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“AN OVERWHELMING QUESTION” ABOUT NON-FORMAL PROCEDURE*

Thomas O. Main†

The Love Song of J. Alfred Prufrock begins “Let us go then, you and I, when the evening is spread out against the sky.”¹ The promise of romance quickly sobers with the next image: “a patient etherized upon a table.” The protagonist in the poem then meanders through “half-deserted streets,” past “one-night cheap hotels” and “sawdust restaurants with oyster shells” leading to some destination, to wit: a social engagement and “an overwhelming question.”² That question seems to be whether the protagonist should assert himself and communicate with others at some level beyond the superficial.³

There are many potential themes and metaphors from the poem that would work for a conference at the University of Nevada, Las Vegas entitled “Dispute Resolution in the Twenty-First Century.” Indeed, there is an air of romance to a conference setting in Las Vegas, Nevada. A trek across the desert and into the city paints a serviceable portrait of wandering through half-deserted streets, one-night cheap hotels and sawdust restaurants with oyster shells. Further, my designated task to find the common denominator that underlay the seemingly unrelated comments of Professors Oakley and other Symposium contributors, and to offer commentary thereupon, could easily lead one to become Eliot’s etherized patient. Yet I hope to draw a more profound parallel to that poem, exploring at this engagement another question, one that I find somewhat overwhelming, and one that likewise involves transcending the superficial. The overwhelming question that I face upon reflection of the thoughtful work of the papers presented is whether, or perhaps when, we should engage non-formal procedure.

An amalgam of mediation, arbitration and more traditional forms of due process will likely characterize dispute resolution in the twenty-first century.⁴

* Professor Main’s published remarks were modified to delete references to a presenter’s work that was not included in the printed symposium.

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¹ T.S. Eliot, *The Love Song of J. Alfred Prufrock*, in *THE NORTON ANTHOLOGY OF POETRY* 1027 (Alexander W. Allison et al. eds., 1970).

² *Id.*

³ See generally FRANK KERMODE & JOHN HOLLANDER, *MODERN BRITISH LITERATURE* 463-464 (Oxford 1973).

⁴ See generally Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 *NOTRE DAME L. REV.* 533 (2002); Stephen A. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better Than I Thought*, 3 *NEV. L.J.* 196 (2003); Edward J.

Indeed, since the publication of Professor Frank Sander's classic piece, *Varieties of Dispute Processing*, it has seemed inevitable that justice would be administered by a diverse and integrated panoply of dispute resolution processes.⁵ Burgeoning caseloads and the emergence of increasingly complex cases may have accelerated this trend.⁶ Contemporary courts already rely heavily on so-called alternative methods.⁷ Meanwhile, alternative methods

Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2003); Paul Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259 (2003).

⁵ See FRANK E.A. SANDER & A.B.A., *Varieties of Dispute Processing*, THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65, 83 (Rand. Inst. for Civil Justice 1979) ("What I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes), according to some of the criteria mentioned."). See generally Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 305 n.19, 309 (1996) (recognizing the 1976 Pound Conference as a "watershed and inaugurating event" for alternative dispute resolution); Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term "ADR" has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 97 (describing Professor Sander as "one of the most prescient commentators on the alternative dispute resolution (ADR) movement").

⁶ See generally Thomas E. Willging, *Mass Torts Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 381-87 (1999); Carrie Menkel-Meadow, *Taking the Mass out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender and Process*, 31 LOY. L.A. L. REV. 513 (1998); Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781 (1998); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851 (1997); Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627 (1995); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961 (1993); Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213 (1991); MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 39-48 (1988).

⁷ See generally James J. Alfini, *Mediation's Coming of (Legal) Age*, 22 N. ILL. U. L. REV. 153 (2002); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591 (2001); Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 564-65, 588 (1998); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 1 (1996); Stempel, *supra* note 5, at 297; Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 214 (1995); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079 (1993); Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1993); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 924 (1991); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1 (1990); Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

have begun to ossify and formalize in a manner reminiscent of their traditional antecedents.⁸

Yet below the surface of this sophisticated network of formal rules are legal norms that are not codified as formal rules but may be no less controlling. The influence of these non-formal forms of law can explain dissonance between form and practice.⁹ Make no mistake: I invented neither the realist movement nor the internet.¹⁰ Nor am I either nostalgic or bold enough to label this regurgitated realism as “post modern reconstructionalist neorealism” or some such thing.¹¹ However, the influence of non-formal forms of law in the

⁸ See generally Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000); Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11 (2000); Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994).

⁹ See generally Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). See also Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers’ Heads*, 90 NW. U. L. REV. 1498 (1996); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL’Y 801 (1994); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

¹⁰ For a discussion of the history of the realist movement, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 65-159 (1995) (detailing the origins and history of the legal realist movement); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 500-502 (1996) (brief history of realism). See generally Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279 (2001); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997).

The allusion to the invention of the internet refers to a 1999 interview of Vice President Albert Gore by the Cable News Network’s Wolf Blitzer during the 2000 electoral contest for President of the United States. Mr. Gore, who was already perceived as prone to exaggerating his record, was lampooned for his statement “I took the initiative in creating the Internet.” See *Transcript: Vice President Gore on CNN’s ‘Late Edition,’* (March 9, 1999), available at <http://www.cnn.com/ALLPOLITICS/stories/1999/03/09/president.2000/transcript.gore/index.html> (last accessed Feb. 8, 2003). See generally Katie Hafner, *No Father of Computing, but Maybe He’s an Uncle*, N.Y. TIMES, Mar. 18, 1999, at G3.

¹¹ By correspondence dated November 20, 2001, from conference organizers to the author, placement in this Journal was assured prior to submission. Hence, no need for posturing here! For a discussion about the selection criteria for law review scholarship, see, e.g., Nathan H. Saunders, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663 (2000); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131 (1995); James Lindgren, *An Author’s Manifesto*, 61 U. CHI. L. REV. 527 (1994) (“Our scholarly journals are in the hands of incompetents . . .”); Arthur D. Austin, *The “Custom of Vetting” as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 4 (1990) (“The use of student edited journals as the main outlet for legal writing is an embarrassing situation deserving the smirks of disdain it gets from colleagues in the sciences and humanities.”); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J.

context of procedural rules raises an important, perhaps even overwhelming, question, as we consider dispute resolution in the twenty-first century.

Professor Oakley's "A Fresh Look at the Federal Rules in State Courts" offers a useful state-by-state survey of textual conformity between state and federal rules of civil procedure.¹² The Advisory Committee that drafted the original Federal Rules of Civil Procedure anticipated, indeed promised, that the Federal Rules would be so enlightened and simple that intra-state uniformity would follow naturally as states voluntarily adopted the federal model.¹³ More than six decades later, however, fewer than half of the United States have replicated a substantial portion of the Federal Rules for their state court systems.¹⁴ Moreover, Professor Oakley concludes the Federal Rules "have lost credibility as avatars of procedural reform."¹⁵ Indeed, he suggests that federal procedure may be "less influential in state courts today than at anytime in the past quarter-century."¹⁶

State court systems that once were replicas of the federal model have failed to keep pace with an increasing number of amendments to the Federal Rules. The original Federal Rules of Civil Procedure enacted in 1938 were substantially amended in 1948, 1961, 1963, 1966, 1970, 1980, 1983, 1985, 1991, 1993, 2000 and 2001.¹⁷ Another set of amendments took effect on December 1, 2002,¹⁸ and still another set in the queue will likely take effect on December 1, 2003.¹⁹ Most of the original Federal Rules have been amended at least three times.²⁰ Only ten of the original Federal Rules have never been

LEGAL EDUC. 14 (1986) ("[S]tudents without law degrees set the standards for publication in the scholarly journals of American law – one of the few reported cases of the inmates truly running the asylum."). See also Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998).

¹² See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).

¹³ See Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916) (federal rules "would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states"); Charles Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938) ("The new federal reform is likely . . . to have an important effect, beyond the direct and immediate changes it makes in federal practice, in setting the standard and tone of procedural reform throughout the country generally."). See generally Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILLANOVA L. REV. 311, 320-321 (2001).

¹⁴ Oakley, *supra* note 12; John B. Oakley, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) [hereinafter Oakley, *Federal Rules in State Courts*].

¹⁵ Oakley, *supra* note 12, at 355.

¹⁶ *Id.*

¹⁷ See STEPHEN C. YEAZELL, U.S. FEDERAL RULES OF CIVIL PROCEDURE WITH SELECTED STATUTES AND CASES (2002).

¹⁸ Available at <http://www.uscourts.gov/rules/supct1101/CVRedline.pdf> (last accessed Feb. 11, 2003).

¹⁹ Available at <http://www.uscourts.gov/rules/proposed021502.htm> (last accessed Feb. 11, 2003).

²⁰ See FED. R. CIV. P. 1, 4, 5, 6, 7, 9, 11, 12, 14, 15, 16, 17, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 43, 44, 45, 50, 52, 53, 54, 56, 58, 59, 60, 62, 68, 69, 71 (see 71A), 72, 73, 77, 79, 81, 82, and 86.

amended.²¹ In light of this proliferation of amendments to the Federal Rules, states that were once replicas have failed to keep pace. It is now at least “arguable that there are no longer any true replicas of the [Federal Rules of Civil Procedure] to be found among the local procedural systems of the fifty states and the District of Columbia.”²² This conclusion, noting the demise of textual conformity, confirms Professor Oakley’s prescience; he predicted as much in his 1986 study.²³

Nevertheless, beneath this veneer of dissimilar formal rules, uniformity in fact or practice may exist. Put another way, conformity may exist, but in a way that our superficial or formal surveys examining textual adoption do not capture. Query, for example, whether state court trial judges require a discovery conference a la Federal Rule 26(f), even if the state court rules committees have not incorporated such a rule into their civil rules package?²⁴ Do state court judges manage their cases like federal court judges even without the express authority given to the latter pursuant to Federal Rule 16?²⁵ Do state court judges impose limits on discovery even without the benefit of the presumptive limits similar to those recently written into the Federal Rules?²⁶ Such questions focus on the standard applied in practice in the state courts. For indeed, there may be substantial conformity in fact, notwithstanding superficial differences between the federal and state rules. Of course, textual adoption and formal uniformity may have its own independent benefit, but if there is uniformity

²¹ See FED. R. CIV. P. 2, 3, 10, 21, 39, 40, 61, 64, 70, and 85.

²² Oakley, *supra* note 12, at 355.

²³ See Oakley, *Federal Rules in State Courts*, *supra* note 14, at 1427 (“[T]he momentum of the Federal Rules as a model for state court reform has subsided . . .”).

²⁴ For a discussion of the history and purposes of a discovery conference under Federal Rule 26(f), see Jeffrey W. Stempel, *Politics and Sociology in Federal Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 545-46 & n.88 (2001) (describing the 1980 amendments to Federal Rule 26 authorizing discovery conferences with judicial supervision); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 772-74 (1998) (discussing the 1980 and 1993 amendments to FED. R. CIV. P. 26(f)). See also FED. R. CIV. P. 26(f), 48 F.R.D. 487 (1980), 146 F.R.D. 443-44 (1993).

²⁵ For a discussion of the history and purposes of case management under Federal Rule 16, see Myron J. Bromberg & Jonathan M. Korn, *Individual Judges’ Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN’S L. REV. 1 (1994); Michael E. Tigar, *Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 157 (1994); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994); Carl Tobias *Judicial Discretion and the 1993 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 933-52 (1991); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989); Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789 (1989); A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 7-8 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

²⁶ For a discussion of the history and purposes of presumptive limits on the use (and duration) of discovery devices, see Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California From the State and Federal Courts*, 32 McGEORGE L. REV. 1051 (2001); Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433 (1999).

in fact, this would certainly change the tenor, if not the urgency, of any conversation about textual uniformity.

The empirical support that I offer is a survey of pleading and summary judgment standards in the federal and state courts of three states that, according to Professor Oakley's 1986 landmark study, are among the state court systems least influenced by the Federal Rules of Civil Procedure; all three, Pennsylvania, Illinois, and Nebraska, are code pleading states.²⁷ The methodology and conclusions of this study were set forth in an article that appeared two years ago in the Villanova Law Review.²⁸ Those findings and conclusions serve as a useful reference point for the overwhelming question posed here.

I traced the evolution of the quantum of factual specificity required of plaintiffs filing civil rights complaints in the federal and state courts of the three aforementioned states. The federal courts were, of course, from 1938 forward bound by the liberal notice pleading requirement of Federal Rule 8(a).²⁹ Since the proliferation of code pleading in the latter half of the nineteenth century, state codes have required plaintiffs to plead the facts constituting the cause of action.³⁰ The difference between the standards of fact pleading under the codes and notice pleading under the Federal Rules was thought to be significant, even revolutionary.³¹ Yet this formal difference seemed far less significant, indeed superficial, in practice.

Animating the survey data was the well-documented evolution of the pleading standard in civil rights cases.³² Beginning in the 1970s and continu-

²⁷ See Oakley, *Federal Rules in State Courts*, *supra* note 14, at 1367; Main, *supra* note 13, at 374.

²⁸ Main, *supra* note 13, at 326 n.61.

²⁹ See generally Charles Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938); Charles Clark & James William Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

³⁰ See 110 ILL. COMP. STAT. ANN. §2-603(a) (West 1983); PA. R. CIV. P. 1019(a); 42 PA. CONS. STAT. ANN. § 1019 (West 2000); NEB. REV. STAT. § 25-804, *repealed by* 2002 NEB. LAWS L.B. 876. See generally AN ACT TO SIMPLIFY AND ABRIDGE THE PRACTICE, PLEADINGS AND PROCEEDINGS OF THE COURTS OF THIS STATE, ch. 379 § 120(2), 1848 N.Y. LAWS 521 (adoption by the State of New York of the Field Code, the progenitor of code reforms); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988); Mildred Coe & Lewis Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942); CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* (1897).

³¹ See generally Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 491, 494-97 (1910) (discussing function of pleadings); ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURTS IN HISTORICAL PERSPECTIVE* 190 (1952) (discussing history of pleading); Subrin, *supra* note 30, at 322 (discussing how drafters of Federal Rules made enormous change from codes when flexible aspects of equity were adopted); Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 641 (1993) (offering historical context for pleading under the Federal Rules of Civil Procedure); Main, *supra* note 13, at 327-28 (discussing significance of change in pleading regimes).

³² See, e.g., A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1580-81 n.49 (1991) (citing examples of civil rights cases where heightened pleading requirements were imposed); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 949 (1990) ("As a general rule notice pleading is sufficient, but an exception

ing thereafter, federal circuit courts of appeals adopted a heightened pleading standard for civil rights plaintiffs; notwithstanding Federal Rule 8(a), all of the circuits had adopted such a requirement by the mid-1980s.³³ The Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* abruptly reversed this trend.³⁴ The Court held unanimously that Rule 8(a) "meant what it said," and civil rights plaintiffs were to enjoy the same liberal standard of notice pleading.³⁵ The Supreme Court recently repeated this mandate, reversing a decision of the United States Court of Appeals for the Second Circuit that permitted the imposition of a heightened pleading requirement in an employment discrimination case.³⁶

Turning briefly to the survey data, the pleading standards in the federal and state courts in the state of Illinois have evolved in lockstep. The data suggest that fact pleading crept into the jurisprudence of both the federal and state courts in the 1970s,³⁷ it predominated by the early 1980s,³⁸ and it was formally adopted in the mid 1980s.³⁹ And after the Court's *Leatherman* decision, the demand for factual specificity cooled in both the federal and state courts.⁴⁰ Throughout this entire period, of course, the federal court ostensibly applied

has been created for cases brought under the Civil Rights Acts."); Evan Sanford Schwartz, *A Plea for Help: Pleading Problems in Section 1983 Municipal Liability Claims*, 6 *TOURO L. REV.* 377, 378 (1990) (noting that popular technique to limit civil rights claims is heightened pleading standard); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 *CORNELL L. REV.* 270, 299 (1989) (discussing various civil rights cases in which heightened pleading was required); Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *COLUM. L. REV.* 433, 436 (1986) (noting inappropriate use of fact pleading requirements as step towards discretionary dismissals); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 *MO. L. REV.* 677, 683 (1984) (discussing history of specificity requirements in civil rights complaints); Christopher M. Fairman, *Heightened Pleading*, 81 *TEX. L. REV.* 551 (2002) (evaluating heightened pleading standards and procedural alternatives thereto).

³³ See, e.g., *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979); *Fine v. N.Y.*, 529 F.2d 70, 73 (2d Cir. 1975); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976); *Smith v. Int'l Longshoremens' Ass'n*, 592 F.2d 225, 226 (4th Cir. 1979); *Jewell v. City of Covington*, 425 F.2d 459, 460 (5th Cir. 1970); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971); *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985); *Morton v. Becker*, 793 F.2d 185, 188 (8th Cir. 1986); *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977); *Coopersmith v. Sup. Ct.*, 465 F.2d 993, 994 (10th Cir. 1972); *Hobson v. Wilson*, 737 F.2d 1, 30 (D.C. Cir. 1984).

³⁴ 507 U.S. 163 (1993).

³⁵ *Id.* at 168 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

³⁶ See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (holding that complaint in an employment discrimination lawsuit must contain only a short and plain statement of the claim and need not contain specific facts establishing a prima facie case).

³⁷ See, e.g., *Ehrlich v. Van Epps*, 428 F.2d 363, 364 (7th Cir. 1970); *Morse v. Nelson*, 363 N.E.2d 167 (Ill. App. Ct. 1977). See also *Main, supra* note 13, at 335-36, 339-42.

³⁸ See, e.g., *Cohen v. Ill. Inst. of Tech.*, 581 F.2d 658, 663 (7th Cir. 1978); *Doyle v. Shlensky*, 458 N.E.2d 1120, 1127 (Ill. App. Ct. 1983). See also *Main, supra* note 13, at 336, 341-42.

³⁹ See, e.g., *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985); *Brown v. Michael Reese Health Plan, Inc.*, 502 N.E.2d 433, 435 (Ill. App. Ct. 1986). See also *Main, supra* note 13, at 336-38, 341-42.

⁴⁰ See, e.g., *Triad Associates, Inc. v. Robinson*, 10 F.3d 492 (7th Cir. 1993); *Doe v. Calumet City*, 641 N.E.2d 498, 501 (Ill. 1994). See also *Main, supra* note 13, at 338-39, 343.

Federal Rule 8(a), and the state court applied the code pleading requirement that plaintiffs plead facts constituting the cause of action. Hence, there was substantial uniformity in fact, notwithstanding the formal differences.

The same phenomenon was observed in the pleading standards imposed on civil rights plaintiffs in the federal and state courts of the Commonwealth of Pennsylvania. In Pennsylvania, however, the shift to fact pleading occurred much earlier than in Illinois.⁴¹ Also, there was a lag of nearly a decade between federal and state court adoption of the heightened pleading standard.⁴² The Pennsylvania federal courts had signaled their retreat to a standard of notice pleading even prior to *Leatherman*; again after a lag, a similar trend was observed in the state courts.⁴³ Hence, these data demonstrate substantial uniformity in fact – eventually.

Intra-state uniformity also was realized in the pleading standards imposed upon civil rights plaintiffs by the federal and state courts in Nebraska.⁴⁴ The most notable finding in the courts of that state, however, was that both the federal and state courts resisted the transition from fact back to notice pleading, notwithstanding the mandate of the Supreme Court's *Leatherman* decision on the federal courts.⁴⁵

Looking at the data set as a whole, then, there was substantial intra-state uniformity even under the fundamentally different regimes of notice pleading and code pleading. Importantly, the data also demonstrate substantial interstate disuniformity. Indeed, the pleading standards transitioned at different times in the three states.⁴⁶ Also, the intra-state uniformity was manifest differently in each – Illinois federal and state courts evolving in lockstep; Pennsylvania evolving with a lag; and Nebraska not really evolving much at all.⁴⁷

To better understand these data, I also looked at the federal and state court summary judgment standards in light of the 1986 decision in *Celotex Corp. v. Catrett*, where the Supreme Court re-characterized the movant's evidentiary burden that the Court previously had set forth in *Adickes v. S.H. Kress & Co.*⁴⁸

⁴¹ See *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976); *Law v. Fisher*, 399 A.2d 453, 457 (Pa. Commw. Ct. 1979). See also Main, *supra* note 13, at 345-47, 349-50.

⁴² See also Main, *supra* note 13, at 351.

⁴³ See, e.g., *Frazier v. S.E. Pa. Transp. Auth.*, 785 F.2d 65 (3d Cir. 1985); *Holder v. City of Allentown*, 987 F.2d 188 (3d Cir. 1993); *Stone & Edwards Ins. Agency, Inc. v. Dept. of Ins.*, 616 A.2d 1060 (Pa. Commw. Ct. 1992); *Heinly v. Commonwealth*, 621 A.2d 1212 (Pa. Commw. Ct. 1993).

⁴⁴ See Main, *supra* note 13, at 354-59.

⁴⁵ See, e.g., *Walker v. M.D. Reed*, 104 F.3d 156, 157-58 (8th Cir. 1997); *Christianson v. Educ. Serv. Unit No. 16*, 501 N.W.2d 281 (Neb. 1993). See also Main, *supra* note 13, at 356-59.

⁴⁶ For example, federal courts in the Commonwealth of Pennsylvania adopted fact pleading a full decade before their federal counterparts within the State of Illinois. Consider also that both the federal and state courts in Pennsylvania had shifted back toward a standard of notice pleading before the federal and state courts in Illinois commenced their retreat; indeed, the Pennsylvania shift occurred even before the Supreme Court's decision in *Leatherman*. See Main, *supra* note 13, at 370-74.

⁴⁷ See Main, *supra* note 13, at 370-74.

⁴⁸ See *Adickes v. S.H. Kress Co.*, 398 U.S. 144, 161 (1970) (noting “[t]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (noting that moving party may satisfy its burden by establishing “absence of evidence” in support of opposing party’s

Because all three of the survey states had adopted, for their state rules, a summary judgment rule that was identical (or nearly so) to Federal Rule 56, this data set operated somewhat like a control group.⁴⁹ The findings were extraordinary.

In Illinois, the federal courts were applying a *Celotex*-like standard even before the Supreme Court's 1986 decision.⁵⁰ The state courts adopted the new standard three years after their federal counterparts.⁵¹ Notably, then, the state courts incorporated the federal court pleading standard into their dissimilar code faster than they adopted the federal court summary judgment standard for their textually-identical summary judgment rule.⁵²

In Pennsylvania, both the federal and state courts have abandoned the *Adickes* standard and have adopted a standard consistent with the Supreme Court's decision in *Celotex*.⁵³ The Pennsylvania federal courts immediately transitioned to the new standard.⁵⁴ Two years later, in a case with facts remarkably similar to those in *Celotex*, a Pennsylvania Superior Court judge applied the new standard by acknowledging a departure from earlier state case law, but made no mention of the *Celotex* case.⁵⁵ The Pennsylvania Supreme court declined to hear the appeal in that case, and the new standard was in place.⁵⁶ Hence, there was intra-state uniformity, albeit with a short lag.

The Nebraska data set again was aberrational. The Nebraska federal courts were very slow to transition to the *Celotex* standard, but ultimately did so.⁵⁷ The Nebraska state courts still apply an *Adickes*-like standard.⁵⁸ Accord-

claim or defense). See generally Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987); Gary T. Foremaster, *The Movant's Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731 (1987).

⁴⁹ The text of the relevant sections of the Illinois and Nebraska Codes differ from Federal Rule 56 only in very minor respects. See 735 ILL. COMP. STAT. ANN. 5/2-1005(c) (West 1992) (differing from the Federal Rule in that it does not expressly include consideration of "answers to interrogatories" upon motions for summary judgment); NEB. REV. STAT. § 25-1332 (West 1992) (same). Until 1996, the Pennsylvania Rules of Civil Procedure copied the Federal Rule *verbatim*. See PA. R. CIV. P. 1035 (West 1994). In 1996, the Pennsylvania legislature amended the state summary judgment rule. See Order Amending Rule 1035, promulgated Feb. 5, 1996. Among other changes, the new rule states that a party may move for summary judgment where "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." PA. R. CIV. P. 1035.2; 42 PA. CONS. STAT. ANN. § 1035 (West 2000). The Pennsylvania legislature thus effectively codified the *Celotex* standard.

⁵⁰ See, e.g., *Am. Nurses Ass'n v. State of Ill.*, 783 F.2d 716 (7th Cir. 1986).

⁵¹ See, e.g., *Guthrie v. Zielinski*, 541 N.E.2d 178 (Ill. App. Ct. 1989) (applying *Adickes*-like standard to summary judgment motion); *Estate of Henderson v. W.R. Grace Co.*, 541 N.E.2d 805 (Ill. App. Ct. 1989) (adopting a *Celotex*-like standard). See generally Main, *supra* note 13, at 364-65.

⁵² See Main, *supra* note 13, at 372.

⁵³ See, e.g., *Falcone v. Columbia Pictures Indus., Inc.*, 805 F.2d 115 (3d Cir. 1986); *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa. Super. Ct. 1988). See Main, *supra* note 13, at 366-67.

⁵⁴ See *Falcone*, 805 F.2d at 115.

⁵⁵ See *Eckenrod*, 544 A.2d at 53.

⁵⁶ See, e.g., *Myers v. Penn Traffic Co.*, 606 A.2d 926, 928 (Pa. Super. Ct. 1992).

⁵⁷ See, e.g., *Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*, 825 F.2d 167, 174 (8th Cir. 1987) ("The burden of establishing the non-existence of any genuine issue of mate-

ingly, for more than a decade the federal and state courts in Nebraska have applied different summary judgment standards, notwithstanding identical textual mandates.⁵⁹

Based on those findings, I have argued that the dramatic state-to-state variation and other factors suggest that a local legal culture can influence the application of formal rules.⁶⁰ A legal culture refers to the composite of shared norms, experiences, expectations and values of lawyers, judges and other institutional forces (whether legal or non-legal) that, while not necessarily reflected in the textual rules, nonetheless inhere in the standards that are applied.⁶¹ That assimilating role of a local legal culture is an example of what I suggest here is part of an overwhelming question about the role of non-formal forms of law. To what extent must our superficial, or formal, proposals and critiques contemplate these forms? Can we, how can we, ignore their potential influence?

So, for a professor in love with the field of procedure and smitten by rules, this love song, too, poses an overwhelming question about future relationships. The formal rules are our tools, yet they undoubtedly are superficial. Indeed, the end product is so much more, or even worse, so much different, because of certain non-formal factors at work. Albert Einstein has remarked that most mistakes in philosophy and logic occur because the human mind is apt to take the symbol for the reality.⁶² Where is procedural reality? If we are to truly understand dispute resolution in the twenty-first century, must we transcend the superficial, the formal, and the textual rules?

Exactly how does one ascertain or describe the scope, operation and evolution of those non-formal norms? Importantly, non-formal procedure is not *informal* procedure. The adjective informal connotes a casual or improvisational quality that belies the gravity of these non-formal rules. Indeed, much of the intrigue and significance of these non-formal rules is that they are rules or forms of law nonetheless. These forms establish norms and change outcomes. The formal procedural Rules are but a metaphor for the rules.

Remember Plato's famous allegory about the prisoners in the cave. In Book Seven of the Republic,⁶³ Plato describes the inhabitants of the cave as prisoners, "their legs and necks fettered from childhood, so that they remain in

rial fact is on the moving party."); *see also id.* at 174 ("Nothing in the affidavits submitted by [defendant] purports to negate the existence of [the material] facts Therefore defendant did not meet its initial burden . . . and summary judgment must be denied notwithstanding the absence of opposing affidavits or other evidence.") (FED. R. CIV. P. 56(c)).

⁵⁸ *See, e.g.,* Roubideaux v. Davenport, 530 N.W.2d 232, 235 (Neb. 1995) ("In the absence of a prima facie showing by the movant that she is entitled to summary judgment, the opposing party is not required to reveal evidence which [sic] she expects to produce at trial to prove the allegations contained in her petition.").

⁵⁹ *See, e.g.,* Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999); Fackler v. Genetzky, 595 N.W.2d 884, 890 (Neb. 1999).

⁶⁰ Main, *supra* note 13, at 370-79.

⁶¹ *See generally* Braucher, *supra* note 9, at 518; Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC'Y REV. 535, 537-38 (1993); LoPucki, *supra* note 9, at 1502; Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 136 (1999); Sullivan et al., *supra* note 9, at 804.

⁶² ALBERT EINSTEIN, COSMIC RELIGION 101 (Codovici Fried ed., 1931).

⁶³ PLATO, REPUBLIC 514A-521C.

the same spot, able to look forward only, and prevented by the fetters from turning their heads.” There is but one light from a fire burning higher up and at a distance behind them. The prisoners’ only interaction with each other is through their respective shadows that appear on a wall. Whether accurate portrayals or grotesque distortions, the prisoners ultimately “believe” the shadows that they see. Because the prisoners have never been out in the sun where things are clear, they are unable to form the criteria necessary to judge the shadows – that is their only reality.⁶⁴

Well, frankly, as a proceduralist, I prefer the superficial rules – the form, the text. I am not a cultural critic,⁶⁵ social scientist,⁶⁶ anthropologist,⁶⁷ psychologist,⁶⁸ organizational theorist,⁶⁹ nor a trained empiricist.⁷⁰ My over-

⁶⁴ See Marshall Berman, *Notes from Underground*, HARVARD DESIGN MAGAZINE, Fall 2001, Number 15.

⁶⁵ For works incorporating law and the humanities, see e.g., MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* (1981); JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).

⁶⁶ For works incorporating social science literature, see, e.g., John M. Conley, *The Social Science of Ideology and the Ideology of Social Science*, 72 N.C. L. REV. 1249 (1994) (“examin[ing] the impact of ideology on legal education and the legal profession from the analytical perspective of the social scientist” as well as the impact social science has had on the law itself); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989) (describing how judges and legislators can better use social science to understand fundamental human behavior and how individuals might respond to factual situations); John Monahan and Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 488 (1986) (arguing that “courts should treat social science research relevant to creating a rule of law as a source of authority rather than as a source of facts”).

⁶⁷ For works incorporating the literature of anthropology, see, e.g., Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 114 (2000) (finding that law school classrooms “convey a distinctive approach to language, text, authority, and morality”); Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597 (1995) (critiquing the “rigid opposition” between the fields of law and anthropology and “argu[ing] that the task of relating law and anthropology as disciplines . . . has now lost its rhetorical force”).

⁶⁸ For works incorporating the literature of the study of psychology, see, e.g., Mark I. Satin, *Law and Psychology: A Movement Whose Time Has Come*, 1994 ANN. SURV. AM. L. 581, 630 (1995) (advocating a law and psychology movement to rival the law and economics movement); Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115 (1987) (studying the tie between the use of the number three in procedural issues); Thibaut and Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978) (examining procedure through applying theories of social psychology and proposing a “general theory of procedure for resolving conflicts”).

⁶⁹ For works integrating organizational theory into legal studies, see, e.g., Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 968 (1999) (stating that “[a]t its core, the entire internalization enterprise rests on the public legal system’s willingness to cede jurisdiction to those organizational forums that persuasively mimic their public counterparts”); Walter W. Powell & Paul J. DiMaggio, eds., *Symposium: Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903 (1996).

⁷⁰ For works discussing the value of empiricism, see Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002)

whelming question is must I, must we proceduralists, transcend the superficial and seek reality beyond the shadows? Should every proposed rule change first be studied to determine how the current rule is applied in fact and then again to see how the revision is applied in fact? What if it is not applied as written? What role for rules then, amend and try again? If we acknowledge the influence of non-formal rules of procedure, apparently we must develop a culture that nurtures the environment and all of its attendant non-formal factors so that the rule is more likely to be "followed." Hence, the overwhelming question is whether to engage in a relationship with a field of procedure that transcends the superficial. I am not sure that I want to. I am not sure that I can. I am not sure whether I must. Indeed, the protagonist in the poem ultimately did not engage either, though he did "measure [the rest of his] life with coffee spoons" until he drowned.⁷¹

(reviewing and explaining the uses of empirical research in the adoption and evolution of the Federal Rules of Civil Procedure and calling for further use of such research in order to create better rules); Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker*, 23 J. LEGAL STUD. 595 (1994); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988) (recommending empirical research on the Federal Rules of Civil Procedure prior to the adoption of amendments); Frank Munger, *Law, Change, and Litigation: A Critical Examination of an Empirical Research Tradition*, 22 LAW & SOC'Y REV. 57 (1988).

⁷¹ See T.S. ELIOT, *supra* note 1. Throughout the poem there are several references to the question whether or not to engage. After an early reference to an "overwhelming question," the poem asks "Do I dare [d]isturb the Universe?" and later, "And how should I begin?" Yet he doesn't begin, because "in short, I was afraid." Following this choice, the protagonist considers whether or not it would have even been worth it to live that engaged life. He was not "Prince Hamlet," but rather "an attendant lord" and "[a]lmost, at times, the Fool." The protagonist did not hear "the mermaids singing" and drowns in the last line of the poem. See generally E. K. Sparks, *Abyss Notes for T.S. Eliot's "The Love Song of J. Alfred Prufrock,"* available at <http://virtual.clemson.edu/groups/dial/t&vseminar/prufaby.htm> (last accessed Feb. 11, 2003); KATHLEEN MCCOY AND JUDITH HARLAN, *ENGLISH LITERATURE FROM 1785*, 265-266 (1992); *Modern American Poetry*, "The Love Song of J. Alfred Prufrock," available at http://www.english.uiuc.edu/maps/poets/a_f/eliot/prufrock.htm#criticism (last accessed Feb. 11, 2003); Jough Dempsey, "The Love Song of J. Alfred Prufrock" – T.S. Eliot, available at <http://www.plagiarist.com/articles/?artid=17> (last accessed Feb. 11, 2003). See also CRASH TEST DUMMIES, *Afternoons and Coffeespoons, on GOD SHUFFLED HIS FEET* (Polygram Int'l Publ'g 1993).