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GOD, METAPROCEDURE, AND METAREALISM AT YALE

Linda S. Mullenix*


Professor Owen Fiss of the Yale Law School, in his memorial tribute to his colleague Robert Cover,1 describes the genesis of a casebook that would appear almost fifteen years later. In the summer of 1974, Professor Fiss was in Washington, D.C. to work on the Nixon impeachment hearings and Professor Cover was teaching at Georgetown. Professor Fiss decided to meet the Covers for a summer stroll, some ice cream, and some pleasant conversation.

Professor Fiss' recollection of that evening's conversation uncannily echoes the experience of many civil procedure teachers:

Diane was with us and graciously feigned some interest in the conversation. Leah was not yet born, but Avi was there in his stroller. He made no pretense. He fell asleep the moment Bob and I started talking about what must have seemed the most boring of all subjects: procedure.2

Professors Cover and Fiss' intense discussion concerning the nature and function of procedure in the American judicial system gave birth to a vision of reforming procedural education in the law school curriculum. The particular passion of these professors, the scope of their vision, and their pedagogical commitment are evident in Professor Fiss' recollection of that evening:

The walk was long and directionless. We must have covered every inch of the Washington Mall, ten times over. . . . Our immediate project was to revise the traditional first-year procedure course, and Bob, the true iconoclast in this endeavor, played with the idea of building a new course out of the proceeding then closing in on Richard Nixon. It didn't seem to matter to Bob that the presidential impeachment process had not been used for over a hundred years and probably would not be used for an-

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2. Fiss, supra note 1, at 1717.
other. Nor did it seem to matter that an impeachment proceeding is the most rarefied form of legal practice imaginable and professionally involves only a dozen or two lawyers in the entire nation. 3

Steepled in the heady excitement of the presidential impeachment proceedings, Professors Cover and Fiss came very close to imposing this momentary historical event (as well as their enthusiasm) on generations of law students. This horse blinders approach to broader realities was explained by their philosophical commitment to a certain educational methodology:

We paused, however, because we were both suckers for the “great case.” Our preferred teaching method was to dwell on a single case for a long, long time (some say for an entire semester), using a single fact situation and a single legal encounter to explore the deepest and hardest issues of the law. The Nixon impeachment had not yet produced that kind of case, but the welfare rights movement had. We soon hit on Goldberg v. Kelly, and when we did, meta-procedure (as the students named it, to distinguish it from real procedure) was born. That was 1974. 4

In 1988, Procedure, the result of the collaborative efforts of Professors Cover, Fiss, 5 and Judith Resnik, 6 was finally published. Without a doubt this truly monumental casebook 7 is legal education's publishing event of the year. Not only is the book of great moment to civil procedure teachers, but it is a casebook that makes a dramatic statement about late-twentieth-century legal education. The casebook's very title bespeaks its bold challenge to entrenched educational orthodoxies: it is not a text on civil procedure, nor on criminal procedure, nor on administrative procedure — but on Procedure. It is a casebook distantly rooted in Dean Roscoe Pound’s sociological jurisprudence 8 and the Realist movement of the 1920s and 1930s. 9 More

3. Id.
4. Id. Goldberg v. Kelly, 397 U.S. 254 (1970), remained the centerpiece of the collaborators' ensuing efforts over the years. Thus, in 1979, Professors Cover and Fiss explained: “We began with Goldberg v. Kelly, and in the years following we have revised the selection and arrangement of cases many times (though we have never considered abandoning Goldberg v. Kelly as the introductory case, even after the Supreme Court decision in Mathews v. Eldridge).” R. COVER & G. FISS, THE STRUCTURE OF PROCEDURE vi (1979); see also (pp. 37-112).
5. Alexander M. Bickel Professor of Public Law, Yale Law School.
6. Professor of Law, University of Southern California Law Center.
7. The casebook runs 1824 pages, exclusive of tables of cases, articles, books, and other materials, and acknowledgements. It weighs in at a hefty 6 lbs. 11 oz. with a 3 inch binding, and can almost lay claim to the prize as the largest casebook on the market today. The winner of this competition (a close one) is P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988) (1878 pages, exclusive of index).
8. See Pound, The Scope and Purpose of Sociological Jurisprudence, 25 HARV. L. REV. 489 (1912). Professor Pound became dean of Harvard Law School in 1916. In the early 1900s, he urged legal educators to shift from teaching legal doctrine to exploring the social effects of legal principles and rules. He also was an early advocate of an interdisciplinary approach to legal study, suggesting that “the modern teacher of law should be a student of sociology, economics, and politics.” L. KALMAN, LEGAL REALISM AT YALE 1927-1960, 45 (1986) (quoting Pound).
9. See generally L. KALMAN, supra note 8; W. RUMBLE, AMERICAN LEGAL REALISM
than anything else, this casebook is a product of Yale. After almost fifty years of false starts, Yale finally has produced a realist casebook for proceduralists. Whether it will suffer the fate of other realist casebook ventures remains to be seen. Nonetheless, metaprocedure has now formally arrived and for procedure teachers this presents the quite simple question: Metaprocedure — what is to be done?

In a legal specialization normally lacking in intellectual excitement, 1988 proved to be a stimulating year for proceduralists. This year marked the fiftieth anniversary of both the Federal Rules of Civil Procedure and the Erie decision, events celebrated in no fewer than five academic conferences. Not coincidentally, a significant portion of one conference was devoted to an exploration of metaprocedure and its implications for the law school curriculum.

The coalescence of these events in one year has generated excitement, enthusiasm, skepticism, dismay, and despair. In the realm of procedure, eternal verities have proven less than eternal; the traditional canon is under attack; and intellectual pluralism reigns supreme. Senior professors have seen it all before; mid-career acade-

(1968). For a discussion of the impact of realism on law school curricula and casebooks, see infra text accompanying notes 56-92.

10. Arguably, Professor Charles E. Clark made the first attempt at a realist procedure casebook. See C. Clark, CASES ON PLEADING AND PROCEDURE (1930).

11. See L. Kalman, supra note 8, at 78-97. For a discussion of the realist casebook efforts, see infra text accompanying notes 71-98.


15. AALS Conference on Civil Procedure. Professor Resnik was a speaker at the conference and her remarks, as well as those of Professor William Eskridge of Georgetown University Law Center, were devoted to a discussion of metaprocedure. J. Resnik, Remarks at the AALS Conference on Civil Procedure (June 6, 1988); W. Eskridge, Remarks at the AALS Conference on Civil Procedure (June 5, 1988). Procedure, the casebook, arrived during the second day of the conference along with the Foundation Press representative. A number of conference participants who had endured harrowing commuter flights from Dulles Airport to Charlottesville speculated about the pilot's requests for weight redistribution when the volumes of Procedure appeared for the shuttle flight.

16. See Ecclesiastes 1:4-11. Surely there are professors who have lived long enough to witness the intellectual advent of realism, post-realism, critical legal studies, and now metaprocedure. See, e.g., White, From Realism to Critical Legal Studies: A Truncated Intellectual History, 40 SW. L.J. 819 (1986); White, The Inevitability of Critical Legal Studies, 36 STAN. L. REV. 649 (1984). See generally H. Packer & T. Ehrlich, NEW DIRECTIONS IN LEGAL EDUCATION (1972) (especially Appendix B); R. Stevens, LAW SCHOOL: LEGAL EDUCATION
micians are for the most part (to borrow from the 1960s which nurtured this generation of the professoriate) "doing their own thing"; and the youngest generation to join procedural ranks is — well — justifiably confused.

The appearance of Procedure, then, is central to the introspective self-searching in which proceduralists are engaged. The fiftieth anniversary of the Federal Rules prompted a reassessment of their efficacy in achieving the stated goals of a "just, speedy, and inexpensive determination of every action." This milestone has also fueled renewed interest in Professor Cover’s critique questioning the transubstantive nature of the rules. Finally, the publication of Procedure has, in effect, set the procedural debate for years to come by challenging the narrow, received tradition of exclusive focus on civil adjudication.

This is an essay about the Cover, Fiss, and Resnik casebook Procedure. But, more broadly, it is an essay about the larger academic setting that will either embrace or reject the intellectual approach embodied in the text. It is an essay about the sea changes currently felt across the discipline, where a significant number of teachers now call themselves "proceduralists." This is a series of reflections on the import of metaprocedure for the traditional canon and for legal education generally.

The first section of this essay places the theory of metaprocedure in its historical context. It shows that the development of a broadly conceived understanding of procedure derives from the realist movement at Yale. This section also describes other attempts at realist curriculum and casebook revision and their reception at law schools. With

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17. At least a half-dozen approaches to procedural scholarship and teaching emerged at the AALS Conference. Among these were a pre-clinical or clinical approach; social science and empirical studies; critical legal and feminist jurisprudential perspectives; metaprocedure; and the traditionalist teaching of civil procedure. For a discussion of these approaches and perspectives, see infra notes 29 and 142.

18. This was one of the themes gleaned from the comments of the AALS Conference participants. While there was general excitement and enthusiasm generated by the various presentations, junior colleagues expressed dismay and confusion about the possibility of developing any unified notion of course content or teaching methodology. Many expressed the view that it was difficult to understand how one was supposed to integrate all the approaches, perspectives, and methodologies into one course.

19. It is interesting to contrast the program and agenda of the 1980 Conference on Civil Procedure with that of the 1988 Conference. As one professor who was present at both explained, there was more sense of a "traditional canon" of civil procedure at the 1980 Conference. The only great debate at that Conference was over the most logical ordering of the elements of the course. In contrast, at the 1988 Conference there was little discussion or agreement concerning a traditional canon. Indeed, traditionalists seemed unaided by their self-characterization as dinosaurs. See H. Fink, Remarks at the AALS Conference on Civil Procedure (June 8, 1988).


this background in mind, the second part of the essay describes and critiques the Cover, Fiss, and Resnik casebook. The general conclusion is that the authors have presented an exciting, challenging, and highly intellectual conception of the discipline. The casebook fills a long-standing gap of theoretically undernourished procedure texts. The authors have redefined a field of study; reshaped thinking about procedural issues; and recast the dialogue among academic colleagues. The ultimate question is whether this revolution will take hold or whether metaprocedure will pass from the scene as another failed realist attempt at reforming the traditional curriculum.

Finally, the third section of the essay attempts to assess the impact of metaprocedure on the current teaching of civil procedure. Thus, apart from its historical roots, metaprocedure is viewed in contemporary context. Here, different approaches to procedural scholarship and education are described, raising challenging issues for the integration of metaprocedure into existing curriculums. Again, the primary question is whether metaprocedure can intelligibly be integrated into current procedure courses, or whether it requires wholesale curriculum reform in order to be truly appreciated as an intellectual framework for understanding the law.

I. REALISM AND PROCEDURE AT YALE

A. The Structure of Procedure: 1979

Professor Fiss' account of his stroll with Professor Cover provides a personal insight into the moment of conception of a revolutionary casebook. The gestation of that book, however, was evident with the 1979 publication of Cover and Fiss' *The Structure of Procedure,* which provided signposts to the past and the future of metaprocedure. It began with the simple declaration: "We invite you to rethink procedure." *Procedure,* the casebook, is the fulfillment of the vision articulated in *The Structure of Procedure.*

By 1974 Professors Cover and Fiss had begun to move away from a model of procedural teaching that stressed professional training toward one that explored theoretical and abstract issues. This deliberate pedagogical choice eschewed the path taken by many procedure teachers who wanted to transform first-year civil procedure into a modified clinical course. The authors recognized the impact of the clinical
legal education movement of the 1960s,\textsuperscript{26} yet viewed its development "not as a model to be followed, but rather as a source of new opportunities."\textsuperscript{27} Thus, at Yale, skills training relating to procedure was relegated to a "side course" supervised by second- and third-year law students.\textsuperscript{28}

Nonetheless, the path not taken by professors Cover and Fiss would be followed at many law schools where clinical training provided a model for first-year civil procedure. The development and increase in "pre-clinical" procedure courses attests to the popularity and enduring quality of simulated practical experience in the law school curriculum. It represents one of the major innovations in procedure teaching in the last twenty-five years and has generated a vibrant, vocal, and dedicated academic following.\textsuperscript{29}

Professors Cover and Fiss instead took the other road. Freed from the burdens of technical rule construction or skill training, the professors were able "to make the course more analytic, more theoretical" and "to devote the major portion of our class discussion and our pedagogic energy to an exploration of the more theoretical issues."\textsuperscript{30}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} Id. ("Starting in the late 1960s clinical education became a larger part of the law school curriculum. Some teachers believed that intense professional activity, whether it be real or simulated, was the most effective way of training lawyers. . . . Clinical education grew, and it had important implications for procedure courses . . ."). See generally H. Packer & T. Ehrlich, supra note 16, at 37-46; R. Stevens, supra note 16, at 214-16, 240-41.
\item \textsuperscript{27} R. Cover & O. Fiss, supra note 4, at iv.
\item \textsuperscript{28} Id. The side course made use of various written assignments including pleading exercises, memoranda, briefs and problems on discovery. The authors note that "[s]uch skills are important, but they are, in our judgment, most effectively taught in a clinical program or supervised work experience: through summer employment or the early years of actual practice, through work in a legal aid office, through clinical courses or seminars in trial practice." Id.
\item \textsuperscript{29} Clinicians were a strong contingent at the 1988 Conference on Civil Procedure, where they presented various formats for clinical teaching of procedure. \textit{See, e.g.,} L. Anderson, "Integrating Actual Litigation Into a Basic Civil Procedure Course," Remarks at the AALS Conference on Civil Procedure (June 5, 1988); L. Grosberg & J. Toran, "Use of Buffalo Creek Materials in Civil Procedure," Remarks at the AALS Conference on Civil Procedure (June 8, 1988); P. Schrag, "Year-long Simulation in a Large Section of Civil Procedure," Remarks at the AALS Conference on Civil Procedure (June 8, 1988). Professor Schneider, a former clinician, also spoke about the use of clinical applications in the civil procedure course she teaches at Brooklyn Law School. \textit{See} J. Resnik & E. Schneider, "Redefining the Canon: Suggested Materials, Texts, and Approaches to Procedure," Remarks at the AALS Conference on Civil Procedure (June 6, 1988).
\item \textsuperscript{30} Many of these proponents have urged clinical teaching methodologies for civil procedure courses. \textit{See, e.g.,} Anderson & Kirkwood, Teaching Civil Procedure With the Aid of Local Tort Litigation, 37 J. Legal Educ. 215 (1987); Schneider, Rethinking the Teaching of Civil Procedure, 37 J. Legal Educ. 41 (1987); Panel discussion, Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations For the Future, 36 Cath. U. L. Rev. 337 (1987) (statement of Philip Schrag, panel participant); Schrag, Terry White: a Two-Front Negotiation Exercise, 88 W. Va. L. Rev. 729 (1986); Downs, Toward Simulation in Legal Education — An Experimental Course in Pre-Trial Litigation (Book Review), J. Prof. Legal Educ. Dec. 1986, at 65. Related to the clinical approaches is a method adopted by a core of professors who use the "Buffalo Creek" disaster materials, including G. Stern, The Buffalo Creek Disaster (1976), as both a unifying theme and opportunity for limited simulated practical skills exercises. \textit{See, e.g.,} Grosberg, The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course, 37 J. Legal Educ. 378 (1987).
\end{itemize}
\end{footnotesize}
focus therefore was on an innovative approach to the entire subject of procedure. Thus, the label "civil" was dropped and the professors urged their students to consider procedure as a unified attribute of law that transcends the traditional professional categories — those implied by the terms "civil," "criminal," or "administrative." 31

The impetus for this innovation was in large measure supplied by the Due Process Revolution of the 1960s; 32 various rule reforms of two decades; 33 and institutional changes including national legal services programs, increased use of federal injunctive power, and the growth of adjudicatory adjuncts. 34 This dramatic transformation of the legal landscape impelled rethinking of the academic teaching of civil procedure:

Rapid and widespread change in legal doctrine and institutions, in our conceptions of due process, made intensive training in rulesmanship — long a primary goal of the first-year civil procedure course — somewhat beside the point. The basic propositions, ones that had long lain dormant and unexamined, now demanded attention. Their axiomatic status had been called into question. We also realized that such a re-examination should not be confined by the traditional labels of the law school curriculum, those that made a sharp distinction between civil and criminal procedure. Procedure should no more be a course in the chronology of specific kinds of law suits than torts should be a course in claims adjustment. 35

This transubstantive conception of procedure is the central tenet of metaprocedure. It is an approach that requires piercing analytical labels to assess the nature, function, and impact of procedural rules on justice and fairness. Thus, a discussion of discovery ought not to be narrowly focused on civil discovery rules, but should instead examine "the more general inquiry into information acquisition and exchange in civil, criminal, and administrative proceedings." 36 This global approach focuses on different premises, parties, stakes, and outcomes. Ultimately, this perspective asks whether such differences "truly mat-

31. Id. at v.
32. Id. at iii. The authors explained that at least three landmark cases of the Due Process Revolution — Gideon v. Wainwright, 372 U.S. 335 (1963); In re Gault, 387 U.S. 1 (1966); and Argersinger v. Hamlin, 407 U.S. 25 (1972) — "tested the traditional categories."
33. The class actions rule (FED. R. CIV. P. 23) was amended in 1966; the discovery rules (FED. R. CIV. P. 26-37) were amended in 1970; and the Federal Rules of Evidence became effective in 1975. Id.
34. See R. COVER & O. FISS, supra note 4, at iii. In the 1970s, the Legal Services program of the Office of Economic Opportunity developed into the Legal Services Corporation. See R. STEVENS, supra note 16, at 237. Cover and Fiss also identify the increased use of the injunctive power as a tool for social justice (see FED. R. CIV. P. 65), and innovative utilization of the offices of special masters as adjuncts to complex litigation (see FED. R. CIV. P. 53). R. STEVENS, supra note 16, at 237.
35. R. COVER & O. FISS, supra note 4, at iii.
36. Id. at iv.
inter[], or matter[] in the way we had been taught."37

The metaprocedure of the 1980s, then, is the child of the procedural revolution of the 1960s. But it is also the intellectual descendent of older educational and philosophical movements. Cover and Fiss acknowledge that interdisciplinary legal scholarship also impelled them toward a broader conception of procedure.38 Thus, the development of sociological jurisprudence brought social scientists and humanists into the legal arena, and by the 1960s interdisciplinary work had broadened perspectives on traditional legal disciplines.39 In particular, economics, philosophy, and history were applied to the substantive legal disciplines of torts, property, and contracts.40 Procedure, as a discrete intellectual endeavor, was slower to receive such interdisciplinary treatment.

Interdisciplinary studies also suggested a methodological framework that was somewhat alien to clinical or traditional doctrinal approaches:

Interdisciplinary work inevitably lessens the focus on professional training, and raises more general theoretical questions. The purpose of much of the research is not to improve professional technique, although that is often a useful by-product, but rather is to understand why people behave the way they do and to guide power wielders in designing institutions or formulating rules.41

Cover and Fiss early established a divide between professional practitioners and academic intellectuals:

Interdisciplinary work also tends to obliterate the traditional curricula categories, such as "civil," "criminal," and "administrative" procedure. While those categories may have a great deal of meaning for the practicing lawyer, they have less significance for the academic inquirer approaching his task from an analytic, rather than a professional lawyer's perspective.42

In The Structure of Procedure, then, Yale claimed the intellectual high ground for all subsequent debate on procedural matters; professional skill or technique was merely acknowledged as a "useful by-product." This perspective was intended to raise the level of inquiry and discourse, but it also has contributed, perhaps accidentally, to a stratification among procedure teachers. After all, when Yale rele-

37. Id.
38. Id. at v.
39. Id.; see also sources cited supra note 8.
40. See R. Cover & O. Fiss, supra note 4, at v.
41. Id.
42. Id. Thus, the authors note: "Harry Kalven and Hans Ziesel were aware that their book, The American Jury, pertained only to the criminal jury. For one instant they considered calling the book The American Criminal Jury. We suspect they chose their title largely because their findings on judge/jury divergence transcended the professionally rooted categories — they spoke to the jury as a unified institution." Id.
gates skills training to a side-course taught by law students, what is the rest of academe to think?

B. The Realist Roots of Metaprocedure

There can be little doubt that Procedure as a casebook is startling, provocative, and challenging — but not innovative. Its conception, format, and structure are direct lineal heirs of several attempts, beginning in the 1930s, at redefining casebook presentation. The fate of those casebooks is instructive, suggesting some potential problems for the reception of both Procedure and metaprocedure.

The development of legal realism at Yale, and generally, has been often told and well documented. It was in large measure a reaction to the rigid conceptualization and classification of legal principles, without regard to underlying facts, that dominated nineteenth-century jurisprudential reform. The realist movement embodied a profound skepticism concerning language in judicial opinions, and much effort was devoted to exposing ambiguities in judicial pronouncements. Moreover, linguistic theory raised questions regarding the validity of legal categorization. An additional ingredient of the realist critique derived from contemporary Freudian theories of the unconscious and rationalization. For some realists, these notions suggested that judicial opinions reflected the idiosyncratic tendencies of individual

43. See supra note 9; see also G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978); Dawson, Legal Realism and Legal Scholarship, 33 J. LEGAL EDUC. 406 (1983); Gilmore, Legal Realism: Its Cause and Cure, 70 YALE L.J. 1037 (1961); Purcell, American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory, 75 AM. HIST. REV. 424 (1969); Schlegal, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 BUFFALO L. REV. 459 (1979); cf. Tushnet, Post-Realist Legal Scholarship, 1980 WIS. L. REV. 1383; White, supra note 16; White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America, 58 VA. L. REV. 999 (1972); Woodard, supra note 16.

44. See L. KALMAN, supra note 8, at 10-20; Woodard, supra note 16, at 697-703. Of course the great systematizers of British law were Blackstone and Jeremy Bentham. In the United States, the chief advocate of considering the study of law a rational science was Christopher Columbus Langdell at Harvard Law School, who concomitantly gave us the Socratic method of teaching ("the case method"). Writes Professor Kalman:

The conceptualism which functionalism attacked dominated the legal world at the end of the nineteenth century and was particularly compatible with the post-Darwinian era. Christopher Columbus Langdell, its principle proponent, was an amateur botanist, who classified law much as he did plants. As dean of the Harvard Law School between 1870 and 1895, Langdell preached that all law should be reduced to a set of well-categorized rules and principles. . . . Langdell based his theory of education on two postulates, which he described in 1886: "first that law is a science; secondly, that all available materials of that science are contained in printed books."

L. KALMAN, supra note 8, at 10-11.

45. See L. KALMAN, supra note 8, at 19-20. "Realists also found contemporary linguistic theory valuable in their attempts to expose the ambiguity of language in the judicial opinion. The realists who read Ogden and 'Richards's The Meaning of Meaning learned that despite words' apparently fixed meaning, they could be understood only through an examination of their ever-changing context." Id. at 19 (citation omitted). This emphasis on contextual knowledge would prove central to the subsequent realist casebooks, and to the Cover, Fiss, and Resnik Procedure, as well. See text accompanying note 114.
In reaction to rigid legal classification and the case method approach to legal training, the realists instead adopted a concept of functionalism as the lodestar of their jurisprudence. This functionalism was central to the realist methodology and would spur realists on to “create a new geography.”47 As Professor Kalman notes: “Central to functionalism, as the realists employed it, were a preoccupation with ‘process,’ a distrust of precedent, criticism of concepts, the substitution of facts for concepts, and a dedication to empiricism.”48

Thus the vision of the 1920s realists resonates in the Cover, Fiss, and Resnik approach to procedure. For these earliest realists, “[t]heir functional approach did not treat subjects of law as abstract entities isolated unto themselves.”49 For example:

Realists noted that when scholars actually catalog[ed] the situations in which the trust device was used, trusts would impinge upon property. Similarly, the law of partnerships would no longer be separate from the law of corporations: there would be a law of business units. Law and equity would be merged, as would substantive law and procedure.50

It is no great surprise, then, that the realists were “preoccupied with procedure” and “tirelessly advocated a new federal civil procedure that would merge law and equity.”51 Yale’s contribution to this momentous endeavor was Professor Charles E. Clark, who served as the senior reporter of the committee that drafted the new rules.52

The Cover, Fiss, and Resnik conception of metaprocedure echoes other attributes of early twentieth-century realism. The realists, utilizing functionalism as their central methodology, strove to objectify the law and reduce subjectivity. Interdisciplinary study and empirical inquiry would come to play a major role in legal scholarship and education at Yale in ensuing years. A summary of the early realist movement also fairly describes the efforts and goals of late twentieth-century metaproceduralists:

The realists preached that the law should be studied as part of society; they concentrated their attention on facts rather than concepts; they spent their time studying law’s operations and showing that judges made law rather than formulating ethical legal rules or arguing that a higher law guided judges; they believed in objectivity and sometimes in reform

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46. “Freud’s emphasis on the unconscious and the theory of rationalization had led him to treat explanations such as judicial opinions as an ex post facto process of finding legitimate reasons to justify a decision to which the unconscious had led the individual.” L. Kalman, supra note 8, at 20.
47. Id. at 30.
48. Id. at 20.
49. Id. at 30.
50. Id. (citations omitted).
51. Id. at 21.
52. Id.
as well; and they all sought to make the subject of their work relevant to contemporary practitioners.53

Realism at Yale, as an intellectual movement and engine for reform, dominated the educational scene in the 1920s and 1930s. The movement presented a fundamental challenge to the soul of legal education at Harvard, and the clash of these two schools, this incredible professional sturm und drang, represents a spectacle now primarily of historical interest. It is received wisdom that contemporary law schools have embraced much of the realist critique, and that interdisciplinary study as well as empiricism have assiduously invaded the law school curriculum.54

Other aspects of the realist reform, however, were less successful, and insofar as they shed some possible light on the fate of metaprocedure, they bear scrutiny. In particular, repeated efforts at overarching curriculum revision, along realist lines, have met with equally repeated resistance. Similarly, attempts at realist casebooks have suffered not only in the marketplace of ideas, but in the marketplace.

C. Realist Reformation of the Curriculum

If the metaprocedural approach hopes to gain a hold upon twenty-first century legal education, it carries with it implications for the traditional first-year curriculum as well as the remainder of law school. Although the casebook’s authors and its advocates urge that Procedure can be easily integrated into existing traditional doctrinal approaches,55 the true metaprocedural agenda is to renovate the law school curriculum along functional lines. Procedure integrates issues and theories across legal categories and melds together analytical speculation not only from criminal, civil, and administrative procedure, but from constitutional law, federal courts, jurisprudence, and remedies (to mention but a few possibilities). In recasting the subject along functional lines rather than according to traditional legal categories, Procedure forces questions about inclusion, exclusion, and redundancy in the curriculum.

53. Id. at 37-38. Almost all these themes resonate in Procedure. See infra Part II.A.

54. “By [1960], Harvard and Yale, which had once professed to offer different styles of legal education, had become similar. The realist revolution had proven a palace revolution, which replaced the old guard with a very similar hierarchy.” L. KALMAN, supra note 8, at xii; see also R. STEVENS, supra note 16, at 264-79; Woodard, supra note 16, at 722-32.

55. See Resnik, Course Syllabus for Federal Civil Procedure, University of Southern California 1984 Fall Term (on file with the Michigan Law Review); Eskridge, Incorporating Meta Procedure into a Doctrinal Course (unpublished memorandum circulated at AALS Civil Procedure Conference, Charlottesville, Virginia, June 7, 1988 (on file with the Michigan Law Review)). The Structure of Procedure also included a guide to users with suggestions for integrating the readings into the traditional, doctrinal casebooks then available. See R. COVER & O. Fiss, supra note 4, at 522-26 (“A Map for Misreading”). Procedure, of course, does not incorporate similar suggestions for integration into a doctrinal course.
History supplies us with at least one example of a wholesale attempt at curricular reform in accord with the realist philosophy. In 1923, Professor Herman Oliphant of the Columbia University Law School wrote a memo to university president Butler urging a revision of the law school's curriculum along functional lines, with an emphasis on integration of social science into legal research and education.\(^{56}\) Oliphant subsequently issued a report that condemned Harvard-style Socratic-method case study as "being pretty much out of touch with life," and charged that educational methodology "with obscuring the social policy behind rules, creating a barrier between law and the social sciences, and sharpening the dichotomy between substantive law and procedure."\(^{57}\)

Professor Oliphant and his colleagues envisioned a curriculum organized along functional lines, into four categories: business relations, familial relations, communal political relations, and law administration.\(^{58}\) The last category would encompass broad issues of procedure.

Between 1926 and 1928, ten faculty committees at Columbia attempted to revise the curriculum in accord with Professor Oliphant's suggested four divisions. The committee titles embodied the realist philosophy: labor, finance and credit, marketing, form of business unit, risk and riskbearing, crimes, family and familiar property, legislation, law administration, and historical and comparative jurisprudence. Clearly, "[t]he absence of committees for property, torts, and contracts implied that teachers would present material traditionally covered in these first-year courses from a radically new perspective."\(^{59}\)

The results were mixed. Functional revision was most successful in business-related portions of the curriculum, but jurisprudence was the only nonbusiness course affected by the realist rethinking.\(^{60}\) Some committee reports had little impact on the curriculum; "[o]ther committees were crippled by the doubts of their own members or influential individuals in the field about the wisdom of the functional approach or the integration of law with the social sciences;"\(^{61}\) and

\(^{56}\) L. Kalman, supra note 8, at 69. Professor Oliphant taught trade regulation. He was joined by colleagues Professor Dowling (industrial relations) and Professor Underhill Moore (commercial law). The three organized their courses around social and economic problems, rather than legal doctrine, and integrated tenets of contracts, torts, equity, criminal law, corporations, agency, and constitutional law. They also emphasized a variety of nonlegal as well as statutory materials. Id. at 68-69. Those themes are all evident in Procedure. See infra Part II.A.

\(^{57}\) L. Kalman, supra note 8, at 70.

\(^{58}\) Id. at 70-71.

\(^{59}\) Id. at 71.

\(^{60}\) Id. at 71-72. Notes Professor Kalman: "The Historical and Comparative Jurisprudence Committee's broad conception of jurisprudence as encompassing legal philosophy, ancient law, legal history, and comparative law led it to opt for greater attention to research and inclusion in the undergraduate law curriculum of logic, Roman law, and the history of the common law." Id. at 72.

\(^{61}\) Id.
“[O]ne committee failed because the faculty as a whole could not accept the logical implications of revision of the curriculum.”\textsuperscript{62} Thus, in a scenario touchingly familiar to any faculty member who has ever labored on a curriculum committee, “[a]t the close of the 1920s, ... the functional approach had triumphed only in jurisprudence and business-related courses, and everywhere the integration of law with the social sciences so crucial to realism remained nothing more than a vague ideal.”\textsuperscript{63}

A number of reasons have been suggested for the failure of this great experiment at realist curriculum reform at Columbia.\textsuperscript{64} Not only did an attempt to revise the entire curriculum prove too ambitious, but the goal of simplifying the curriculum proved elusive. There is a certain sense of poignancy, if not \textit{déjà vu}, in reflecting on the Columbia experience: “Nor had the functional approach always resulted in simplification. Its exposure of the overgeneralizations inherent in legal principles frequently required more hours than had its conceptualist predecessor. The old course on corporations became three more time-consuming courses.”\textsuperscript{65}

This is a telling critique, with equal import for \textit{Procedure}. In their efforts to avoid the rigid classification of civil procedure, the authors have replaced the traditional course with a greatly expanded functional approach. Professor Resnik, at least, has indicated that the text is not meant to be utilized in a single course, but contemplates further exploration beyond the first-year experience.\textsuperscript{66} The problem, of course, is that, unlike Columbia’s well-intentioned venture into functional curriculum revision, metaprocedure has been launched into an academic universe that is not yet functionally reorganized. Metaprocedure puts most law schools to a hard choice. Schools must receive it \textit{sui generis}, and the rest of the existing curriculum be damned; or they must engage in wholesale curricular reform to accommodate its challenging intellectual framework.

\textit{Procedure} is intellectually demanding precisely because it requires its readers to think about legal problems across categories. But this new approach, ironically, will prove a simpler task for new generations of students unschooled in traditional legal classification, writing on the

\textsuperscript{62} Id. This was the “Risk and Riskbearing Committee” which proposed a course organized around the theme of risk apportionment. It would have drawn on materials and concepts usually found in the traditional courses dealing with agency, partnership, corporations, sales, procedure, contracts, evidence, property, insurance, and torts.

\textsuperscript{63} Id. at 73.

\textsuperscript{64} See id. at 73-78; R. Stevens, supra note 16, at 139-41.

\textsuperscript{65} L. Kalman, supra note 8, at 73.

\textsuperscript{66} Conversation with Judith Resnik, AALS Conference on Civil Procedure, Charlottesville, Virginia, June 4-9, 1988. The authors note in their Preface that “[a] year is needed to complete the book” (p. xi), and that the new course in metaprocedure “is intended to take the place now occupied by first year civil procedure and to serve as an introduction to the advanced curriculum in civil, criminal, and administrative procedure” (p. vii).
proverbial *tabula rasa*. For the garden-variety civil procedure teacher raised on *Pennoyer v. Neff*, *Procedure* presents a daunting spectre indeed. It literally requires reeducation in subjects unexamined since law school, and a bent of mind that can capably draw comparisons and distinctions across traditional doctrinal classifications. One worries about the fate of *Procedure* in the hands of the un-Yaled.

**D. Adventures in Realist Casebooks**

Just as the experience of realist curriculum reform is informative, so too is the history of attempts at designing realist casebooks. Again, professors at Yale and Columbia took the lead in dramatically rethinking legal education, this time through course presentation. As with curriculum reform, the casebook revisers took a total root-and-branch approach in discarding existing formats, categories, and doctrinal outlines. As with many startling revolutions prematurely foisted on unsuspecting populations, the resulting casebooks failed to garner crucial support in academic ranks that would have ensured ultimate survival and vindication.

Realist casebooks began to appear in the 1920s and 1930s in the fields of trade regulation, sales, property, trusts and estates, as well as trial, judgments, and appeals. Closely hewing to the realist perspective, these casebooks attempted to integrate different parts of the law school curriculum, and the modern casebook as we know it.

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67. *Pennoyer v. Neff*, 95 U.S. 714 (1877). *Pennoyer*, of course, is the traditional lead-off case for most doctrinal procedure casebooks on the market today, and (perhaps for that reason, among others) was much maligned by metaproceduralists and clinicians at the AALS Conference on Civil Procedure. After three days of constant abuse, *Pennoyer* was defended by Professor Phil Schrag of Georgetown, who noted the interesting historical treatment in *Perdue, Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

68. Cf. L. Kalman, *supra* note 8, at 78-79. As with curriculum reform, Columbia again took the lead with the publication of Karl Llewellyn's *Cases and Materials on the Law of Sales* (1930). *Id.*


70. See K. Llewellyn, *Cases and Materials on the Law of Sales* (1930). This casebook emphasized contract theory rather than property concepts of title, and treated sales as "a matter of marketing, as a tool of modern business . . ." *Id.* at xv; see also L. Kalman, *supra* note 8, at 79. It contained only 108 cases and included more than 600 case digests. It also included annotations "about business organization, marketing practices, methods of financing, bills of lading, and other functions of business." *Id.*


72. See R. Powell, *Cases and Materials on the Law of Trusts and Estates* (1932-33). This casebook was an early attempt at combining the subjects of trusts, wills, and estates.

emerged, with cases constituting a smaller percentage of overall text. The realists added digests, annotations, statutes, and readings from other disciplines. 74 Thus, "[b]y destroying traditional barriers between courses and reorganizing course content, the functional approach sought to align law more closely with life." 75

The second major characteristic of the realist casebooks was their approach to traditional doctrine. Although the realists did not abandon traditional doctrine, they did seek to reposition the importance of doctrinal teaching in overall legal education. Doctrine was viewed as subsidiary to factual context, and the realist casebooks endeavored to impart to students not only case rules and principles, but the human vagaries that also explained judicial decisionmaking. Thus, in the realist casebooks, "[t]he judge’s reaction to the factual context of the future case might prove equally important" as an articulated statement of legal rules, and there was great "concern with factual context and human idiosyncracy in addition to legal doctrine . . . ." 76 Traditional doctrine, then, was not the end of classroom learning but merely the beginning of a broader inquiry into questions of justice.

The realist casebooks utilized two approaches to organizing legal material. The first or "amalgamated" format sought to integrate legal issues and principles classified in different subject areas throughout the curriculum. This approach was successfully employed in casebooks dealing with property 77 and trial and appeals. 78 The second approach was "comparativist," which similarly selected disparate materials from across subject areas, but with a view toward comparing legal problems and their solutions. Here the aim was to encourage students to compare the way in which the legal system alternatively solved issues in different areas, and to question the efficacy (and justice) of the system as a whole.

In the procedure arena, Professor Clark’s book, *Cases on Pleading and Procedure* 79 attempted an integration of topics across the then-existing procedural horizon:

The result was a casebook that covered several courses in title only, one course that consumed as many or more classroom hours than its several predecessors . . . . Clark hoped that his casebook on procedure would make possible a single course that would replace common law pleading, code pleading, equitable remedies, and part of evidence. Had he succeeded, the student would have been able to compare the relative ease of

74. L. Kalman, supra note 8, at 79. Kalman’s work describes in some detail these and many other realist casebook attempts in the 1930s. See id. at 78-90.

75. Id. at 80.

76. Id. Similarly, *Procedure* deemphasizes doctrinal development and focuses on contextual understanding of legal problems. See infra Parts II.A.(3) and II.A.(5).

77. L. Kalman, supra note 8, at 80-81; see casebooks cited supra note 71.

78. L. Kalman, supra note 8, at 80-81; see casebook cited supra note 73.

79. C. Clark, supra note 10.
code pleading with the trials of pleading at common law and the tribulations of pleading in equity. Clark's grand design was not successful because his text became hopelessly bogged down in its massive, grand conception of procedure.

Time rather than editorial assistance remedied the fundamental problem with Clark's casebook. Ironically, it was Professor Clark's other great realist effort — the Federal Rules of Civil Procedure, with their transubstantive approach to civil actions — that did more for restructuring procedure casebooks than any casebook ever could. In particular, the rules' merger of law and equity forced the teaching of equity into the background, only to be summoned in the direst of circumstances, such as the teaching of Shaffer v. Heitner, peculiar problems in interlocutory appeal, or the right to trial by jury. Further, as succeeding generations of procedure casebooks have demonstrated, the entire history of common law pleading has diminished in each new casebook, no doubt to disappear entirely by the twenty-first century.

Clark's casebook effort encountered a further nagging problem that bears some relevance for apprehending Cover, Fiss, and Resnik's effort. In its comparativist approach, which integrated materials from throughout the curriculum, Clark created a kind of Frankenstein's monster of a text:

Clark had estimated that teaching the casebook would take a minimum of four or five classroom hours per week for a year. Professor Mechem pointed out that in most law schools this period was the equivalent of two important courses. Mechem wondered why Clark had not divided his materials into two courses and called one Pleading and Procedure and the other Equity? "Will not the subject matter of its own weight

80. L. Kalman, supra note 8, at 82.
81. Because Clark emphasized the present, he did not stress common law pleading; the first volume centered around code pleading. In the middle of the first volume, a six-hundred page sequence on equity began, which developed the same material Walter Wheeler Cook had included in his nine-hundred-page equity casebook. As Philip Mechem complained, there had been "no integration, no fusion. The equity materials remain as an undigested lump; the only cohesion is that supplied by the binder."
86. H. Fink, Remarks at the AALS Conference on Civil Procedure (June 6, 1988) (entitled "The Proper Role of History in the Study of Civil Procedure").
break into two such parts?"87

One fundamental problem with these functional attempts to render procedure a unified whole is that they unsparingly demand the attention of the entire educational endeavor. While it may be true that there is never too much of a good thing, there is a certain intellectual arrogance in deeming equity, or common law pleading, or the Federal Rules of Civil Procedure, or metaprocedure to be the good thing. Moreover, many law schools discovered that amalgamated and comparativist casebooks could not be successfully adopted unless all companion volumes followed. Once adopted, the functionalist path required an entire sequence of realist texts in order to make sense of the overarching framework.88 And, more germane to Procedure, perhaps, was the experience of many "dismayed law professors who had themselves learned law through the study of legal doctrine."89

Clearly, the realist texts required reeducation not only in one discipline but in entire uncharted subjects — alien precisely because of the curriculum's compartmentalization. Functionalism required both a methodology and a breadth of knowledge intimidating to the intellectually insecure.

The counterpart to professorial intimidation would prove to be student laziness of mind. One can only smile in amused recognition at the following lament of Professor Charles Alan Wright in his early days of teaching:

I was spoiled at Yale; since everyone I knew there conceded the ridiculousness of conceptualism, I supposed that that devil had been exorcised, and that legal realism, in greater or less degree, was everywhere triumphant. I couldn't have been more wrong. From morning to night, I fight with my classes, with students in to see me, and with some members of the faculty, and all I get from them is: "What was good enough for Langdell is good enough for me." Or "It's easy to decide cases. You just take the facts and look in the law books and get your answer automatically." Or I will waste a whole class hour going over all the possible policy ramifications of a case, and problems of that sort in it, and someone is sure to come up after the hour: "Mr. Wright, what is the rule of the case?" I find myself alternating between an eager determination to stand conceptualism on its ear, and a feeling of why the hell am I wasting my time here.90


88. L. Kalman, supra note 8, at 94.

89. "It also frustrated students who wanted the security of legal principles. Perhaps the idea of focusing on facts rather than doctrine upset all but the brightest students." Id.

90. Letter from Yale Law School graduate Charles Alan Wright, then teaching at the University of Minnesota Law School, to Yale Professor Fred Rodell (Nov. 9, 1950) (reprinted in L. Kalman, supra note 8, at 95).
Ultimately, realist casebooks quietly passed from the educational scene because law professors (both realist and traditionalist) failed to adopt them in their courses. The greatly vaunted integration of social science materials into amalgamated courses failed to gain hold, and at least one commentator has suggested that for "all their pretensions," the realist casebooks failed to offer much that was new. "Although they aligned law more closely with life, [the realist casebooks] failed to give the aspiring lawyer any method for improving the quality of law or life."2

II. Procedure: The Casebook

It is against this backdrop of realist revision of textbooks and curricula that one must consider the Cover, Fiss, and Resnik casebook, for it is very much a piece of that movement and educational history. The book's structure and aspirations resonate with that past, and its problems are anticipated in that history.

A. Procedure as a Post-Modern Realist Text

Procedure is not for the faint-hearted civil procedure teacher. The first thing that leaps out from the table of contents is the relative dearth of appellate cases that constitute the mainstay of most traditional casebooks. Indeed, in the first 431 pages of the text, only seven cases appear. Of these seven cases, none report judicial opinions usually collected in civil procedure texts. It is not until page 479 that one encounters a case familiar to most existing procedure books: Mullane v. Central Hanover Bank & Trust Co. Further examination reveals that in the 1824 pages of materials, roughly seventy-five cases are included. Of these, only nineteen (depending on how one categorizes cases) are certifiable old stand-bys recognizable to civil procedure teachers. Thus, calling Procedure a "casebook" is something of a

91. L. Kalman, supra note 8, at 95.
92. Id. Among other reasons cited for the failure of the realist casebooks was, ironically, the "frequent failure" of the realist professors to adopt the functional approach; and the failure fully to integrate the social sciences into law teaching. Id.
misnomer; “notebook” might be more appropriate. Clearly, the authors have eschewed any traditional casebook protocol in favor of their own particular pedagogical agenda.

The importance of material selection is echoed in *Procedure*. Faithful to the realist heritage, the authors indicate that “[w]e have also departed from the often exclusive reliance, typical of many casebooks, upon court (usually appellate court) opinions.” 96 This is because teaching through the Langdellian case method fails “to capture both the complex theoretical problems of procedure and the fascinating dynamics of litigation” (p. xi). According to the authors, true appreciation of the theory and practice of procedure is often obscured by reading appellate decisions, and thus “the provision of such materials as pleadings, affidavits, transcripts of hearings, lower court opinions, and commentary enable an understanding of the role of the lawyer in the procedural system” (p. xi).

True to this belief, *Procedure* consists of much more than conventional appellate opinions. Indeed, appellate case reports assume the role of bit players on the stage of extensive scholarly commentary. The book does yeoman’s service in incorporating various litigation documents alien to most first-year students, but well over half the book is devoted to article excerpts. To invoke a culinary metaphor, *The Structure of Procedure* has been folded into bits of cases, litigation documents, and illustrations. In its selection and organization of materials, *Procedure* is the logical outgrowth of realist philosophy and is the ultimate realist text on the market today.

Yet even without the historical framework, *Procedure* manifestly is the progeny of those earlier realist casebook efforts. In at least five major respects, *Procedure* elaborates the same philosophical and pedagogical themes as those earlier texts, including (1) functional organization, (2) comparativist approach, (3) contextual understanding, (4) influences on decisionmaking, and (5) subordination of traditional doctrine. Each of these aspects will be discussed below, followed by an overall assessment of this casebook endeavor.

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96. P. xi; cf. L. *KALMAN*, *supra* note 8, at 79 (discussing the selection of materials in K. LLEWELLYN, *supra* note 70).
1. Functional Organization

For civil procedure, conceptualism has long dictated a casebook format that either follows the course of a typical litigation or progresses through a study of the Federal Rules of Civil Procedure. Although Cover, Fiss, and Resnik do not label their approach as such, functionalism is the essential organizing principle for the text. *Procedure*’s functional approach eschews narrow rule construction (nuts-and-bolts procedure) in favor of broader jurisprudential enquiry. Functionalism as a pedagogy permits the authors to take the intellectual high road, an approach clearly anticipated in *The Structure of Procedure*. Thus the authors state: “We might also add that in writing this book, we have deliberately avoided an organization based upon the linear unfolding of a lawsuit or upon a detailed sequential examination of all the rules of federal civil, criminal, and administrative procedure. In our view, this pedagogic method fails to capture both the complex theoretical problems of procedure and the fascinating dynamics of litigation” (p. xi). Further, the authors’ twin goals “are to provide appreciation and insight into both the theory and practice of procedure — insights often obscured by a linear organization . . .” (p. xi).

*Procedure*, then, does not begin where most procedure texts begin. The first overarching chapter, “The Value of Procedure,” raises the metaquestion, “Why we have process and why we care about the kind of process the law provides” (pp. vii-37). The centerpiece of this chapter is a thorough examination of *Goldberg v. Kelly* (pp. 37-104), Cover and Fiss’s “big case” from the due process revolution that provided the original impetus for rethinking procedure.

The second theme addresses the “The Forms of Adjudication” (pp. 180-428), and “examines the role of courts and their remedial capacities” (p. viii). Here a school desegregation case, *Hart v. Community School Board of Brooklyn*, provides the focus for inquiries into “the permissible limits of adjudication as a mechanism for societal decision-

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97. See casebooks cited *supra* note 95; see also J. CHADBURN, A. LEVIN & P. SHUCHMAN, CASES AND MATERIALS ON CIVIL PROCEDURE (2d ed. 1974) (tracking course of litigation); F. JAMES & G. HAZARD, CIVIL PROCEDURE (3d ed. 1985) (approximately the same); D. LOUISELL, G. HAZARD & C. TAFT, CASES AND MATERIALS ON PLEADING AND PROCEDURE: STATE AND FEDERAL (5th ed. 1983) (rules orientation); M. ROSENBERG, H. SMIT & H. KORN, ELEMENTS OF CIVIL PROCEDURE: CASES AND MATERIALS (4th ed. 1985) (tracking litigation for the most part). *But see* P. CARRINGTON & B. BARCOCK, CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION (3d ed. 1983). This casebook most resembles *Procedure* in that its chapter divisions are functionally designed, e.g., chapter 1: “Introduction: The Social Science of Court Rules”; chapter 2: “Office: The Qualification of Decision Makers”; chapter 3: “Jurisdiction: Divisions of Judicial Power”; and so on. It is a casebook that makes the greatest attempt to integrate interdisciplinary approaches to procedure, and stresses not only judicial decisionmaking, but issues of legal process and economic cost.

98. See *supra* notes 4, 23-43, and accompanying text. Many of the chapter headings and article excerpts in *The Structure of Procedure* have been carried forward into *Procedure*.

making” (p. viii). Chapter 3 then explores two topics familiar to federal courts courses: Who constitutes a proper party to a lawsuit, and what constitutes a case? (pp. viii, 428-631).

The fourth functional category is “Strategic Interaction,” which “shifts the focus from the examination of legal rules about the construction of lawsuits to an exploration of the strategic dimensions of adjudication” (p. ix). Here the authors “consider the pervasive effects that the disparate economic and social settings of the parties have on litigation” (p. ix, pp. 631-859). The fifth theme involves “The Problem of Judgment” (pp ix, 976-1316) and raises various questions concerning “making binding factual and legal decisions in the face of uncertainty” (p. ix).

Chapter 6, “Decision Centers,” elaborates on an institutional level upon the same problems as chapter 5. Thus, the materials “look beyond the question of authority of individual decisionmakers to the institutional authority of the judiciary” (pp. x, 1316-570). The text here deals with broad questions of judicial authority, political legitimacy, force and violence, and community — “all potential sources of power for courts” (p. x). In this segment the book also broaches issues raised by the dual court system.

The final theme sounded in Procedure is “Anti-Procedure,” assuredly a catchy chapter heading (pp. x-xi, 1620-787). This is really about what everyone else calls res judicata, collateral estoppel, consent, concurrent adjudication, laches, statutes of limitations, and so on.

2. Comparativist Approach

A second key feature of many realist casebooks has been a comparativist approach utilizing cases and materials from various traditional fields, with a view toward constructive comparison and critique. Unmistakably, a comparativist perspective is central to understanding both Procedure and metaprocedure, and is crucial to the authors’ efforts to redefine the field. They explain:

Because the issues central to procedure — the values to be implemented, the remedial capacities of courts, the permissible range of party structure, the relationship among decision centers — are common to all kinds of litigation, we have not limited our concerns to a single context, be it civil, criminal or administrative. Rather, our concerns embrace them all. This course is intended to take the place now occupied by first year civil procedure and to serve as an introduction to the advanced curriculum in civil, criminal, and administrative procedure. [p. vii]

This comparativist approach unfolds throughout the text. The opening essay on “the processes of law” introduces students to civil actions, criminal actions, administrative proceedings and the various institutions involved in legal process (pp. 1-37). Examples abound of the comparativist approach. Lassiter v. Department of Social Serv-
ices is utilized as a vehicle for drawing out the procedural implications of a state-supervised parental rights’ termination hearing. The Hart desegregation materials provide an opportunity to investigate an intervention proceeding (pp. 276-93) as well as to examine the court’s use of judicial adjuncts such as a special master (pp. 293-311). Dunlop v. Bachowski is pressed into service to “raise an issue which is a theme throughout this course: When do the labels “civil” and “criminal” attach to a proceeding and what flows from the labeling?” (p. 581).

Similarly, several cases are presented to induce discussion of the different roles that courts play in the settlement of class actions, major antitrust litigation, and criminal actions (pp. 516-37; 589-601; 606-12). The discovery materials, renamed “information in a strategic context” (pp. 784-87), range across criminal discovery rules (pp. 788-93), through the landmark civil discovery cases, Hickman v. Taylor and Upjohn Company v. United States.

The comparativist approach is not limited to the discrete fields of civil, criminal, and administrative procedure. Rather, the book draws on a wide spectrum of materials usually encountered in separate courses in constitutional law, federal courts, alternative dispute resolution, complex litigation, conflict of laws, family law, legal process, professional responsibility, law and economics, and remedies.

In this sense, Procedure greatly resembles the amalgamated realist casebooks of the 1930s. There are numerous illustrations. For example, the issue of standing, traditionally raised in constitutional law or federal courts, is examined in chapter 3’s exploration of parties. The materials include Sierra Club v. Morton, Davis v. Passman, and an article excerpt on standing to challenge administrative action. In addition to various materials on settlement (pp. 589-612), several article excerpts critically examine alternative dispute resolution mechanisms. Another thematic thread centers on special problems raised by complex cases, such as school desegregation litigation (pp. 227-100. 425 U.S. 18 (1981).
103. 329 U.S. 495 (1947).
106. 442 U.S. 228 (1979).
3. Contextual Understanding

A third major dimension of the realist critique has been an insistence on contextual understanding of cases and judicial opinions. The functionalist approach demanded that analysts classify legal problems by reference to facts, rather than principles. Contextual understanding is a recurring theme throughout Procedure. Thus, in the Preface, the authors acknowledge that their presentation of the Silkwood case is accompanied by a short story, to "illuminate the contextual vantage points of women and men" (p. ix). Similarly, after describing the materials included in the chapter on "Anti-Procedure," the authors comment that "[h]ere, as in all the chapters, the concern is with the influence of context on rules, of preferences for and prohibitions

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against repetitive litigation linked to specific genres of litigation and to views of the moral worthiness of certain categories of litigants” (p. xi).

Cases are not presented simply as appellate decisions leaping full-blown from the brow of the judicial system. Great care has been taken to demonstrate the process of dispute resolution from beginning to end and to illustrate the entire process of individual and group interaction with the legal system. Thus, seventy-five pages are devoted to the Goldberg v. Kelly litigation, including its docket sheet, to show the development of that litigation and ultimate vindication of individual rights (pp. 37-112). This methodology is repeated with the Hart school desegregation case, which includes a note on “the cast of players” (pp. 271-73): The authors also have taken great care to humanize the legal process. For example, the story of the efforts of Gary Gilmore's mother to prevent her son's execution is utilized to illustrate the problem of party participation (pp. 429-36). Similarly, the jury deliberation process in the Silkwood case is examined contextually through attorney Gary Spence's closing argument, the judge's instructions, the settlement, and related judicial opinions (pp. 976-1081).

Finally, a minor though philosophically important point made throughout the text is the use of the full names of all parties in case captions, a novelty for law texts.115 This is repeated for article excerpts, where authors receive full-name recognition for their contribution to legal analysis. The point is that real, live people are involved in cases and articles, a fact sometimes obscured in more traditional academic approaches to the law. Thus, Procedure insistently reminds students that people, including professors, count.

4. Influences on Decisionmaking

Closely related to the realists' concern with contextual understanding of the legal process was their emphasis on the social and psychological dimensions of the law. Thus, theories and concepts were borrowed from anthropology, history, sociology, economics, psychology and linguistics to illuminate legal process.116 Likewise, this theme is sounded throughout Procedure: “We evaluate how legal rules respond to the ways in which human judgment is affected by social and psychological biases. The issue is whether we can structure legitimate procedures within a society permeated by race, class and gender divisions” (p. x).

Procedure relies heavily on interdisciplinary scholarship, literature, and other studies to flesh out the broad implications of complex legal problems. Materials for the Silkwood case therefore include “summaries of psychological literature that discuss systematic errors in cogni-

115. Apparently, this was achieved not without some great resistance from the book publisher. Remarks of J. Resnik, supra note 15.
116. See note 54 supra and accompanying text.
tion" (pp. ix, 1081). Frequently case reports are followed by article excerpts that discuss the economic, social and psychological costs of dispute resolution. Such mundane documents as the statistical report of state court caseloads are included to supply students with basic empirical data concerning the efficacy of process (pp. 209-212).

Traditional interdisciplinary studies are joined by other less orthodox materials one would not expect to find in a law school casebook. For example, an excerpt from James B. Stewart's *The Partners* is included to provide a lively narrative background to the famous Dono­van, Leisure episode relating to document discovery in the *Berkey Photo* case (pp. 860-76). Another thread throughout the text explores how "the images and myths of justice may help us understand what aspirations we hold for those who render judgment" (pp. 1229, 1229-32, 1316-22), and, consistent with this thesis, *Procedure* also intersperses its text with photo illustrations (frontispiece; pp. 80, 269, 454, 780). Thus, through its innovative collection of materials, *Procedure* induces its students to think more broadly about the influences on legal process.

5. *Subordination of Traditional Doctrine*

The realist movement also expressed a profound skepticism about the role of doctrine in judicial decisionmaking, and as a consequence, realist casebooks have downplayed doctrinal development. The realists believed that emphasis on doctrinal teaching was misguided, because attention to legal principles tended to "oversimplify" problems. This approach therefore would leave students "ignorant of the fact that they will be concerned with judges who behave as human beings in deciding cases" and tended "to overstimulate [students] with confidence that a deduction from what judges said in one case with its setting can be used to fix what they will decide in another case." The rejection of doctrinal teaching is implicit and explicit in *Procedure*. In the Preface the authors note that their effort "is not to provide a definitive account of the current state of the law but to enable a sustained analysis of the essential theoretical issues to be faced — whatever their transitory resolutions may be" (p. vii). Again, a perusal of the table of contents immediately suggests that the authors are not concerned with

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119. L. KALMAN, supra note 8, at 79-80 (quoting Sturges, Book Review, 40 HARV. L. REV. 510, 513 (1931)).
traditional doctrinal development in civil procedure, or any of the other discrete subjects that constitute the core of the text.

For example, the problem of jurisdiction — which consumes much of traditional casebook content — is covered through exactly one case report of *World-Wide Volkswagen v. Woodson*. The authors present the high points of jurisdiction through a note on *Pennoyer, Harris, and International Shoe* (pp. 1434-42). Other personal jurisdiction cases reported in traditional texts are reduced to annotations (pp. 1456-61). *Shaffer v. Heitner*, a central doctrinal piece of the personal jurisdiction puzzle, is mentioned microscopically (pp. 1441, 1442), and only reappears in the report of Justice Brennan's dissent in *World Wide Volkswagen* (pp. 1452, 1453). From this textbook treatment students will not have a clue what *Shaffer* is all about, or why it is significant. Similarly, the *Erie* doctrine is presented through two cases: *Erie Railroad Company v. Tompkins* and *Hanna v. Plumer*. The authors are simply unconcerned with the doctrinal unfolding of *Erie* nuances through cases, and no doubt this nontreatment of major Supreme Court opinions will prove shocking to the sensibilities of traditionalists.

*Procedure* simply does not purport to develop doctrine. Thus, while the authors are very interested in the problem of intervention (pp. 275-93, 545-49), there is virtually no corresponding attention paid to problems relating to impleader, necessary and indispensable parties, real party in interest, the relationship of joinder to jurisdiction, or manipulation of joinder rules to create or defeat jurisdiction. Although the authors pay unusual attention to the problem of the government as a party to a lawsuit (pp. 537-612) and to constitutional standing requirements (pp. 446-78), they nearly ignore the requirements of federal subject matter jurisdiction. Indeed, it seems somewhat difficult to ascertain how students are to divine very much at all about jurisdiction from these materials. Venue, transfer, *forum non conveniens*, removal jurisdiction: all these conventional procedure topics are not systematically presented through rules and cases, but rather are to

121. 444 U.S. 286 (1980).
123. 304 U.S. 64 (1938).
125. Federal subject matter jurisdiction is generally discussed at pp. 1434-35. Diversity jurisdiction is presented in bits and pieces at pp. 183, 189, 614, 616, 1435, and 1455. Federal question jurisdiction is noted at pp. 168, 1434, 1455. Jurisdiction under the Alien Tort Claims Act, on the other hand, commands a whopping eight consecutive page treatment (pp. 1364-72).
126. Venue is treated as a transfer problem at pp. 1712-13, and as a multidistrict litigation issue at p. 1707. The textbook index indicates that the doctrine of *forum non conveniens* is treated at pp. 1434-42, but these eight pages are the ones outlining *Pennoyer, Harris, International Shoe, and Shaffer*. However, the index does, under *forum non conveniens*, indicate "see
be learned contextually or interstitially through other materials in the book.

Finally, just as the list of materials included in Procedure is impressive, so too, is the list of what is left out.127 Noteworthy is the complete nontreatment of pleading, including the total banishment of historical discussion of common law pleading and the nineteenth-century legal reform movements.128 Although a complaint is supplied with the Goldberg v. Kelly materials (pp. 61-72), one wonders if it is expected to shoulder the burden of teaching proper pleading to first-year students. This absence of pleading theory is an unusual omission for a text so avowedly interdisciplinary and contextual; history apparently does not matter in the same sense as economics or psychology.

B. Critiquing Procedure

Critical review is a tricky business. It seems unfair to compare a Kandinsky to a Rembrandt and to find the Kandinsky wanting; the Kandinsky needs to be judged on its own or some other terms. So, too, with Procedure, which deliberately sets out to be unlike existing casebooks and certainly succeeds. How, then, is one to assess this effort?

At a minimum, it is possible to draw upon the criticism and the fate of earlier realist casebooks in thinking about Procedure, and, indeed, many of the problems noted by past critics bear relevance for this casebook endeavor. For example, the sheer massiveness that plagued Professor Clark's casebook haunts Procedure. It is an awesome book. Just as Professor Clark became hopelessly bogged down in a six-hundred page treatment of equity, Cover, Fiss, and Resnik, with their "big case" pedagogy, spend almost 425 pages fleshing out the policy and procedural nuances of just two cases, Goldberg v. Kelly and Hart v. Community Board. This approach may succeed if a charismatic teacher leads the way, but one suspects that some students, with the typical wisdom and patience of youth, will be yearning for the professor to get on with it.

Professor Clark prematurely attempted to merge law and equity in his casebook, but time and events proved him essentially correct. Pro-

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127. See supra note 126; see also FED. R. CIV. P. 13 (impleader); FED. R. CIV. P. 4 (mechanics of giving notice); FED. R. CIV. P. 13 (joinder of claims); FED. R. CIV. P. 19 (necessary and indispensable parties); FED. R. CIV. P. 50 (directed verdicts, judgments notwithstanding the verdict); and FED. R. CIV. P. 55 (default judgments). None of these topics are treated in any systematic, doctrinal fashion.

Professor Resnik has prophesied that in the twenty-first century law students will look back on the division between civil, criminal, and administrative procedure as an arbitrary, if not quaint anachronism. Nonetheless, the comparativist approach central to Procedure raises a number of questions.

It is somewhat apparent that in trying to do too much, the text succeeds in doing many things superficially but nothing really well. The text does provide an introduction to a number of loosely related concepts but only in a basic, introductory way for a survey course of procedure, or more appropriately, a survey course in legal process. In this regard, Procedure resembles not so much any legal casebook on the market as it does Palmer's History of The Modern World, or Samuelson's Economics. Its likely companion volume, surely to follow from Yale, will be Substance. By a peculiar irony, if a student wanted to learn particular procedure, then this text forces the student to take an "advanced" course in, say, civil procedure.

Moreover, one must accept an entire array of pedagogical assumptions if this book is to work. For example, one must agree that the "big case" approach is an effective vehicle to teach policy and doctrine; one must agree that the reasonably literate law professor can teach these comprehensive materials well; and one must agree that rule parsing and doctrinal development are subordinate skills that may be gleaned through contextual learning.

The disparate, voluminous materials in Procedure also give rise to a coverage problem that was evident in Professor Clark's predecessor text. The authors here admit that Procedure is to be taught over an entire year, but there is no suggestion relating to short courses. This puts the professor of the four-credit course to extremely hard choices. Institutional requirements that compel intellectual triage suggest interesting possibilities for streamlining Procedure. One approach would be to eliminate all the materials on criminal and administrative law, focusing on the civil litigation aspects of the text. Another possibility would be to eliminate the collateral readings, focusing on the cases. Obviously, both approaches eviscerate the overarching conception of the book.

The criticism of the realist casebooks as ahistorical and insufficiently doctrinal applies with equal force to Procedure. The message here is that any student can pick up doctrine (the "they can get it at the bar review" mentality), but that students really need to discover, dissect, and debate policy and process. In this manner, Procedure is a gross over-correction to the increasingly pragmatic casebooks that do

little else but present pre-digested doctrine.\textsuperscript{132} If some casebooks fail to teach procedure because the texts spell out too much doctrine, then \textit{Procedure} errs in the opposite direction by spelling out practically no doctrine.

Both species of casebooks, the overly simplistic and the overly theoretical, miss the point. The ultimate goal of doctrinal teaching is not, after all, merely to teach a set of rules and principles. The reason for requiring students to work through a series of cases is to educate the student in the cognitive process of getting from here to there. The purpose is to teach comparison, distinction, inductive and deductive reasoning, analogy, fallacious assumptions and conclusions, dicta, and a dozen other legal concepts. The purpose of doctrinal teaching is to induce students to understand the importance of facts and the relationship of facts to rules and principles. A text that digests cases and offers black-letter summaries of doctrine short-circuits the pedagogical goal of encouraging students to puzzle these things out for themselves. Similarly, a text with an overemphasis on commentary, policy, and process never requires the student to struggle with the original source material of the law; instead, student analysis and critique must largely be based on selected secondary source material.

Moreover, both types of casebooks fail to teach students the skills that practicing attorneys and judges utilize every day: skills of fact analysis, case and statutory research, and the application of facts to the law. Relegating "skills" training to a side course does not accomplish this task either. Simply put, the kinds of technical skills required for drafting a complaint or motion are quite different from the skills required to read a series of cases intelligently. The authors of \textit{Procedure} do not believe that appellate decisions are all that important (certainly not \textit{series} of cases), and so they use cases sparingly, as vehicles for raising theoretical discussions about larger process and justice questions. The students thus learn legal process at the expense of legal reasoning.

The absence of any historical referent in \textit{Procedure} is likewise as controversial as it was for the realist texts of the 1930s. Except for a piece added at the very end (pp. 1814-24), the casebook presents no discussion of the British heritage of the American rules of civil procedure. Professor Fink's prophesy that English common law pleading would disappear from future casebooks is with us now. Even the most innovative and theoretical text on procedure, Carrington and Babcock's \textit{Civil Procedure: Cases and Comments on the Process of Adjudication}, includes a ten-page essay on the history of pleading.\textsuperscript{133}

The flip-side of this ahistorical approach is an overweening pres-

\textsuperscript{132} See, e.g., D. CRUMP, W. DORSANEIO, O. CHASE & R. PERSCHBACHER, CASES AND MATERIALS ON CIVIL PROCEDURE (1987), reviewed in Mullenix, \textit{supra} note 22.

\textsuperscript{133} P. CARRINGTON & B. BABCOCK, \textit{supra} note 97, at 629-39.
ent-ism typical of realist casebooks. With the exception of the invocation of a few old venerables such as *Pennoyer v. Neff*, the focus here is on selected litigation problems of the post-1960 era. The stuff of dispute resolution is welfare rights, school desegregation, the death penalty, and environmental injury. The text gives very little sense of the earlier procedural universe and the disputes that forged many of the contemporary rules. This absence of history renders the transsubstantive critique as a cheap shot at the rules. It is easy, from the perspective of the 1980s, to declare the rules ineffective for a variety of contemporary legal problems. But history teaches that the rules were drafted in their time for the legal problems of that day, and the drafters (well intentioned as they were) could not have anticipated late twentieth-century litigation nor the implications of modern technology for dispute resolution.

Two other problems of the realist casebooks are also relevant for *Procedure*. Both then and now, theoretical casebooks tend to appeal to the brightest professors of the brightest students at the brightest law schools. This is not a criticism of the endeavor, but it hints at a problem of educational elitism on the one hand and militant student consumerism on the other.134 As was suggested earlier, metaprocedure needs to succeed not only in the marketplace of ideas, but in the economic marketplace, as well.

The final dilemma confronting *Procedure* is that it is competing in an increasingly pluralistic educational environment. The realists had only to convert their traditionalist Langdellian colleagues; metaproceduralists, on the contrary, must integrate their approach into courses and curricula populated with traditionalists, social scientists, clinicians, and others. This raises a number of evident questions: is metaprocedure an all-or-nothing pedagogy, or can it be integrated into an otherwise conventional civil procedure course? If metaprocedure must stand alone, what implications does this raise for the rest of the first-year curriculum and advanced courses? And, ultimately, with the reigning pluralism in legal education, will metaprocedure sell?

### III. The Future of Civil Procedure in the Curriculum: A Coda135

The articulation and advocacy of metaprocedure at the Conference on Civil Procedure generated a good deal of excitement, interest, and debate.136 The metaproceduralists portentously opened the conference


135. This was the title of the final session of the AALS Conference on Civil Procedure, June 9, 1988.

and seized the high ground, with Professor Eskridge presenting a talk on "The Importance of Theory in Teaching Civil Procedure," and Professor Resnik calling for "Redefining the Canon." Perhaps sounding a lugubrious note for all civil procedure teachers, Professor Eskridge pronounced that "[t]he traditional course is boring to the vast majority of law students, and to many professors as well." He went on to suggest that there were at least two ways "thoughtful law professors have jazzed up the course." The first method utilized various clinical approaches, and the second alternative "eschew[ed] not only the historical material of the traditional approach, but also the how-to-do-it material of the pre-clinical approach. The focus is nonhistorical theory and expanded perspective."

Professor Eskridge sketched the procedural landscape in contemporary law school curriculums and was followed by advocates for teaching procedure from different perspectives, methodologies, and approaches. The common thread, however, was that the traditional

137. Eskridge, supra note 15.
139. Eskridge, supra note 15, at 25.
140. Id.
141. Id. He articulated his conception of metaprocedure:
This theoretical approach . . . treats "adjudication" as a phenomenon to be explored as a purely intellectual endeavor. It asks the "big questions" and subjects adjudication to scrutiny and criticism from the perspectives of political theory, ethics, philosophy, sociology, anthropology. It examines such issues as the role or value of procedure in our culture and the nature of fairness: the relationship of procedure to substantive issues, especially issues of social justice; formal modeling of adjudication, as part of an institutional dispute resolution continuum; alternative conceptions of adjudication, drawn from comparative systems and public interest litigation; and the ideological and philosophical dimensions of the adversary focus of our system of adjudication.

Along with this description of the "intellectual" approach to procedure, Professor Eskridge outlined a sociology of the field:
The theoretical approach tends to disdain the historical evolution of legal rules and doctrine. It does not disdain the how-to-do-it skills of the pre-clinical approach, but it argues that these skills should be left to a real clinical course and/or developed through extra drafting exercises in civil procedure (with little class time spent on them). The forthcoming casebook by the late Bob Cover, Owen Fiss, and Judy Resnik will be the classic book for this theoretical approach.

course is soporific, with *Pennoyer v. Neff* vilified as the quintessential evil of the traditional course (rivaled only by those dull, dull sections on common law pleading). For many brief, shining moments, metaproceduralists, social scientists, feminists, empiricists, clinicians, and alternative dispute resolution advocates united in the belief that civil procedure desperately requires jazzing up. Thus, conferees saw the enemy and it was student boredom. This very notion is enough to send traditionalists into seizures of Bloomian despair. 143

Metaprocedure, as well as the other innovative approaches to teaching civil procedure, does ameliorate ennui; the ultimate question, of course, is at what price. Traditionalists obviously will lament the end of tradition and the loss of pedagogical values associated with doctrinal teaching. Enthusiasts of legal history will mourn the disappearance of certain annals of intellectual history and perhaps note Santayana’s famous epigram. 144 If the clinicians and metaproceduralists do successfully take the field, then skills training (at one polar end) and theory (at the other) will dominate courses of the future. And in curious, mirror-like fashion, both pedagogies will sacrifice legal reasoning to technical skills and legal process.

What is the future of metaprocedure? Metaprocedure will take hold at Yale, at the other prestige law schools, and wherever Yale graduates teach. It will take hold among the best and the brightest. Perhaps that is the ultimate tribute to *Procedure*. Nonetheless, there remains the nagging sense that *Procedure* is, well, hopelessly snobbish. Some such pedantry in defense of intellectual endeavor is no vice; but this elitism in defense of metaprocedure is no virtue.

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144. To wit, “Those who cannot remember the past are condemned to repeat it.” G. SANTAYANA, REASON IN COMMON SENSE 284 (1929) (vol. I of THE LIFE OF REASON).