. *See* Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 315 (2012).

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

separating legal decision-making procedures from adversary adjudication altogether—practically and conceptually disaggregating due process from judicial process. One may be inclined to dismiss these examples as outliers in the otherwise laudable development of dispute resolution outside the traditional confines of the adversary system. The burden of this Article is to convince you that these limited cases nevertheless warrant close scrutiny because they signal indifference bordering on contempt toward the adversary system as well as the associated due process rights of the people whose lives are affected. The problem of vanishing trials, on this view, is not that trials are now rare compared to historical baselines or that judges seem to believe they have failed in some sense when cases go to trial (though this is an oddly prevalent disposition among judges in a country that constitutionalized the right to jury trial).[62] The problem is that we appear to be crossing a kind of cultural threshold in which doubts about the virtues of adversary adjudication not only pervade the bench and bar but also are converging with larger social forces to affect basic understandings about the rule of law and what it means to see justice done. The commitment to due process may itself be vanishing. If that is true, it raises profound ethical questions about the responsibilities and values of the legal profession, as well as the kind of legal subject constituted by the avoidance of adjudication in court.

The first example involves the disaggregation of due process from judicial process in the legal justification of targeted killing authored by lawyers for the Obama administration. Here, the formal separation of due process from judicial process is quite explicit—decisions resulting in the targeting of American citizens are made exclusively within the executive branch—and is predicated on a remarkable distortion of Supreme Court precedent on the Due Process Clause. The second example is the disaggregation of legal process from adjudication in ordinary civil and criminal matters. Here, unlike the targeted killing program, courts are directly and continuously involved but on terms that nullify procedural rights attendant to adversary adjudication.

II. DISAGGREGATING DUE PROCESS FROM JUDICIAL PROCESS AT THE DEPARTMENT OF JUSTICE

The 2011 killing of Anwar al-Awlaki in a drone strike in Yemen, along with his associate and fellow American citizen Samir Khan, is "the first time since the Civil War [that] the United States . . . carried out the deliberate killing of an American citizen as a wartime enemy and without a trial."[63] The incident was widely covered in the news, on law and national

62. *In re* Warner Comm. Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985) ("[A] bad settlement is almost always better than a good trial.").

63. Mark Mazzetti et al., *How a U.S. Citizen Came to Be in America's Cross Hairs*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html [https://perma.cc/H8DB-NPZT]. On the complicated national security consequences of the targeted killing of al-Awlaki, see Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015),

security blogs, and in other legal commentary. Opinion varies on the legal and moral implications of targeted killing, though there is a convergence of opinion, at least among national security scholars and experts on the law of war, that the program, properly administered, is both within the President's war powers and morally justifiable on the principles of just war theory.[64]

Critics, and even some supporters of the program, have argued for modifications in the process for classifying an individual as a target. But for present purposes, it is Attorney General Eric Holder's principal argument in defense of the program, offered in the spring of 2012, that warrants closer scrutiny. As controversy swirled about the drone program, he gave a speech at Northwestern Pritzker School of Law in which he insisted that the requirements of due process could be met without providing judicial process:

> Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of Al Qaeda or associated forces . . . . This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.[65]

There are several notable features of this argument. The first is that Holder's public defense is consistent with the due process analysis presented in the leaked internal legal memoranda concluding that the program is a constitutional exercise of executive power.[66] The memoranda show that DOJ lawyers relied heavily on *Mathews v. Eldridge*[67] and *Hamdi v. Rumsfeld*[68] to conclude that due process does not require judicial review notwithstanding the fact that the interests of the individual affected by the government's contemplated course of action are at their peak (as they surely are when the government action is life threatening).[69] At a time of war, the lawyers reasoned, the government's interest prevails as long as the individual presents an "imminent" threat (where imminence is construed broadly to include membership in an organization that is planning terrorist

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http://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html?_r=0 [https://perma.cc/V2S6-E52M].

64. *Compare* Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1 (2013), *with* David Luban, *What Would Augustine Do?: The President, Drones, and Just War Theory*, BOS. REV. (June 6, 2012), http://bostonreview.net/david-luban-the-president-drones-augustine-just-war-theory [https://perma.cc/D3MF-HVHX].

65. Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES (Mar. 5, 2012), http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html?_r=1&scp=1&sq=holder%20savage&st=cse [https://perma.cc/F534-VDZW].

66. *See* U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE (2011) [hereinafter DOJ WHITE PAPER].

67. 424 U.S. 319 (1976).

68. 542 U.S. 507 (2004).

69. DOJ WHITE PAPER, *supra* note 66, at 5–6.

attacks), capture is "infeasible," and "applicable law of war principles" are observed.[70]

One might come to different conclusions about how to weigh the interests of the individual, the interests of the government, and the risk of error in the government's internal deliberations on imminence and feasibility. And, of course, one might have concerns about the separation of powers implications of secret deliberations taking place entirely within the military and national security apparatus of the executive branch, or, alternatively, the consequences of exposing such deliberations in an Article III court. For present purposes, the important thing is that both the *Mathews* balancing test and the idea that due process and judicial process are not the same have deep roots in New Deal hostility to the adversary system and confidence in technocratic expertise.[71] At the same time, the conjunction of these two ideas in Holder's defense of targeted killing takes aversion to judicial resolution of disputes *far beyond* the NLRB's decision to eschew formal rulemaking and submerge its policies in the facts of individual enforcement actions.[72]

Consider the procedural design of legal decision making in the drone program: there are lawyers in the mix of agency deliberation on the classification system for targeted killing, but not courts (except insofar as earlier published decisions are taken up in the lawyers' purposive interpretation of the limits of due process). And the deliberation is obviously not public as it is in ordinary adjudication by an agency or an administrative law judge. Indeed, the lawyers' application of law to fact turns on almost total deference to secret fact-finding conducted by military and intelligence experts. Moreover, although the "client" these lawyers serve is nominally the public, their appointment and removal are contingent in no small degree on their fidelity to the political officers they serve. They may pride themselves on their willingness to say "no" when permission for a program such as this is sought, but the stakes are so high that the cognitive pressures and personal incentives to say "yes" must be significant. No one wants the blood of innocent victims of a future attack on their hands, least of all those whose decisions might prevent such an attack.

Notice too that even if they were determined to say no, the *Mathews* balancing test—derived from a series of earlier opinions by the godfather of New Deal lawyers, Felix Frankfurter—tilts against trial.[73] That is not just because balancing is inherently subjective nor because the modern Supreme Court has tended to favor the government's interests (especially in cases of

70. *Id.* at 1.

71. *See supra* notes 44–46 and accompanying text.

72. *See supra* note 37 and accompanying text.

73. *See* Mathews v. Eldridge, 424 U.S. 319, 333–34 (1976) (citing Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)); Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (citing *Joint Anti-Fascist*, 341 U.S. 123); *see also* FCC v. WJR, Goodwill Station, Inc., 337 U.S. 265, 272 (1949) (citing FCC v. Pottsville Broad. Co., 309 U.S. 134, 145 (1940)). For earlier evidence of Frankfurter's views, see Felix Frankfurter, *Hands Off the Investigations*, NEW REPUBLIC, May 21, 1924, at 329.

national security) and to doubt the virtues of the adversary system. It is because the core analytic components of the *Mathews* test are the risk of error and the marginal cost of additional procedural protections.[74] Courts may imagine jury trial as a kind of gold standard when they engage in *Mathews* balancing, but concentrating on accuracy and efficiency, as opposed to the broader rule of law values that due process supposedly protects (participation, public transparency, dignity, decentralized decision making, equality, uniformity, finality, etc.) invites subtraction.[75] Attention gravitates to the features of trial one can leave out and still achieve acceptably accurate results that do not impose undue burdens in time and resources on the adjudicator and other participants.[76]

The risk of error regarding whether al-Awlaki previously had sponsored terrorist attacks as a member of Al-Qaeda in the Arabian Peninsula (AQAP) is likely zero given the dossier intelligence officials had compiled by the time he was killed. There are other scenarios one can imagine in which it would be much greater, but be that as it may, the trickiest factual questions in the legal justification of the targeting of al-Awlaki had nothing to do with his guilt (understood in the conventional retrospective sense) or the depth of his commitment to AQAP. Rather, they turned on the imminence of any future attack for which his support was material and, crucially, the feasibility of capture.[77] Whatever one makes of the DOJ's review process, or the fact that President Obama took responsibility for the ultimate decision to list individuals as targets, the determination of the dispositive facts on these two difficult questions rests exclusively with the relevant agency technocrats. The most important legal judgments will therefore almost always be submerged in expert agency fact-finding in an even more subterranean sense than in NLRB adjudications.

With respect to Holder's specific argument, the turn of phrase he used has a long and distinguished pedigree in administrative law and the jurisprudence of due process. It is, on its surface, quite unremarkable, expressing as it does the common sense idea that procedures other than jury trial can be fair as long as they too vindicate core rule of law values. But use of the phrase in the context of targeted killing squarely contradicts its traditional application.

Running from the very first Supreme Court case to take up the meaning of the Due Process Clause of the Fifth Amendment in 1855, *Murray's*

74. *Mathews*, 424 U.S. at 335.

75. The marginalization of other due process values in the *Mathews* balancing test was criticized early on. *See generally* 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); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. I), 1973 DUKE L.J. 1153.

76. That may of course be entirely appropriate in ordinary administrative proceedings where both internal agency norms of due process are well engrained and judicial review of agency action is more than a theoretical possibility. I take up the absence of strong norms and judicial review in Part IV.

77. *See* DOJ WHITE PAPER, *supra* note 66, at 1.

Lessee v. Hoboken Land & Improvement Co.,[78] through a series of famous cases decided by the New Deal Court,[79] the phrase applied to deprivations of liberty or property (not life) where exceptional circumstances justified administrative action without providing ex ante notice and a hearing. Crucially, in each of these cases, the justification turned not merely on exigent circumstances favoring the government's interest, but on the existence and integrity of postdeprivation procedures—most commonly a combination of administrative adjudication *and* access to judicial review. No court or legal officer before Attorney General Holder had ever claimed that due process is satisfied by a deprivation that, by definition, destroys the possibility of the victim's participation in any postdeprivation challenge to the legality of the administrative action.

Consider the *Murray's Lessee* case.[80] Samuel Swartwout served as a "collector of the customs for the port of New York."[81] Eight years into his service, the account he was supposed to keep for his collections was audited by the Department of the Treasury and found in arrears.[82] A distress warrant was issued according to the provisions of a federal statute allowing the Treasury to recover funds misappropriated by customs officers.[83] Swartwout's land was seized and sold by the U.S. marshal pursuant to the distress warrant. The plaintiffs contended (1) that the statute justifying the marshal's seizure and sale unconstitutionally allocated to officers of the executive branch "judicial power" reserved to the Article III courts and (2) that the distress warrant process was inconsistent with the guarantee of due process under the Fifth Amendment.[84]

The Court tied these arguments together, framing the issue as whether Swartwout "can be deprived of his liberty, or property, in order to enforce payment . . . without the exercise of the judicial power of the United States, and yet by due process of law . . . and if so . . . whether the warrant in question was such due process of law."[85] The Court began its analysis with the famous "by the law of the land" language from Magna Carta, emphasized that due process derives from this guarantee, and rejected the view that due process is whatever process Congress sets out in an otherwise lawfully enacted statute.[86] Due process must instead be determined by examining

> those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which

78. 59 U.S. 272 (1855).

79. *See, e.g.*, St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Crowell v. Benson, 285 U.S. 22 (1932).

80. *Murray's Lessee*, 59 U.S. 272.

81. *Id.* at 275.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 275–76.

86. *Id.* at 276 (insisting that "it was not left to the legislative power to enact any process which might be devised").

> are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[87]

This is a historical test for determining the meaning of procedural due process.

The Court went on to hold that the distress warrant easily passed this test because English statutes had long authorized, and her courts long upheld, the use of summary process to collect debts on behalf of the Crown against "public defaulters" (as opposed to "ordinary debtors").[88] Moreover, those practices were well

> understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States . . . . Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it.[89]

Put simply, government employees charged with collecting or handling public funds were regularly subject to summary proceedings to recoup any funds they had misappropriated or otherwise failed promptly to report.

The Court emphasized, however, that this summary process used to make the government whole as against *delinquent employees* was an exception to the ordinary presumption in favor of jury trial. Due process, the Court wrote, "generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings."[90] As importantly, Congress had provided detailed postdeprivation procedures to the customs collector in the statute at issue. A collector could oppose the warrant by filing a bill and posting bond on the amount for which he was alleged to be in arrears, and the statute expressly recognized the right to bring an action in federal court to challenge the findings of the audit.[91] Even if Congress had not provided a federal right of action, an aggrieved collector could sue the auditor or the marshal for damages at common law for unlawfully issuing or executing upon the warrant.

With respect to the Article III claim, the Court flatly conceded that what the auditor for the Treasury does pursuant to the distress warrant statute is "in an enlarged sense, a judicial act."[92] But, "[s]o are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law."[93] As the Court concluded, "[I]t is not sufficient to bring such matters under the

87. *Id.* at 277.
88. *Id.* at 278.
89. *Id.* at 278–79.
90. *Id.* at 280.
91. *Id.* at 278–79.
92. *Id.* at 280.
93. *Id.*

judicial power, that they involve the exercise of judgment upon law and fact."[94] *Murray's Lessee* thus recognizes that due process is not always judicial process, but it endorsed a historical test that measured deviations from judicial process according to settled usages, not a balancing test tuned to the imperatives of innovation in the administrative state. As importantly, the extrajudicial procedures the Court upheld in *Murray's Lessee* not only provided for the collector's participation in postseizure administrative review but also for judicial review of the agency action and any ultra vires action by the relevant officers.

The first appearance of the phrase "[d]ue process is not necessarily judicial process" is fully consistent with the holding and analytic framework of *Murray's Lessee*.[95] In *Reetz v. Michigan*,[96] the Court reviewed the criminal prosecution of a doctor for practicing without registering in and obtaining a license from the state of Michigan.[97] Augustus Reetz had mailed a copy of his medical degree to the state licensing board, but after he received written notice that his application had been denied, he failed to appear at any of the regularly scheduled board meetings to prove he was entitled to be certified to practice.[98] In the ensuing criminal trial for practicing without a license, Reetz argued (as had the customs officer in *Murray*) that the board certification process was an unconstitutional delegation of judicial power to an administrative agency and that the licensing rules violated due process because there was no provision for judicial review of board decisions.[99] The Supreme Court upheld the process, stressing not only that the board would have granted a hearing if Reetz had appeared and requested one but also that Michigan state law recognizes mandamus jurisdiction for judicial review of board decisions and regularly contemplates application of law to fact by executive officers:

> [W]e know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. *Due process is not necessarily judicial process*.[100]

Following *Reetz*, the idea that due process and judicial process are not coextensive becomes a common refrain in cases involving the constitutionality of the regulatory and welfare state during and after the

94. *Id.*
95. *See* Reetz v. Michigan, 188 U.S. 505, 507 (1903).
96. 188 U.S. 505 (1903).
97. *Id.* at 509.
98. *Id.*
99. *Id.* at 507.
100. *Id.* (emphasis added) (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855)).

New Deal.[101] In *all* of these cases, the point of emphasizing that due process is not necessarily judicial process is to establish that, although trial remains the benchmark of due process analysis, the state may, in some instances, act first and litigate later. It may do so even if the action involves an element of adjudication (the application of law to fact). The agency adjudication may occur ex parte in exceptional circumstances. And, as the Court held in the famous New Deal case *Crowell*, the agency's fact-finding (at least with respect to nonconstitutional facts) may be treated as final.[102]

The reason the executive branch enjoys these privileges under the Due Process Clause and Article III is not merely that the state's interests are significant, nor that the state is unlikely to err, but rather that its actions have the "sanction of settled usage" *and* any ex ante procedural deficits are offset by procedures for ex post review. Taken in its full doctrinal context, then, the formal meaning of the phrase "due process does not necessarily require judicial process" is something like this:

> *Due process does not require judicial process in advance of a deprivation of property or liberty if the method of deprivation has earned the sanction of settled usage and is followed by adequate postdeprivation procedures.*

The phrase was *never* used to justify a complete disaggregation of due process from judicial process. Yet its use in the context of the drone program for targeted killing does just that. The drone program does not have the sanction of settled usage (until now, perhaps), and, crucially, it destroys the possibility of the target's participation in any ex post review. Indeed, given the Supreme Court's current *Bivens* jurisprudence, it likely destroys the possibility of judicial review altogether.[103]

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101. The cases leading up to Justice Louis Brandeis's famous use of the phrase in *Crowell* are *Dohany v. Rogers*, 281 U.S. 362, 369 (1930) (citing *Reetz*, 188 U.S. 505), *Public Clearing House v. Coyne*, 194 U.S. 497 (1904), *Ex parte Wall*, 107 U.S. 265, 289 (1882), and *Davidson v. New Orleans*, 96 U.S. 97 (1877). For a post-*Crowell* analysis, see *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73–78 (1936).

In subsequent cases, Brandeis's dictum is typically invoked to demonstrate the importance of judicial review of administrative processes. *Compare* Ortwein v. Schwab, 410 U.S. 656 (1973), *with* Zadvydas v. Davis, 533 U.S. 678 (2001), Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985), Walpole v. Hill, 472 U.S. 445 (1985), *and* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

Circuit level cases relying on Brandeis's formulation also have focused on the question of when judicial review of administrative adjudication is constitutionally required. *See* Cabrera-Alvarez v. Gonzales, 423 F.3d 1006, 1014 (9th Cir. 2005) (Pregerson, J., dissenting); Bartlett v. Bowen, 816 F.2d 695, 700 (D.C. Cir. 1987); Spagnola v. Mathis, 809 F.2d 16, 27 (D.C. Cir. 1986); Cal. Med. Ass'n v. FEC, 641 F.2d 619, 639 (9th Cir. 1980) (Wallace, J., concurring in part and dissenting in part); Ralpho v. Bell, 569 F.2d 607, 620 (D.C. Cir. 1977).

102. Crowell v. Benson, 285 U.S. 22, 46 (1932).

103. *See* Vance v. Rumsfeld, 701 F.3d 193, 200 (7th Cir. 2012) (denying the *Bivens* claim of American citizens allegedly subjected to abusive interrogation during military detention on the ground that "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate" (quoting United States v. Stanley, 483 U.S. 669, 683 (1987))); Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (citing and relying upon Chappell v. Wallace, 462 U.S. 296, 298 (1983), to conclude that "'special factors' counsel against" recognizing *Bivens* liability against military and foreign policy officials allegedly responsible for illegal detention and mistreatment at the U.S. Naval Base at Guantanamo Bay, Cuba); Al-Aulaqi v.

The disaggregation of due process from judicial process on these terms—terms that demand total (and, in the absence of leaks, uninformed) public deference to agency technocrats in a program that ends life—thus represents the apotheosis of faith in bureaucratic rationality and the New Deal vision of technocratic expertise as superior to judicial review.[104] It is one thing to say on Schmidtian grounds, or on the grounds of some other theory of the state of exception, that the law is silent in time of war and therefore that due process must give way to national security imperatives and the President's war powers. Then at least the public knows the true cost of the state of exception (death at the hands of the state by extralegal means) and can distinguish any deference required under these conditions from the deference it might be willing to grant under normal circumstances. But for the U.S. Attorney General to claim that due process is a meaningful constraint on a counterterrorism policy that nevertheless tolerates procedural innovations unknown to settled usage—innovations that preempt judicial review altogether—is quite pernicious. Due process disaggregated from judicial process on these terms is but a paper-thin veneer of legality slipped over the iron fist of the state. Only lawyers supremely confident in the technocratic expertise of the national security officials upon whom they must rely, confident in the wisdom and restraint of the policy-level officers at whose pleasure they serve, and, it must be said, deeply influenced by the antiadversarial culture of the modern bench and bar, could defend the program on these terms.

III. "WHERE IS THE SERIOUS STUFF?": THE DISAGGREGATION OF DUE PROCESS FROM JUDICIAL PROCESS IN THE NATION'S MUNICIPAL COURTS

The justification for the targeted killing program is obviously quite distinct from the operation of due process in the nation's municipal courts. Most prominently, judges are absent in the targeted killing program, whereas, in the municipal courts, judges are intimately involved with prosecutors, city attorneys, public defenders, and private lawyers in the design and implementation of procedures for the administration of justice. What draws the two quite disparate legal settings together is that, in many municipal courts, due process has been divorced from judicial process—judges are present, but they preside over and promote a systematic evasion of formal in-court adjudication (especially trial) on terms that are suggestive of contempt for the procedural rights of the litigants who appear before them.

Amy Bach's book, *Ordinary Injustice: How America Holds Court*, recounts widespread procedural defects in the country's municipal

Panetta, 35 F. Supp. 3d 56, 59 (D.D.C. 2014) (dismissing the *Bivens* suit of the relatives of Anwar Al-Awlaki).

104. Agencies make decisions affecting life all the time, but these occur in regulatory settings where the primary action is taken by the regulated entity, not the agency. *See, e.g.*, LUBAN, *supra* note 56, at 208, 211 (discussing the calculation of the safety/price tradeoff in automobile design and regulation).

courts.[105] In Georgia, for example, half-hearted efforts on the part of state and county officials to meet the terms of *Gideon v. Wainwright*[106] resulted, for decades, in a patchwork system in which some counties used public defender offices with barely adequate resources while others outsourced criminal defense work to "a part-time lawyer who is hired based solely on how cheaply he is prepared to do the work."[107] Over a four-year period in one such county, the lawyer who held the contract for indigent defense handled 1,493 cases.[108] Only fourteen of those were taken to trial, the rest were resolved by plea bargain.[109] Of 142 cases on the court's calendar during a week when Bach attended, the contract lawyer represented eighty-nine of the defendants and none were taken to trial.[110]

If that seems like a model of efficient administration of justice on behalf of clients who have been properly charged with crimes, Bach's research into individual cases handled by the lawyer reveals cause for concern:

> [The contract lawyer] had little time to talk in detail to his clients, and so he often had limited information to use in their favor. It was thus difficult for him to bargain with prosecutors to secure a more lenient sentence, nor could he produce the ultimate trump card: a willingness to go to trial when his clients claimed innocence. Many of them risked losing their homes, children, and livelihoods if they pleaded guilty, and yet his actions remained the same: His caseload often made it hard for him to clarify the facts—for example, whether his client had been the ringleader or had acted without intent or was guilty of a lesser crime—which is the kind of information that can mitigate the severity of a sentence or get charges dropped in negotiation.
>
> . . . Under the weight of too many clients to represent, he seemed to have lost the ability both to decide which cases required attention and to care one way or the other.[111]

Many clients complained that the contract lawyer failed to return phone calls; frequently was not in court when his defendants pled; hastily discussed plea offers in the halls of the courthouse just before they were entered; instructed clients to consult with his paralegal when he was busy, without telling clients that she was not a lawyer; allowed his paralegal to *negotiate* pleas with prosecutors; and "rarely" filed pretrial motions designed to reveal information about the prosecutor's evidence.[112] In one heartbreaking exchange overheard by Bach, a client appeared to have no understanding of the implications of entering her plea bargain:

> "I know I'm pleading guilty," she said. "But I don't know why."
> "Well, we talked about that," [the contract lawyer] said.

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105. AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009).
106. 372 U.S. 335 (1963).
107. BACH, *supra* note 105, at 31 (noting that the practice of contract bidding persisted in Georgia well after the ABA condemned it in 1985).
108. *Id.* at 14.
109. *Id.*
110. *Id.*
111. *Id.* at 15.
112. *Id.* at 13–23, 37–38.

> She shook her head. No, they hadn't.
>
> "Don't you remember when we talked?" said [the lawyer], as he flipped through a file.
>
> "We *never* talked," she said, calm and resigned, mocking her lawyer as if she knew she would get nothing from him and just wanted him to admit as much.[113]

In another incident, the lawyer could not identify his own client as proceedings began and had to be corrected, twice, by the judge.[114]

An investigation by the state bar's Indigent Defense Committee and several lawsuits filed by the Southern Center for Human Rights in Atlanta challenging the constitutionality of practices in a number of Georgia counties prompted the state supreme court to investigate.[115] The findings of its Commission on Indigent Defense are jaw dropping.[116] One contract defense lawyer's testimony, Bach observes, was

> astounding in its disregard for his clients. . . . "If [my client is] guilty and he admits it [to me] why jerk everybody around with a trial?" He admitted that he didn't keep records about his cases, saying that "too many records just give things for people to come back at you, anyway."
>
> . . . [H]e seemed not to understand counsel's role, which is, quite obviously, to test the prosecution's case and mount a defense. Instead, he mused that the true role of the defense lawyer was to assume his client's guilt. . . . "It's an error to go in there and assume your client is innocent," adding that, "the vast majority of the time if you're going to go to trial, the client has been lying to you the whole time."
>
> . . . [He] sounded more like a lawyer from a totalitarian country.[117]

Bach notes that the public defender system the state adopted in the wake of the commission's report still left defense lawyers in many counties with staggering caseloads.[118] She goes on to show that Georgia is not unique and that the problem is not simply one of inadequate resources for public defenders. Rather, prosecutors and judges in courts all around the country contribute to a system in which guilt is assumed, investigation is short-circuited, and plea bargains are coerced by setting steep bail, by arbitrarily denying indigent defendants access to counsel, and by holding them in jail until they accept a plea in order to be released.[119]

Bach found, for instance, that a judge who enjoyed widespread community support in Troy, New York, was removed from the bench by a state oversight commission for setting constitutionally excessive bail, failing to ascertain whether defendants were entitled to a public defender, and, in some instances, entering pleas on the record without the defendant either being present in court or having agreed to the plea.[120] When

113. *Id.* at 17.
114. *Id.* at 60.
115. *Id.* at 34.
116. *Id.* at 59.
117. *Id.* at 58–59.
118. *Id.* at 66.
119. *Id.* at 91, 120.
120. *Id.* at 78, 100.

confronted with evidence regarding these procedural errors by the commission, the judge reportedly asked his lawyer, "Where is the serious stuff?"[121] In its decision removing him from the bench, the commission specifically emphasized the judge's indifference toward the procedural rights of the accused—the judge failed to "give any persuasive indication that he recognized the impropriety of his conduct."[122] Local lawyers nevertheless supported the judge, Bach noted, "because the judge did most of their work for them, and the community didn't mind because when injustice in the lower courts is ostensibly aimed at keeping the streets safe and the system moving, the only people who suffer are the poor and neglected."[123]

Bach's book was published in 2009 and in many of the jurisdictions she studied, attempts have been made to correct the worst abuses. However, since the DOJ released its report on the municipal court and police department in Ferguson,[124] it has become increasingly clear that the antiadversarial practices Bach identified persist in our nation's municipal courts and affect the administration of both criminal and civil justice. Particularly in regions with falling property and sales taxes, local governments have turned to their municipal courts as a source of revenue.[125] Unpaid civil and criminal fines and fees have been reduced to enforceable civil judgments and, in some jurisdictions arrest warrants are issued to compel payment.[126]

For example, in a recently settled case brought against Jennings, a city adjacent to Ferguson, the municipal court effectively functioned as a debtors' prison, generating revenue well in excess of the costs of the administration of the courts.[127] People were arrested and jailed for failure to make payments on financial penalties imposed for minor violations of the city's ordinances.[128] The arrests were made without any inquiry into their ability to pay, onerous payment plans were imposed (leading to years of mounting debt for late payments, interest, and fees), and arrestees were held

121. *Id.* at 117.

122. *Id.* at 122.

123. *Id.* at 78.

124. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/8RJE-NPVF].

125. *See, e.g.*, 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?_r=0 [https://perma.cc/Z4CN-39HK].

126. The problem extends beyond the collection of debts owed to a municipality for civil and criminal fines and fees. In a number of states, those who owe purely *private* debts can be jailed because state law allows private collection agencies to seek, and judges to grant, imprisonment for civil contempt. *See* Lea Shepard, *Creditors' Contempt*, 2011 BYU L. REV. 1509, 1526–27; *see also* Turner v. Rogers, 564 U.S. 431, 435 (2011) (refusing to hold that due process requires access to counsel when the state uses jail time to force debtors to pay).

127. *See* Complaint, Jenkins v. City of Jennings, 4:15-cv-00252-CEJ (E.D. Mo. Feb. 8, 2015).

128. In 2014, the city allegedly issued "almost 1.4 arrest warrants *for every adult*, mostly in cases involving unpaid debt for tickets." *Id.* at 3.

in appalling conditions in the city's jail unless they paid up.[129] A 2013 report found that cities in and around St. Louis depended on fines "for more than 40 percent of their general fund" and "that the cities most dependent on such revenue were majority African-American with large impoverished populations."[130] In Jennings, the plaintiffs spent nearly 8,300 combined days in the city's jail over the five-year period between 2010 and 2015.[131] The city, which has a population of about 15,000, "had issued about twice as many warrants as there were households."[132]

Many features of the city's collection system were unconstitutional, but two warrant special attention. First, court sessions were deliberately designed to minimize public scrutiny and maximize the intimidation of alleged debtors. The court was in session only once a week for jailed debtors to appear.[133] Thus, failure to pay automatically resulted in as much as a week in jail before being brought before a judge. While in jail, corrections officers routinely verbally abused debtors and offered release upon payment of arbitrarily specified sums.[134] Weekly court sessions for detainees were closed to the public (the courtroom and courthouse doors were locked during the "confined docket"); the prosecutor represented the city, but no counsel was provided to detainees; people were told that they would remain in jail unless they made a payment but were not offered alternatives to incarceration and no inquiry was made into their ability to pay; and people were not advised of their legal rights under state and federal law.[135] Toward the end of the confined docket, the courthouse allegedly was opened so that debtors who had not been arrested and were arriving for the "payment docket" could hear the prosecutor and judge "threatening those who cannot afford their debts with longer jail terms and sending those unable to pay back to the City jail."[136]

A second significant feature is that the system of fines, warrant, arrest, indefinite detention was not employed if a debtor retained private counsel. In those cases, the court apparently functioned by the notice and hearing standards of procedural due process. Thus, the court and participating attorneys were not oblivious to the requirements of due process. They

129. *Id.* at 1–2. The jail cells were allegedly overcrowded; arrestees were denied toothbrushes, toothpaste, and soap; the walls were smeared with mucus, blood, and feces; untreated illnesses spread to other inmates, and they were denied access to prescription medication; the arrestees went days and sometimes weeks without access to a shower; women were denied hygiene products for menstruation; and they were "provided food so insufficient and lacking in nutrition that inmates [we]re forced to compete to perform demeaning janitorial labor for extra food rations." *Id.* at 2.

130. *See* Robertson, *supra* note 125.

131. *Id.*

132. *Id.*

133. Complaint, *supra* note 127, at 5.

134. *Id.* at 3.

135. *Id.* at 40–41.

136. *Id.* at 41 n.23. Although the "payment docket" was open to the public, the proceedings were conducted "as private bench conferences, with the defendant standing at the bench with the judge. The courtroom audience [wa]s unable to hear the content of the proceedings, other than the words of the judge, who sp[oke] into a microphone. No transcripts or audio recordings of proceedings [we]re available." *Id.*

knew perfectly well what fair procedures should look like. They just did not believe certain debtors were entitled to those procedures, or, in a craven attempt to expand the city's revenue, they jettisoned those procedures. Or both. The consequence, in any event, was to disaggregate judicial process from any plausible theory of due process of law.

Squalid jail conditions are not new. The absence of attorneys for poor and low-income people caught up in civil, criminal, and administrative proceedings is not new. Judges who skirt procedural formalities to mete out what they take to be substantive justice are not new. And the kinds of cognitive and bureaucratic pressures that cause people of goodwill to commit unspeakable injustices are known to us as a matter of theory and practice.[137] But it is remarkable how long the city ran its courts for the extraction of revenue from its citizens and how long the court and attorneys in the jurisdiction worked within and normalized a parasitic system that was so obviously dehumanizing for arrestees and, concomitantly, for the responsible officials. Indeed, but for the DOJ's Ferguson report, which itself was an outgrowth of street protests in Ferguson, the flagrantly unconstitutional practices in Jennings might have continued much longer.

CONCLUSION

It may be tempting to dismiss *Jennings* and the examples Bach describes as aberrations largely restricted to the criminal justice system or to the points where debt collection and criminal law intersect. But even in civil and administrative courts, where there is no overtly contumacious disposition toward the requirements of due process, massive delays and arbitrary outcomes raise profound questions about whether justice is being administered in a fair and evenhanded manner.[138] Here too, crushing caseloads, long delays, rushed or circumvented hearings, superficial treatment of claims, and rubber-stamping are dehumanizing for litigants and officers of the court.

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137. *See* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 237 (2007).

138. On delays and high variations in outcomes of immigration cases, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES (2016). On indefinite detention without bond hearings in immigration cases, see Adam Liptak, *Supreme Court Weighs Jailed Immigrants' Right to Periodic Hearings*, N.Y. TIMES (Nov. 30, 2016), http://www.nytimes.com/2016/11/30/us/politics/supreme-court-jailed-immigrants.html [https://perma.cc/B627-PYQF]. On delays in the processing of veterans benefits claims, see Aaron Glantz, *VA Struggling with Promise to End Long Benefits Waits This Year*, REVEAL (July 23, 2015), https://www.revealnews.org/article/va-struggling-with-promise-to-end-long-benefits-waits-this-year/ [https://perma.cc/C6S8-BCHU]. On the respects in which the deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 invites lower federal courts to "rubber-stamp" denials in habeas cases involving unconstitutional state action, see Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 VAND. L. REV. 103 (1998). On the Supreme Court's deference to "postcard" denials of habeas petitions by state courts, see Harrington v. Richter, 562 U.S. 86 (2011).

Judge Friendly may have been right to ask in 1975 if "we would not do better to abandon the adversary system in certain areas of mass justice,"[139] but four decades later we can no longer blink at the hard facts. The abandonment of the adversary system has not been restricted to the areas he imagined, and, in many of the areas of mass justice in which he rightly called for experimentation, adequate alternatives have not been developed. Judge Friendly certainly did not advocate *abandoning due process* along with the adversary system, but the fact of the matter is that it has all too often been a casualty of the procedural innovation he advocated and the Supreme Court has since endorsed.

We have thus arrived at a strange moment in the history of due process. As the commitment to adversarialism has faded and the formalities of due process are brushed aside in ordinary cases, lavish media coverage of sensational cases that do go to trial often showcases "hyper-adversarial" conduct in court.[140] For the lay public, as Bach observes, this helps to "reinforce" the myth that the profession's commitment to due process remains "rigorous."[141] If Bach is right, due process and judicial process are not only disaggregated in ordinary cases decided in rooms where no cameras can be found, that disaggregation is further obscured by coverage of procedural decadence in the rare cases that go to trial. Paradoxically, then, the culture of antiadversarialism feeds off of the embers of our adversary traditions.

For the legal profession, unlike the lay public, the disaggregation of due process and judicial process is no obscurity. The culture of antiadversarialism and the strange procedures it sustains are a product of our collective hubris.[142] We are the children of a centuries-long tradition of due process and professionalism derived from the adversary system and jury trial. It is a tradition we have mythologized even as we have subjected it to withering criticism and set it aside in our technocratic confidence that more rational and efficient means can meet the demands of mass justice. And we have done so in full knowledge of the constraints (bureaucratic and otherwise) that regularly compromise the integrity of supposedly more rational and efficient means. In our own clumsy and well-intentioned way, we have become Victor Frankenstein.

There is no unmaking the monster. The demands of mass justice are too great to permit a broad revival of trial procedures. But that does not mean the traditional link between due process and judicial process should be severed and that we should abandon jury trial as the standard against which procedural alternatives are judged. Indeed, as technology begins to reshape the capacities of courts and agencies to design alternatives to trial, and as it enables law enforcement practices such as predictive policing, the connection may be more important than ever. Nowhere is the promise and

139. Friendly, *supra* note 61, at 1289.
140. BACH, *supra* note 105, at 260.
141. *Id.*
142. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

hubris of technocratic expertise greater than among those seeking to reduce the administration of justice to lines of code.

The relationship between due process and judicial process is more than doctrinal—a connection that courts sustain or weaken when confronted with claims that a specific process violates due process and that additional procedural safeguards are constitutionally required. It is a relationship that depends upon the profession honoring the underlying ethical, social, and democratic values historically protected by judicial process. This is perhaps most important in areas of the administration of justice in which trial is infeasible. If we are to have due process without judicial process, those responsible for innovations in the administration of justice must hold these values dear.