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Duty-Oriented Procedure in a Rights-Oriented Society

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FOREWORD

A Duty-Oriented Procedure in a Rights-Oriented Society

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> Discourage litigation. Persuade your neighbors to compromise whenever possible . . . as a peace-maker, the lawyer has a superior opportunity to be a good man. There will still be business enough.
> — Abraham Lincoln, Notes for a law lecture, July 1, 1850[1]

I.

On September 16, 1938, the Federal Rules of Civil Procedure went into effect. The event marked the culmination of a long process. A distinguished advisory committee of law professors and practitioners drafted the rules. The Supreme Court then approved the rules, and Congress allowed them to go into effect when it did not exercise its reserved statutory authority to veto them. Since that time the rules have been revised a number of times by subsequent advisory committees.[2]

In 1988, Notre Dame Law School and the *Notre Dame Law Review* sponsored a symposium celebrating the fiftieth anniversary of these rules. We were privileged to host the current chairperson of the rules advisory committee, the current reporter, and two former reporters. With these and a number of other luminaries, this gathering and its published results offer not only an opportunity to celebrate the accomplishments that the rules embody, but also an occasion to ponder where to go from here.

A number of profound challenges beset our current procedural system. We live in a rights-based society, in which the number and types of substantive legal claims[3] that we can impose on each other have proliferated.[4] Our rights-based ethos that powerfully influences current legal thought has catalyzed many of these issues. Impelling liberals and conservatives alike, this rights-based milieu presents our procedural architecture with at least two very different kinds of dilemmas. One very practical difficulty involves the sheer number of cases that rights-based thinking helps to inspire. A second problem, which might be described

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1 THE LIFE AND WRITING OF ABRAHAM LINCOLN 329 (P. Stern ed. 1940).

2 *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1004-05 (1987).

3 The word "claims" is borrowed from Hohfeld. *See* W. HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS 37-38 (1923).

4 *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

as attitudinal, concerns how the rights-based approach to substantive law can impair the integrity of an independent system of procedural justice.

This brief foreword simply identifies some problems that rights-based thinking poses for procedural justice. First, the essay explores the practical, empirical concerns stemming from bulging court dockets and the additional problems spawned by the institutional responses to those dockets. Second, the analysis examines the more subtle and perhaps more worrisome attitudinal changes effected by the rights-based society. Third, the essay attempts to indicate how some of the papers in this symposium have endeavored to engage the challenges posed by the rights-based society.[5]

II.

The empirical concerns mentioned above are often referred to as the "litigation explosion."[6] Beyond requiring federal procedure to treat more cases, the litigation explosion has forced cases of tremendously variable size and substance on one set of ostensibly trans-substantive rules. Theoretically, the same Federal Rules must handle everything from the comparatively small debt case to mammoth mass disaster cases like *Agent Orange*.[7]

Simple economics would have predicted some increases in litigation over the past few years. Many of the factors driving this phenomenon represent important advances in our search for justice. First, in its 1977 decision of *Bates v. State Bar of Arizona*,[8] the Supreme Court allowed lawyers to advertise with the concomitant potential to expand their markets.[9] Second, legislation increasingly provides for awarding attorney's

5 I am not criticizing the expansion of substantive rights. *See infra* text accompanying notes 7-18.

6 For example, from 1970 to 1986, the number of civil cases filed in federal court increased from 82,665 to 254,249, or 297%. *See* P. BATOR, P. MISHKIN, D. MELTZER, & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 51 (3d. ed. 1988). *See also* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-129 (1985); Burger, *Symposium: Reducing the Costs of Civil Litigation: Introduction*, 37 RUTGERS L. REV. 217 (1985); Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L. J. 1643 (1985).

Controversy surrounds even the claim of a litigation explosion itself, as some commentators dispute the extent to which this assertion is true as a descriptive matter. *See e.g.*, Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63 (1986); Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

7 *See generally* P. SCHUCK, AGENT ORANGE ON TRIAL (1986).

8 433 U.S. 350 (1977).

9 Since *Bates*, the Court and the bar have continued to expand the rights of lawyers to advertise. *See* Shapero v. Kentucky Bar Ass'n, 108 S. Ct. 1916 (1988); Attanasio, *Lawyer Advertising in England and the United States*, 34 AM. J. COMP. L. 493, 508-10 (1984).

In response to some who have downplayed the impact of advertising on market behavior, John Kenneth Galbraith has remarked, "[t]he present disposition of conventional economic theory to write off annual outlays of many billions of dollars of advertising and similar sales costs by the planning system as without purpose or consequence is, to say the least, peculiar." J. GALBRAITH, THE NEW INDUSTRIAL STATE 188 (4th ed. 1985).

fees, which now fund a significant amount of litigation.[10] Third, between 1970 and 1985, the ratio of lawyers to overall population increased dramatically, from 1/572 to 1/360.[11] All of these lawyers must be occupying themselves somehow.

Additionally, and perhaps more fundamentally, the rights-informed ethos has caused federal dockets to grow. Good and appropriate commitments to equal access and to new substantive claims are prominent examples of our rights-driven concept of justice. Myriad developments, including some that I have already described, have afforded avenues of recourse to many in our society who have lacked access to our system of justice.[12] According to one noted ABA study, this lack of entry has affected not only the poor, but also the middle class.[13] Fueling part of any so-called litigation explosion, then, has been a drive for equal access to the rights that substantive law already guarantees.

Part of the phenomenon almost certainly has resulted from adjudicating newly promulgated or enforced substantive claims. Legislatures have proffered some of these initiatives,[14] courts have fashioned others,[15] and both institutions have shared in formulating still others.[16] Inevitably, the dual commitments to equal access and new substantive rights would fuel some increase in litigation. The rights-oriented mindset has even recast the way we think about courts. Many now think of courts not solely as resolvers of individual disputes, but as major forces for social change in our society.[17] This broader role requires a more sophisticated procedural response.[18]

These developments and the perceived burdens on the judicial process that they have imposed have provoked a wide variety of reactions—some of which have further strained the process of civil dispute resolution. Congress has dramatically increased the size of the federal judici-

10 *See, e.g.*, Berger, *Court Awarded Attorney's Fees: What is Reasonable?*, 126 U. PA. L. REV. 281, 303 n.104 (1978); Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

11 B. CURRAN, K. ROSICH, C. CARSON & M. PUCCETTI, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 1 (1986) [hereinafter B. CURRAN, SUPPLEMENT]; B. CURRAN, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s, 4 (1985) [hereinafter B. CURRAN, REPORT]; The number of lawyers has also increased dramatically; between 1970 and 1985, it went from 355,242 to 655,191. B. CURRAN, SUPPLEMENT, *supra*, at 1; B. CURRAN, REPORT, *supra*, at 4.

12 *See* Attanasio, *supra* note 9, at 519-21.

13 *Id.*

14 An example of legislative initiative is the Racketeering Influenced and Corrupt Organizations Act. *See* 18 U.S.C. § 1964(c) (1982).

15 Strict liability in products cases is an example of judicial initiative. *See, e.g.*, Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

16 The civil rights area illustrates combined legislative and judicial efforts. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); 42 U.S.C. § 2000e (1982).

17 *See* Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUMAN BEHAVIOR 121 (1982); Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

18 For other potential causes of the litigation explosion, see McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 821 (1988).

ary, but this solution may have distinct limits.[19] Another less conscious, but economically predictable result has been that fewer cases go to trial. Indeed, as few as 5% of all federal lawsuits proceed to trial and pretrial motions resolve approximately 35% of all federal litigation.[20]

Other predictable reactions have emerged. To ease the burden on the federal courts, some would scale back their jurisdiction and their expansive interpretation of substantive rights.[21]

The advocates of alternative dispute resolution are pressing a strong challenge to the litigation model.[22] The attractiveness of this competing paradigm stems partly from lower costs as compared with the traditional litigation model. Some of these costs are financial,[23] but there are others as well. For example, judicial process can be time-consuming. Moreover, litigation in general and trial in particular can exact high emotional costs.[24] Sometimes, ill feelings can make healing and reconciliation difficult.[25]

In some sense, alternative dispute resolution might be understood as part of a larger movement to privatize adjudication. In many areas, the Supreme Court has allowed arbitrators and private courts to resolve even important public law disputes. Indeed, the Supreme Court has construed the Federal Arbitration Act to require lower federal courts to abstain from hearing cases in which an arbitration agreement exists.[26] Moving beyond our traditional conception of arbitration, new businesses are sprouting that offer private judges and court-like facilities.[27] Of course, privatization of law is hardly a new development; the phenome-

19 R. POSNER, *supra* note 6, at 14, 36 (size of judiciary can adversely affect ability to attract candidates and manageability of decision-making at the appellate level).

20 Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511-12 (1986). The number of cases going to trial has declined dramatically in recent years. *Id.* at 558.

21 *See* R. POSNER, *supra* note 6, at 175-315. *Cf.* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, — Stat. — (1988) (reducing the reach of diversity jurisdiction of the federal courts).

22 *See generally* Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

Calling this "alternative dispute resolution" may offend aficionados of this model. Many of them think about this approach as simply being dispute resolution, with judicial process serving as one alternative.

23 *See* Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 248-51 (1985).

24 G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 55, 58-59, 61 (1978); *see also* L. HAND, LECTURES ON LEGAL TOPICS 105 (1926) ("After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.").

25 *See* McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985). Of course, sometimes disputants may want a cathartic process, and the litigation model supplies this opportunity. Other difficulties might also inhere. For example, at least one commentator worries that alternative dispute resolution may disserve the disadvantaged in institutional litigation. *See* Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). *Cf.* Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) (warning of additional dangers and complaining of a lack of adequate information with which to form opinions).

26 *See* Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987) (Securities Exchange Act of 1934, and Racketeer Influenced and Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) (Sherman Act and other public laws).

27 Raven, *Private Judging: A Challenge to Public Service*, A.B.A. J., Sept. 1, 1988, at 8; Thompson, *Lucrative 'Rent-a-Judge' Firms Court Legal Scholar Criticism*, Atlanta Journal and Constitution, Mar. 20, 1988, at 1A, col. 2.

non has deep roots in our history.[28] Still, of late, legislative proposals have surfaced which would impose public law obligations—as against voluntary, contractual ones—to enlist private adjudicators prior to, or instead of, courts. For example, prominent products liability proposals also have given defendants substantial incentives to admit liability and submit any disagreement about damages to an arbitrator.[29] Although they are not strictly private, administrative alternatives have also emerged such as the recent proposal of the American Medical Association to resolve medical malpractice disputes.[30]

Perhaps the widespread perception of crowded dockets, the strain of new types of cases, and the competition from various alternatives have prompted responses from the federal courts themselves. The litigation model has changed so much that trial remains not so much the exception as a veritable freak.[31] Hand in hand with this continuing move away from the trial version of the litigation model is the emergence of what has been called "managerial judging."[32] Those who describe this approach depict judges as being intimately involved in the litigation process, closely supervising cases from the pleadings through discovery and eventual resolution—generally by settlement.

The move towards managerial judging has interesting parallels with the alternative dispute resolution movement. As Robert McKay suggests in his article in this symposium, federal judges have invoked the broad mandates of Rule 16 to incorporate alternative dispute resolution mechanisms into federal proceedings.[33] Increasingly, they have also involved many non-judges in the process.[34] Often, small cases are tried before magistrates; and in the mammoth *Agent Orange* case, the district court made extensive use of special masters.[35] Thus, to cope with the burdens of a heavy docket, the method of resolving disputes under the Federal Rules is changing. Ultimately, the challenge posed involves the feasibility of applying these uniform rules of procedure to the number and variety of cases presented by the rights-based society.[36]

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28 M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 145-59 (1977).

29 Dodd, *A Proposal for Making Product Liability Fair, Efficient and Predictable*, 14 J. LEGIS. 133, 141-42, 146-47 (1987). *Cf.* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, — Stat. — (1988) (experimental arbitration program in the federal courts for amounts in controversy of less than $100,000).

30 *See* AMERICAN MEDICAL ASSOCIATION, A PROPOSED ALTERNATIVE TO THE CIVIL JUSTICE SYSTEM FOR RESOLVING MEDICAL LIABILITY DISPUTES: A FAULT-BASED ADMINISTRATIVE SYSTEM (1988).

31 *See supra* note 20 and accompanying text.

32 *See* Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

33 *See* McKay, *supra* note 18.

34 C. SERRON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES (1985); Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986).

35 *See* P. SCHUCK, *supra* note 7, at 5, 82-83, 144-47.

36 *See, e.g.*, Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988); Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

III.

Such factors as the proliferation of substantive rights, the equal access to those rights, and the heavy reliance on courts as agents for broad-ranging societal reforms have burdened the Federal Rules in fairly obvious ways. As I have already suggested, the rights-based milieu exerts a more subtle kind of stress on our procedural architecture: it influences thinking about procedural law. While one can marshal powerful arguments in favor of a rights-based approach to substantive law,[37] it is a category mistake to focus solely on perceived substantive rights when dealing with issues of procedural jurisprudence.

Procedural justice in large measure must exist independent of, rather than subservient to, substantive justice. Otherwise, two unfortunate results can ensue. First, we might deprive litigants of procedural rights that help to protect their dignity as persons. For example, while we might seek the truth to reach the correct substantive result, we are unwilling to subject a deponent to physical violence to obtain it. Second, clouding procedural duties with rights-based thinking can distort or impair principles of substantive law. Rights-oriented lawyers and clients who strongly believe in the substantive merits of their cause may be willing to distort and obfuscate so as to undermine the existing mandate of substantive law.

Renowned moral philosopher John Rawls describes the ideal type of pure procedural justice that exists apart from actual substantive results.[38] Rawls uses the rather unexpected illustration of gambling. If those risking their money agree on a fair system of rules, they will abide by the eventual distribution of winnings and losses even if the distribution disproportionately favors certain individuals over others. For Rawls, the obligation to obey these procedural rules obtains independently of the actual distributive shares they generate.[39]

Of course, the question of whether there is a coherent boundary line between procedural and substantive justice has plagued procedure scholars for quite some time.[40] Without getting embroiled in this debate, let me just make two brief points. First, the very attention devoted to this issue may derive in part from some basic intuition that procedural justice has an integrity independent of substantive rules. Second, while a universal boundary line between matters of substance and matters of procedure may be difficult to draw, each of these admittedly elastic concepts conveys to the legal community some core of shared meaning that can be

37 *See generally* text accompanying notes 11-13, *supra*. With respect to substantive law, I take rights-based thinking as a descriptive given for purposes of this essay. For a discussion of the interaction between concepts of rights and duties in substantive law, see Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 723-34, 749-50 (1988). For an interesting discussion of rights and duties in moral reasoning, see O'Neill, *Children's Rights, Children's Lives*, 98 ETHICS 445 (1988).

38 *See* J. RAWLS, A THEORY OF JUSTICE 84-85 (1971).

39 *See id.* at 86-90.

40 *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Kane, *The Golden Wedding Year: Erie R.R. Co. v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988).

used to resolve a substantial number of issues.[41] Obviously, the drafters of the Federal Rules of Civil Procedure fastened on this distinction between substance and procedure[42] to identify some shared understanding of what constitutes a procedural rule.[43]

Assuming that some ascertainable realm of procedural justice does exist, what conditions ought it entail? While exhaustive accounts are difficult, Rule 1 contains a widely accepted list of basic demands. In this version, the goal of procedural justice is to ascertain the facts fairly, accurately, and efficiently and apply the substantive law to them. To accomplish this mission and retain its integrity, procedural justice must be conceptualized differently from substantive justice. If courts should enforce rather than undercut substantive rights, strong concepts of duty must inform a system of procedural justice, even if strong concepts of rights inform substantive law. Litigants must honor—or overtly pursue existing procedures to change—duly promulgated societal conceptions of substantive rights. Substantive rights cannot be determined through procedural maneuvers calculated to subvert their operation, but instead should be fashioned through an open, accepted process in which judges, juries, legislators, and other relevant decision makers participate.

Rather than a duty-premised course, however, a largely rights-based ethic has dominated the American approach to procedure. Such a course intensifies our already strong commitment to a highly adversarial system. Within the fairly lax parameters allowed by the rules, the litigants are free to press their cause with all available vigor. Somehow the clash of positions will produce a result that comports with contemporary notions of substantive justice, despite the best procedural efforts of litigants to the contrary.

Ironically, or perhaps predictably, efforts to control the adversarial dialectic between opposing litigants have only spawned another dialectic between litigants as a group and rules advisory committees. Advisory committees have modified the Federal Rules to curb the more egregious litigation tactics which one side might deploy. In response, many attorneys transform these new measures into additional or different weapons. Thus, they subvert these intended controls to gain new advantages in the litigation joust that will necessitate still other countermeasures. And so the rules dialectic proceeds . . . .

Let us take a familiar example. Since the initial conception of permissiveness in pleading and openness in discovery, the drafters have imposed more obligations on the litigants. For example, they have added Rule 16 which affords broad-ranging powers to impose duties on litigants; they have promulgated additional discovery obligations and sanctions;[44] and perhaps most importantly, they have modified Rule 11 to

41 *See* D. LOUISELL, G. HAZARD & C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE (5th ed. 1983).

42 *See* Clark, *Two Decades of Federal Civil Rules*, 58 COLUM. L. REV. 435, 446 (1958); Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935).

43 *See generally* Hanna v. Plummer, 380 U.S. 460 (1965).

44 *See* FED. R. CIV. P. 26(b)(1), (g).

allow a fairly controversial array of sanctions.[45] Implementation of such measures indicates the advisory committee's increasing sensitivity to a more duty-oriented conception of procedure. The committee's attempted reorientation has attained only limited success, however, as these changes have taken place within the rights-oriented, adversarial nomos. In a strong rights-premised, adversarial milieu, many attorneys believe that they are ethically entitled and even obligated, within very broad parameters, to do what is possible to advance the wants and interests of their clients.

Against this zealous backdrop, modifications of the rules enjoy marginal success. Consistent with the ethical injunctions of the adversarial, rights-based model, attorneys view new rules like Rule 11 as additional or different weapons in their litigation arsenal rather than as new duties to curb abuses. Thus, new abuses may well replace old ones. The rights perspective sees a rule as a possible exercise of power, an entitlement of litigation, not as an obligation of justice to act or forego acting.

At bottom, the problems that I have described are moral and human ones that no set of rules is likely to cure.[46] Of late, judges have begun to perceive these difficulties in human terms. This gradual realization together with the strain of the rights-oriented society may well have prompted the managerial judging phenomenon. The thought may be that the malaise of overzealous litigation can only be detected and solved at a human level, despite the subjectivity entailed by this method. Obviously, this considerable discretion stands in some tension with the ideal of a uniform set of rules. Indeed, at some level, the informal and flexible process threatens the entire vision of uniformity which underlies the Federal Rules.[47] Unfortunately, litigants can use even this discretion to seize tactical advantage.

The participants in the litigation enterprise must change, as many judges already have, to understand the ethical dimensions of procedural problems. Specifically, the radical adversarial model must be softened so that the rules of civil procedure are not perceived merely as entitlements to be used as means of achieving a particular desired result, but rather as ethical ends which are good in themselves. In this connection, an important value that strongly influences much jurisprudence today is the Kantian categorical imperative.[48] This ethical duty requires ethical action to treat others as ends rather than as a mere means. To satisfy the imperative in the litigation context, litigants should not treat opponents as mere means to the end of victory, but must continue to engage them as ends,

45 *See, e.g.*, FEDERAL PROCEDURE COMMITTEE, LITIGATION SECTION, AMERICAN BAR ASSOCIATION, SANCTIONS: RULE 11 AND OTHER POWERS (2d. ed. 1988); PRACTICING LAW INSTITUTE, RULE 11 AND OTHER SANCTIONS (1987); Nelken, *Sanctions Under Amended Federal Rule 11-Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986).

46 *See* L. Hand, Deficiencies of Trials to Reach the Heart of the Matter, Address by Learned Hand before the Association of the Bar of the City of New York (Nov. 17, 1921), *reprinted in* 2 ASS'N BAR CITY N.Y. LECTURES ON LEGAL TOPICS 87 (1926).

47 *See* Resnik, *supra* note 32; *see also* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

48 *See* I. KANT, THE METAPHYSICS OF ETHICS 40 (J. Semple trans. 1869). *See also* H. PATON, THE CATEGORICAL IMPERATIVE 129 (1948).

as fragile human beings. Litigants ought to see rules of procedure as injunctions to treat others as ends, not as entitlements to use others to pursue their own claims. Litigants should perceive procedural justice as having intrinsic, and not merely instrumental, value.

My point is fairly basic: there are some actions we believe we ought not take against other people even to achieve a substantively just result. For example, if someone unjustly breaches a contract, I cannot simply rob that person to obtain recompense. To put the point more starkly, if someone kills my spouse, shooting that person is not a permissible procedure to obtain substantive justice—even in a society that recognizes the death penalty. Indeed, methods used to pursue the goal of truth, which is so fundamental to our conception of substantive and procedural justice, are limited by the dignity of all persons, including opponents. In this connection, we do not permit discovery by dragging the opponent behind a horse for a mile or two.

Plaintiffs should not reduce defendants to sacks of money. On the other hand, defendants should not reduce physically or monetarily injured plaintiffs to potential debits on balance sheets. Real flesh and blood people exist on either side of a lawsuit possessing real substantive rights that the law bestows. In the most vulnerable interlude that is litigation, lawyers should not try to prey on natural weaknesses by trying to triumph at any cost. Departures from this Kantian ideal impair not only instrumentally valuable means to a substantively just result but also intrinsically valuable procedural norms. If civil procedure is conceptualized as a system of dispute resolution, then this should perform a healing function. People remain people throughout litigation and must not be reduced to mere pawns in some elaborate game.[49]

Treating procedural duties as ethically independent ends in themselves may sound attractive, but let us posit the truly hard case. In an oft-cited essay, Robert Cover posed several actual fact patterns that involve manipulation of procedure to avoid the evil of allowing someone else to be enslaved. Does avoiding this malignant result legitimate procedural sleight-of-hand? Cover made a convincing argument that procedural manipulation is indeed justified to avert this substantive horror.[50] The case of legalized slavery posits a cogent circumstance for what resembles a kind of civil disobedience of a corrupt substantive order. Perhaps, we do not so much forsake procedural duties at that point as much as reject the validity of such an obvious and outrageous substantive injustice.

Under the extreme circumstances posited, moral trumps of a higher order may well require that substance-neutral procedural principles be forsaken. Nevertheless, one must narrowly circumscribe the conditions under which one would relinquish the aspiration for neutral procedural

49 With some regret, I do not deny that litigation has some aspects of a game.

50 *See* Cover, *supra* note 36. Aquinas argues that when a law enslaves a person, it is unjust, and consequently, ceases to be law. *See* T. AQUINAS, SUMMA THEOLOGICA, I, II, Q. 95, art. 2 ("I answer that, as Augustine says, that which is not just seems to be no law at all . . . . But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.").

principles.[51] Lawyers are guardians of process.[52] The charge is in some sense sacred because process helps to shield us from that decision by whim often called tyranny.

IV.

Many of the papers presented in this symposium implicitly engage the struggle for procedural justice to come to grips with the rights-oriented society. In his article, Arthur Von Mehren provides a conceptual point of departure for us to contemplate the procedural ends of fairness and efficiency articulated in Rule 1. Specifically, he builds on his earlier seminal work with Benjamin Kaplan comparing the German procedural model of periodic trials with the American model of prolonged pretrial and continuous trial.[53] The context of comparative law helps us examine such values as fairness and efficiency by placing them against the backdrop of concrete legal systems.[54]

Two papers etch the contours and precepts of our current procedural system. Geoffrey Hazard nicely encapsulates the model that the Federal Rules have followed of striving to adjudicate one factual transaction completely in a single trial. This is the familiar trans-substantive paradigm of resolving all legal causes of action arising from the same factual transaction in a single proceeding and under one set of procedural rules. Hazard also recounts the inherent limitations of this trans-substantive ideal. Edward Cooper astutely surveys how the appellate stage of the current adjudicatory model can affect trial. Focusing on Rule 52(a), he presents a valuable picture of standards of review on appeal.

While the preceding papers concern our current approach to procedural justice, several others challenge the viability of that system. Mary Kay Kane's article tests the entire premise of a cognizable boundary between substantive and procedural rules. Kane describes the dogged problems which continue to trouble the federal courts on this score. Stephen Burbank critiques the trans-substantive vision of procedural justice that the Federal Rules profess to embody. Using the context of statutes of limitation, Burbank depicts quite vividly the elusive quality of attempts to fashion such rules.

Moving to a different set of concerns, Joseph Bauer examines the Supreme Court's vision of an independent system of procedural justice. Specifically, Bauer questions the weight that the Supreme Court currently affords advisory committee notes in interpreting the rules. He

51 Kant's ethical system has been criticized for its "rigorism" in denying one the right to lie in the face of an unmitigated evil. However, at least one author argues that parts of the Kantian system will sometimes permit lying under such circumstances. Moreover, although parts of Kant's writings do reject such behavior, this result "does not impugn Kant's ethic as an *ideal* system. Instead, it shows that we need special principles for dealing with an unmitigated evil." *See* Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFF. 325, 327 (1986) (arguing that morality itself sometimes allows or even requires something that from an ideal perspective may be wrong).

52 *See* J. ELY, DEMOCRACY AND DISTRUST 102-04 (1980).

53 *See* Kaplan, Von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958).

54 Tur, *The Dialectic of General Jurisprudence and Comparative Law*, 1977 JURID. REV. 238.

asks why the Court which is explicitly vested with the power to draft the rules should defer in subsequent interpretations to the committee that only advises it.

A final group of papers cluster around the theme of procedural reform. Of necessity, some engage the dialectical approach that currently dominates procedural change; however, some also argue for more fundamental revisions. Paul Carrington, current reporter of the advisory committee, sets out a number of intriguing proposals for modifying Rule 4. Most notably, he discusses dropping the territorial jurisdiction requirement in federal question cases to permit nation-wide service of process.[55]

Judge McLaughlin recounts the problems in discovering the opinions of opposing experts. The secrecy often shrouding such information contrasts sharply with the openness that characterizes discovery and looms particularly important in light of the battles of experts that define so many trials. To ameliorate this incongruity in the rules, Judge McLaughlin recommends greater availability of information regarding experts.

Jack Friedenthal discusses several recent Supreme Court decisions which afford greater opportunities for summary judgment. While these rulings may expedite the litigation process, they also offer new litigation weapons, of which defendants in particular might avail themselves. Also addressing problems emanating from the rules dialectic, Judge Kenneth Ripple and Gary Saalman examine the important and complex development of Rule 11 jurisprudence. They carefully delineate some difficulties in applying this Rule to constitutional adjudication.

Two articles relate new ways of thinking that may enable us to break the rules dialectic. The circle of rule abuse and modification represents a kind of long run expression of our extreme adversarial mindset. Robert McKay describes a different way of thinking which places primary value not on winning, but on more cooperative methods of solving disputes. As McKay skillfully demonstrates, this model has exerted such powerful sway that many federal courts are introducing some of its methods into federal litigation. Unfortunately, however, even the methods of alternative dispute resolution can be transformed into litigation weapons.

Judge John Grady, the chairperson of the rules advisory committee, pleads that the hearts and minds of the participants in this great spectacle change. Judge Grady lays blame on lawyers, law professors, and judges alike, calling for each group to modify its behavior.

With specific regard to law professors, we must begin to think about duty-premised notions of procedure, whereby lawyers feel internally constrained rather than simply externally forbidden from engaging in certain behavior. I am not sure how to reach this goal. The starting points with which some have grappled include introducing legal ethics and alternative dispute resolution into the first-year procedure course. Perhaps we should devote more classroom time to examining what lawyers should or

55 Federal venue requirements would still remain. *See, e.g.*, 28 U.S.C. § 1391 (1982).

should not do, as against what they can or cannot do.[56] Discussion of philosophical notions such as the Kantian categorical imperative or the Rawlsian theory of pure procedural justice may prove useful. Possibly, we should relate stories about the bad things that the extreme litigation model can do to people. Maybe, we should recount the perspectives of forebears like Abraham Lincoln or Learned Hand.

I recognize that these are sketchy and inadequate solutions, but new ways of thinking about procedure will take time for those of us who were socialized into the old system. While the notion of an essential respect for others is fairly simple, detailing its ethical and other implications would undoubtedly prove quite complex. I have obviously left many of these points to be worked out at some other time. Even if we can develop and "profess" a duty-based system of procedure, this would hardly solve all the problems debated in this symposium. For example, it would not make *Erie* go away. This essay, however, only aspires to provide a provocative beginning—a "foreword."

On a personal note, I would like to thank the distinguished participants who presented papers, moderated sessions, or otherwise contributed to this conference. I only hope the printed page begins to convey the sense of intellectual excitement they brought to this gathering.

56 *See, e.g.*, T. SHAFFER, FAITH AND THE PROFESSIONS (1987); Burns, *A Lawyer's Truth: Notes for a Moral Philosophy of Litigation Practice*, 3 J. L. & RELIGION 229 (1985); Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509 (1987); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) and *Correspondence*, 86 YALE L.J. 573 (1977); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.