SECURING THE NORMATIVE FOUNDATIONS OF LITIGATION REFORM

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INTRODUCTION

Federal court adjudication has changed in major ways over the past thirty years. Judges are more actively involved in promoting settlement than ever before; alternative dispute resolution (ADR) has moved center stage; and large-scale aggregation of related lawsuits has become much more common. These changes raise deep and difficult questions that implicate core elements of civil adjudication. Should trial judges be actively involved in promoting settlement or should they focus exclusively (or mostly) on trial? Should procedural rules be designed with settlement effects in mind or should they aim exclusively at trial outcomes? When should related cases be aggregated and how should aggregation be accomplished – by joinder, multi-district litigation, class action, or some other device? How much procedure should be prescribed by general rules uniformly applied, and how much left to the discretion of trial judges in individual cases? These questions present some of the most serious litigation challenges for federal judges in the twenty-first century. 1

In 1975, just before the explosion of recent interest in procedural reform, a Yale Law School professor and noted procedure scholar, Robert Cover,
published a famous article in the Yale Law Journal dedicated to James William Moore, one of the principal architects and promoters of the original Federal Rules of Civil Procedure. This article, entitled For James Wm. Moore: Some Reflections on a Reading of the Rules,\(^2\) challenged a central tenet of the original Federal Rule vision: the commitment to “trans-substantive” rules. By “trans-substantive,” Professor Cover meant general rules applied uniformly to all types of lawsuits regardless of the substantive stakes. He rejected trans-substantivity as a procedural ideal and advocated for greater flexibility in adapting procedures to serve different substantive interests.

In this brief symposium contribution, I propose to revisit Professor Cover’s 1975 article and explore what it has to tell us today about how to approach the normative dimension of procedural reform. I shall defend three general points: first, that a coherent normative account of the procedure-substance relationship is essential to crafting sound procedure; second, that Professor Cover grasped the nature of that relationship more clearly than many proceduralists do today; and third, that we would do well to follow Professor Cover’s lead in working out answers to the difficult procedural questions that twenty-first century judges will confront.

Proceduralists today often blame empirical deficiencies for failed reform efforts and sometimes seem to assume that successful reform will follow on the heels of a richer empirical understanding of how rules actually operate in practice.\(^3\) Poor empirics are a problem, to be sure, but they are only half the problem. The other half has to do with normative deficiencies. There is no way to evaluate empirical data, regardless of how extensive and detailed it is, without a clear understanding of what the data is supposed to test. Thus, effective procedural reform must be based on a coherent normative account of civil procedure that is capable of attracting broad-based support. We do not have such an account today.

At the most general level, then, this Essay is a call for more rigorous normative work in civil procedure. Any such effort must begin with a theory of the relationship between procedure and substantive law. Professor Cover understood this point thirty years ago, and we must understand it again if we are to fashion procedures to handle the most serious litigation challenges of the twenty-first century.

The following discussion is divided into three parts. Part I reviews the argument in For James Wm. Moore: Some Reflections on a Reading of the Rules and shows how Professor Cover’s

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3 See, e.g., Bryant G. Garth, Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research, 49 ALA. L. REV. 103, 103-13 (1997) (observing that the “natural tendency of the legal community is to demand solutions from empirical research and then to blame the research for failing to resolve the debates”); Laurens Walker, A Comprehensive Reform for Federal Civil Rulemaking, 61 GEO. WASH. L. REV. 455, 484-89 (1993) (proposing that procedural rulemaking move from a “rationalistic” approach toward an “empirical” approach).
rejection of the trans-substantive ideal follows from a much deeper and more important point about the substantive nature of procedural justification. Part II extends Professor Cover’s insight and explains why substantive values figure in the justification of all procedural rules. Part III applies this insight to three critical areas of current and future reform interest: settlement, aggregation, and the proper scope of judicial discretion.

I. COVER AND TRANS-SUBSTANTIvITY

In the introduction to *A Reading of the Rules*, Professor Cover described his project as “an exploration to rediscover the feel of a tension.” The tension he had in mind was between “procedure generalized across substantive lines and procedure applied to implement a particular substantive end.” The former he referred to as “trans-substantive” procedure.

Professor Cover used an inductive approach to examine this tension. He identified concrete examples of cases in which courts tailored procedures with an eye to substantive interests. He then explored reasons why the results seemed intuitively acceptable and argued that a major reason had to do with the fact that the procedures in question successfully enforced the substantive policies at stake and did so in a principled way. From this, he concluded that the system was not, and should not be, committed to trans-substantivity as an ideal.

One of Cover’s examples involved remote participatory rights of third parties who seek to represent or otherwise pursue litigation on behalf of others. He discussed an early Virginia case involving the rights of a discharged executor to litigate the claims of slaves to freedom under a will, as well as modern cases involving the class action. In Cover’s view, any decision to allow third party litigation, be it in the form of surrogate standing or a class action, “must represent in large part a judgment about the likelihood of a particular form of litigation taking place without such participation, and about the desirability of encouraging such litigation.” The latter judgment, he insisted, had to take account of the substantive objectives at stake. Only in this way was it possible to evaluate the social benefits of third party litigation and compare those benefits to the risks and costs.
He saw the same dynamic at work in his other examples. For instance, a court might legitimately apply a rebuttable presumption even if the presumption was contrary to the usual facts.\textsuperscript{12} Such a counter-probabilistic presumption might be justified if a large number of errors would occur in the absence of the presumption and the cost of those errors, measured in terms of the substantive interests at stake, would greatly exceed the cost of new errors created by the presumption itself.\textsuperscript{13} So too for exceptions to the hearsay rule.\textsuperscript{14} Hearsay evidence should be admitted, Professor Cover reasoned, if the expected cost of error upon exclusion greatly exceeded the expected cost of error upon admission – and as in the presumption case, the cost of error was a function of the substantive interests at stake.\textsuperscript{15} Thus, as Cover concluded, some procedural choices simply had to take account of substantive policy.

\textsuperscript{12} Cover’s example was \textit{Hudgins v. Wrights}, 11 Va. (1 Hen. & M.) 134 (1806), in which the chancellor indulged a counter-probabilistic presumption that all men regardless of race and color were free men (thereby putting the burden on those who claimed a man was a slave). Cover, \textit{supra} note 2, at 729-30.

\textsuperscript{13} Cover concluded his discussion of \textit{Hudgins} with the following general observation: “It seems impossible to conceive of a manner of allocating the risks of uncertainty without considering substantive preferences. A general rule conforming allocations solely to probability flies in the face of our sense that one wants to be more certain when consequences are sufficiently serious.” \textit{Id.} at 730.

\textsuperscript{14} Cover’s example was \textit{Mima Queen v. Hepburn}, 11 U.S. (7 Cranch) 290 (1813), in which the Supreme Court, over a powerful dissent, refused to admit hearsay evidence supporting a claim by black plaintiffs that they were descended from a free maternal ancestor and thus free themselves. Cover criticized the majority for simply applying the general hearsay rules without regard to the substantive consequences, and he applauded the dissent for directly addressing the strong substantive policy in favor of freedom from slavery. Cover, \textit{supra} note 2, at 725-26, 730-31.

\textsuperscript{15} See Cover, \textit{supra} note 2, at 731. The phrase “expected cost of error” is mine, not Professor Cover’s, but it accurately describes what he had in mind. For Cover, any decision about admitting hearsay had to balance “the disutility” of an erroneous decision due to the unavailability of non-hearsay evidence against “the disutility” of an erroneous decision due to the admission of unreliable hearsay. \textit{Id.}
It is common today to cite Professor Cover’s article for rejection of the trans-substantive ideal and endorsement of substance-specific rules. This reading of the article, while correct as far as it goes, misses Cover’s deeper point. He actually meant to say something about the nature of procedural justification and its close connection to substantive value. His deeper point was that sometimes the justification for a procedural choice necessarily had to take account of substantive policies, and in such cases, judges should explain their choices publicly and make the connection to substantive policy explicit. His rejection of trans-substantivity follows from this deeper point. Simply put, trans-substantivity cannot be an ideal because different substantive policies sometimes justify different procedural choices for different types of cases.

This is particularly clear from Professor Cover’s discussion of the Rules Enabling Act proviso which, at the time Cover wrote, stated that the Federal Rules of Civil Procedure should not “abridge, enlarge or modify” substantive rights. Cover’s view, that at least some procedures should be explicitly tailored to substantive interests, might seem inconsistent with a proviso that appears to forbid substantive modification through procedural choice. Professor Cover, however, interpreted the proviso more narrowly, to permit federal judges to tailor procedures to substantive interests so long as those judges “justify substantive impact in terms of substantive values” rather than on substance-neutral, trans-substantive grounds. Cover’s focus in this part of his discussion is on justification: when procedural choices must be justified in terms of substantive value, the most the Rules Enabling Act proviso can expect is that judges make the substantive content of their justifications explicit. If they do that, “Congress will know what choice was made and will be able to correct it or not as it chooses.”

Professor Cover, however, stopped short of embracing the full implications of his argument. Occasionally he suggested that the same justificatory link between procedure and substance that he found in his examples might hold for much more of procedural law, but he was far too modest in advancing this broader claim. In fact, properly understood, Professor Cover’s point about procedure and substance applies to all of procedural law. In other words,

18 Cover, supra note 2, at 735.
19 See id. at 739 (“[T]he most problematic character of the Federal Rules of Civil Procedure under the Rules Enabling Act emerges from letting the mere fact of a rule’s existence control the promotion (or lack thereof) of substantive values.”).
20 Id. at 736.
trans-substantivity is not an option we can accept or reject, for there is no such thing as a procedural rule that is trans-substantive in the sense that it can be justified exclusively by reference to procedural values without considering substantive ends. The following section explains why.

II. COVER’S THESIS AND ADJUDICATION THEORY

The problem with the trans-substantive ideal is not that it is illogical or inconsistent with obvious features of the procedural system. The problem is that it does not fit any plausible theory of American civil adjudication. This is what Professor Cover understood and why he mounted his challenge to trans-substantivity in the way he did. He identified concrete examples where substantive values mattered to procedural choice and used those examples as evidence that the system was not in fact committed to an ideal of trans-substantivity after all.

The following discussion makes Professor Cover’s point at a more general level. Rather than arguing inductively from specific examples, I argue deductively from generally shared views about the primary purpose of adjudication. This deductive argument shows that the justificatory link between procedure and substance holds not just for certain rules, but for the procedural system as a whole.

I shall first provide a capsule summary of my argument before giving a more detailed version. The argument flows logically from the proposition that the primary function of procedure in the American system of adjudication is to reduce expected error costs.21 Expected error cost is a function of two variables: the risk of outcome error and the cost of outcome error. The risk of outcome error is the probability that the outcome of litigation will deviate from the parties’ substantive entitlements. The cost of outcome error is the harm that results when such a deviation occurs, and this harm must be measured in terms of the values that the parties’ substantive entitlements protect. Procedure reduces the risk of outcome error, which reduces the number of errors and thus the total harm that the system’s errors create. The more valuable the substantive interests at stake, the greater the harm from an error. The greater that harm, the greater the social benefit in avoiding it and the more society should be willing to spend on procedures to prevent it. In sum, any procedural choice must be justified by the error costs it generates, which depend on the substantive values at stake. The following discussion develops these points in somewhat more detail.

Adjudication, like all complex social institutions, serves a variety of purposes and creates many different types of benefit. Yet its primary purpose is to produce outcomes that accurately reflect the parties’ substantive entitlements. Many courts and commentators are fond of citing psychological

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benefits from party participation, and some emphasize the benefits of educating the public on social norms or dramatizing important value conflicts through highly publicized trials. Further, some commentators insist that respect for individual dignity is an important value of adjudication and supports participation even when participation yields no gain in outcome accuracy (and perhaps even when it yields a loss). Although these benefits have some value, they are not the core reason for the institution’s existence. I take it as (relatively) uncontroversial that the core function of civil adjudication is to enforce the substantive law by producing outcomes that conform to the parties’ substantive entitlements.

If the primary goal of adjudication is to produce outcomes that conform to the substantive law, it follows that accuracy must be the core metric for evaluating outcome quality. It is important to be clear about what “accuracy” means in this context. An accurate result need not be a uniquely correct result. Frequently, legal materials must be interpreted and facts inferred from circumstantial evidence. Even though reasonable minds can disagree about such matters, it still makes sense to refer to accurate and inaccurate results. As long as the set of reasonable outcomes is bounded – as it must be – any result within that set is accurate and any result outside it is inaccurate.

For example, some view the adversarial process as giving parties a chance for cathartic release, instilling in them a feeling of just treatment, or increasing their acceptance of adverse results. See, e.g., Carey v. Piphus, 435 U.S. 247, 260-61 (1978) (stating that due process rights guarantee individuals a “feeling of just treatment” by the government,” in addition to protecting against unjustified deprivations (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)); E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 26-40, 61-83, 93-127 (1988) (discussing empirical studies on procedural justice which show that individuals are more satisfied with the fairness of the process and the outcome when they have a chance to participate); Michael J. Saks & Peter David Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 STAN. L. REV. 815, 838 (1992) (equating participation value with litigant satisfaction).


After all, therapists are likely to be better than judges at instilling psychological benefits, and litigation, while sometimes dramatic, is an uncertain and rather limited medium for social education.

Even those who claim that adjudication is about articulating public values assume that public values are articulated through interpreting and applying substantive law norms. See, e.g., Owen M. Fiss, The Supreme Court, 1978 Term – Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 1-2 (1979).

Indeed, accuracy has meaning even when the substantive law is being fashioned through a common law process. In a common law system, a judge is supposed to fit a new
The next step is to recognize that accuracy is valuable not as an end in itself, but rather as a means to the end of promoting the values underlying the substantive law. This should be relatively obvious. The only way accuracy could have value in itself is if people desired a more accurate world just for the sake of living in such a world — and were willing to spend scarce social resources to create and sustain it — even when accuracy served no other purpose at all. However, people are not that compulsive. Accuracy is prized not for its own sake, but for its instrumental value in creating desirable results.

In the case of adjudication, accurate outcomes are valuable because they advance substantive law goals.

For example, if the substantive goal is to safeguard individual rights, accurate decisions are valuable because they protect those rights. Accordingly, the cost of an outcome error in such a case is the harm associated with failing to protect the moral values underlying the right and the resulting loss to the individual affected. By the same token, if the goal is to encourage efficient behavior through deterrence, accurate decisions are valuable because they support the ex ante incentives that the substantive law seeks to create. Accordingly, the cost of error is measured in terms of the overall reduction in social wealth caused by skewed incentives.

It follows from the previous propositions that the social benefit of procedure must always be measured in terms of the substantive values at stake. To illustrate, consider the scope of pre-trial discovery. The main reason to expand discovery is to enable parties to obtain more information before trial. Obviously, obtaining more information is not valuable in itself; it is valuable because information revelation improves the adversarial process and increases the likelihood of an accurate result. Moreover, accuracy is not the ultimate goal either. Accuracy is valuable only insofar as it improves enforcement of the substantive law and bolsters protection for the values served by that law. Thus, the social benefits of broader discovery must be measured in terms of the social benefits flowing from more effective protection of substantive values.

rule or principle to precedent. As long as there is a meaningful criterion of fit — which any common law system committed to stare decisis should have — it makes sense to equate accurate decisions with those that meet the fit criterion and erroneous decisions with those that do not.

To take a familiar example, accuracy in answering examination questions is not valuable in itself; it is valuable because of how it affects the future educational and professional prospects of the exam-taker.

This assumes that broader discovery in fact increases outcome accuracy. There is another point to bear in mind. Obviously, these benefits have to be balanced against the costs. Broader discovery, for example, invites more discovery requests, requires more responses, and generates more adversarial battles with attendant court hearings and judicial deliberations. Broader discovery can also produce more indirect costs by opening up strategic opportunities to make abusive discovery demands, which can produce skewed settlements that impair substantive values. Further, social resources spent on broader
The foregoing argument is perfectly general and consistent with a broad range of normative perspectives. The language of “error risk” and “error cost,” as well as the reference to “expected error cost,” might lead a reader to think that the argument works only for a law-and-economics approach. But that would be a mistake. The conclusion follows logically from the premise that the primary purpose of adjudication is to produce outcomes that conform to the substantive law, and this premise holds for any theory that pays attention to consequences, be it economic, rights-based, or equality-based. To be sure, the concept of an error cost has somewhat different meaning within different normative theories. For example, a person concerned about protecting individual moral rights is likely to measure cost in terms of moral harms qualitatively understood, whereas a person concerned about maximizing social utility is likely to measure cost in terms of utility quantitatively understood. Both can agree, however, that error cost is a function of the substantive values at stake.

For example, a proceduralist who advocates for dignitary participation rights must take account of substantive values when making trade-offs between dignity and outcome accuracy. She must consider how much a particular form of dignity-based participation costs the system in terms of reduced outcome accuracy. And to do this properly, she has to evaluate the magnitude of the additional error cost in terms of the substantive values adversely affected by outcome error.

III. IMPLICATIONS OF COVER’S THESIS FOR LITIGATION REFORM

To recap the argument so far, there is no way to evaluate the social benefit of procedure overall other than to measure the cost of the outcome errors that procedure avoids. The magnitude of this cost depends on the value of the substantive interests that accuracy protects. Thus, procedure and substance are connected at the level of justification, through the cost-benefit balance that proper justification requires. This means that different cases with different substantive interests might call for different procedural rules if the substantive interests at stake have different value or if the cost of the procedure varies with different case types. Professor Cover recognized these points even if he was not quite willing to accept all their implications.

These basic insights have a number of important ramifications for contemporary litigation reform. In this section, I will briefly discuss three topics: settlement promotion, aggregation, and case-specific discretion.

discovery create opportunity costs, since these are resources that could be spent on other worthwhile social projects such as better schools and safer roads.

29 This does not mean that procedure should necessarily be case-specific. There are benefits to general rules and costs to case-specific discretion, so the optimal level of generality of procedural norms depends on the cost-benefit balance, a topic I address briefly below. See infra Part III.C.
A. Settlement

One of the most important developments of the past thirty years is the increasingly active involvement of federal district judges in encouraging settlements. Judicial involvement ranges from relatively minimal forms of intervention, such as giving parties a preliminary view of the merits, to much more aggressive measures, such as mediating settlements, referring cases to ADR, and pressuring parties to accept what the judge believes to be reasonable settlement terms. Moreover, procedural rules have been adopted to strengthen judges’ settlement powers.

These developments have elicited strong opposition. Many critics complain that federal judges have lost sight of their core mission, to conduct trials. This criticism, however, oversimplifies the issues. It may be that judicial involvement in settlement is excessive today – and I happen to believe that it is – but it is also a mistake to exaggerate the importance of trial in civil adjudication. In fact, settlement effects are critically important to the design of any system of civil procedure, and a procedural system that ignores these effects and focuses on trial exclusively cannot provide a convincing justification for its own rules.

The reason is easy to see. Civil adjudication protects substantive values in two ways – by producing good trial outcomes and by producing good settlements. Accordingly, procedural justification must take account of both types of outcome. I have explained this point in some detail elsewhere and I will not repeat all of that analysis here. It is relatively obvious for a theory of procedure that equates accurate outcomes with optimal deterrence.


32 Indeed, it is a bit odd to ignore settlement, since the vast majority of cases filed in federal court are resolved in that way. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 928 & nn.10-11 (2000) (noting that about 70% of filed cases settle and only about 6% reach trial); see also Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, 76 Tex. L. Rev. 77, 77 (1997) (reporting that 90-95% of cases not dismissed by courts end in settlement before trial).


Settlements are at least as important as trial judgments in this theory because rational actors take account of the liability risk created by settlements as well as trial judgments when deciding how to act. In other words, it is the overall pattern of judgments and settlements that deters, so the procedural system must be evaluated by the overall pattern it creates.\textsuperscript{35}

To illustrate the point, consider the following example. Imagine a procedural system that has onerous pleading requirements, very limited discovery, highly restrictive evidence rules, and the like. Suppose that this system seriously burdens plaintiffs and greatly advantages corporate defendants in products liability litigation. Faced with these burdens, few plaintiffs file suit and virtually all who do end up settling for much less than their substantive entitlements. My point is that this procedural system must be judged not simply for its effect on the very few cases that reach trial, but also for its effect on settlement.

The fact that parties consent when they settle does not mean that settlements can be ignored. The normative force of consent depends on the circumstances in which it is given. In my hypothetical, for example, the plaintiff consents only because her trial alternative is extremely bleak, which makes her consent highly problematic. Moreover, these problems exist no matter what theory of adjudication one applies. From the perspective of a deterrence theory, a pattern of deficient settlements presents a serious problem despite the presence of consent when it dilutes the deterrent effect of the substantive law. So too, if the goal is compensation for rights violations, problems arise when consent to deficient settlements is tainted by the injustice of the trial outcomes that induce it.

However, it would still be possible for a procedural system to focus exclusively on trial if the procedures that produced good trial judgments also happened to produce good settlements. In our products liability hypothetical, for example, the prospect of bad trial judgments is a major factor in inducing bad settlements, so fixing procedures to improve the quality of trial judgments (discussing different theories of procedure). The additional complication with a rights-based theory has to do with the fact that rights can be waived. Settlements involve consensual waiver of rights, so why should one ever worry about how settlements affect rights enforcement? The answer is that the consent underlying a settlement is not always normatively adequate. If a party’s only alternative is a seriously flawed trial (because the procedures for trial are grossly deficient), then the party is likely to agree to a seriously flawed settlement.

\textsuperscript{35} One might object that judges have no business meddling in the parties’ private affairs. If parties wish to settle, what business is it of the judge? The answer to this question is that adjudication and settlement are not purely private matters. Adjudication has a public purpose in this theory – to achieve optimal deterrence according to the substantive law. It follows that rulemakers and judges should be concerned about procedure’s effect on settlement as long as there is some risk that settlements will deviate from the substantive law norm, and such a risk exists because parties do not internalize all the benefits and costs of deterrence.
might also improve the quality of settlements. If this were generally true—if procedures suited to producing good trial judgments always produced good settlements—then there would be no need to consider settlement quality explicitly when designing a procedural system, and judges could devote themselves exclusively to trial. For reasons I have discussed elsewhere, however, this happy coincidence is highly unlikely.\(^{36}\) The goal of designing procedures to produce good trial judgments will often conflict with the goal of designing procedures to produce good settlements. Simply put, different procedures are suited to different goals.

To illustrate, consider the scope of pre-trial discovery. Someone who focuses exclusively on trial judgments is likely to choose a broader scope for discovery than someone who also considers settlement effects. Broad discovery helps to uncover evidence important for constructing an accurate account of the events at trial and choosing the proper law. These benefits must be balanced against the costs of discovery requests, including the cost of formulating requests, responding to those requests, litigating motions to compel, and so on. However, these costs increase markedly when settlement effects are added to the mix. The broader the discovery, the greater the opportunity for powerful parties to credibly threaten the imposition of discovery costs on weaker opponents and thereby obtain skewed settlements in their favor.\(^{37}\) This, when settlement is added to the picture, broad discovery can create additional costs in the form of skewed settlements produced by strategic abuse, and the presence of these additional costs can tip the cost-benefit balance in favor of narrower discovery rules.

The important lesson here is that a procedural system must consider the quality of its settlements as well as its trial judgments and must strike a balance between the two goals when deciding on the appropriate level of judicial involvement in settlement. Striking this balance is a complicated task and well beyond the scope of this brief Essay. Yet three points are relatively clear and worth emphasizing. First, one should not dismiss \textit{a priori} the idea of designing procedural rules to regulate settlements. It is tempting to think of adjudication exclusively in terms of trials and to view settlement as a mere byproduct of the adjudicatory system. But the previous analysis explains why this view is mistaken. Second, one should consider effects on settlement \textit{quality}, not just quantity. Indeed, settlement quality is more important than settlement quantity. Third, one should not dismiss out of hand the notion that optimal procedural rules might enlist the judge to some extent in facilitating or regulating settlements. Whether doing so is a good idea depends on the benefits and costs, given the limits to trial judge competence and the comparative merits of feasible alternatives.

\(^{36}\) See Bone, \textit{Settlement}, \textit{supra} note 33, at 34-36.

B. Aggregation

How best to aggregate related cases for adjudication is a hotly debated question in procedure circles these days. The class action is perhaps the most notorious and controversial example. The issues are too vast to address here, but it is worth making a point that is too often neglected, a point that follows from a clear understanding of the justificatory link between procedure and substance. Any evaluation of aggregation is always a “compared to what” assessment, which means that the evaluator must first define a baseline against which aggregative outcomes are compared. Defining this baseline is a normative task that can be undertaken successfully only with a fully developed theory of what substantive effects should count in the analysis. In particular, if the baseline includes extra-litigative alternatives that parties are likely to employ when a form of aggregation is denied, then aggregative litigation might be optimal despite its high costs when the alternatives produce results that do an even worse job of enforcing substantive law values.

To illustrate the point, consider the class action. The benefits and costs of the class action are familiar. On the benefit side, class actions save duplicative investments in litigating common issues, make it possible for parties with small claims to enforce the substantive law, and redress imbalances of power across the party line. On the cost side, class actions add substantial litigation costs of their own and sometimes produce suboptimal settlements due to agency problems and adverse selection effects.

Probably the most controversial application of the class action is in the mass tort setting, where it is used to aggregate thousands of individual tort suits stemming from a common product or activity. Critics point out that class attorneys in these cases often agree to settlements that sell out the class in return for a large guaranteed fee. These criticisms are justified to some extent. The mass tort class action has many flaws. However, whether its flaws are serious enough to condemn it must surely depend on how the device fares compared to the alternatives parties are likely to employ in its absence. This presents the question of baseline: what are the alternatives to which the class action should be compared?

To make the point more concrete, consider what is likely to happen in the absence of a mass tort class action. It is tempting to compare the mass tort class action to an idealized form of individual litigation, in which a single plaintiff with ample resources litigates her own suit through a loyal attorney and enjoys exclusive control over the settlement decision. This baseline is unrealistic, however. Experience shows that many mass tort cases settle en

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38 See Bone, supra note 21, at 261-92.
39 Suits involving the marketing of a drug or the widespread use of asbestos are familiar examples. See, e.g., John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1384-1404 (1995) (presenting a case study of asbestos class action litigation).
40 See, e.g., id. at 1367.
masse with or without a class action. 41 Often a mass tort lawyer will take active steps to collect a large inventory of clients (often numbering in the thousands) through advertising, referrals, and other methods, and work out an aggregate settlement in which defendants pay one lump sum for the entire group or different lump sums for different subgroups. 42

The class action appears more attractive when compared to this aggregation baseline. If mass tort lawyers are likely to turn to inventory settlements, then it is not clear that outcome quality is improved by erecting high procedural barriers to class actions in mass tort cases. Agency problems infect inventory settlements too. Indeed, it is quite possible that the agency problems are more serious for the inventory settlement than for the class action. Inventory settlements are often concluded without judicial oversight, whereas class settlements are reviewed by a judge (and class litigation is judicially monitored in other ways). 43 Though imperfect, this judicial oversight at least opens up the possibility that serious class action problems might be identified and corrected, a possibility that does not exist for inventory settlements concluded entirely outside of court. 44 Thus, it might be better to do what we can to control agency costs and other problems in the class setting and simply live with the remaining risks even if they are serious, provided they are less serious than those associated with the inventory settlement alternative. 45

41 See Howard M. Erichson, Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation, 2003 U. CHI. LEGAL F. 519, 530-43 (describing the dynamics of settlement in non-class collective representation). For an excellent history of settlement practices in tort cases, showing that bureaucratic aggregate settlement of mature torts has existed ever since the middle of the nineteenth century and exploring some of the ramifications for the modern class action, see generally Samuel Issacharoff & John Fabian Witt, The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law, 57 VAND. L. REV. 1571 (2004).

42 See Erichson, supra note 41, at 533-39, 545-50.

43 See id. at 527; see also id. at 571-72 (describing possible conflicts of interest in distributing lump sum settlements).

44 The class action is not superior to inventory settlements in all respects. For example, inventory settlements at least hold out the hope of competition in the market for mass tort clients, and this competition might have a beneficial effect in constraining attorney opportunism. The class action, on the other hand, gives the class attorney a monopoly over the entire class litigation. Issacharoff & Witt, supra note 41, at 1631-34. However, one should not make too much of this difference. The market for legal services is far from perfect and the number of firms specializing in mass tort litigation is fairly limited.

45 It is true that in a world of high agency costs a self-interested lawyer with complete control over the litigation will choose the dispute resolution method – class action or inventory settlement – that maximizes his expected fee (net of his costs). This might lead one to conclude that the class action could never be superior from a social perspective. If a lawyer chooses the class action in this scenario, it must be because the class action gives him a larger expected fee than an inventory settlement. However, this is not necessarily so. First, even mass tort attorneys pay some attention to client interests; agency costs exist, but there are some constraints on attorney self-interest. Second, the class action, especially the
The selection of baseline for evaluating a form of aggregation such as the class action is not a purely empirical task; it is also normative. In particular, it depends on a normative account of what substantive effects should matter for procedural justification. Choice of procedure affects not only trial judgments and litigation settlements, but also settlement of disputes that could be filed as lawsuits but are not. We have already seen that someone justifying a particular choice of procedure must take account of trial judgments and litigation settlements. The question is what else must be considered, and in particular whether effects on extra-litigative outcomes should matter as well. I do not propose to answer this difficult question here. I only note that any answer requires a normative account of adjudication capable of explaining when effects admittedly caused by procedure are relevant to justification.

C. Discretion

The Federal Rules of Civil Procedure give trial judges broad discretion to design procedures for particular cases. For example, judges have considerable latitude to shape party and claim structure, define the sequence and scope of discovery, influence settlement, and so on. The original Federal Rule drafters made a conscious choice to grant broad discretion, based on the assumption that trial judges had the experience and expertise to appropriately tailor procedures to the circumstances of individual cases.

Whether trial judges should have as much discretion as they do today is a huge issue well beyond the scope of this Essay. In other writing, I argue for much tighter constraints. Here I wish to make two simple points. First, when general rules are desirable, it is because their benefits exceed their costs,
not because their generality qualifies them as trans-substantive. On the benefit side, applying a general rule saves the administrative costs of tailoring procedure more closely to specific cases and avoids the error costs of tailoring in the wrong way. On the cost side, a general rule uniformly and strictly applied creates error costs in the cases it fits poorly, and those error costs are likely to be greater when the class of relevant cases is more heterogeneous.

The second point has to do with how case-specific discretion should operate within a system of general rules. Once one accepts the full reach of Professor Cover’s thesis, one is committed to analyzing case-specific procedural discretion by the quality of the settlement and trial outcomes it creates. I am skeptical about the value of broad discretion because I have grave doubts that trial judges can gather and process the information necessary to craft case-specific procedures that produce good outcomes in the highly strategic environment of litigation. Someone who is less skeptical might support broad trial judge discretion while still rejecting trans-substantivity as a procedural ideal. Indeed, Professor Cover falls into this camp himself. He challenged trans-substantivity in order to free trial judges to interpret the Federal Rules – and perhaps even to depart from those Rules – in ways that serve the substantive interests at stake in particular cases, especially cases involving strong public interests.  

CONCLUSION

We have much work to do in securing the normative foundations of civil procedure reform. The early twentieth century reformers, those who lobbied successfully for the original Federal Rules of Civil Procedure, shared a normative vision that guided their reform efforts. That vision viewed the design of procedural rules as primarily an engineering task devoid of substantive policy choice, and viewed judges as engineering experts in matters of procedural design. Today, we have lost confidence in this earlier vision, but we have no generally shared theory to replace it. The result is intense disagreement and no clear normative basis for resolving the disagreement and producing a stable and sensible set of reforms.

Empirical studies, as important as they are, cannot fill this gap alone. We also need rigorous normative work. Moreover, this work must proceed from generally shared understandings of civil adjudication if it is to produce results capable of eliciting broad support.  

Professor Cover pointed the way three decades ago, and we would do well to follow his lead today.

53 Cover, supra note 2, at 733-36 (analogizing this process to courts exercising remedial creativity). But Cover also appreciated the value of general rules, albeit flexible ones. See id. at 736-39.

54 I am not so pollyannaish as to believe that it is possible to achieve consensus on a complete and comprehensive theory of civil adjudication. However, I do believe that with careful normative work informed by empirical studies of the litigation process, we can move a lot further in that direction than we already have.