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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.

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

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* 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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² Id.
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.

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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 But 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”).


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 reconstructionist neorealism" or some such thing.\(^11\) However, the influence of non-formal forms of law in the

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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. 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. 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. Moreover, Professor Oakley concludes the Federal Rules "have lost credibility as avatars of procedural reform." Indeed, he suggests that federal procedure may be "less influential in state courts today than at anytime in the past quarter-century."

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. Another set of amendments took effect on December 1, 2002, and still another set in the queue will likely take effect on December 1, 2003. Most of the original Federal Rules have been amended at least three times. Only ten of the original Federal Rules have never been

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15 Oakley, supra note 12, at 355.
16 Id.
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.\textsuperscript{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."\textsuperscript{22} This conclusion, noting the demise of textual conformity, confirms Professor Oakley's prescience; he predicted as much in his 1986 study.\textsuperscript{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 à la Federal Rule 26(f), even if the state court rules committees have not incorporated such a rule into their civil rules package?\textsuperscript{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?\textsuperscript{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?\textsuperscript{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

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

\textsuperscript{22} Oakley, supra note 12, at 355.

\textsuperscript{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 . . . .").


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.


\(^{31}\) 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. Robbins, 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. The Supreme Court’s decision in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit abruptly reversed this trend. 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. 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.

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, it predominated by the early 1980s, and it was formally adopted in the mid 1980s. And after the Court’s Leatherman decision, the demand for factual specificity cooled in both the federal and state courts. Throughout this entire period, of course, the federal court ostensibly applied has been created for cases brought under the Civil Rights Acts.

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 Longshoremen's 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).

See also Main, supra note 13, at 338-39, 343.

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.

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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. Also, there was a lag of nearly a decade between federal and state court adoption of the heightened pleading standard. 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. 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. 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.

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. 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.

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.

42 See also Main, supra note 13, at 351.
44 See Main, supra note 13, at 354-59.
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.
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. The findings were extraordinary.

In Illinois, the federal courts were applying a Celotex-like standard even before the Supreme Court's 1986 decision. The state courts adopted the new standard three years after their federal counterparts. 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.

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. The Pennsylvania federal courts immediately transitioned to the new standard. 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. The Pennsylvania Supreme court declined to hear the appeal in that case, and the new standard was in place. 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. The Nebraska state courts still apply an Adickes-like standard. Accord-
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
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, social scientist, anthropologist, psychologist, organizational theorist, 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) (“examining] 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”).
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.\footnote{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); Kathleene 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_feliot/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’t Publ’g 1993).}