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## Procedural Categories

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## Procedural Categories

Ramon Feldbrin\*

*Procedural law is organized around the assumption that different categories of rules apply to different categories of cases. We internalize this idea at an early stage of our legal education and learn to treat the categories of civil, criminal, and administrative procedure as natural and sacrosanct. Unwittingly we imprison our theorizing, our rulemaking, and our practice within their strict bounds. Yet the premise is fundamentally false. The system of procedure is far from static, and the categories are not fixed or unchanging. The various sets of rules reflect nothing more than our latent—but vitally important—beliefs about the proper way to channel disputes into court. Illuminating the evolving nature of these categories, this Article sets out to identify for the first time the ways in which we shape the forms of procedure through the choices we make.*

*The interaction of two competing principles have long pulled procedure in opposite directions. One principle, transsubstantivity, pushes the design of rules toward a generic and content-indifferent form. The other principle, substance-specificity, points toward the need to tailor procedural rules to a specific type of litigation. The tension between these fundamental organizing principles reflects a tacit understanding that it is neither possible to adopt a general procedure for all types of cases nor adjust the system to address every nuance. It is their synthesis that brings us to distinct sets of rules that apply uniformly within but not beyond a certain class of proceedings. Given the changing attitudes about the correct balance between the two principles, over time new procedural categories are created while others are dissolved. These insights embolden us to rethink the present-day categories and determine whether they are in need of revision. Ultimately, this Article creates a common ground for discussion among proceduralists across separate fields and takes us a step forward toward a unified theory of procedure.*

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#### INTRODUCTION

Procedural law is organized around a simple idea: the litigation of different categories of cases requires the application of different procedural rules. Very early in our legal education, we acknowledge the traditional, almost sacred division of procedural rules into two subject matter categories known as “civil procedure” and “criminal procedure.” We soon add “administrative procedure” to the list.<sup>1</sup> Law students encounter this sweeping order at the outset of their careers and tend to absorb it uncritically, falling into the belief that these categories are self-evident. By the time students have graduated from law school, where procedural subjects are taught in separate courses, they have internalized this structure and consider the categories of procedure as changeless, autonomous, and fixed sets of rules.<sup>2</sup> Correspondingly, the categories of

1. The Thomson Reuters digest *Federal Procedure: Lawyers Edition* lists “Civil, Criminal, Administrative” on the cover of each book in the series. See also ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* 1 (1988); ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE*, at iii (1979); GEORGE E. GLOS, *COMPARATIVE LAW* 5–28 (1979); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 542 (1978).

2. See JUDITH RESNIK, *PROCESSES OF THE LAW* 131 (2004); Ronen Avraham & William H.J.

procedure continue to be used widely and to be perceived as occupying separate worlds.<sup>3</sup> Often the work of academics, rulemakers, and practitioners alike tends to compartmentalize and center on just one area of procedure.<sup>4</sup> Therefore, the literature consistently overlooks legal procedure as a whole, and the organization of the entire procedural system is generally and unreflectively accepted.

Since our studies begin by assuming the existence of independent categories of procedure, we do not normally question how we got here: How did we end up with precisely these categories of procedural rules? Why do we have different procedural rules for different types of cases? What determines which classes of cases come under each category? What is the optimal number of modes for conflict resolution, and what are the procedural alternatives?<sup>5</sup> Such questions are indeed immaterial if we are just focused on the practical application of rules or, in other words, only interested in how to “do” a lawsuit or in getting today’s client out of his or her difficulty. But turning our attention to such questions is crucial in order to develop a structured understanding of our procedural system as well as for purposes of scholarly assessment and improving courts and their procedures. Unfortunately, current scholarship largely ignores these kinds of questions—and not because the answers are clear. The fact is that if we try to look deeper into things, we find that the lines between the familiar spheres of procedural law are more blurred and arbitrary than we usually presume.<sup>6</sup> The purpose of punitive civil sanctions, for example, is to punish, even though their procedural setting is civil.<sup>7</sup>

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Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 884 (2020); Lord Chorley, *Procedural Reform in England*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 98, 102 (Alison Reppy ed., 1949).

3. See David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 684 (2006); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1797 (1992).

4. See JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 112 (3d ed. 2007); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 85 (2008).

5. Cf. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 31 (2002) (“Thus are our narrative categories rooted in tales so implicit, so tacit, as to be beyond our ordinary awareness, unless we pull ourselves (or others) up short and insist on stopping to examine them afresh.”).

6. Some scholars went as far as to question the very distinction between civil and criminal procedure. See Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2222 (1989); Rosen-Zvi & Fisher, *supra* note 4, at 84; Sklansky & Yeazell, *supra* note 3, at 684; see also Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017).

7. Mann, *supra* note 3, at 1798.

Yet the distinction between civil and criminal procedure seems such a basic feature of our legal system that it is tempting to think that the categorization is natural and sacrosanct. But this is misleading. Although the distinction in the common law between civil and criminal process is quite old,<sup>8</sup> the current contours of that procedural divide are not.<sup>9</sup> As recently as the nineteenth century, civil and criminal proceedings were alternative ways for aggrieved victims of wrongs to enlist the adjudicatory machinery of the state in seeking redress. In fact, formal rules of criminal and civil procedure are a relatively new body of law, introduced into the United States federal courts only in the 1930s. Furthermore, a comparative perspective suggests that it is not unthinkable to consider these two separate procedural universes as one. In continental Europe, for example, it is not a general truth that proceedings that are criminal are not also civil. In some countries, such as Spain, Belgium, France, and Italy, a criminal prosecution and a civil claim are routinely combined in a single proceeding.<sup>10</sup>

Taking into consideration our fragmentary understanding of the reasoning behind the different categories of procedure, the problem is that we lack a general theory of procedure that could explain the evolution and consequent organization of the legal process.<sup>11</sup> For this reason, among other things, scholars and rulemakers have been largely focused on making incremental changes within the traditional procedural territories. But too much attention given to specific rules leads us to miss the big picture. The shortcoming diagnosed here is, first and foremost, a lack of an understanding of how procedural law develops as a whole.<sup>12</sup> This Article attempts to fill this theoretical gap by considering our reasons for splitting the procedural system into categories and examining the ways in which these objectives shape the alternatives that are open to us.

The Article introduces a struggle between two fundamental organizing principles that have long influenced the development of procedural law

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8. In fact, there was a time when no such distinction could be made. JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 540 (5th ed. 2019) [hereinafter BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY].

9. Sklansky & Yeazell, *supra* note 3, at 686.

10. J. A. JOLOWICZ, ON CIVIL PROCEDURE 15–16 (2000).

11. Cf. Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1156, 1170 (2006) [hereinafter Bone, *Foundations of Litigation Reform*] (arguing that we do not have today a coherent normative account of civil procedure that can be the basis for an effective procedural reform).

12. Charles Clark already noted that “there has been little attempt in our system of law to develop a procedural jurisprudence. All our attention has been directed to the immediately practical, and almost no attempt has been made to state the theory.” CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 69 (2d ed. 1947).

in opposite directions. One principle, *transsubstantivity*,<sup>13</sup> pushes the design of rules toward a generic and content-indifferent form (a one-size-fits-all set of rules). The other principle, *substance-specificity*, points toward the need to tailor procedural rules to a specific type of litigation in order to secure particular ends. While these principles have already been mentioned in the literature, the academic discussion of transsubstantivity and substance-specificity has proceeded until now almost entirely within the realm of civil procedure.<sup>14</sup> The reality, however, is that these two principles have a more primary role in the structure of the entire legal procedure system—one that has a significant explanatory value. In fact, this Article shows that these architectural principles are not merely competing theoretical methods of ordering procedural rules. Each is a functional principle, drawing its origins from the manner in which the two distinct court systems in the old common law had developed and operated.

Along these lines, the Article suggests that the evolution and current design of the procedural categories are shaped to a large extent by an underrated tension between the two architectural principles.<sup>15</sup> The tension reflects an entrenched rejection of following a uniform procedure for all classes of litigation on the one hand, and an understanding that one cannot reinvent a procedural system for every single case on the other.<sup>16</sup> To be sure, transsubstantivity and substance-specificity represent

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13. There seems to be some disagreement among writers about whether to hyphenate this word or not. Those who prefer hyphens should feel free to imagine them in all of the appropriate locations.

14. See, e.g., David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376–77 (2010) [hereinafter Marcus, *Trans-Substantivity in Federal Civil Procedure*]; Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 403 (2010) [hereinafter Subrin, *Limitations of Transsubstantive Procedure*]; Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1501 (1992) [hereinafter Tobias, *Transformation of Trans-Substantivity*]; but see David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1194–95 (2013) [hereinafter Marcus, *Processes of American Law*] (arguing that the focus on transsubstantivity in the context of civil procedure is too narrow).

15. Cf. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (describing his project as “an exploration to rediscover the feel of a tension” between “procedure generalized across substantive lines and procedure applied to implement a particular substantive end”); Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1157 (recounting Robert Cover’s argument); Marcus, *Processes of American Law*, *supra* note 14, at 1195–96 (criticizing the use of transsubstantivity solely in the domain of civil procedure and offering an account of the way transsubstantivity influences the design of “process law”); see generally Samuel L. Bray, *The Parable of the Forms*, 93 ST. JOHN’S L. REV. 623 (2019).

16. Cf. *Harris v. Nelson*, 394 U.S. 286, 305–06 (1969) (Harlan, J., dissenting) (rejecting the idea that each district court would devise “‘appropriate modes of procedure’ on a case-by-case basis” and arguing that procedures in habeas corpus cases should be uniform throughout the federal courts).

idealized patterns to which no actual category of procedure precisely corresponds, but rather all the present-day categories combine both of the two procedural principles.<sup>17</sup> However, once our procedural system is seen in light of the long-standing interplay between the two opposed ways of thinking about procedure, the entire discipline becomes much easier to understand.

The synthesis of the architectural principles is the result of the merger of the old courts of law and equity, with their distinct modes of process, under a single judicature. The new order, which had been fixed during the reforms of the nineteenth century, was based on the assumption that different substantive legal issues trigger different sets of procedures. From that point forward, legal proceedings have been sorted under hybrid categories of procedural rules—every procedural category is transsubstantive and substance-specific at the same time. This means that a set of procedural rules applies uniformly *within but not beyond* a certain category of proceedings. Thus, for example, civil procedure's commitment to transsubstantivity is a commitment to uniform rules within but not beyond civil actions. Put differently, civil procedure is virtually the same whether the subject of the conflict is tort or contract, but it does not apply to noncivil disputes. Correspondingly, there is no such thing as a procedural category that is entirely transsubstantive in the sense that it can be justified exclusively by reference to process values without considering the distinctive features of the litigation associated with it.

Furthermore, the Article points to the fact that the categories of procedure are not static, and that transsubstantivity and substance-specificity continue to play a central role in shaping and reshaping the forms of process. Some procedures inevitably become outdated as society evolves. When this occurs, the procedural system will have to change in order to deal with the changing nature and volume of litigation. And thus, over time new procedural categories emerge, while other categories are dismantled, and previously disjointed types of cases are merged under a more general set of rules. One could choose any number of areas to see this. The Article documents this phenomenon by presenting two opposite examples from the second half of the twentieth century: the emergence of bankruptcy procedure and the removal of admiralty procedure from the procedural landscape. In both these cases, changing litigation practices and a new balance between the two architectural principles led to a rearrangement of the legal procedure system.

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17. See H. H. Gerth & C. Wright Mills, *Introduction* to FROM MAX WEBER: ESSAYS IN SOCIOLOGY 3, 59–61 (H. H. Gerth & C. Wright Mills trans. & eds., 1946) (discussing Weber's concept of the "ideal type").

The Article's conception of the tradeoff between transsubstantivity and substance-specificity has three important implications for the discourse on procedure. First, it underscores the provisional nature of our current thinking about the various categories of procedure, reframing the debate about procedural design by challenging the views on the structure of procedure that we usually take for granted. From here, we will be in a better position to assess the connection between alternative, overlapping, and sometimes conflicting forms of process. Secondly, it generates helpful insights and reveals the extent to which commentators have overlooked a variety of options for structuring procedural rules. To facilitate procedural reform, the Article highlights the balance between the two architectural principles in a given context and the desirability of novel procedural categories. It is worth remembering that categorization is ultimately a human choice.<sup>18</sup> There is nothing in the nature of law that requires us to arrange legal procedure under the familiar categories. By the same token, it is hard to hold an a priori preference for either of the two architectural principles. Neither has an inherently positive or negative valence. Rather, the amount of pull given to each of the principles in a particular context is an important question of procedural design. Awareness to this question will allow us to develop ways of evaluating procedure that are analytically sharper and normatively more significant. Thirdly, the Article places the various dialogues on procedure occurring in isolation into conversation with one other. By providing a common ground for discussion among scholars across different areas of procedure, the Article uncovers what the categories have in common and how they noticeably differ. This larger conversation in turn pushes us to consider procedure as a unified field.<sup>19</sup>

This Article proceeds in six parts. Part I sharpens the terms "transsubstantivity" and "substance-specificity" and frames the normative bases of the two architectural principles. It introduces the tension between these principles as a dominant force that has shaped, and will continue to shape, legal procedure into specific territories. Part II locates the historical roots of the two procedural principles in the practices used by the old common-law courts. Part III offers a historical framework for understanding the procedural reforms of the nineteenth century. In addition, Part III documents the prominent role played by Jeremy Bentham and Edward Livingston in setting the stage for the merger of law and equity and the synthesis of their distinct procedural

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18. See AMSTERDAM & BRUNER, *supra* note 5, at 35; LEE A. FENNELL, SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE 5 (2019).

19. In continental systems we find the subject of "general theory of process." See, e.g., LOÏC CADIET, JACQUES NORMAND & SORAYA AMRANI-MEKKI, THÉORIE GÉNÉRALE DU PROCÈS (2010).

modes. Part IV examines the evolution of modern procedural categories and the key function that the architectural principles of transsubstantivity and substance-specificity play in procedural design. Part V illustrates the creation and dissolution of procedural categories in two areas of law: admiralty and bankruptcy. Thereby, Part V proves the continuous relevance of the two architectural principles in the ways in which we sort categories of cases under categories of procedural rules. Here, the Article suggests a new paradigm for assessing procedural changes and considering future reforms. Part VI discusses certain variations that we need to bear in mind regarding the structure of procedure.

### I. THE ARCHITECTURAL PRINCIPLES OF PROCEDURE

The structure of procedure hinges on a continuous tug-of-war between generic forms of process and tailored procedural mechanisms. These two competing methods of ordering procedural rules are known in the literature as the principles of transsubstantivity and substance-specificity. Each of the two opposed ideals deserves to be thought about carefully, which includes speaking about them in straightforward, unambiguous terms so that we can all understand what we are talking about. That said, it seems that these principles are never clearly defined by commentators. Instead, the principles of transsubstantivity and substance-specificity often seem to operate more as metaphors than as clear concepts. Therefore, prior to examining the important role that these principles play in our procedural system, some definitions are necessary.

#### A. *Transsubstantivity*

A dominant school of thought presupposes that it is possible and wise to consider general theories and elements of procedural rules apart from particular substantive objectives.<sup>20</sup> Such rules are considered to be *transsubstantive* in character and effect—that is, the rules are meant to be equally or similarly relevant to different sorts of disputes regardless of subject matter, the parties involved, the relief requested, or the magnitude of the stakes. Civil procedure is generally considered transsubstantive, for example, because most of its rules govern all civil litigation, regardless of claim type.<sup>21</sup>

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20. See COVER & FISS, *supra* note 1, at 75; Bone, *Foundations of Litigation Reform*, *supra* note 11; Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110–12 (2009) [hereinafter Burbank, *Pleading and the Dilemmas*].

21. See Marcus, *Processes of American Law*, *supra* note 14, at 1207; Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1653 (2017).

The transsubstantive principle generates a sense of a uniform process.<sup>22</sup> It is valued for the simplicity and impartiality that it injects into the design and application of rules of procedure. It requires, for instance, that the procedural treatment for an ordinary contract dispute mirrors exactly what applies in a complicated antitrust litigation. Consequently, transsubstantive rules could presumably reduce litigation costs because they facilitate simple and predictable instructions to those who must make everyday decisions about different legal disputes. They smooth the work of judges and lawyers asked to make a decision about a disputed matter—such judges and lawyers do not need to relearn procedure every time they get a new case founded on a different substantive legal doctrine.<sup>23</sup> Likewise, transsubstantive rules can lower the barriers to entry for areas of practice. Transsubstantivity means fewer advantages for specialists, which in turn enables lawyers to practice in a wider array of contexts.<sup>24</sup> To put it another way, the more complicated our legal system becomes the more efficient it is to use procedural rules that are transsubstantive and general. Therefore, the transsubstantive principle is important for a neutral and impartial justice system that seeks to treat like cases in a like manner<sup>25</sup> and thereby avoid the targeting of particular entities or persons for idiosyncratic treatment.<sup>26</sup>

### B. Substance-Specificity

Even accounting for the advantages of transsubstantivity that were surveyed above, the application of this architectural principle alone is flawed.<sup>27</sup> As Robert Cover eloquently explained in his famous article, we also have substantive concerns and specific process values that cannot be addressed except through the purposeful shaping of the process to a

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22. Transsubstantivity and uniformity are not synonymous. Geographic uniformity, for example, means that the same rules apply in all jurisdictions. However, a procedural system can be uniform and yet follow substance-specific rules. See Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 376–77; see also Burbank, *Pleading and the Dilemmas*, *supra* note 20; Stancil, *supra* note 21, at 1653–54.

23. See Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 372; cf. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (holding that its interpretation of the Federal Rules is not limited to a substantive context).

24. See Marcus, *Processes of American Law*, *supra* note 14, at 1221.

25. Lon Fuller asserted in a passage reproduced in *The Legal Process* materials that “[a]djudication can be effective only when it is attended by that minimum, formal rationality which demands a like treatment of like cases.” Lon L. Fuller, *The Forms and Limits of Adjudication*, in HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 397, 399 (1994); see also JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 27 (11th ed. 2013); Marcus, *Processes of American Law*, *supra* note 14, at 1195, 1220.

26. See Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 419; Marcus, *Processes of American Law*, *supra* note 14, at 1214.

27. See Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 861 (2018).

particular type of case or a particular doctrinal category.<sup>28</sup> One of Professor Cover's examples involves remote participatory rights of third parties who seek to pursue litigation on behalf of others. Cover discussed an early Virginia case involving the rights of a discharged executor to litigate the claims of slaves to freedom under a will,<sup>29</sup> as well as modern cases involving class actions.<sup>30</sup> 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. It is difficult to imagine how such judgments can be made in a trans-substantive fashion."<sup>31</sup> Cover explains further that "[o]ne might wish to encourage litigation in order to deter a certain kind of conduct (by structuring litigation risks and making adverse results more likely) or in order to protect a certain class of persons considered particularly vulnerable to some specific form of predatory conduct. But those judgments must be made on an individual basis for each substantive question."<sup>32</sup> Similarly, David Marcus has recently observed that "[a] particular antecedent regime may indeed work better if particularized rules sensitive to the regime's peculiar needs regulate the legal process involving it."<sup>33</sup>

A procedure that ignores real differences between cases that end up in a courtroom might be problematic. Indeed, there is a strong shared intuition that various policy objectives might justify different procedures for different types of cases.<sup>34</sup> Robert Bone, for example, points out that "any procedural choice must be justified by the error costs it generates, which depend on the substantive values at stake."<sup>35</sup> Professor Bone explains that this means "different substantive interests might call for

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28. Cover, *supra* note 15, at 718; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.1 (2004) ("Judges should tailor case-management procedures to the needs of the particular litigation."); Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1156; Marcus, *Processes of American Law*, *supra* note 14, at 1221.

29. Cover, *supra* note 15, at 724–25, 728–29 (discussing *Pleasants v. Pleasants*, 6 Va. (2 Call) 319 (1800)).

30. *Id.* at 733–36, 738–39 (discussing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and other cases).

31. *Id.* at 728.

32. *Id.*

33. Marcus, *Processes of American Law*, *supra* note 14, at 1230; *see also* Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 380.

34. *See* Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1159, 1163; Lahav, *supra* note 27, at 883; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2049 (1989) [hereinafter Subrin, *Emerging Procedural Patterns*].

35. Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1160; *see also* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333–34 (2008) [hereinafter Bone, *Making Effective Rules*].

different procedural rules if the substantive interests at stake have different value or if the cost of the procedure varies with different case types.”<sup>36</sup>

Hence, under certain circumstances, a *substance-specific procedure* can provide a more appropriate litigation environment for a category of similar or equivalent controversies.<sup>37</sup> Alexandra Lahav has explained that “the main benefit of substance-specific procedural design is that it can provide a more perfect fit between the value of the right to be vindicated and the procedural law.”<sup>38</sup> This is because tailored procedures could better take into account nuances and complexities, serving the needs of particular categories of litigation. Ultimately, the different natures of legal disputes and concerns about fairness and outcome accuracy seem to be the main reasons that push for the fine-tuning of procedural rules.<sup>39</sup> It can also be said that the principle of substance-specificity rejects the notion that a “veil of ignorance”<sup>40</sup> is required in treating different types of litigation in order to pursue true justice.

### C. Resolving the Tension: A Procedural Equilibrium

The silent tension and interaction between the principles of transsubstantivity and substance-specificity shapes the entire structure of procedural law. We cannot say that either of these principles is wrong. Antipodal in their aims, each has its place in a balanced procedural system. The question rulemakers must therefore ask is which should be emphasized in a particular context. At bottom, the tension between transsubstantivity and substance-specificity reflects a deep-seated, though tacit, understanding that it is neither possible to adopt a general procedure for all classes of litigation nor tailor the system to address every nuance. As shown in Part II, transsubstantivity and substance-specificity each has long historical roots in the practices of the old common-law courts. For centuries, the common law has been

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36. Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1163.

37. See Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 376; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985, 991 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*].

38. Lahav, *supra* note 27, at 886.

39. “Theories of procedural fairness fall into two broad categories: process-based and outcome-based. Process-based theories evaluate fairness by the way procedure treats litigants within the litigation process itself, independent of outcome quality. Outcome-based theories evaluate fairness by the quality of the outcomes a procedural system generates.” ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 189–97* (2003); see also JOHN RAWLS, *A THEORY OF JUSTICE* 86 (1971); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1160–63; Bone, *Making Effective Rules*, *supra* note 35, at 337–40.

40. See RAWLS, *supra* note 39, at 136–42.

characterized by a struggle between these two visions of procedural order. Part III demonstrates how their synthesis, within a single judicature, is the basis for the modern allotment of procedural law into categories. In the end, some historical inquiry into where it all started is key to our understating of how these contradictory principles cooperate in today's litigation environment.<sup>41</sup>

## II. THE ORIGINS OF THE ARCHITECTURAL PRINCIPLES IN COMMON-LAW PROCEDURE

The common law, the justice system formed in medieval England, was expanded during the early modern times throughout English-speaking countries.<sup>42</sup> These jurisdictions share a strong legal heritage and have broadly common understandings of the historical experiences and theoretical constructs on which the legal system is based.<sup>43</sup> Common-law jurisdictions have been characterized as having “a significant degree of doctrinal and institutional similarity, overlying a substratum of considerable cultural difference.”<sup>44</sup> As we shall see, these shared origins and structures are especially strong in relation to procedural law.<sup>45</sup> That

41. Cf. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1478 (1987) [hereinafter Burbank, *The Costs of Complexity*] (“[A] historical perspective will also be useful in designing an alternative [procedural] system.”); THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 4 (2d ed. 2009) (noting that any study of the federal courts must be informed by some sense of history).

42. See Roscoe Pound, *David Dudley Field: An Appraisal*, in DAVID DUDLEY FIELD CENTENARY ESSAYS, *supra* note 2, at 3, 3 [hereinafter Pound, *David Dudley Field*] (“The common-law system of the English-speaking world has a unity which justifies our looking to that system as a whole.”); STEPHEN N. SUBRIN & MARGARET Y. K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 8 (2006); see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 3 (3d ed. 2005); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 260–67 (5th ed. 2014) [hereinafter GLENN, TRADITIONS OF THE WORLD]; H. PATRICK GLENN, ON COMMON LAWS 27 (2005); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 1 (2003); 2 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 144–46 (2013); 3 *id.* at 132–34 (2016); JOHN B. OAKLEY & VIKRAM D. AMAR, AMERICAN CIVIL PROCEDURE: A GUIDE TO CIVIL ADJUDICATION IN US COURTS 25 (2009); DAVID A. STRAUSS, THE LIVING CONSTITUTION 36 (2010); Calvin Woodard, *Is the United States a Common Law Country?*, in ESSAYS ON ENGLISH LAW AND THE AMERICAN EXPERIENCE 120 (Elisabeth A. Cawthon & David E. Narrett eds., 1994).

43. See DEAN R. KNIGHT, VIGILANCE AND RESTRAINT IN THE COMMON LAW OF JUDICIAL REVIEW 17 (2018); Cheryl Saunders, *Common Law Public Law: Some Comparative Reflections*, in PUBLIC LAW ADJUDICATION IN COMMON LAW SYSTEMS: PROCESS AND SUBSTANCE 353, 354–57 (John Bell, Mark Elliot, Jason NE Veruhas & Philip Murray eds., 2016) [hereinafter Saunders, *Common Law Public Law*]; Cheryl Saunders, *Apples, Oranges and Comparative Administrative Law*, 2006 ACTA JURIDICA 423, 427 (2006) [hereinafter Saunders, *Comparative Administrative Law*].

44. Saunders, *Comparative Administrative Law*, *supra* note 43, at 427; see also Saunders, *Common Law Public Law*, *supra* note 43, at 361–64.

45. See CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICAN AND ENGLAND, at xiv–xv, 14–16, 199–204 (Cincinnati, W. H. Anderson & Co. 1897); see generally Erik S. Knutsen et al., *The Teaching of Procedure Across Common Law Systems*, 51 OSGOODE HALL L.J. 1 (2013).

historical anchor remains even as the jurisdictions adopt local approaches: “[W]hile doctrine now is diversifying,” Cheryl Saunders writes, “it is doing so from a common base.”<sup>46</sup>

Between the thirteenth century and the reforms of the nineteenth, distinct rules of procedure had materialized in the common-law courts for the settlement of disputes, and procedural formalities dominated common-law thought.<sup>47</sup> Broadly speaking, the entire justice system had been divided into two separate bodies that exhibited different outlooks and procedural patterns: the courts of law and the Court of Chancery.<sup>48</sup> The courts of law, developed under the idea that residual jurisdiction was retained by local communities, followed an ideal type of substance-specific procedural order: the writs—the categories of claim accepted at common law.<sup>49</sup> The goal of the law courts’ substance-specific procedure was, among other things, to frame disputes so that the case could be reduced to an “issue”: a question for decision by the local jury.<sup>50</sup> The reliance on intimate community knowledge that manifests itself in the institution of trial by jury is thus responsible for many features of procedure in the courts of law.<sup>51</sup>

“The writ worked like a pass admitting a suitor to the court,” John Baker notes, “and there were different kinds of pass for different purposes.”<sup>52</sup> Plaintiffs were allowed to commence an action at law only through standardized forms, recognized as suited to their case; otherwise,

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46. Cheryl Saunders, *Constitution as Catalyst: Different Paths within Australasian Administrative Law*, 10 NZJPIL 143, 146 (2012).

47. See BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 60; Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179, 1185–87 (2007); Fred A. Maynard, *Reform in Legal Procedure*, 2 MICH. L. J. 75, 81 (1893); Stephen C. Yeazell, *Convention, Fiction, and Law*, 13 NEW LITERARY HIST. 89, 92 (1981).

48. See 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 446–69 (3d ed. 1922); JOHN SORABJI, ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS: A CRITICAL ANALYSIS 14 (2014); Thomas P. Gallanis, *Victorian Reform of Civil Litigation in the Superior Courts of Common Law*, in WITHIN A REASONABLE TIME: THE HISTORY OF DUE AND UNDUE DELAY IN CIVIL LITIGATION 233, 234 (C. H. Van Rhee ed. 2010); Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 914.

49. See Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 382; Stancil, *supra* note 21, at 1655.

50. See BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 61; JOHN P. DAWSON, A HISTORY OF LAY JUDGES 170 (1960); SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY 8 (2013); DAVID DUDLEY FIELD, ARPHAXED LOOMIS & DAVID GRAHAM, FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF PROCEDURE 71 (Albany, Charles Van Benthuysen, Public Printer 1848) [hereinafter FIELD, LOOMIS & GRAHAM, FIRST REPORT]; see also SORABJI, *supra* note 48, at 31; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 1000; THE FEDERALIST No. 83, at 505 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

51. See CLARK, *supra* note 12, at 13; Gallanis, *supra* note 48, at 235.

52. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 61.

they had no standing in the court.<sup>53</sup> Each form, a writ, dealt with a specific type of claim—for example, an action for the possession of land, an action for debt, or an action for assault.<sup>54</sup> The choice of writ governed the whole course of litigation from beginning to end.<sup>55</sup> Thus, each writ gave rise to a *particular* and *inflexible* procedure to be followed,<sup>56</sup> with a specific time limit for bringing the action, the required mode of proof, the manner of trial, and the type of sanction that would attend the eventual judgment.<sup>57</sup> Correspondingly, writs' procedures varied widely among the different available claims, creating a substance-specific system of formulaic procedural requirements unique to each action.<sup>58</sup>

Furthermore, criminal prosecution would become a government monopoly only in later times. During this period, the system relied largely on private prosecution,<sup>59</sup> and we find certain writs that dealt with what we would today consider as criminal cases. The appeal, which was an accusation of a crime by the victim, or family members of the victim, was typically brought to the courts of law through the writ of trespass or the writ of attachment.<sup>60</sup> Another way to bring a complaint against a wrongdoer was by a writ in the form of *pone*, whereby the sheriff was ordered to “put the defendant by gage and safe pledges” to come before the king's justices and show why he had committed some specified misdeed.<sup>61</sup> As David Sklansky and Stephen Yeazell point out, the practice of private prosecution “meant that for many citizens the

53. See HARRY K. WOOLF ET AL., *DE SMITH'S JUDICIAL REVIEW* 857–58 (7th ed. 2013); ROY L. BROOKS, *CRITICAL PROCEDURE* 80–81 (1998); HEPBURN, *supra* note 45, at 46–50; Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 *YALE L.J.* 259, 259 (1925).

54. See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 32 (1952); Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 915; see also AMSTERDAM & BRUNER, *supra* note 5, at 112; Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 *J. CONTEMP. LEGAL ISSUES* 43 (1996); FIELD, LOOMIS & GRAHAM, *FIRST REPORT*, *supra* note 50, at 81–86 (giving an account of the early development of the writ system).

55. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, *supra* note 8, at 63.

56. See GLENN, *TRADITIONS OF THE WORLD*, *supra* note 42, at 241; Gallanis, *supra* note 48, at 238; D. M. KERLY, *AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 9 (Cambridge, University Press 1890).

57. R. C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 29 (2d ed. 1988).

58. See BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, *supra* note 8, at 64; DODSON, *supra* note 50, at 8.

59. See Sklansky & Yeazell, *supra* note 3, at 687–89; LANGBEIN, *supra* note 42, at 7 (“[N]either a specialist criminal bench nor specialized criminal courts developed in England until recent times. The trial judges who presided at provincial assize courts and at the Old Bailey in London were seconded from the three central courts of civil jurisdiction for a few weeks a year.”).

60. See BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, *supra* note 8, at 66–71, 543–45 (observing that by the late fourteenth century, about half of all appeals were begun in the King's Bench, and that nearly all appeals were tried by jury); S. F. C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 404 (2d ed. 1981) [hereinafter MILSOM, *HISTORICAL FOUNDATIONS*].

61. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, *supra* note 8, at 66.

functions of criminal and civil justice was barely distinguishable. Both served as means for citizens to pursue grievances about the behavior of others.”<sup>62</sup> A third way of proceeding against a wrongdoer, not through any particular writ, was by indictments. The accusers in such a case were a group of community representatives who made presentments of suspected offenders to the courts of law.<sup>63</sup>

According to *Bracton*<sup>64</sup> there were as many writ formulae as there were types of action,<sup>65</sup> and Frederick Pollock and Frederic William Maitland wrote that at the golden age of the forms “there were in common use some thirty or forty actions.”<sup>66</sup> The truth is that the total number of forms of action is disputed,<sup>67</sup> and “the subsequent development of forms will consist almost entirely of modifications of a single action, namely, Trespass, until at length it and its progeny—Ejectment, Case, Assumpsit, Trover,—will have ousted nearly all the older actions.”<sup>68</sup> Still others argue that “at the beginning of the nineteenth century, there were no fewer than sixteen different methods for commencing civil litigation in the superior courts of common law.”<sup>69</sup> Either way, what is clear is that this labyrinthine procedural order gave rise to a formalistic culture which affected legal analysis and thinking at every turn.<sup>70</sup> Nonetheless, this is only half the story. The fractionated condition of procedural law in this episode of the common law was even greater considering the fact that the

62. Sklansky & Yeazell, *supra* note 3, at 688.

63. The accusing body of local representatives acquired the name “grand jury” to distinguish it from the trial jury, which was charged with finding the truth as to an individual’s guilt. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 545.

64. *Bracton*, which appeared in the thirteenth century, was one of the earliest treatises on the common law and its procedures. See BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 62–64, 185–87.

65. 4 BRACON DE LEGIBUS ET CONSUEUDINIBUS ANGLIÆ [BRACON ON THE LAWS AND CUSTOMS OF ENGLAND] 286 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1977) (c. 1235).

66. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 592 (Liberty Fund 2010) (2d ed. 1898) (referring to the final years of Henry III).

67. See GLENN, TRADITIONS OF THE WORLD, *supra* note 42, at 242 (suggesting that there were about 75 different forms of writs); HEPBURN, *supra* note 45, at 49 (observing that “the full number of common law writs and actions is not clearly known”); GEOFFREY R. ELTON, F. W. MAITLAND 40–42 (1985); JOHN H. LANGBEIN, RENÉE L. LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 110–11 (2009); FIELD, LOOMIS & GRAHAM, FIRST REPORT, *supra* note 50, at 77–81, 84 (providing a summary of different forms of action as they existed in the common law and suggesting that there were fifty-one different writs).

68. POLLOCK & MAITLAND, *supra* note 66, at 564; see also BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 62, 67–71; see generally DAVID IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (2001).

69. Gallanis, *supra* note 48, at 238.

70. See BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 60; S. F. C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW, at xvi (2003).

Court of Chancery followed a separate procedure.<sup>71</sup>

The Court of Chancery grew out of an administrative practice of referring individual petitions to the chancellor who served as the direct representative of the King.<sup>72</sup> The chancellor's equitable jurisdiction offered an alternative to the writ system when, as a matter of conscience, it was clear that the courts of law were unable or unwilling to offer an effective remedy adjusted to a particular situation.<sup>73</sup> To be sure, the courts of law and the Chancery were complementary tribunals.<sup>74</sup> Equity was meant to fulfill the law, and in order to achieve this result, the Court of Chancery introduced a *liberal* and *flexible* procedure, somewhat unpredictable, that allowed parties to bring forward the entire controversy rather than breaking it up into smaller units through the different writs.<sup>75</sup> It was able to adopt this kind of procedure due to two main reasons. First,

71. See Charles J. Hamson, *Civil Procedure in France and England*, 10 CAMBRIDGE L.J. 411, 414–15 (1950).

72. JOLOWICZ, *supra* note 10, at 25; see also HOLDSWORTH, *supra* note 48, at 446–49; JOHN N. POMEROY & SPENCER W. SYMONS, 1 TREATISE ON EQUITY JURISPRUDENCE 38–39 (5th ed. 1941); Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD CENTENARY ESSAYS, *supra* note 2, at 17, 22–23; see generally 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 8 (Boston, Hilliard, Gray & Co. (1836); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1198–1210 (2005).

73. See THE FEDERALIST No. 83, *supra* note 50, at 505 (Alexander Hamilton) (“The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to the general rules.”); GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION 4–5, 24 (1982); see also 2 JOHN BAKER, COLLECTED PAPERS ON ENGLISH LEGAL HISTORY 946 (2013) [hereinafter BAKER, COLLECTED PAPERS]; Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 22 (1989) [hereinafter Bone, *Mapping the Boundaries of a Dispute*]; Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I*, 22 LAW & HIST. REV. 389, 391 (2004) [hereinafter Lobban, *Preparing for Fusion, Part I*]; Joshua Getzler, *Patterns of Fusion*, in THE CLASSIFICATION OF OBLIGATIONS 157, 164 (Peter Birks ed., 1997); MILLAR, *supra* note 54, at 24; SHELDON AMOS, A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE 326 (London, Longmans, Green, and Co. 1872); STORY, *supra* note 72, at 8; Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 300 (1938); Clark & Hutchins, *supra* note 53, at 260; George B. Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 97 (1916); FIELD, LOOMIS & GRAHAM, FIRST REPORT, *supra* note 50, at 68–69. The ability to fashion a specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only monetary damages. See CLARK, *supra* note 12, at 14; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 919; cf. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“Traditionally, equity has been characterized by a practical flexibility in shaping its remedies, and by a facility for adjusting and reconciling public and private interests. These cases call for the exercise of these traditional attributes of equity power.”).

74. See BAKER, COLLECTED PAPERS, *supra* note 73, at 952; MCDOWELL, *supra* note 73, at 5 (observing that the major innovations in equity jurisprudence were procedural rather than substantive).

75. See SORABJI, *supra* note 48, at 42–46; F. W. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW 2–5 (A. H. Chaytor & W. J. Whittaker eds., 1909); BROOKS, *supra* note 53, at 81; DODSON, *supra* note 50, at 9; Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 29; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 919–20.

its jurisdiction arose from a general delegation of authority to the chancellor under the royal prerogative, rather than through specific delegation to the law courts by way of a writ containing the form of action.<sup>76</sup> Secondly, it did not seek to refine a single point for the determination of a jury because the lord chancellor, who handled all cases, was the sole judge. Accordingly, equity procedure enabled the Court of Chancery to adjudicate all possible issues between all interested parties rather than reduce the dispute to a single issue.<sup>77</sup>

For present purposes, suffice it to say that the Chancery knew no forms of action and did not classify its business. There was, consequently, no equivalent to the forms of action, which could define and limit its jurisdiction. A complainant stated his case at large in the form of a petition to the chancellor.<sup>78</sup> This meant, among other things, that the procedure in the Court of Chancery did not differ among the various types of cases and that it was flexible enough to accommodate any kind of dispute, regardless of the number of issues, parties, or stakes involved.<sup>79</sup> From a modern point of view we can say that equity procedure was, unlike the writs system, transsubstantive: it used a single form of process, and the same procedural rules applied irrespective of the doctrinal categories.<sup>80</sup>

While this state of the common law had proven adaptable enough over centuries to meet new challenges, it was, however, subject to many defects that became more and more acute as the system struggled toward maturity. Clearly, there were serious flaws in a justice system which needed, or allowed, the resources of more than one court to settle many litigious disputes.<sup>81</sup> And as J. A. Jolowicz suggested, if the system of writs had come to seem as basic as the Ten Commandments,<sup>82</sup> “the division between law and equity must have seemed as natural as the division between land and sea.”<sup>83</sup> They were different things calling for different tribunals and different procedural techniques that could not

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76. SORABJI, *supra* note 48, at 38.

77. *See id.* at 38–41, 57; Lobban, *Preparing for Fusion, Part I*, *supra* note 73, at 391.

78. *See* HENRY HORWITZ, *CHANCERY EQUITY RECORDS AND PROCEEDINGS 1600–1800*, at 31 (1995); CLARK, *supra* note 12, at 16; HEPBURN, *supra* note 45, at 46 (“[C]ourts of equity had but one form of suit.”).

79. *See* CLARK, *supra* note 12, at 17; HORWITZ, *supra* note 78, at 3; Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 22–25; Clark & Hutchins, *supra* note 53, at 266–67; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 933–34; FIELD, LOOMIS & GRAHAM, *FIRST REPORT*, *supra* note 50, at 71 (observing with regard to equity procedure that “there was literally no form about it. . . . Under this practice, any suit for any kind of remedy may be brought.”).

80. *See* SORABJI, *supra* note 48, at 39, 57.

81. W. J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* 19 (1967).

82. MILSOM, *HISTORICAL FOUNDATIONS*, *supra* note 60, at 36.

83. JOLOWICZ, *supra* note 10, at 26–27.

sensibly have been combined. Inevitably, the separate administration of justice in different courts led frequently to a situation in which lawyers often did not know in which court to commence suit,<sup>84</sup> and a single controversy could only be disposed of completely if proceedings were brought before a court of law and also, independently, before the Court of Chancery.<sup>85</sup> By the late eighteenth century increased criticism reflected a widespread belief that the traditional legal system was grotesquely out of step with the times. For too many, the courts were simply unable to secure substantive justice and vindicate rights, either at all or at a reasonable cost and in a reasonable time.<sup>86</sup> Indeed, it had become clear that the bifurcation of the judicature gave rise to numerous complexities and was inadequate to respond to the new demands arising from the social and economic upheavals set in train by the ongoing processes of industrialization and urbanization.<sup>87</sup> As Lawrence Friedman crisply put it, “English procedure, in other words, was too medieval for the modern world.”<sup>88</sup> A new procedural order, discussed in the next Part, became inevitable.

### III. THE FOUNDATIONS OF A NEW PROCEDURAL ORDER

#### A. *Categorization in the Making: Synthesizing Law and Equity*

From the mid-nineteenth century through the first half of the twentieth century the common-law procedural landscape had undergone a radical shakeup. Previous reforms had accepted the binary nature of the system as given. Reforms operated, and mostly failed, within the framework it provided. But the common-law reformers “drew what might have been thought to be the obvious conclusion and rejected the status quo. The

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84. See ARPHAXED LOOMIS, *HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS* 9 (Little Falls, J. R. & G. G. Stebbins, Printers 1879); SUBRIN & WOO, *supra* note 42, at 49.

85. See JOLOWICZ, *supra* note 10, at 26–27; Clark & Hutchins, *supra* note 53, at 263; Gallanis, *supra* note 48, at 235–36; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 933; see also THE FEDERALIST No. 80, *supra* note 50, at 480 (Alexander Hamilton).

86. SORABJI, *supra* note 48, at 32–33.

87. See JOHN WHEELER, *THE ENGLISH LEGAL SYSTEM* 57 (2002); HEPBURN, *supra* note 45, at 24, 182 (noting that “the ancient machinery of justice was continually required to meet new and strange conditions of fact, and under this strain was continually breaking down.”); Frederick N. Judson, *A Modern View of the Law Reforms of Jeremy Bentham*, 10 COLUM. L. REV. 41, 49 (1910); Lobban, *Preparing for Fusion, Part I*, *supra* note 73, at 411 (noting that equity procedure was ill-adapted to the type of business generated in a modern commercial society); Meyn, *supra* note 6, at 703 (“Common law’s rigidity and its prohibitions on joinder could not attend to the growth of complex legal relationships between government, individuals, and enterprise—or to the growth of organized crime.”); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 322 (1988); Woodard, *supra* note 42, at 131–32.

88. FRIEDMAN, *supra* note 42, at 96.

binary system had to go.”<sup>89</sup> For the first time, the common-law courts and the procedural systems as a whole were subject to scrutiny.

The common-law reformers looked for a new structure that would merge law and equity courts and impose a more uniform system of procedure.<sup>90</sup> To do so, it was vital to escape the confinement of the old procedural categories. Concurrently, the reformers started to think about the interrelationships of the different forms of actions and suits in Chancery and boil them down to the synergetic principles beneath the hodgepodge of the various proceedings. Only then did it become possible, for the first time, to consider the law as being the application of substantive, rather than procedural, rules.<sup>91</sup> This intellectual process was the driving force behind the emergence of the new procedural regime that came out of the ruins of the two dominant patterns of procedure in the common law.<sup>92</sup> For the purposes of what follows, it is unnecessary to describe in detail the steps by which the basic reforms were brought about. Nonetheless, it is important to note here that the conceptual change had not occurred overnight. Rather, it was the result of an ongoing Anglo-American campaign pushed forward by different figures and various political currents that ultimately joined together in a historic surge.<sup>93</sup> Even so, this reform movement had a strong sense of shared mission and agenda.

The main objective of the reformers was the reorganization of the court system and the law-equity procedural regime.<sup>94</sup> The underlying idea did not mark a complete break with the past—the reformers did not look to destroy the common law or to create new rights and remedies:<sup>95</sup> “This

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89. SORABJI, *supra* note 48, at 14.

90. See Gallanis, *supra* note 48, at 242–44; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 933; see also CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 74–75* (1981).

91. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 382 (5th ed., 1956).

92. See Bone, *Making Effective Rules*, *supra* note 35, at 321.

93. See, e.g., JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* 3–4 (1969); Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 942–43; CHARLES H. HUNT, *LIFE OF EDWARD LIVINGSTON* 117 (New York, D. Appleton & Co. 1864); LOOMIS, *supra* note 84, at 5; Henry Upson Sims, *The Problem of Reforming Procedure*, 21 *YALE L.J.* 215, 216–30 (1912); Eugene Smith, *Edward Livingston, and the Louisiana Codes*, 2 *COLUM. L. REV.* 24, 30–36 (1902).

94. See MCDOWELL, *supra* note 73, at 7; Clark & Hutchins, *supra* note 53, at 262; Judson, *supra* note 84, at 44; William H. Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 *A.B.A. J.* 601, 604 (1922).

95. See HEPBURN, *supra* note 45, at 13; MCDOWELL, *supra* note 73, at 87; JOHN NORTON POMEROY, *REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE* 37–38 (Boston, Little, Brown & Co. 1876); Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 391. This is particularly clear in the

was simply a merger of jurisdictions, not a changing of the substantive remedies.”<sup>96</sup> To be sure, they stressed the cumbersome nature of the dual law-equity procedural regime and its tendency to produce unreasonable costs, delays, and uncertainty.<sup>97</sup> In other words, the reformers sought to preserve the existing laws’ essence and provide a bridge between the two dominating procedural vectors that were meant to interface under the umbrella of a unified system of courts.<sup>98</sup> To accomplish this, the reformers had to come up with a new procedural order that was not wholly transsubstantive or entirely fine-grained into substance-specific categories. Viewed from this standpoint, some middle ground had to be found, and it probably made sense to split procedure into a number of categories based on some similar characteristics of the various typical legal disputes that reach the courts. And it would follow that a single set of rules should apply to all cases within the sphere of each category. In such a way, a synthesis of the two procedural patterns would be achieved for the conjoint administration of law and equity in the same proceeding.

The problem was what criteria to use in making such a classification or, in other words, in defining what should fall into each category. Theoretically, the reformers could have structured the new procedural order according to multiple models. Indeed, the task of gathering different classes of cases that would efficiently follow the same body of procedural rules raises analytical difficulties and practical questions, such as how to form useful and abstract concepts to organize what one knows.<sup>99</sup> More

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Rules Enabling Act of 1934, which represents the culmination of the reform efforts, and requires that any rules enacted pursuant to its terms “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b); *see also* FIELD, LOOMIS & GRAHAM, FIRST REPORT, *supra* note 50, at 74.

96. BAKER, COLLECTED PAPERS, *supra* note 73, at 952; *see also* SORABJI, *supra* note 48, at 14.

97. *See* Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 11.

98. *See* DODSON, *supra* note 50, at 15–16; GLENN, TRADITIONS OF THE WORLD, *supra* note 42, at 255; LOOMIS, *supra* note 84, at 10; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 922; *see also* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1004 (4th ed. 2008); Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II*, 22 LAW & HIST. REV. 565, 586–94 (2004) [hereinafter Lobban, *Preparing for Fusion, Part II*].

99. Classification of objects into meaningful groups or clusters is a basic conceptual activity. In order to grasp a new object or understand a new phenomenon, we always try to identify its descriptive features and compare them with those of known objects or phenomena, according to some certain standards or rules. “Similarity,” however, does not lie in the simple recognition that things are alike or not alike, but instead in the ways in which these concepts are expressed and implemented. *See, e.g.*, MARK S. ALDENDERFER & ROGER K. BLASHFIELD, CLUSTER ANALYSIS 7–17 (1984); AMSTERDAM & BRUNER, *supra* note 5, at 42 (“[T]he question of what composes a category of similar things seems to be a matter of one’s choice of criteria.”); JOHN A. HARTIGAN, CLUSTERING ALGORITHMS I (1975); H. CHARLES ROMESBURG, CLUSTER ANALYSIS FOR RESEARCHERS 2–10 (1984); RUI XU & DONALD C. WUNSCH, CLUSTERING I–4 (2009); *see also* Tom Ginsburg & Nicholas Stephanopoulos, *The Concepts of Law*, 84 U. CHI. L. REV. 147, 150

specifically, what is a legitimate reason to lump together various types of conflicts under a single mode of procedure? The reformers faced a legal characterization puzzle. Clearly any procedural category ought to be characterized by a certain internal homogeneity and external separation—the types of cases in the same category should be similar to each other in a clear and meaningful way, while decidedly different from those falling under the rules of different categories.<sup>100</sup> This may appear simple and relatively straightforward, but in fact there is absolutely no way to determine an independent criterion that is necessarily the best in order to aggregate and disaggregate cases for that purpose.<sup>101</sup> It is not like solving a math problem; it is not algorithmic. And as Anthony Amsterdam and Jerome Bruner maintain, in most instances “similarity is the result of categorization rather than the cause of it.”<sup>102</sup> With that in mind, the only thing that can be said with confidence is that there must have been at least an attempt to engage in a process that could have yielded a sensible concept for compartmentalization and system design.<sup>103</sup> Therefore, we definitely could have expected to see the reformers weighing alternative models and trying to articulate an ordering principle that explains how

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(2017) (contending that concepts provide the mental architecture by which we understand the world and that legal concepts are often not well understood).

100. See AMSTERDAM & BRUNER, *supra* note 5, at 49 (“[T]hings within the category are more similar to one another than to things outside the category.”).

101. The design of a procedural system represents a multi-objective optimization problem or a “polycentric task.” In such a scenario there are two or more conflicting objectives, such as outcome accuracy, efficiency, fairness, individual autonomy, and participation, and there is no single solution that simultaneously optimizes each objective. “More precisely, what makes a task polycentric is that none of the critical variables are exogenously fixed; that is, all variables are affected by the choice of value for any one. As a result, one can never fix a value for a variable (X) and then reason to optimal values for other variables (Y and Z), because the choice of values for Y and Z might alter the value of X, which in turn might change the optimal values for Y and Z—and so on. Accordingly, the only way to solve a polycentric problem is to consider the effects on all variables at once and search for an equilibrium.” Robert G. Bone, *Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1314 (1995). See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978); see also Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 14, at 403 (“There is no such thing as a perfect procedural system.”); Subrin, *Emerging Procedural Patterns*, *supra* note 34, at 2049 n.255 (“The criteria to be used for applying some procedures to selected cases may prove difficult to define, and, as to some procedures, there may be no clear-cut criteria.”); Michael Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 33, 41–57 (1986) (“It is not clear that one can conceptualize a perfect legal procedure.”); LIND & TYLER, *supra* note 39, at 38–39; cf. RAWLS, *supra* note 39, at 86 (“The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it.”). For a more general account of the concept of optimizing, see RUTH CHANG, MAKING COMPARISONS COUNT 46–48 (2002).

102. AMSTERDAM & BRUNER, *supra* note 5, at 49.

103. Cf. Ginsburg & Stephanopoulos, *supra* note 99, at 148 (arguing that social science can improve our understanding of the formation and linkage of legal concepts).

distinct sets of situations are logically connected in a way that makes it appropriate to consider them together.

Surprisingly, however, there is no evidence to suggest that this was a major concern for the reformers. Moreover, one particularly striking feature during all the reform activity is the absence of any real disagreement about the basic scope of the new procedural order—namely, the demarcation of the entire procedural realm into civil and criminal proceedings. This formative choice was not set according to a clear and definite parameter about the optimal number of procedural categories or by a conscious decision delineating important differences between the types of cases that would end up under each. One could imagine that it would have been a product of a scrutinized survey that analyzed conflicting objectives, such as outcome accuracy, efficiency, fairness, individual autonomy and participation, litigation costs, the nature of the parties, and the size of cases. However, the real vice of the reform movement was probably its weak empirical base. The reformers never conducted a careful study of what actually happened in the courts.<sup>104</sup> The fact of the matter is that there was no master plan for the emerging procedural blueprint. Rather, it is safe to say that the decision to draw the line between civil and criminal subjects was intuitive and assumed as self-evident. It seems that the reformers muddled through against a backdrop of typical situations likely to reach the courts.<sup>105</sup> The problem with this approach, as we shall see, is that it left the procedural setting obscure due to the lack of a rigorous theory of procedure.

*B. The Anglo-American Collaboration: The Work of Bentham and Livingston*

The procedural reform in the common-law world was the result of a cross-fertilization project between England and the United States, and during the nineteenth century, the two countries traveled through roughly parallel routes of change.<sup>106</sup> Two towering figures, Jeremy Bentham, English philosopher and jurist, and Edward Livingston, American jurist and statesman, played a key role from the beginning, and their spellbinding views had fixed the configuration of the new procedural

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104. FRIEDMAN, *supra* note 42, at 295.

105. Bentham took the view that English law books could be useful to him as means of checking the comprehensiveness of his work, as a record, in his words, of “the cases that are *liable* to arise and call for *decision* and therefore for *legislation*.” Letter from Jeremy Bentham to Samuel Bentham (Nov. 30, 1804), in 7 THE CORRESPONDENCE OF JEREMY BENTHAM: JANUARY 1802 TO DECEMBER 1808, at 294 (J. R. Dinwiddy ed., 1988); see also COOK, *supra* note 90, at 70 (“Codification, as promoted in antebellum America, was, by and large, a lawyer’s reform designed to remedy ills that practitioners and judges observed in the legal environment.”).

106. See FRIEDMAN, *supra* note 42, at 97, 297; HEPBURN, *supra* note 45, at 70–71.

order.<sup>107</sup> While we have no record of the two individuals being in a room together, the two pioneering, like-minded individuals exchanged their works with each other and participated in a shared legal conversation.<sup>108</sup>

Bentham and Livingston thought that the common-law processes failed to secure substantive justice because they were overly complex and spread across an unnecessarily complicated web of courts and competing jurisdictions. In their view, the main division between law and equity was all wrong. By the same token, they determined that procedure could not continue to be the determining factor of the common law. This was a paradigm shift. William Blackstone, for example, embraced in his *Commentaries* the procedural structure of the common law of his day. While Blackstone abandoned the writs as organizing principles, he thought that it was better to adapt the old forms of action to modern conditions through fictions, rather than to reform the entire system.<sup>109</sup> But Bentham and Livingston parted ways with Blackstone and looked to restructure the familiar legal territories in order to create a justice system capable of meeting the needs of the public in the nineteenth century.<sup>110</sup>

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107. See FRIEDMAN, *supra* note 42, at 97; see also CLARK, *supra* note 12, at 18; HEPBURN, *supra* note 45, at 71–80.

108. Well-established evidence proves without doubt that Bentham and Livingston exchanged their works with each other. This explains the congruence in their theory and methodology. See HUNT, *supra* note 93, at 278, 351; Agustín Parise, *Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation Between Continental European and Common Law Systems*, 27 TUL. EUR. & CIV. L.F. 133, 144, 148 (2012); Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 387; Woodard, *supra* note 42, at 124, 128; David S. Clark, *The Civil Influence on David Dudley Field's Code of Civil Procedure*, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820–1920, at 63, 69 (Mathias Reimann ed., 1993) [hereinafter Clark, *Civil Influence*]; Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 746 (1942); Mitchell Franklin, *Concerning the Historic Importance of Edward Livingston*, 11 TUL. L. REV. 163, 205–06 (1937); Elon H. Moore, *The Livingston Code*, 19 AM. INST. CRIM. L. & CRIMINOLOGY 344, 347–48, 357 (1928); James E. Crimmins, *Jeremy Bentham*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/bentham/#Inf> [<https://perma.cc/82JB-XZKQ>] (Jan. 28, 2019). The correspondences between Bentham and Livingston further substantiate their strong connection to the reform efforts. See *Memoirs of Jeremy Bentham*, in 11 THE WORKS OF JEREMY BENTHAM 23, 35–38, 51 (John Bowring ed., London, Simpkin, Marshall & Co. 1843); see also COOK, *supra* note 90, at 74–75 (noting that Bentham's views on codification were a source of inspiration for the American codifiers, and that while few reformers credited Bentham as a source for their ideas and proposals, Livingston was a notable exception); HEPBURN, *supra* note 45, at 80; Pound, *David Dudley Field*, *supra* note 42, at 5 (noting that the reform movement, as an era in the history of Anglo-American law, is considered to have begun with the publication of Bentham's first book in 1776).

109. Blackstone's *Commentaries* followed the model supplied by Justinian's *Institutes* and the basic format that pervades the continental institutionalist literature: the rights of persons, the rights of things, private wrongs, and public wrongs. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford 1765–1769) (4 vols.); see also LANGBEIN, LERNER & SMITH, *supra* note 67, at 838–43.

110. See Judson, *supra* note 87, at 41–42; CLARK, *supra* note 12, at 18; COOK, *supra* note 90, at 76–77; JOHN DINWIDDY, BENTHAM 54–60 (1989); 5 CARL B. SWISHER, HISTORY OF THE

This restructuring was to be accomplished in two ways. First, Bentham and Livingston vigorously aspired to arrange the whole body of law into a written or statutory form because at that point the common law was, to quote Professor Friedman, “an amorphous entity, a ghost, scattered in little bits and pieces among hundreds of case reports, in hundreds of different books. Nobody knew what was and was not law.”<sup>111</sup> Indeed, the common law had been built up over centuries through incremental changes, and the rules and practices it embodied were seen as the outcome of the cumulative experience of many generations.<sup>112</sup> Driven by the need to present the different subjects in a systematic and convenient way, Bentham and Livingston began to classify law into its familiar doctrinal categories. According to Bentham and Livingston’s scheme of organization, the whole legal order, or “modes of human action,” is divided into two main branches of substantive law: *civil* and *penal*.<sup>113</sup> This division represented a shared focus regarding the basis for the logical distribution of a nation’s laws—an arrangement that is based on the twin functions of law as being to suppress wrongs and to define and secure personal rights.<sup>114</sup>

Secondly, and more importantly, Bentham and Livingston set out the first serious “attempt in the English language . . . at a philosophical account of the law of procedure.”<sup>115</sup> They shared a common belief that procedural rules should have no independent goals of their own and

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SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64, at 342 (1974); Moore, *supra* note 108, at 350; Pound, *David Dudley Field*, *supra* note 42, at 5; John H. Wigmore, *Louisiana: The Story of Its Legal System*, 1 S.L.Q. 1, 10 (1916); cf. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 18–24 (2006) (offering a historical overview of Blackstone and Bentham and their differing approaches to statutory interpretation); John R. Commons, *Law and Economics*, 34 YALE L.J. 371, 371 (1925) (elaborating on Bentham’s criticism of Blackstone).

111. FRIEDMAN, *supra* note 42, at 302 (noting that the procedural reform movement was part of the plan to codify the entire common law); see also SORABJI, *supra* note 48, at 75.

112. Bentham viewed the common law as one immense fiction. He described the common law at large as a “fictitious composition which has no person for its author, no known assemblage of words for its substance.” JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 8 (J. H. Burns and H. L. A. Hart eds., 1970); see also POLLOCK & MAITLAND, *supra* note 66, at 559; EDWARD S. ROSCOE, *THE GROWTH OF ENGLISH LAW* 19 (1911).

113. See Letters from Jeremy Bentham, an Englishman, to the Citizens of the Several American United States (July 1817), in ‘LEGISLATOR OF THE WORLD’: WRITINGS ON CODIFICATION, LAW AND EDUCATION 113, 139–40 (Philip Schofield & Jonathan Harris eds., 1998) [hereinafter Bentham, Letters to U.S. Citizens]; 1 THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE 169–71 (New York, Nat’l Prison Ass’n of the U.S. 1873); AMOS, *supra* note 73, at 283.

114. See Jeremy Bentham, First Lines of a Proposed Code of Law for Any Nation Compleat and Rationalized, in ‘LEGISLATOR OF THE WORLD’, *supra* note 113, at 187, 194–214 [hereinafter Bentham, First Lines]; see also AMOS, *supra* note 73, at 96–102; FRIEDMAN, *supra* note 42, at 207.

115. Gerald J. Postema, *The Principle of Utility and the Law of Procedure: Bentham’s Theory of Adjudication*, 11 GA. L. REV. 1393, 1393 (1977); see also SORABJI, *supra* note 48, at 75–100; Stancil, *supra* note 21, at 1655–59.

instead exist only to provide for the efficient resolution of cases on their substantive merits.<sup>116</sup> In fact, the concepts of “substantive” and “procedural” law seem to have been invented by Bentham.<sup>117</sup> Substantive law included all doctrine that regulated rights and duties, with its end being “the maximization of the happiness of the greatest number of the members of the community in question.”<sup>118</sup> By contrast, procedure, or “adjective law,” was defined as “the course taken for the execution of the laws.”<sup>119</sup> Properly conceived, it implied that the content of the substantive law would have an effect on the structure of the forms of process. The precise effect or relationship, however, was never explicitly explained, and we were left with only general statements echoing the trade-off between transsubstantivity and substance-specificity. The following excerpt captures the critical theme of this Article and also illustrates Bentham’s cursory treatment of the way in which the two procedural principles should play out:

Here, then, comes the line of distinction—the distinction between that part of the proposed system of procedure, which may be given without the previous exhibition of any part of the system of substantive law, and that part which cannot. The means for coming at the truth, as to matters of fact, are the same in all cases: the means for obtaining and exercising the powers necessary to the giving execution and effect to the ordinances of substantive law, are the same in all cases.

But of this general application of machinery, different ordinances of substantive law require the application of different engines or instruments to be brought into exercise. On which occasion, which instrument shall be brought into exercise, and how applied—this will depend upon the particular portion or article of substantive law, to which, for the purpose of giving effect to it, application is to be made of it.<sup>120</sup>

As can be seen, the new order is based on the assumption that different subject matters trigger different sets of procedures. Admittedly, however, neither Bentham nor Livingston laid down a sound theory for the ideal grouping of different types of cases and their corresponding procedural

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116. See Bentham, *First Lines*, *supra* note 114, at 223; Postema, *supra* note 115, at 1396–1402.

117. Albert Kocourek, *Substance and Procedure*, 10 *FORDHAM L. REV.* 157, 157 (1941).

118. JEREMY BENTHAM, *Principles of Judicial Procedure*, in 2 *THE WORKS OF JEREMY BENTHAM*, *supra* note 108, at 6 [hereinafter BENTHAM, *Principles of Judicial Procedure*].

119. *Id.* at 5–6 (“Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law.”). A similar distinction was made earlier by Blackstone. However, Blackstone insisted on the traditional terms and distinguished between a cause of action, which was a matter of substantive law, and the form of action, which was a matter of procedure. See SORABJI, *supra* note 48, at 51; Kocourek, *supra* note 117, *passim*; Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 384–86; HEPBURN, *supra* note 45, at 13.

120. BENTHAM, *Principles of Judicial Procedure*, *supra* note 118, at 15.

rules. This does not mean, of course, that the procedural categories they had formulated were arbitrary or out-of-the-blue.<sup>121</sup>

For them, the configuration of procedural law was deeply linked to a vision of procedure as instrumental to a distinct body of substantive law, which meant, in turn, that procedure simply depended upon the large-scale arrangement of the legal order that they had envisioned.<sup>122</sup> Therefore, under Bentham and Livingston's scheme, a corresponding code of procedure is to be attached to each of the two discrete categories of subject matter—criminal law has as its corollary criminal procedure, and private law has as its corollary civil procedure.<sup>123</sup> This approach to cleave civil from criminal procedure and send, as we shall see, civil and criminal litigation on different paths for generations, was adopted without further discussion. Even the question regarding what policy objectives should inform the task of designing such procedural rules was left unanswered. Bentham summarized this pragmatic approach in the following way:

So, as between the *main body* of the law, or say system of *Substantive law*, and the system of the *Law of Procedure*, or say *System of Adjective Law*, included in each such *Part* as above. In each *Part*, the *Adjective* branch has for its object and business the giving execution and effect to the *Substantive* branch. Conceive now, in the Penal and Civil *Parts*, taken together or separately, a system of *Procedure*, having for its object the giving execution and effect to a system of *benefits* and *burthens*, of *rights* and *obligations*, the forms and denominations of which remain to be determined: the system of *Substantive law*, the production of one work-man, the system of *Procedure*, which is to give execution and effect to it, that of another: both works going on without concert at the same time. In such a state of things, in what case is he, to whose lot it falls to pen the system of *Procedure*? Instead of *seeing* the system of *offences* as exhibited in the Penal Code, and that of the efficient causes of *rights* and *obligations* as exhibited in the Civil Code,

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121. Cf. AMSTERDAM & BRUNER, *supra* note 5, at 29 (“[W]henever we categorize something, our choice of category implies (often unintentionally) some conception about where and how that something fits into a broader vision of the world.”).

122. See Bone, *Making Effective Rules*, *supra* note 35, at 321–23 (noting that earlier reform movements aimed to reorganize the law along more rational lines and redesign procedural rules to fit a more scientific understanding of the nature of rights); see also JEROME FRANK, COURTS ON TRIAL 104 (1949) (“[T]he ‘procedural reformers[]’ have insisted that the procedural rules must be so revised as to provide efficient ‘machinery’ for the vindication of ‘substantive’ rights.”); cf. AMSTERDAM & BRUNER, *supra* note 5, at 22 (contending that categories are never arbitrary but that “[t]hey are derived, consciously or unconsciously, from some larger-scale theory or narrative about the canonical or desirable state of things in the world”).

123. Bentham, Letters to U.S. Citizens, *supra* note 113, at 139–40; Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435, 479 (2000).

he is reduced to *grope* for all those objects in the dark in the region of conjecture.<sup>124</sup>

This framework certainly succeeded in achieving the aspiration to synthesize law and equity and to create different sets of procedural rules that are transsubstantive and substance-specific at the same time. Not only do both legal and equitable remedies remain available in the same circumstances as they had in the past, but they could now also be sought in the same proceedings.<sup>125</sup> Under this scheme, civil procedure is the same whether the subject of the conflict is tort, contract, or other civil matters; and criminal procedure is thought appropriate for the prosecution of all crimes and acts that are unlawful, without any distinction between burglary, assault, and homicide. This means that each set of procedural rules is applicable to a broad range of cases and offers virtually no distinctions among such cases in terms of the available process—they do not create distinctions among types of criminal cases and among types of civil cases. This does not mean, however, that every civil case is accorded precisely the same procedure as every other civil case, or that criminal cases are always accorded precisely the same procedure. There are differences in degree. But as Gail Heriot observes, these differences within classes “tend to be viewed as differences of big ducks and little ducks rather than of ducks and trucks.”<sup>126</sup> In essence, under this configuration, transsubstantivity ensures uniform rules *within but not beyond* each of the wide-ranging substantive categories. And as a result, we must accept the fact that according to the system that Bentham and Livingston endowed us with, there is no such thing as a procedural category that is transsubstantive in the sense that it can be justified exclusively by reference to procedural values without also considering substantive ends.<sup>127</sup>

Today, we accept, almost without thinking, the distinction between civil and criminal procedure.<sup>128</sup> It is thus clear that Bentham and

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124. Codification Proposal, Addressed By Jeremy Bentham to All Nations Professing Liberal Opinions, in ‘LEGISLATOR OF THE WORLD’, *supra* note 113, at 243, 287.

125. BAKER, COLLECTED PAPERS, *supra* note 73, at 952.

126. Heriot, *supra* note 54, at 45 n.15.

127. This historical account helps explain the important relationship between procedure and substance: the two have been intimately connected from the beginning. *See also* Mary Liston, *Transubstantiation in Canadian Public Law: Processing Substance and Instantiating Process*, in PUBLIC LAW ADJUDICATION IN COMMON LAW SYSTEMS: PROCESS AND SUBSTANCE, *supra* note 43, at 213, 214 (“Even the strongest defender of the distinction—Jeremy Bentham—conceded that neither could conceptually exist without the other.”); CLARK, *supra* note 12, at 4; *cf.* Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1160.

128. *See* United States v. United Mine Workers of Am., 330 U.S. 258, 364 (1947) (Rutledge, J., dissenting) (“[T]he idea that a criminal prosecution and a civil suit for damages or equitable relief could be hashed together in a single criminal-civil hodgepodge would be shocking to every

Livingston's ideas of reform had long-lasting effects and greatly influenced our procedural jurisprudence.<sup>129</sup> Bentham and Livingston's avid publications constituted a breakthrough in procedural thought and represent to this day the most comprehensive attempt to give an account of the basic blueprint for procedural law. The legal community of their time, along with the generation that followed, saw Bentham and Livingston as the intellectual leaders of the campaign to merge law and equity and to divide civil and criminal proceedings. The ultimate success of their work rests on the implementation of this new platform by other leading procedural theorists.

Many scholars consider David Dudley Field's code of civil procedure, adopted by New York State in 1848, as the fountainhead of our current procedural order and as the parent of the Federal Rules of Civil Procedure.<sup>130</sup> There is no doubt that the Field Code has played a major role in the common-law world and served as a kind of catalytic agent for procedural change—it was adopted in whole or part by a majority of American jurisdictions thereafter,<sup>131</sup> and powerfully influenced procedural reform in England, Ireland, and several other British overseas territories (notably India).<sup>132</sup> But despite scholarly claims to the contrary,

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American lawyer and to most citizens.”); JOLOWICZ, *supra* note 10, at 13–14 (2000) (“[T]he prevailing English view that the most important and overriding division of proceedings before the courts of law is that between the criminal and the civil. . . . All cases which are not criminal are civil: there is no other category of proceedings.”); Heriot, *supra* note 54, at 44; *Introduction to MANUAL FOR COMPLEX LITIGATION (FORTH)* 1, 2 (2004) (noting that civil and criminal case management differ significantly).

129. See Pound, *David Dudley Field*, *supra* note 42, at 4 (“[Bentham] was a chief actor in the movement that made the common law in the nineteenth century fit to be the basis of legal development in the twentieth century, and left a mass of polemical writing which has proved a quarry for law reforms since.”)

130. See, e.g., DODSON, *supra* note 50, at 11; MCDOWELL, *supra* note 73, at 86. Similarly to Bentham and Livingston, David Dudley Field had drafted, in addition to a civil procedure code, a criminal procedure code, and codes for all substantive law. See COOK, *supra* note 90, at 194–96 (discussing Field's attempts to codify both procedural and substantive law); SUBRIN & WOO, *supra* note 42, at 49; Clark, *Civil Influence*, *supra* note 108, at 65 n.6 (observing that Livingston's criminal code, prepared for Louisiana, influenced Field's Code of Criminal Procedure); Lord Chorley, *Our Anglo-American Common Law Heritage*, in DAVID DUDLEY FIELD CENTENARY ESSAYS, *supra* note 2, at 302, 311 (Chief Justice Arthur T. Vanderbilt addressing); Obituaries Comments, *David Dudley Field*, in REPORT OF THE SEVENTEENTH ANNUAL AMERICAN BAR ASSOCIATION MEETING 517–22 (1894); see generally Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

131. See CLARK, *supra* note 12, at 24; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 939; FRIEDMAN, *supra* note 42, at 293–98; Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152 (2015); Pound, *David Dudley Field*, *supra* note 42, at 10.

132. See HEPBURN, *supra* note 45, at 14–16, 175–76; JOLOWICZ, *supra* note 10, at 35; Pound, *David Dudley Field*, *supra* note 42, at 12; William D. Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS, *supra* note 2, at 73; Maynard, *supra*

the Field Code was not entirely innovative. Historical evidence clearly proves that the New York Commission headed by Field followed Bentham and Livingston's earlier works and had borrowed significant elements from the Louisiana codes.<sup>133</sup> And since the Federal Rules are in many respects extensions of nineteenth-century states' code procedures, it follows that the Federal Rules also date back to Bentham and Livingston's project.<sup>134</sup>

At bottom, Bentham and Livingston's notable contribution was their ability to break with the old common-law patterns and think about procedure in terms of categories that are transsubstantive and substance-specific at the same time. And while the content of present-day rules of

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note 47, at 78; *David Dudley Field*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/David-Dudley-Field> [<https://perma.cc/B7H8-E6MN>] (Apr. 9, 2021).

133. David Dudley Field explicitly referred to the civil procedure code of Louisiana in his writings. See DAVID DUDLEY FIELD, *WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS: SHALL IT BE WHOLLY REFORMED?* 20 (New York, John S. Voorhies 1847) ("I think the example of Louisiana should be sufficient for us."); see also DAVID DUDLEY FIELD, ARPHAXED LOOMIS & DAVID GRAHAM, *FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF CRIMINAL PROCEDURE*, at xiv, xxi–xxiii, xxvii–xxviii (Albany, Weed, Parsons & Co., Public Printers 1849) [hereinafter FIELD, LOOMIS & GRAHAM, *FOURTH REPORT*] (explicitly referring to Livingston and his report of a criminal code for Louisiana); CLARK, *supra* note 12, at 28 n.70 (noting that "very many of the best portions of the Field Code were adopted" from the Code of Practice drafted by Livingston); LOOMIS, *supra* note 84, at 15 (observing that the New York Commissioners reviewed Livingston's code as an example when drafting the New York Code); SWISHER, *supra* note 110, at 341–42, 347 (noting that Field had used the materials produced by Bentham, Livingston, and Story); Clark, *Civil Influence*, *supra* note 108, at 70, 74, 80–82, 86 (observing that the most important sources for Field's ideas about codification and content of civil procedure came from Livingston's work and detailing specific examples of definitions and rules that Field borrowed from the Louisiana codes of procedure); Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 388; Parise, *supra* note 108, at 136 (observing that David Dudley Field was influenced by the works of Bentham); Henry G. McMahon, *The Proposed Louisiana Code of Practice: A Synthesis of Anglo-American and Continental Civil Procedures*, 14 LA. L. REV. 36, 51 (1953) (noting that it was the Louisiana Code of Practice of 1825 which provided the inspiration for the Field Code); but see Pound, *David Dudley Field*, *supra* note 42, at 3–16 (comparing Field with Bentham and Livingston wherein Pound notes Bentham's influence over Field but argues that in preparing the code of civil procedure, Field had nothing to build on); Reppy, *supra* note 72, at 52–53 (Bentham and Field compared).

134. For portrayals of the Federal Rules as a logical extension of the Field Code and nineteenth century procedural thought, see, e.g., JOLOWICZ, *supra* note 10, at 27; MCDOWELL, *supra* note 73, at 92; Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 392, 394–96 ("Although innovative in many respects, the Federal Rules of 1938 did nothing particularly novel with respect to the development of trans-substantivity." The Federal Rules' authors followed Bentham's lead.); Warren E. Burger, *Rx for Justice: Modernize the Courts*, NATION'S BUSINESS, Sept. 1974, at 61 (noting that the development of the Federal Rules of Civil Procedure was no more than a refinement of existing procedure); Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1060–61 (1955); Pound, *David Dudley Field*, *supra* note 42, at 14; Charles E. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS, *supra* note 2, at 55, 65. But see Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 932 (arguing that the Field Code was not a parent of the Federal Rules).

procedure may differ widely from Bentham and Livingston's codes, their far-reaching vision for the arrangement of procedural law is still at play. Over the course of the twentieth century, different legal systems within the common-law world have continued, knowingly or not, to sort proceedings into hybrid categories of procedural rules.

### C. *The Normative Motives for the New Procedural Order*

The procedural distinction between civil and criminal actions was also based on practical and normative concerns about the proper administration of justice. By the late eighteenth and early nineteenth centuries, the concept of public responsibility for prosecuting criminal activity and the engagement of the government in the administration of criminal justice emerged as a dominant idea.<sup>135</sup> As Professor Heriot explains, the costs of initiating a prosecution had changed significantly as a consequence of urbanization and greater mobility.<sup>136</sup> "When private prosecutions were common, a higher proportion of crimes occurred in small towns and rural areas, simply because an overwhelmingly higher proportion of the population lived in such places. In such cases, victim, wrongdoer and witnesses were often personally acquainted. Little detective work was necessary or even possible;"<sup>137</sup> and at those early times, "[a] victim with even a weak taste for vengeance might be willing to undertake the costs necessary to initiate the prosecution."<sup>138</sup> However, following urbanization, "the likelihood that victim, wrongdoer and witnesses would be strangers increased significantly. Hence the need for serious detective work increased."<sup>139</sup> These social and economic forces pushed victims to refrain from prosecution because it seemed far more sensible for private individuals to let the associated costs be borne by the

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135. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 29–30 (1993); Bruce P. Smith, *The Myth of Private Prosecution in England, 1750–1850*, in *MODERN HISTORIES OF CRIME AND PUNISHMENT* 151 (Markus D. Dubber & Lindsay Farmer eds., 2007); Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 *AM. CRIM. L. REV.* 1309, 1323–24 (2002); JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 6–7 (The Lawbook Exchange 2003) (1927).

136. See Heriot, *supra* note 54, at 49–51; cf. FRIEDMAN, *supra* note 42, at 37 ("As the colonies grew in size, as economic and social life became more complex, as mobility (of all sorts) increased, the techniques and mental habits that worked in the early days lost a good deal of their bite and their magic. Criminal justice was ripe for reform and for change.").

137. Heriot, *supra* note 54, at 49–50.

138. *Id.* at 50; cf. FRIEDMAN, *supra* note 42, at 37 ("In England, there was no such thing as a district attorney—no public prosecutor. People were supposed to do their own prosecuting—and pay for it themselves."). It seems that well into the twentieth century private persons had vast authority in the criminal sphere. Private people were allowed to arrest others without a warrant in a variety of circumstances, and any person was authorized to present a bill of indictment to a grand jury against the accused. See John D. Lawson & Edwin R. Keedy, *Criminal Procedure in England*, 1 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 595, 602–03 (1911).

139. Heriot, *supra* note 54, at 49–51.

entire society.<sup>140</sup> “One suspects,” Steven Shavell writes, “that, were society to depend on private prosecution of criminal cases, the number of cases brought would be grossly inadequate. Public prosecution may thus be viewed as an answer to this latent problem.”<sup>141</sup> Indeed, during the nineteenth century the need for the state to assume the role of a prosecutor became unavoidable,<sup>142</sup> and the corresponding shift in the nature of criminal litigation made an adaptive procedural regime essential.<sup>143</sup>

Up until then, almost all litigation arose from a private controversy between individuals.<sup>144</sup> In a dispute between one private citizen and another, the system had no general incentive to target particular entities or persons for idiosyncratic treatment. This neutrality resulted from the revolving nature of players, where the same individual could be a plaintiff in one case and a defendant in another.<sup>145</sup> In addition, “the motive of a person who brings suit is ordinarily not chiefly, if at all, to deter socially undesirable behavior in the future. Rather, it is usually to obtain compensation for harm or other relief.”<sup>146</sup> Professor Shavell argues further that “when a [private] party makes a litigation decision, he does not take into account the legal costs that he induces others to incur (a negative externality), nor does he recognize associated effects on deterrence and certain other social benefits (a positive externality).”<sup>147</sup> Moreover, the action of the executive branch of government was traditionally postponed to the last stage in the settlement of the dispute. Government was limited, John Dickinson asserted, “to the role of arbitrating differences between individuals through the courts after the difference has arisen, and then enforcing the court’s award through the executive. The only regulating force operating on individuals prior to action by them is their own knowledge, or presumed knowledge, of the law applying to their contemplated act.”<sup>148</sup> Therefore, Professor Dickinson pointed out, in the adjudication of civil disputes “by courts of law alone, the process of adjudication went on within a separate cell or compartment, as it were, tightly closed off from the sphere of

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140. See Irving R. Kaufman, *Criminal Procedure in England and the United States: Comparisons in Initiating Prosecutions*, 49 *FORDHAM L. REV.* 26, 28 (1980); cf. FRIEDMAN, *supra* note 42, at 218 (“Murder and other crimes were once privately enforced. . . . Public prosecution is supposed to do away with private vengeance.”).

141. Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 *J. LEGAL STUD.* 575, 600 (1997).

142. See Heriot, *supra* note 54, at 50.

143. See JEROME HALL, *THEFT, LAW, AND SOCIETY* 140 (2d ed. 1952); FRIEDMAN, *supra* note 42, at 211–12; CLARK, *supra* note 12, at 5.

144. See Sklansky & Yeazell, *supra* note 3, at 687–92, 698.

145. See RESNIK, *supra* note 2, at 124–25.

146. Shavell, *supra* note 141, at 578.

147. *Id.* at 575.

148. DICKINSON, *supra* note 135, at 8; see also *id.* at 8–10.

governmental action. There was thus made possible a single-minded attention to the individual rights of the parties immediately before the court, with only an accidental regard for the interests of the public at large.”<sup>149</sup> To a large extent these were, and still are, the bedrock assumptions regarding civil litigation. Accordingly, civil procedure adopted a neutral approach that focuses on the private interactions among disputants and assumes a balance of power between litigants.<sup>150</sup> Normally, therefore, the rules of civil procedure do not purport to change the apparent power balance or tilt it toward either party.<sup>151</sup> Their main purpose is to incentivize private litigants, who are selfishly disposed, to conduct legal proceedings in fair and efficient ways.

On the criminal side, however, the lack of equilibrium between government and individual defendants generated concern about the integrity of criminal judgments.<sup>152</sup> The involvement of the state in the detection, investigation, prosecution, and punishment of crimes symbolized a real departure from the civil model in several ways.<sup>153</sup> First, the criminal law model recognizes that “in addition to the interests of individuals, there is a social interest which should be protected.”<sup>154</sup> In the criminal sphere we see a clash between the rights of a particular individual and the rights of the public, “with a resulting restriction on that particular individual’s conduct.”<sup>155</sup>

Secondly, the role of the government in the criminal sphere is not limited to that of an arbitrator. The increased governmental operations created an obvious conflict of interest in every criminal case—“the justice to which [a person] might be brought and the authority which might bring [him or her] to it were the same.”<sup>156</sup> Indeed, “courts no less than administrative bodies,” Justice Felix Frankfurter said, “are agencies of government. Both are instruments for realizing public purposes.”<sup>157</sup> The widened area of influence thus opened the doors for the government to affect and hamper criminal proceedings. Even the mere influence on the appearance of justice and impartiality in such cases, since the court is an arm of the state, represented a structural change in the criminal sphere

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149. *Id.* at 30.

150. The balance of power is to a degree a legal fiction. In each civil case we find litigants with different economic and legal resources. *See Ex parte United States*, 101 F.2d 870, 876–77 (7th Cir. 1939), *aff’d sub nom.* *United States v. Stone*, 308 U.S. 519 (1939); Heriot, *supra* note 54, at 54.

151. The modern class action purposely deviates from the ordinary civil procedure attitude. But that of course is the exception that proves the general rule.

152. *See RESNIK, supra* note 2, at 124.

153. *See Sklansky & Yeazell, supra* note 3, at 691.

154. DICKINSON, *supra* note 135, at 9.

155. *Id.* at 21.

156. MILSOM, HISTORICAL FOUNDATIONS, *supra* note 60, at 404.

157. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 15 (1942).

that gave a justification for a different procedural treatment.<sup>158</sup> In other words, in criminal cases the accused is seen against the Leviathan—an immensely powerful entity that will win any case unless certain procedures are created to make the confrontation a “fair fight.”<sup>159</sup>

Thirdly, in a criminal case the court must decide whether the accused is guilty or not guilty. There is no middle ground—ordinarily the accused cannot be partially guilty. In most forms of civil cases, in contrast, the court can divide or apportion responsibility or fault between the parties.<sup>160</sup> Criminal procedure springs, therefore, from the impelling need to even up the particular hazards that public prosecutions were thought to pose for defendants and to guard against the evil of an unjust conviction.<sup>161</sup>

Indeed, similar ideas influenced the choice to adopt different federal rules of procedure for criminal and civil cases in the United States.<sup>162</sup> Interestingly, however, the normative and practical considerations of conflicts of interest—power balance, costs, and incentives—were not pinpointed in any clear, thought-through way. Ion Meyn observed that in the absence of any explicit guiding principles, various members of the advisory committee appointed to draft rules of criminal procedure for the federal courts simply announced that criminal litigation was different because “[a] civil case is a controversy between two private individuals, which is different from criminal procedure.”<sup>163</sup>

The historical developments that led to the procedural civil-criminal dichotomy are quite clear. And yet the divergent trails fail to reflect the

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158. See MILSOM, *HISTORICAL FOUNDATIONS*, *supra* note 60, at 409–10 (observing the significance of the indictment being now the king’s suit, in which the victim played no formal part and had no interest in the outcome, to the division of criminal proceedings); AMOS, *supra* note 73, at 286–87; FRANK, *supra* note 122, at 96; LANGBEIN, *supra* note 42, at 7–9; Steve Struthers, *The Evolution of Legal Procedures*, 8 RES. NEWS 3 (1984); FIELD, LOOMIS & GRAHAM, *FIRST REPORT*, *supra* note 50, at 3; *cf.* *United States v. Cunan*, 156 F.3d 110, 114–16 (1st Cir. 1998) (discussing the dichotomy between civil actions and criminal prosecutions in the context of forfeiture proceedings).

159. Interestingly, the increased involvement of the state in the prosecution of crimes has led to a different procedural development in the Continent. “[I]n the European legal tradition the work of investigating and adjudicating cases of serious crime is treated as a public responsibility assigned to neutral professionals who bring the resources of the state to bear both *for* and *against* the accused.” LANGBEIN, *supra* note 42, at 9 (emphasis added).

160. See Struthers, *supra* note 158, at 3.

161. See Hamson, *supra* note 71, at 416 (noting the resemblance between civil and criminal procedure and observing that “an English prosecution can be described as a civil proceeding in which the Crown happens to be the plaintiff and in which, because of the formidable quality of that plaintiff, it has been thought proper to give to the defendant advantages which an ordinary civilian defendant does not enjoy”); Heriot, *supra* note 54, at 54.

162. See generally Meyn, *supra* note 6.

163. *Id.* at 717, 733.

true distinction between the various legal proceedings.<sup>164</sup> An identical act can be a violation of both civil and criminal law, sometimes under the same names—as in criminal and civil trespass and criminal and civil fraud.<sup>165</sup> And the fact that a prosecution and a claim for a civil remedy, even when based upon the same facts, are distinct causes of action that initiate different legal proceedings is by no means intuitively apparent. S. F. C. Milsom, for example, noted that “[i]n practical terms it is not self-evident that a road accident, for example, should be followed by separate criminal and civil proceedings which can reach different conclusions about responsibility.”<sup>166</sup> Professor Milsom emphasized that “in social terms, it is not self-evident that the penal and civil disincentives should be separately considered, that offenders should see themselves and be seen as ranged against an impersonal society, or that victims and other law-abiding persons should see the whole matter as somebody else’s business.”<sup>167</sup>

Indeed, it hardly seems likely that state involvement fully accounts for the separate treatment of civil and criminal proceedings. This is because some civil actions are brought by the state against ordinary individuals. And those instances apparently present the same fairness concerns and imbalance of power between the parties as in criminal cases.<sup>168</sup> Furthermore, a different procedural treatment cannot be entirely justified on a generalization that more is at stake in criminal cases than in civil cases.<sup>169</sup> Civil commitment and a variety of other civil measures can deprive or put restrictions on a person’s liberty.<sup>170</sup> As Jerome Frank has correctly suggested, “the consequence of a court decision in a civil suit,

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164. Mann, *supra* note 3, at 1804.

165. Karen Orren, *Constitutional, Criminal, Civil*, 76 REV. POL. 635, 637 (2014); see Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 693 (1993).

166. MILSOM, HISTORICAL FOUNDATIONS, *supra* note 60, at 410. Consider, for example, a car collision in which one of the drivers is charged with the criminal offence of impaired driving and is also sued for negligence by the owner of the other car who seeks compensation for expenses incurred in vehicle repairs and medical treatment.

167. *Id.*

168. Heriot, *supra* note 54, at 57 n.59.

169. The Supreme Court has followed this line of argument and justified the relative lack of protections for civil matters on the grounds that in those proceedings the interests at stake are not as serious. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981) (holding that an indigent’s right to appointed counsel is recognized to exist only where the defendant “may lose his physical liberty if he loses the litigation”); but see *id.* at 41–42, 41 n.8 (Blackmun, J., dissenting) (criticizing the majority decision for “opting for the insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel”); Douglas J. Besharov, *Terminating Parental Rights*, 15 FAM. L.Q. 205, 221 (1981) (“*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver’s night in the cooler is a greater deprivation of liberty than a parent’s permanent loss of rights in a child.”).

170. Robinson, *supra* note 165, at 694.

based upon the court's mistaken view of the actual facts, may be as grave as a criminal judgment which convicts an innocent person."<sup>171</sup> Furthermore, Frank argues that "[i]f, because of such an erroneous decision, a man loses his job or his savings and becomes utterly impoverished, he may be in almost as serious a plight as if he had been jailed."<sup>172</sup>

These and other arguments destabilize the prevailing notion that civil and criminal disputes inherently require different procedural treatment.<sup>173</sup> In fact, similar doctrinal challenges to the civil-criminal divide in the mid-twentieth century *almost* brought about the adoption of a single set of transsubstantive code of procedure that would have governed virtually all types of litigation in the United States.<sup>174</sup>

Whether or not these arguments are convincing, they have not made a serious impact or set off a departure from Bentham and Livingston's blueprint for the arrangement of cases under different procedural categories. The next Part documents the actual steps taken to merge law and equity and highlights for the first time the silent role that the interaction between transsubstantivity and substance-specificity has played in the creation of the modern procedural categories of criminal and civil procedure.

#### IV. THE EVOLUTION OF PROCEDURAL CATEGORIES

Looking back on the nineteenth century, we can see that Britain and the United States were struggling with similar problems arising out of the common-law system.<sup>175</sup> It is helpful to begin by recalling that the United States gained its independence from England by revolution but retained

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171. FRANK, *supra* note 122, at 96.

172. *Id.*; *see also* Heriot, *supra* note 54, at 57 n.59 ("Even prison sentences may be less onerous than civil damages in many cases. Given the choice between spending a year in prison and losing the family farm, many would surely choose the former. If the distinction between high safeguard procedures for civil law were based only on the severity of the sanction, one would think that many criminal cases (particularly those involving fines) would be allocated to the low-safeguard side of the line and the high-damage civil cases would be allocated to the high-safeguard side.").

173. *See, e.g.*, Hall, *supra* note 108, at 739 (maintaining that civil and criminal disputes share similar challenges and are accordingly susceptible to a similar procedural treatment); Heriot, *supra* note 54, at 45, 57 n.59 ("The distinction between [criminal and civil procedure] was probably never as clear in the law as it seemed in the public mind. It is fair to say, however, that the distinction has suffered some erosion in the last century, perhaps even serious erosion."); Meyn, *supra* note 6, at 699–700, 700 n.7 ("[L]egal scholars continue to question the procedural boundary between civil and criminal disputes."); Rosen-Zvi & Fisher, *supra* note 4, at 133 ("[The] civil-criminal procedural dichotomy is inappropriate for the realities of the twenty-first century.").

174. *See* Meyn, *supra* note 6, at 708–12.

175. *See* Woodard, *supra* note 42, at 130; *cf.* Diane P. Wood, *Back to the Basics of Erie*, 18 LEWIS & CLARK L. REV. 673, 676–77 (2014) (paralleling the English and American views of the common law as a customary system that evolves using the building blocks of experience).

England's language, the spirit of its laws, and many of its customs.<sup>176</sup> Procedurally speaking, at first there were some differences between the colonies and England.<sup>177</sup> But with time, colonial legal systems came to look more and more like the traditional common law with all its modes of procedure.<sup>178</sup> Succeeding American independence, English law and its procedures were already held up as a model<sup>179</sup>—“[a]fter all, the Revolution was fought, it was said, to achieve the rights of Englishmen”<sup>180</sup>—and most states passed reception statutes or constitutional provisions that adopted the common law and its procedural system.<sup>181</sup> There was a general divide, just like in England, between law and equity jurisdictions, and it was commonplace for American courts to have separate rules of procedure for actions at law and for suits in equity.<sup>182</sup> Subsequently, as courts and their procedures continued to evolve, American and English judges and academics did not forget their common heritage, “frequently looking to the development of legal doctrine in the other's country as fertile ground for comparative study.”<sup>183</sup> The interchange of ideas often stressed practical considerations, in the hope that the advanced legal procedures and judicial administration of one country might be adopted and utilized in the other.<sup>184</sup>

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176. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 155 (1965) (noting that the American courts assumed that they were the inheritors of all the powers of the English courts and that the content of the “judicial power” in the United States has, for the most part, been worked out in terms of the system of remedies in use in the English courts in the eighteenth century).

177. See SUBRIN & WOO, *supra* note 42, at 47.

178. See FRIEDMAN, *supra* note 42, at 3, 22 (“Only from England was there a source and a supply of law that American lawyers could use without translation. It was a source of law that was familiar. . . . The fundamentals—jury, grand jury, writ, summons, written pleadings, and oral testimony—were as fundamental in the colonies as in England, though never exactly the same as in the mother country.”); SUBRIN & WOO, *supra* note 42, at 48; MEYN, *supra* note 6, at 701 (“[The] deep structure of common law was exported to the United States, preserving a procedural parallelism.”); Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 927–28.

179. FRIEDMAN, *supra* note 42, at 23; see DODSON, *supra* note 50, at 10; Martin Shapiro, *The United States*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 43, 43 (C. Neal Tate & Torbjörn Vallinder eds., 1995); *THE FEDERALIST* No. 83, *supra* note 50, at 505 (Alexander Hamilton) (“[T]he separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence, which is the model that has been followed in several of the States.”); Kaufman, *supra* note 140, at 26.

180. SUBRIN & WOO, *supra* note 42, at 48.

181. DODSON, *supra* note 50, at 10; see 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 612 (1981); LANGBEIN, LERNER & SMITH, *supra* note 67, at 842; SUBRIN & WOO, *supra* note 42, at 8; Woodard, *supra* note 42, at 121.

182. See OAKLEY & AMAR, *supra* note 42, at 25; Funk, *supra* note 131, at 156; Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 283–84 (1928); FIELD, LOOMIS & GRAHAM, *FIRST REPORT*, *supra* note 50, at 68 (explaining that the separate jurisdictions of law and equity in the state of New York were borrowed from similar institutions in England).

183. Kaufman, *supra* note 140, at 26.

184. *Id.*

That said, federalism added a new dimension to the procedural complexities in the United States that was absent from the English court system.<sup>185</sup> The founding fathers broke new ground by adopting a written constitution in which they granted the federal courts jurisdiction over both actions at law and suits in equity.<sup>186</sup> For the first time, these two distinct modes of procedure were expected to work together within the same court.<sup>187</sup> A fusion of law and equity, however, was still inconceivable;<sup>188</sup> and, therefore, the First Congress's solution was "characterized by conformity to existing procedures and continuity with the past."<sup>189</sup> Congress passed a statute mandating that federal courts, in actions at law, follow the forms of writs and modes of process used in the states in which they sat.<sup>190</sup> Thus, the rule of conformity to state practice governed federal procedure in actions at law. Such intrastate uniformity of procedure in actions at law made good sense when most litigation was local.<sup>191</sup> The multitude of forms of action and their distinct procedures probably dictated that approach—it would simply have been unmanageable for two different writ systems to develop simultaneously within the same territory.

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185. See CLARK, *supra* note 12, at 31–34; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 930.

186. U.S. CONST. art. III, § 2, cl. 1; see also MCDOWELL, *supra* note 73, at 6.

187. Some states in the early republic followed the English tradition of maintaining separate courts for law and equity. Others, however, vested their courts with both types of jurisdictions, as did Congress with the federal courts. See DODSON, *supra* note 50, at 10; see also FRIEDMAN, *supra* note 42, at 8; THE FEDERALIST No. 83, *supra* note 50, at 502 (Alexander Hamilton); Nudd v. Burrows, 91 U.S. 426, 441 (1875) ("The purpose of the [Conformity Act of 1875] is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State courts of the same locality.").

188. See, e.g., THE FEDERALIST No. 83, *supra* note 50, at 505–06 (Alexander Hamilton) ("My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction. To unite the jurisdiction of [a court of equity] with the ordinary jurisdiction must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination."); Letter from the Federal Farmer to the Republican III (Oct. 10, 1787), reprinted in THE ANTI-FEDERALIST 43, 53 (Herbert J. Storing ed., 1985) ("It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate.").

189. Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 2 (1965).

190. See ALEXANDER HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 1 (1940); RESNIK, *supra* note 2, at 132–33 ("During the nineteenth century, Congress authorized a dynamic, rather than a static, conformity—permitting federal courts to update their rules as state practices changed."); Wood, *supra* note 175, at 678; *Process Act (May 8, 1792)*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/process-act> [<https://perma.cc/CW5T-9SNM>] (last visited May 10, 2021).

191. Michael C. Dorf, *Meet the New Federal Rules of Civil Procedure: Same as the Old Rules?*, FINDLAW (July 18, 2007), <https://supreme.findlaw.com/legal-commentary/meet-the-new-federal-rules-of-civil-procedure-same-as-the-old-rules.html> [<https://perma.cc/RAS4-9UZK>].

It has been argued, however, that the conformity principle led to significant differences of procedure in law actions among the federal courts in the different states.<sup>192</sup> But although local procedural variations between states were frequent during that period,<sup>193</sup> we should be careful not to overstate their impact.<sup>194</sup> In a broader view, there was still a substantial amount of deference to the English practice, and essentially all the states in the new union followed the traditional writ system. Conversely, for suits in equity, the federal courts were directed to follow “the principles, rules, and usages which belong to courts of equity,”<sup>195</sup> which was generally understood to refer to the English Court of Chancery.<sup>196</sup> At the same time, Congress gave the Supreme Court power to establish uniform rules of procedure for the federal courts in equity proceedings, a power the Court first exercised in 1822;<sup>197</sup> but English Chancery practices continued to supply the default rules for situations not covered by the Supreme Court equity rules.<sup>198</sup> There was no sensible reason to extend the conformity principle to suits in equity because, as we have seen, those proceedings followed a transsubstantive and flexible

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192. WRIGHT ET AL., *supra* note 98, at § 1002.

193. See FRIEDMAN, *supra* note 42, at 99; THE FEDERALIST No. 83, *supra* note 50, at 502–03 (Alexander Hamilton).

194. Cf. MCDOWELL, *supra* note 73, at 90 (“Before the adoption of the Field Code the effects of state codification on the procedure of the federal courts were slight because the acts of Congress governing federal procedure had always tended to ‘prescribe for the federal courts in a state the rules of practice of the courts of that state . . . as of some prescribed date, such as the date of admission to the union.’”).

195. See *Jurisdiction: Equity*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-equity> [<https://perma.cc/5HED-KRAU>] (last visited May 4, 2021) (explaining that this was done in order to ensure that actions at law and suits in equity remained distinct and that judges did not unduly enlarge their discretion by applying equitable doctrines to actions properly governed by the law jurisdiction).

196. See MCDOWELL, *supra* note 73, at 7; *Process Act (May 8, 1892)*, *supra* note 190; *Jurisdiction: Equity*, *supra* note 195 (noting that federal judges sitting in equity were directed by rules issued by Chief Justice John Jay in 1792 to look to the precedents of the English Court of Chancery).

197. See WRIGHT ET AL., *supra* note 98, at § 1002 (noting that the Process Act of 1792 remained the primary directive regarding federal equity procedure until the merging of law and equity in 1938); MCDOWELL, *supra* note 73, at 92–93 (“[T]he main bodies of equity rules—those of 1822, 1842, and 1912—were extremely detailed. They outlined in clear language the exact procedure to be followed, from the filing of the bill to the taking of testimony and the keeping of records. The emphasis on such detail was necessary to maintain the procedural distinction between the equity jurisdiction and the law jurisdiction of the federal courts.”); HOLTZOFF, *supra* note 190, at 2–4.

198. See WRIGHT ET AL., *supra* note 98, at § 1002 n.14 (“At first there were thirty-three equity rules . . . . All matters not expressly covered by the rules were to be ‘regulated by the practice of the high court of chancery in England.’”) (quoting Equity Rule 33); Robert E. Bunker, *The New Federal Equity Rules*, 11 MICH. L. REV. 435, 439 (1913) (observing that the rules regulating the practice in the equity courts of the United States were molded in the forms of the English Chancery Court); *Jurisdiction: Equity*, *supra* note 195 (noting also that the Supreme Court promulgated detailed sets of rules in 1822, 1842, and 1912, with the dual aims of maintaining the strict separation between equity and law and ensuring uniformity in federal equity jurisprudence).

procedure in which judges based decisions on general principles of fairness: “The federal courts’ equity jurisdiction, rather than encompassing certain types of suits, pertained to situations that could arise in virtually any sort of litigation.”<sup>199</sup> Subjecting equity proceedings in federal courts to the equity procedure in state courts would have been redundant.<sup>200</sup>

#### A. *The Civil Procedure Category*

By the 1830s, there were many critics in the United States and England of the common-law procedural system as well as the dual courts of law and equity.<sup>201</sup> In 1846, the movement for procedural reform, initiated by Bentham and Livingston, reached a milestone when a new state constitution was passed in New York that eliminated the Court of Chancery and mandated the creation of a single court “having general jurisdiction in law and equity.”<sup>202</sup> Two years later, a commission headed by David Dudley Field endorsed the abolition of the distinction between actions at law and suits in equity and the creation of a division between civil and criminal proceedings.<sup>203</sup> The report went on to introduce a transsubstantive code of civil procedure that resolved that there would be only “one form of action—which shall be denominated a civil action;”<sup>204</sup> shortly after, the same commission published another report that included a transsubstantive code of criminal procedure.<sup>205</sup>

When Stephen Subrin discusses the civil procedure code of New York, the Field Code, he concludes that “there are striking similarities between equity practice and the procedural choices made by the Field Code. The

199. *Jurisdiction: Equity*, *supra* note 195.

200. *Cf.* WRIGHT ET AL., *supra* note 98, at § 1002 (observing that the states did not develop any substantial equity jurisprudence until long after the American Revolution); Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 931 (maintaining that at the end of the eighteenth century equity either did not exist or was underdeveloped in the states, and, therefore, there was little or no distinct equity law to which to conform).

201. *See* CLARK, *supra* note 12, at 17–18; DODSON, *supra* note 50, at 11; FRIEDMAN, *supra* note 42, at 97, 294; SUBRIN & WOO, *supra* note 42, at 48–49; SWISHER, *supra* note 110, at 342–43.

202. *See* CLARK, *supra* note 12, at 21–23; LANGBEIN, LERNER & SMITH, *supra* note 67, at 382–83; SUBRIN & WOO, *supra* note 42, at 49.

203. *See* CLARK, *supra* note 12, at 21–23; Mitchell, *supra* note 132, at 73; FIELD, LOOMIS & GRAHAM, FIRST REPORT, *supra* note 50, at 3 (clarifying that where the violation of a right admits to both civil and criminal remedies, a person cannot merge his claims and must proceed in different procedural tracks); *see also* Funk, *supra* note 131, at 165.

204. The crux of the Field Code was contained in Section 62, which declared that “the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.” FIELD, LOOMIS & GRAHAM, FIRST REPORT, *supra* note 50, at 87–88.

205. FIELD, LOOMIS & GRAHAM, FOURTH REPORT, *supra* note 133; *see also* David Dudley Field, *supra* note 132; Funk, *supra* note 131, at 165–66.

Code eliminated the forms of action and, for the most part, provided the same procedure for all types of cases, regardless of substantive law, the number of issues and parties, or the stakes.”<sup>206</sup> This statement highlights the transsubstantive side of the Field Code. But the fact is that the Field Code remained hinged to a certain category of substantive law, types of cases, and a given range of litigation; it was not an across-the-board code of procedure. Rather, its commitment to transsubstantivity was a commitment to uniform rules *within but not beyond* civil actions. Hence, we can clearly see how the Field Commission embraced the underlying idea of distinct procedural categories. This result was not reached inadvertently; as noted above, Field was directly exposed to Bentham and Livingston’s work and squarely embraced their approach for the reform of procedural law. The fact is that transsubstantivity within each procedural category stood at the core of the Field Commission’s *mentalité* for the synthesis of law and equity:

Keeping in view the distinction between rights, on the one hand, and the means of their ascertainment and enforcement, on the other, the only question is, whether a mode of proceeding, common to all civil controversies, whether known as legal or equitable, can be safely and conveniently prescribed.

The object of every suit, so far as modes of proceeding are concerned, is to place the parties whose rights are involved in it, in a proper and convenient form, before the tribunal by which they are to be adjudicated; to present their conflicting allegations, plainly and intelligibly to each other and to the court; to secure by adequate means a trial or hearing of the contested points; to obtain a judgment or determination adapted to the justice of the case; and to effect the enforcement of that judgment, by vigorous and efficient means. This object is not peculiar to any form of remedy, whether it be legal or equitable, or whether it fall within any one of the subordinate classes of actions, as they now exist at law, but is common to all. That it can be practically attained in every species of controversy, so far as the mere formal and progressive steps in the conduct of suits is concerned, we are thoroughly convinced; and with a confidence, we trust not unbecoming, we present the subsequent provisions of the proposed act, as well adapted to carry out that object.<sup>207</sup>

The Field Code demonstrated that it was possible to successfully merge the two separate procedural patterns of law and equity into a single proceeding.<sup>208</sup> Subsequently, the Field Code energized procedural reforms elsewhere in the common-law world; it was widely adopted,

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206. Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 933–34; *see also* Stancil, *supra* note 21, at 1656.

207. FIELD, LOOMIS & GRAHAM, FIRST REPORT, *supra* note 50, at 74–75.

208. *See* LANGBEIN, LERNER & SMITH, *supra* note 67, at 385.

copied, and modified, and essentially became the dominant model of civil procedure.<sup>209</sup> The Field Code profoundly influenced the English practice provisions adopted in the Judicature Acts of 1873 and 1875, which consolidated the old English courts into one Supreme Court, abolished the archaic forms of actions, and attempted to establish a uniform procedure for all civil matters that was a blend of the Chancery and law court practices.<sup>210</sup> Furthermore, before the nineteenth century was over, almost all the states had reformed their procedures and abolished the distinction between law and equity;<sup>211</sup> other British territories and dominions, such as Australia, Canada, Ireland, and New Zealand loyally copied the provisions of the Judicature Acts and adopted the unified court system.<sup>212</sup>

As the reform movement swept through the states, and many of the states' legal systems "reached the drastic point of merging law and equity, confusion and dissent mushroomed" in the federal courts.<sup>213</sup> The conformity to the procedural rules of the forum state became increasingly problematic—the new transsubstantive codes of procedure were creatures of state law, but the federal courts continued to adhere to the

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209. See CLARK, *supra* note 12, at 19; FRIEDMAN, *supra* note 42, at 297; MCDOWELL, *supra* note 73, at 89; OAKLEY & AMAR, *supra* note 42, at 25; SUBRIN & WOO, *supra* note 42, at 50; Marcus, *Processes of American Law*, *supra* note 14, at 1209; Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 10.

210. See BAKER, COLLECTED PAPERS, *supra* note 73, at 951–53; CLARK, *supra* note 12, at 19; FRIEDMAN, *supra* note 42, at 297; HEPBURN, *supra* note 45, at 182–86; JOLOWICZ, *supra* note 10, at 23; KERLY, *supra* note 56, at 293–95; LANGBEIN, LERNER & SMITH, *supra* note 67, at 384–85 (noting that Field himself traveled to England and spoke before notable members of the bar about the merging of law and equity in New York); SWISHER, *supra* note 110, at 348; WHEELER, *supra* note 87, at 58; Lobban, *Preparing for Fusion, Part II*, *supra* note 98, at 584 (“[T]he key political impetus for fusion [in England] came from America.”); Thomas A. Shaw, *Procedural Reform and the Rule-Making Power in New York*, 24 *FORDHAM L. REV.* 338, 339 (1955); Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 942.

211. See FRIEDMAN, *supra* note 42, at 297; Funk, *supra* note 131, at 167; Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 10 n.14.

212. See Greg Taylor, *South Australia's Judicature Act Reforms of 1853: The First Attempt to Fuse Law and Equity in the British Empire*, 22 *J. LEGAL HIST.* 55, 55 & 80 nn.2–4 (2001) (discussing a forgotten provision for the merging of law and equity which was made by the South Australian legislature twenty years before the English reforms of 1873–75, but suggesting that the motivation for the South Australian experiment was also the Field Code); *but see* Shaunnagh Dorsett, *Reforming Equity: New Zealand 1843–56*, 34 *J. LEGAL HIST.* 285 (2013) (recounting the first attempt to fuse law and equity procedure in New Zealand ahead of both the New York Field Code and the later English Judicature Acts).

213. MCDOWELL, *supra* note 73, at 90; see CLARK, *supra* note 12, at 31 (“Until 1938, federal procedure was one of the most difficult in the country, requiring the skill of trained specialists for the application of its esoteric principles.”); Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 371; Subrin, *How Equity Conquered Common Law*, *supra* note 37, at 957–58.

separate rules for law and equity.<sup>214</sup> In fact, Chief Justice Roger Taney insisted that on the federal level the distinction between law and equity was not a matter of legislative fiat or judicial rulemaking but was a constitutional requisite.<sup>215</sup> Time and again the Supreme Court came to the defense of the original structure of common-law procedure.<sup>216</sup> Speaking for a unanimous Court in 1858, Justice Robert Grier reiterated the strong resistance to the merger of law and equity and to the adoption of transsubstantive procedural rules. Justice Grier extolled the system of pleading and the subtle distinctions between forms of actions as the proper method for the achievement of justice:

This system, matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts.<sup>217</sup>

But the Supreme Court of the United States was fighting a losing battle to preserve the rituals of the common law. Before the turn of the twentieth century, it had become increasingly difficult in the growing number of code states for lawyers to practice in both state and federal courts—lawyers who specialized in federal litigation wanted the ability to go into a federal courthouse anywhere in the country and use the same set of rules, rather than having to master the procedures of fifty different

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214. See WRIGHT ET AL., *supra* note 98, at §§ 1002, 1041; CHARLES A. WRIGHT & MARY K. KANE, *LAW OF FEDERAL COURTS* 385–87 (8th ed. 2017); DODSON, *supra* note 50, at 12; SUBRIN & WOO, *supra* note 42, at 51; SWISHER, *supra* note 110, at 351; Wood, *supra* note 175, at 678; *Jurisdiction: Equity*, *supra* note 195; Charles E. Clark, *The Influence of Federal Procedure Reform*, 13 *LAW & CONTEMP. PROBS.* 144, 145–46 (1948) [hereinafter Clark, *The Influence of Federal Procedure Reform*].

215. *Bennett v. Butterworth*, 52 U.S. 669, 674–75 (1851); see also *United States v. King*, 48 U.S. 833, 844 (1849) (holding that in the courts of the United States “the distinction between courts of law and of equity is preserved in Louisiana as well as in the other States,” although Louisiana’s state practice already ignored this distinction); CLARK, *supra* note 12, at 32; MCDOWELL, *supra* note 73, at 90; SWISHER, *supra* note 110, at 324–25, 353.

216. Justice Joseph Story, for example, adamantly objected to the attempts to merge law and equity. Story firmly believed that separate courts of law and equity were necessary to the administration of justice. See MCDOWELL, *supra* note 73, at 74–85; see also McCormick, *supra* note 182, at 285–89.

217. *McFaul v. Ramsey*, 61 U.S. 523, 525 (1858); see also MCDOWELL, *supra* note 73, at 91 (quoting *Ramsey*, 61 U.S. at 525); SWISHER, *supra* note 110, at 354.

states.<sup>218</sup> Furthermore, new federal judges were appointed “from among lawyers who knew code practice much better than they knew practice according to the antiquated procedures of the common law.”<sup>219</sup> Thus, although the federal courts continued to maintain procedural distinctions between actions at law and suits in equity,<sup>220</sup> the reform ideas gradually percolated into the ranks of the Supreme Court,<sup>221</sup> high academic circles,<sup>222</sup> and the American Bar.<sup>223</sup>

The movement for procedural reform crystallized and culminated in the first half of the twentieth century when most traces of old law and equity practices were eliminated from the federal courts of the United States.<sup>224</sup> It was at this stage that Bentham and Livingston’s leading motif—a procedural order that is built around transsubstantive procedural categories—had gained its final triumph over the old procedural regime.

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218. See CLARK, *supra* note 12, at 31–34 (“The resulting discord tended to make the practice of each federal district indigenous and unique.”); SWISHER, *supra* note 110, at 355; Dorf, *supra* note 191.

219. SWISHER, *supra* note 110, at 355.

220. See WRIGHT ET AL., *supra* note 98, at § 1041.

221. See, e.g., Taft, *supra* note 94, at 604 (Chief Justice Taft’s remarks before the forty-fifth annual meeting of the American Bar Association urging the union of law and equity procedure in a single form of action); see also WRIGHT ET AL., *supra* note 95, at §§ 1003, 1041; SWISHER, *supra* note 110, at 355.

222. See, e.g., Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 745 (1906) [hereinafter Pound, *Causes of Popular Dissatisfaction*] (addressing at the twenty-ninth annual meeting of the American Bar Association, and attributing some of the defects in the federal judicial system to the “survival of the obsolete Chinese Wall between law and equity in procedure”); Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1 (1925) (arguing that failure to merge law and equity defeats justice); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 393 (1935) (summarizing the history of procedure in the federal courts and predicting that reform would be a failure unless it included the merger of law and equity); Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291, 1292 (1935); Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 4, 80.

223. The attempts by the ABA to secure a federal code of procedure were in fact led by David Dudley Field. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1044 (1982) [hereinafter Burbank, *Rules Enabling Act*]. See also CLARK, *supra* note 12, at 34–35; MCDOWELL, *supra* note 73, at 91; SUBRIN & WOO, *supra* note 42, at 51; WRIGHT ET AL., *supra* note 98, at § 1003 (observing that the American Bar Association, at its session in 1911, adopted a resolution favoring a uniform system of federal procedure); Bone, *Mapping the Boundaries of a Dispute*, *supra* note 73, at 79; Charles E. Clark, *The Challenge for a New Federal Civil Procedure*, 19 J. AM. JUDICATURE SOC’Y 8, 9 (1935).

224. But see U.S. CONST. amend. VII. The movement to merge law and equity in the federal courts coincided, in the turn of the twentieth century, with critiques of the various state procedural codes. For comprehensive accounts of this lengthy campaign, see Burbank, *Rules Enabling Act*, *supra* note 223, at 1043–98. Roscoe Pound, for example, famously decried the technical pitfalls and the “sporting theory of justice” of the codes. See Pound, *Causes of Popular Dissatisfaction*, *supra* note 222, at 738; see also BROOKS, *supra* note 53, at 80–84; DODSON, *supra* note 50, at 11, 15; JOLOWICZ, *supra* note 10, at 24; SUBRIN & WOO, *supra* note 42, at 50–54 (noting that some critics argued that code procedure was too close to the common-law mentality and inefficient); Wood, *supra* note 175, at 679.

In 1934, Congress passed the Rules Enabling Act, which authorized the Supreme Court to unite procedural rules for actions at law with those for suits in equity and to prescribe general rules of procedure for civil actions.<sup>225</sup> Immediately after, the Supreme Court began to exercise the power vested in it. The Court appointed an advisory committee of eminent members of the American Bar and law professors to assist in the preparation of the uniform rules.<sup>226</sup> The rules that the advisory committee drafted,<sup>227</sup> largely accepted by the Supreme Court,<sup>228</sup> were presented to Congress and became effective in 1938 as the procedural rules for all civil litigation in the federal courts.<sup>229</sup> These rules overthrew prior procedures and provided, as had been done in the Field Code, a single form of civil action in all federal courts.<sup>230</sup> In fact, the reliance on the Field Code was explicitly stated in the advisory committee's notes: "This rule [that there shall be one form of action to be known as 'civil action'] follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N. Y. Code 1848 . . . ."<sup>231</sup> Therefore, as could have been expected, we see that the Federal Rules of Civil Procedure are transsubstantive in character, but

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225. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (originally codified at 28 U.S.C. §§ 723b-723c (1934) (codified as amended at 28 U.S.C. § 2072); *see also* CLARK, *supra* note 12, at 41-45.

226. *See* CLARK, *supra* note 12, at 36-37; DODSON, *supra* note 50, at 16; HOLTZOFF, *supra* note 190, at 5.

227. FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (Nov. 1937).

228. *Cf.* Clark, *The Influence of Federal Procedure Reform*, *supra* note 214, at 149 (noting that the Supreme Court eliminated certain proposed rules in its original action in 1937).

229. *See* Orders Re Rules of Procedure, Order of December 20, 1937, 302 U.S. 783 (1937) ("It is ordered that Rules of Procedure for the District Courts of the United States be adopted . . . . Mr. Justice Brandeis states that he does not approve of the adoption of the Rules."); *see also* Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645 (1939) (providing the full text of the Rules); Clark, *The Influence of Federal Procedure Reform*, *supra* note 214, at 150; HOLTZOFF, *supra* note 190, at 5-6. It is worth mentioning that the momentous *Erie* decision was handed down only months before the Federal Rules of Civil Procedure became effective. This was not a coincidence. Justice Brandeis was a strong opponent of the Federal Rules and in fact the only Justice to dissent from their approval. Apparently, Brandeis viewed the new civil rules as an example of overreaching federal authority. Accordingly, Brandeis saw in *Erie* the opportunity to overrule *Swift v. Tyson* and counterbalance the new civil rules by decentralizing substantive—rather than procedural—decision-making authority. Wood, *supra* note 168, at 680; *see also* RICHARD A. POSNER, THE FEDERAL COURTS 48-50 (1996); Max Minzner, *The Criminal Rules Enabling Act*, 46 U. RICH. L. REV. 1047, 1053-54 (2012).

230. *See* *Ross v. Bernhard*, 396 U.S. 531, 539-40 (1970); *Beacon Theatres v. Westover*, 359 U.S. 500, 508 (1959); HOLTZOFF, *supra* note 190, at 15.

231. INTERIM REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 3 n.3 (1937) [hereinafter INTERIM REPORT] (mentioning several other state statutes).

their applicability is confined to “suits of a civil nature.”<sup>232</sup> The Federal Rules, although amended many times, still govern civil litigation in the federal courts today.<sup>233</sup>

### B. *The Criminal Procedure Category*

Consistent with the general assumption underlying the reform movement, that different types of proceedings require different procedural treatment, the regulation of criminal procedure took shape alongside the adoption of the civil rules. Prior to that time, criminal litigation in the federal courts followed “a tangled web of numerous heterogeneous strands,”<sup>234</sup> made up of an unwieldy conglomeration of common-law practice, constitutional requirements, ad hoc legislation, and references to state laws.<sup>235</sup> The need for standardized procedure in a uniform system became obvious by the end of the nineteenth century, especially as the substantive federal criminal law grew in scope and importance as a result of the growth of the federal government.<sup>236</sup>

In 1940, invigorated by the success of the civil procedure reform, Congress authorized the Supreme Court to make rules of criminal procedure.<sup>237</sup> Clothed with this authority, the Court appointed an advisory committee of lawyers, former judges, and law professors in

232. See DODSON, *supra* note 50, at 17; HOLTZOFF, *supra* note 190, at 9 (citing the original wording of Federal Rule of Civil Procedure 1); RESNIK, *supra* note 2, at 134; Clark, *The Influence of Federal Procedure Reform*, *supra* note 214, at 154. Another dimension of the transsubstantive character of the civil rules is that they did not purport to distinguish between a commencement of private actions from actions by or against the United States and governmental bodies and agencies. See INTERIM REPORT, *supra* note 231, at 5 (note (a) to the Supreme Court).

233. “[M]any states have adopted virtual replicas of the federal rules as their own state rules of civil procedure.” OAKLEY & AMAR, *supra* note 42, at 25; see RESNIK, *supra* note 2, at 133–34; SUBRIN & WOO, *supra* note 42, at 54.

234. Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 122 (1944).

235. See 1 WRIGHT ET AL., *supra* note 95, at § 1; ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 271–74 (2d ed. 2002); JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 69 (1977); George Z. Medalie, *Federal Rules of Criminal Procedure*, LAWS. GUILD REV. June–July 1944, at 1, 2 (1944); see also WM. L. CLARK, JR. & WILLIAM E. MIKELL, HANDBOOK OF CRIMINAL PROCEDURE 158 (2d ed. 1918) (noting that some of the rules and principles with respect to a civil action are applicable to a criminal indictment); Lester B. Orfield, *Early Federal Criminal Procedure*, 7 WAYNE L. REV. 503, 504 (1961) (“Prior to the Federal Rules of Criminal Procedure there had been but little legislative action on federal criminal procedure.”).

236. See 1 WRIGHT ET AL., *supra* note 98, at § 1.

237. The statutes giving the Supreme Court the rulemaking power for criminal rules were originally codified in 18 U.S.C. § 687 (1940) (codified as amended at 28 U.S.C. § 2072). See Meyn, *supra* note 6, at 706–08, 707 n.55; WEINSTEIN, *supra* note 235, at 70 (“[I]n 1933, [Congress] authorized the Supreme Court to devise rules [to govern all proceedings after verdict in criminal cases]. . . . In 1940, Congress expanded the Court’s authority to include power to draft rules for criminal proceedings prior to and including the verdict.”); 1 WRIGHT ET AL., *supra* note 98, at § 1 (“The two statutory strands of authority—the ability to make rules for post-verdict proceedings and to make rules for pre-trial—co-existed until 1988, when all rulemaking statutes were combined.”).

order to prepare rules of criminal procedure for the federal courts.<sup>238</sup> The committee initially proposed that all litigation in federal courts, civil and criminal, be governed by a unified transsubstantive code of procedure.<sup>239</sup> The implementation of this original vision would have been a dramatic departure from Bentham and Livingston's model and would have led to the emergence of an alternative procedural order.<sup>240</sup> The advisory committee's final product, however, came in line with the earlier reform efforts in the common-law world, and criminal litigation was placed on a different procedural course than civil litigation. The committee proposed rules that apply to "all criminal proceedings," and therefore, these were concluded to be transsubstantive in character.<sup>241</sup> These rules were approved by the Supreme Court and took effect in 1946;<sup>242</sup> while since then they have been amended on a number of occasions, they still form the backbone of criminal litigation in the United States.<sup>243</sup>

The final choice of the advisory committee exemplifies the deep roots of Bentham and Livingston's ideas regarding the basic organization of procedural law. Adopting a separate set of procedural rules for criminal matters was submission, even if only tacit, to an understanding about the structure of procedural law that had become entrenched through the years of struggle for procedural reform. Here we see the lack of a general theory for the meta-organization of procedural rules. Professor Meyn observed that the advisory committee charged with drafting the federal rules of criminal procedure *did not assert the rationale* for the perceived difference between civil and criminal procedure. In the absence of any explicit principles, various members announced that criminal law was just "different."<sup>244</sup>

Given the important role that criminal law plays in modern societies, the formation of a single instrument of criminal procedure in the United States may very well seem a late development. But, in England, there had not been a compendium of procedural rules for criminal cases until very

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238. See Meyn, *supra* note 6, at 707–08, 708 n.58.

239. See *id.* at 708–14.

240. See *id.* at 713 ("Under [the original proposal] civil and criminal litigators would look across a more transsubstantive plane.")

241. Including "all possible steps in the criminal case from its inception to judgment and sentence." See 1 WRIGHT ET AL., *supra* note 98, at § 22 (quoting *United States v. Choate*, 276 F.2d 724, 727 n.6 (5th Cir. 1960)).

242. See Rules of Criminal Procedure, Order of December 26, 1944, 323 U.S. 821 (1944) ("Mr. Justice Black states that he does not approve of the adoption of the Rules."); see also *id.* at 821–23 (Frankfurter, J., memorandum) (disagreeing with the Court's adoption of the Rules of Criminal Procedure).

243. Minzner, *supra* note 229, at 1048; see also Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. MICH. J.L. REFORM 465, 485 (1982) (observing that more than half of state criminal procedure codes are influenced by federal rules).

244. Meyn, *supra* note 6, at 733.

recently. The weight of the movement for procedural reform in England lay almost entirely on the civil side and there had been no parallel development to that which took place in the twentieth century in the United States.<sup>245</sup> It seems unbelievable that up until 2005 there were some fifty separate sets of rules, scattered in a variety of sources, sometimes difficult to find.<sup>246</sup> Such a mix of different provisions providing for common procedural needs was viewed as a significant barrier to an efficient and effective system of criminal justice.<sup>247</sup> Here again, when change finally came, it followed the established approach for the arrangement of procedural law—the main purpose was to create a distinct set of transsubstantive rules that are, “so far as practicable, the same for every level and type of criminal jurisdiction.”<sup>248</sup> The resulting Criminal Procedure Rules of 2005, which represent the *first* ever consolidation of criminal procedure rules in England, were thus designed to apply “in all criminal cases.”<sup>249</sup> Interestingly, the Criminal Procedure Rules in England were regarded at their commencement as a significant step toward the creation of “a comprehensive criminal procedural code”<sup>250</sup>—a description that calls to mind Bentham’s nineteenth-century vision of a penal procedure code.<sup>251</sup>

In a broader sense, this brief account on the formation of civil and criminal procedure shows that even when legislators and scholars are dedicated to making a new start, they are often blinkered by tradition. This is especially true with regard to procedure in the common-law world in which writers have tended to avoid first principles and limited themselves simply to the practical details of the day.<sup>252</sup> And so, even when it is the local conditions that shape the properties and specificities of legal procedures in a particular jurisdiction, we see that rulemakers choose time and again to create different categories of procedural rules

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245. See Chorley, *supra* note 2, at 101–03; see also Kaufman, *supra* note 140, at 28. Apart from the English reforms described above, a far-reaching reform of civil procedure was introduced in England in 1998 as a result of a report by Lord Woolf. See, e.g., JOLOWICZ, *supra* note 10, at 386–97.

246. See JOHN SPRACK, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE 13 (13th ed. 2011).

247. See *id.*; *The Objectives and Content of the First Criminal Procedure Rules*, MINISTRY OF JUST. (UK), <http://www.justice.gov.uk/courts/procedure-rules/criminal/notes-tables/notes> [https://perma.cc/JTL6-M9DK] (Dec. 17, 2020) (citing Lord Justice Auld’s Review of the Criminal Courts of England and Wales).

248. *The Objectives and Content of the First Criminal Procedure Rules*, *supra* note 247.

249. See The Criminal Procedure Rules 2.1. (UK) (When the Rules apply); SPRACK, *supra* note 246, at 14.

250. *The Objectives and Content of the First Criminal Procedure Rules*, *supra* note 247.

251. Cf. HEPBURN, *supra* note 45, at 3–16 (noting that the term “code” rarely appeared as a term of law before Jeremy Bentham and Edward Livingston introduced it in their writings).

252. See CLARK, *supra* note 12, at 9; EDWIN BORCHARD, DECLARATORY JUDGMENTS, at xiii (2d ed. 1941); Clark, *The Influence of Federal Procedure Reform*, *supra* note 214, at 162–64.

for different types of cases. This sheds important light on the overlooked fact that our procedural system is shaped by the tension between transsubstantivity and substance-specificity. Hereafter, the Article illustrates that the structures of the procedural categories are not static and that the silent tradeoff between the two architectural principles continues to play a central role in procedural design.

## V. CREATION AND DISSOLUTION OF PROCEDURAL CATEGORIES

The tide of procedural reform which had been flowing quite strongly for more than one hundred years began to slow down in the second half of the twentieth century. Nevertheless, further developments show the persistent preference for regulating litigation through categories of transsubstantive rules that apply to different categories of proceedings. The examples discussed in the next two sections are concrete illustrations of the relevance of the interaction between transsubstantivity and substance-specificity in modern procedural design. They document the continuous creation and dissolution of procedural categories and are proof of the need to constantly reevaluate the various forms of process. It serves as a reminder that justice calls for the harmonization of procedure with emerging types of legal domains, which are determined, to use Bentham's own words, "either by the subject to which [a legal domain] applies, or by the species of useful business which [a legal domain] has in view."<sup>253</sup>

### A. *The Admiralty Procedure Category*

Maritime disputes were litigated in England in the fourteenth century under the specialized court of admiralty.<sup>254</sup> Largely because of its peculiar history, admiralty was conceived by the founding fathers and the First Congress as a distinct legal domain, and for some 175 years admiralty suits were handled under an entirely separate set of procedural rules.<sup>255</sup> Interestingly, admiralty courts have decided monetary disputes as well as punished crimes committed aboard ships at sea.<sup>256</sup> Hence, a

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253. Bentham, Letters to U.S. Citizens, *supra* note 113, at 139 (arguing that there is no certain limit on the number of procedural codes).

254. See BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY, *supra* note 8, at 132–33.

255. The Constitution grants to the federal courts judicial power in "all cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2; see DAVID P. CURRIE, FEDERAL COURTS, CASES AND MATERIALS 209–12 (4th ed. 1990); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 561 (7th ed. 2015); FRIEDMAN, *supra* note 42, at 19–20, 417–19 (noting that, among other things, admiralty cases were tried without juries); GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 18–20 (2d ed. 1975); SURRENCY, *supra* note 235, at 209–16; WEINSTEIN, *supra* note 235, at 63; Currie, *supra* note 189, at 2.

256. See GILMORE & BLACK, *supra* note 255, at 44; LANGBEIN, LERNER & SMITH, *supra* note 67, at 196; SURRENCY, *supra* note 235, at 216.

criminal offense and a civil action stemming from an incident on a vessel at sea received similar procedural treatment. Some important adjudication principles were introduced by the first Judiciary Act;<sup>257</sup> but for the first several decades of the nineteenth century, the Supreme Court of the United States failed to exercise its admiralty rulemaking power and different procedural rules were developed haphazardly by district courts.<sup>258</sup> In 1844, the Supreme Court issued for the first time federal rules of procedure for admiralty cases. The forty-seven admiralty rules were not a comprehensive codification but were clarifications of, and additions to, traditional admiralty practice. During that time, admiralty litigation was common in all the district courts, and a majority of cases handled by the Supreme Court were admiralty cases.<sup>259</sup> Logically, this was the result of the widespread use of steamboats and other vessels as means for transporting agricultural and industrial supplies in the United States.<sup>260</sup>

Although steamboats dominated trade and travel in the nineteenth century, they were eventually replaced by newer forms of transportation. By the 1870s, railroads had become more efficient modes of transportation and began to supplant steamboats as the major transporters of both goods and passengers. Later on, “with the invention of cars, trucks, and airplanes, steamboats became obsolete, and most were retired.”<sup>261</sup> With these economic changes, the significance of admiralty practice began to disappear.<sup>262</sup> In fact, in the twentieth century admiralty law was downgraded and rarely offered in any law school curriculum.<sup>263</sup>

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257. Act to Establish the Judicial Courts of the United States, 1 Cong. ch. 20, 1 Stat. 73 (1789) (establishing the organization of the U.S. federal court system). Section 30 was particularly relevant to admiralty cases. *See id.* at § 30, 1 Stat. at 88–90.

258. *See* FALLON ET AL., *supra* note 255, at 561; SURRENCY, *supra* note 235, at 221–22; WEINSTEIN, *supra* note 235, at 63; Currie, *supra* note 189, at 3.

259. *See* SURRENCY, *supra* note 235, at 219, 225, 339.

260. *See* *Steamboat*, ENCYC. BRITANNICA, <https://www.britannica.com/technology/steamboat> [<https://perma.cc/D489-ND5C>] (May 3, 2021); RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT 181–92 (2018); CURRIE, *supra* note 255, at 212–13; FRIEDMAN, *supra* note 42, at 190–92; GILMORE & BLACK, *supra* note 255, at 31–33 (observing that the admiralty jurisdiction of the United States extends to all public navigable waters); ROBERT M. HUGHES, HANDBOOK OF ADMIRALTY LAW 8–12 (1901) (noting that the Supreme Court repudiated the English tidal test and decided that the waters included in the admiralty jurisdiction are all waters navigable for commerce of a substantial character and thus extend to domestic waterways); Richard J. Cusick, *Navigable Waters and Admiralty Jurisdiction*, 7 W. RES. L. REV. 72 (1955).

261. *A History of Steamboats*, U.S. ARMY CORPS OF ENG'RS, at 6, <https://www.sam.usace.army.mil/Portals/46/docs/recreation/OP-CO/montgomery/pdfs/10thand11th/ahistoryofsteamboats.pdf> [<https://perma.cc/GVD6-X86M>] (last visited Jan. 30, 2020).

262. *See* Currie, *supra* note 189, at 14.

263. *See* SURRENCY, *supra* note 235, at 219, 222.

The demise of admiralty practice led in the 1960s the Judicial Conference of the United States to consider the feasibility of integrating admiralty proceedings with civil procedure.<sup>264</sup> The chair of the advisory committee, “Judge Walter L. Pope, made it clear that the study must be a pragmatic one: different procedures could not be justified on the basis of tradition alone . . . . Distinctive rules for maritime cases must be justified by differences of substantive law or by factual exigencies of maritime transactions and litigation.”<sup>265</sup> As the rule-by-rule study progressed it became increasingly evident that unification was workable. The “[c]ritical evaluation of suggestions for differential treatment led to the rejection of many on the ground that they could not be justified in terms of the pragmatic criteria laid down by Judge Pope.”<sup>266</sup> There were already large areas of similarities between civil and admiralty cases, and it made no sense to continue and maintain distinct procedural categories.<sup>267</sup> Consequently, in 1966, admiralty cases were brought within the Federal Rules of Civil Procedure,<sup>268</sup> along with a handful of procedural rules preserved for certain admiralty and maritime matters.<sup>269</sup> In this historical account of admiralty procedure, we clearly see that the categories of rules are not static. The undeclared interplay of transsubstantivity and substance-specificity continues to play a central role in shaping the forms of process, dismantling and merging categories as practical changes necessitate.

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264. See generally Leavenworth Colby, *Admiralty Unification*, 54 GEO. L.J. 1258 (1966).

265. Currie, *supra* note 189, at 7–8; see Colby, *supra* note 264, at 1259; George Rutherglen, *The Federal Rules for Admiralty and Maritime Cases: A Verdict of Quiescent Years*, 27 J. MAR. L. & COM. 581, 599 (1996).

266. Currie, *supra* note 189, at 8.

267. See *id.* at 14; Rutherglen, *supra* note 265, at 584–85 (“[B]y 1966, the existence of two entirely separate procedural systems could no longer be justified.”).

268. See Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1031–32 (1966) (effective July 1, 1966); *id.* at 1032–37 (Black, J., dissenting). “The single change that merged admiralty cases into the one form of civil action recognized by the rules was to add the phrase ‘or in admiralty’ to the first sentence of Rule 1.” Rutherglen, *supra* note 265, at 583–84. The language of Rule 1 has been amended as part of the general restyling of the Federal Rules in 2007, and the former reference to the merger of law, equity, and admiralty practices has been abandoned.

269. See 28 U.S.C. § 2072 (Admiralty Rules). First, some Federal Rules contain provisions specific to admiralty cases. See, e.g., FED. R. CIV. P. 9(h) (pleading admiralty); FED. R. CIV. P. 14(c) (expanding third-party practice in admiralty). Secondly, admiralty cases are also governed by the “Supplemental Rules for Certain Admiralty and Maritime Claims.” See FED. R. CIV. P. Supp. R. A–G; see also 2 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY app. C (2021) (Supplemental Rules); GILMORE & BLACK, *supra* note 255, at 2, 19; Currie, *supra* note 189, at 8–13; Rutherglen, *supra* note 265, at 588–606; Colby, *supra* note 264, at 1260–64 (“[T]he provisions for different treatment in admiralty actions . . . are required by the nature of maritime business transactions . . . and grows directly out of the nature of maritime litigation.”).

### B. *The Bankruptcy Procedure Category*

Earlier practices in England had established procedures for dealing with merchants who could not pay their debts. Upon the occurrence of an act of bankruptcy, creditors could petition the chancellor to convene a bankruptcy case.<sup>270</sup> At its inception, the overriding purpose of a bankruptcy proceeding was to aid creditors in the collection of debts, and only later, the conceptual agenda changed and the law introduced the discharge of debts for the benefit of a cooperating debtor.<sup>271</sup> Since the Framers were concerned about interstate commerce and in view of the English experience at the Court of Chancery, it is not surprising that, like in equity, the Constitution gave the federal government the authority to establish a uniform system of bankruptcy.<sup>272</sup> For over a century after the ratification of the Constitution, however, the bankruptcy clause remained largely unexercised by Congress, and the states were generally allowed to fill this gap with bankruptcy and insolvency laws of their own.<sup>273</sup>

Federal courts conspicuously entered the reorganization business with the advent of the equity receivership. Use of this device blossomed in the late nineteenth century as a means to keep railroads running. At a time when railroads were of great economic importance, but in dire financial straits, there was no federal bankruptcy law to deal with their problems. Charles Tabb explains that “[g]iven the interstate nature of virtually all the railroads, state remedies were entirely inadequate. The creative solution was to invoke the equity power of the federal courts to supervise the restructuring of troubled railroads.”<sup>274</sup> Finally, in 1898, Congress stepped in and enacted the first long-lived bankruptcy statute, which incorporated many of the procedural practices that were developed by the

270. See Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–12 (1995); HOLDSWORTH, *supra* note 48, at 470–73. The chancellor would appoint bankruptcy commissioners who had substantial powers, originally somewhat akin to a combination of today’s trustee and bankruptcy judge. Tabb, *supra*, at 8; HOLDSWORTH, *supra* note 48, at 470–71.

271. See BARRY E. ADLER, DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 22–25 (4th ed. 2007); Tabb, *supra* note 270, at 8–11, 43–44.

272. See U.S. CONST. art. I, § 8, cl. 4; THE FEDERALIST No. 42, *supra* note 50, at 271 (James Madison); SURRENCY, *supra* note 235, at 247–51; Tabb, *supra* note 270, at 12–13, 43; see also *In re Ultra Petroleum Corp.*, 913 F.3d 533, 544 (5th Cir. 2019), *withdrawn and superseded on other grounds*, 943 F.3d 758 (5th Cir. 2019) (noting that bankruptcy law in the United States paralleled English bankruptcy law up until the enacting of the Bankruptcy Code in 1978).

273. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196 (1819) (“[U]ntil the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the States are not forbidden to pass a bankrupt law.”); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (holding that a state bankruptcy law that applied to debts contracted after its passage does not violate the Constitution); ADLER, BAIRD & JACKSON, *supra* note 271, at 25; BROOKHISER, *supra* note 260, at 214–22; FRIEDMAN, *supra* note 42, at 416–17; Tabb, *supra* note 270, at 13–21, 48.

274. Tabb, *supra* note 270, at 21–22; see also DOUGLAS G. BAIRD, ELEMENTS OF BANKRUPTCY 59–64 (6th ed. 2014).

federal courts to address the particular needs of bankruptcy proceedings.<sup>275</sup> Additionally, under the authority of the 1898 Act, the Supreme Court periodically passed general orders and forms to further govern the procedure in bankruptcy matters.<sup>276</sup> That procedural structure held until the procedural reforms in the federal judicial system in 1938. Naturally, the abolition of the distinction between actions at law and cases in equity had a direct effect on a bankruptcy procedure that was based upon equity jurisdiction.<sup>277</sup> Soon after the adoption of the Federal Rules of Civil Procedure, the Supreme Court issued an order that made it mandatory that all bankruptcy proceedings follow the civil rules “as nearly as may be” except insofar as those rules were inconsistent with the Bankruptcy Act of 1898 or with the Court’s general orders.<sup>278</sup>

This patchy procedural environment came to an end in 1973 with the creation of a separate and distinct set of bankruptcy rules.<sup>279</sup> In 1964, Congress structured the process of rulemaking for bankruptcy cases and authorized the promulgation of rules of bankruptcy procedure by the Supreme Court.<sup>280</sup> After years of effort by an advisory committee,<sup>281</sup> the first set of Federal Rules of Bankruptcy Procedure took effect in 1973.<sup>282</sup> These rules were replaced in 1983 by new Federal Rules of Bankruptcy Procedure, and those in turn had to be significantly amended to take account of later changes in the Bankruptcy Code.<sup>283</sup> To be sure, the Bankruptcy Rules presuppose the modern framework of procedural rules remarked on earlier in this Article—they are transsubstantive and

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275. See ADLER, BAIRD & JACKSON, *supra* note 271, at 25; FRIEDMAN, *supra* note 42, at 417; SURRENCY, *supra* note 235, at 255–59; Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 217, 218 (1996) (noting that at least seventy percent of the Bankruptcy Act was procedural provisions); Tabb, *supra* note 270, at 23–26.

276. Tabb, *supra* note 270, at 31; see King, *supra* note 275, at 218; Charles Elihu Nadler, *The Federal Rules of Civil Procedure Applied to Bankruptcy*, 27 J. NAT’L ASS’N REF. BANKR. 49 (1953).

277. The bankruptcy court has often been regarded as a court of equity that uses “chancery methods.” See *Barton v. Barbour*, 104 U.S. 126, 134 (1881); ADLER, BAIRD & JACKSON, *supra* note 271, at 45.

278. See *General Orders and Forms in Bankruptcy*, 305 U.S. 677, 698 (Nos. 36–37) (1939) (amended and established Jan. 16, 1939); CLARK, *supra* note 12, at 38; FALLON ET AL., *supra* note 255, at 562; Nadler, *supra* note 276, *passim*.

279. See *Bankruptcy Rules and Official Bankruptcy Forms*, 411 U.S. 989, 991 (1973) (effective Oct. 1, 1973); *id.* at 992 (Douglas, J. dissenting); WRIGHT & KANE, *supra* note 214, at 393; Lawrence K. Snider, *The New Bankruptcy Rules of Procedure*, 52 MICH. ST. B.J. 694 (1973); H.R. COMM. ON THE JUDICIARY, 116TH CONG., FEDERAL RULES OF BANKRUPTCY PROCEDURE, at VII–VIII (Comm. Print 2018) (Historical Note).

280. See 28 U.S.C. § 2075; King, *supra* note 275, at 219–20.

281. See King, *supra* note 275, at 220–33.

282. Tabb, *supra* note 270, at 31; see Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 277, 278–80 (1996) (describing the rulemaking process of the Bankruptcy Rules).

283. See *Bankruptcy Rules*, 461 U.S. 973, 975 (1983) (effective Aug. 1, 1983); WRIGHT & KANE, *supra* note 214, at 393; Klee, *supra* note 282, at 282; King, *supra* note 275, at 237–41.

substance-specific at the same time. On the one hand, the Bankruptcy Rules are tailored as a separate and distinct group of rules designed to attain greater uniformity and suitable procedural treatment in the administration of bankruptcy proceedings. On the other hand, while there are significant differences between the circumstances of individual and corporate debtors, many provisions in the Bankruptcy Rules, such as those providing an automatic stay of collection action and policing pre-bankruptcy transfers, apply to all types of bankruptcy cases.<sup>284</sup>

The adoption of a new procedural category for bankruptcy matters was of no coincidence and could be attributed to two converging factors. The first was the exponential growth in the number of bankruptcy cases in the last half of the twentieth century. After the end of World War II, the number of bankruptcy filings in the United States escalated from around ten thousand in 1946 to over two hundred and fifty thousand in 1975.<sup>285</sup> By 1970, a general feeling prevailed that the time for an overhaul of the bankruptcy system had arrived. The second is that bankruptcy cases differ significantly from other civil matters, and subjecting bankruptcy proceedings to the civil rules of procedure proved insufficient. At its core, a bankruptcy proceeding is a special legal process that is designed to coordinate the actions of creditors and overcome the collective action problem they face in asserting their claims.<sup>286</sup> Put differently, the bankruptcy court is meant to provide a single national forum in which all the debtor's affairs can be sorted out fairly and efficiently.<sup>287</sup> To accomplish these objectives, the procedural rules used in bankruptcy cases have to assure that the process is not abusive and that strategic players are not able to capture value that rightfully belongs to others.<sup>288</sup> Together, the nature and extent of bankruptcy litigation provided the impetus for the consolidation of a distinct procedural category for the regulation of bankruptcy proceedings.

That said, there is one reservation to be made with respect to the idiosyncratic nature of the bankruptcy rules of procedure in the United States. In large measure, bankruptcy litigation is governed by the same

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284. See ADLER, BAIRD & JACKSON, *supra* note 271, at 51; Robert K. Rasmussen, *Introduction to BANKRUPTCY LAW STORIES* 1, 3 (Robert K. Rasmussen ed., 2007); King, *supra* note 275, at 238 (noting that when the committee drafted the Bankruptcy Rules “it was unnecessary to have different sets of Rules for the different chapters” and that “the rules could flow as one set”).

285. SURRENCY, *supra* note 235, at 260.

286. See ADLER, BAIRD & JACKSON, *supra* note 271, at 23–24, 41, 51; Rasmussen, *supra* note 284, at 8.

287. See ADLER, BAIRD & JACKSON, *supra* note 271, at 41; SURRENCY, *supra* note 235, at 263; King, *supra* note 275, at 223 (“In other words, a bankruptcy case has national application and administration.”).

288. See ADLER, BAIRD & JACKSON, *supra* note 271, at 29; BAIRD, *supra* note 274, at 5, 269; Rasmussen, *supra* note 284, at 5.

rules of procedure that apply in general civil practice;<sup>289</sup> “[s]ections of the Federal Rules of Civil Procedure covering such things as pleading, joinder, depositions, interrogatories, and summary judgment have been incorporated into the bankruptcy rules.”<sup>290</sup> A bankruptcy judge observed in a comprehensive study in 2001 that “seventy-seven of the eighty-nine Civil Rules are imported, in whole or part, into the Bankruptcy Rules—sixty-seven by way of express incorporation and another ten by restatement in essentially identical language.”<sup>291</sup> It does not follow, however, that the linkage between the Bankruptcy Rules and the Civil Rules negates their existence as separate procedural categories. There are numerous rules of procedure that are designed to apply only in bankruptcy matters and which in turn create a distinct litigation environment.<sup>292</sup> More accurately, the interdependence of the Bankruptcy Rules and the Civil Rules calls attention to the fact that modern categories of procedure are not necessarily isolated silos; different categories of procedure could be, and in fact are in many situations, interrelated. The current underlying and energizing this interdependence is once more boiled down to the more latent interplay of transsubstantivity and substance-specificity throughout the rulemaking process.

#### VI. VARIATIONS IN PROCEDURAL CATEGORIES

The emphasis on transsubstantivity and substance-specificity as the two architectural principles of procedure helps us simplify and get a better understanding of the current procedural layout. That said, it might also create a deceptive prism. The picture of the procedural system as a network of categories, each with its own uniform rules, accounts only for the most common and clear-cut categorizations.<sup>293</sup> The reality, however, is that there are many other dimensions to consider when describing, or when thinking about designing, modern modes of procedure. It is therefore useful to mention a few variations in the procedural categories while acknowledging that this is not an exhaustive list.

First and most obviously, we need to acknowledge that there are

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289. Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure that Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 36 (2001); see FED. R. CIV. P. 81(a)(2); King, *supra* note 275, at 222; Frank R. Kennedy, *Some Comments About the Rules of Bankruptcy Procedure Under the Bankruptcy Reform Act*, 85 COM. L.J. 125, 128 (1980); Snider, *supra* note 279.

290. ADLER, BAIRD & JACKSON, *supra* note 271, at 49.

291. Klein, *supra* note 289, at 35.

292. See generally Patrick A. Jackson & Justin H. Rucki, *Chapter 11 Litigation: The Bankruptcy Judges Speak*, DEL. LAW., Summer 2013, at 12.

293. Aside from the general procedural categories discussed above, there are other areas of litigation, such as probate, family, and FISA proceedings, that follow distinct sets of procedural rules.

differences in the content of rules over time and across jurisdictional lines. In any jurisdiction, the procedural rules in each category are constantly evolving. The Federal Rules of Civil Procedure in force today, for instance, are not identical to the same rules used seventy years ago. Further, different legal systems may place emphases on different rules within each of the procedural categories. For example, initial disclosure and discovery provisions in the codes of civil procedure in the United States, England, and Israel vary significantly. Similarly, differences exist between jurisdictions in the rules that control the number of interrogations, the joinder of claims and parties, and the claim and issue preclusion. In other words, the fact that there is in all jurisdictions a basic division into civil and criminal procedural spheres does not mean that the content of such rules is identical.

In addition, in the United States there are plenty of local rules, standing orders, and internal operating procedures for particular courts.<sup>294</sup> While historically most state rules were patterned on the federal rules, differences between state and federal procedures are now pervasive.<sup>295</sup> Some local rules modify or contradict the Federal Rules.<sup>296</sup> Other local rules even attempt to restate sections of Title 28.<sup>297</sup> Rules and orders such as these, which create inconsistencies in practice among the various districts, make it hard, to some extent, to speak of a uniform system of procedure throughout the United States federal system.<sup>298</sup>

Moreover, as David Shapiro points out, a true transsubstantive procedure would require that we apply exactly the same rules to every case.<sup>299</sup> However, even if a single set of rules is formally

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294. See Tobias, *Transformation of Trans-Substantivity*, *supra* note 14, at 1504; Subrin, *Emerging Procedural Patterns*, *supra* note 34, at 2021 (noting that local rules vary not only among the federal courts throughout the country, but also among federal courts within a single state).

295. See Seymour Moskowitz, *Discovery in State Civil Procedure: The National Perspective*, 35 W. ST. U. L. REV. 121, 124 (2007); see also Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 *passim* (2018); Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 414; Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2084–85 (1989).

296. See Daniel R. Coquillette, Mary P. Squiers & Stephen N. Subrin, *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62, 62.

297. See *id.*; Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 951 (1996).

298. See FALLON ET AL., *supra* note 255, at 559; RESNIK, *supra* note 2, at 143; Rasmussen, *supra* note 284, at 3; WRIGHT & KANE, *supra* note 214, at 391–92; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 *passim* (1992); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992); but see Subrin, *Emerging Procedural Patterns*, *supra* note 34, at 2030 (asserting that the most important features of the Federal Rules are also found in the civil rules of state courts).

299. See Subrin, *Emerging Procedural Patterns*, *supra* note 34, at 2000 n.9 (referencing conversations with Shapiro).

transsubstantive, courts do not necessarily apply the rules in a uniform manner, and the emphasis on judicial discretion reflects a recognition of the value of tailoring broad principles to the circumstances of individual cases.<sup>300</sup> To put it another way, courts have always applied the general rules of procedure in different ways to different kinds of cases.<sup>301</sup> Charles Clark, the architect of the Civil Rules, believed all along that there were cases that did not require all of the process afforded by them.<sup>302</sup> Clark noted that judicial management and case-specific application is critical “so that [a case] may be separated for its own particular treatment from the vast grist of cases passing through our courts in daily routine toward negotiation and settlement and, occasionally, trial.”<sup>303</sup> The comments to amended Federal Rule 16, for example, suggest that, “the district courts undoubtedly will develop several prototype scheduling orders for different types of cases.”<sup>304</sup> Indeed, it seems ludicrous to impose the same limit on the number of interrogatories, length of depositions, or time to complete discovery in a complex antitrust case as in a simple tort action.<sup>305</sup> A necessary consequence of this flexibility is that procedure may also differ from one courtroom to another, according to the tastes, instincts, and talents of individual judges.<sup>306</sup> Thus, even the exact same

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300. See Bone, *Making Effective Rules*, *supra* note 35, at 326 & n.31 (noting that the Federal Rules give trial judges broad discretion); Burbank, *The Costs of Complexity*, *supra* note 41, at 1474; see also RESNIK, *supra* note 2, at 134; Avraham & Hubbard, *supra* note 2, at 911; Carrington, *supra* note 295, at 2081–83; Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795, 1798 (2002); Lahav, *supra* note 27, at 860–61 (“[T]he structure of the Federal Rules provides a default sequence of motions within which judges have significant discretion.”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 370 (2013) (noting that the transsubstantivity of the Federal Rules exists “in name only”); Subrin, *Emerging Procedural Patterns*, *supra* note 34, at 2045; but see Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 378 (contending that ad hoc substance-specific procedures that an individual judge might employ differ significantly from a substance-specific rule that binds the hands of all judges).

301. See Lahav, *supra* note 27, at 860–69; Urja Mittal, *Litigation Rulemaking*, 127 YALE L.J. 1010, 1059 (2018); but see Bone, *Foundations of Litigation Reform*, *supra* note 11, at 1169–70; Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 410–13 (contending that in a series of decisions on pleading standards, the Supreme Court has expressed a commitment to transsubstantivity).

302. Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 14, at 394.

303. Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 164 (1956).

304. FED. R. CIV. P. 16 Advisory Committee’s Notes to the 1983 Amendment (“Subdivision (b); Scheduling and Planning.”).

305. See Robert A. Sacks, *Coping with the Jekyll-Hyde Nature of Interrogatories by Imposing a Numerical Limitation: The Uses and Abuses of Discovery Procedures as Exemplified by Texas Rules of Civil Procedure 168*, 2 REV. LITIG. 95, 106 (1981).

306. Carrington, *supra* note 297, at 945.

case may be subject to different procedures depending on the vagaries of judges.<sup>307</sup>

Moreover, in a variety of contexts, Congress and state legislatures have crafted, *in advance*, rules that are linked to a particular kind of lawsuit or specific types of litigants that run counter to transsubstantivity.<sup>308</sup> Litigants in securities, employment, prisoner, civil rights, and medical malpractice cases in the United States often must meet particularized procedural requirements.<sup>309</sup> Finally, parties to a case can reach agreements that alter otherwise controlling rules without court involvement.<sup>310</sup> Familiar examples include party stipulations to increase the number of depositions or interrogatories available in discovery<sup>311</sup> and party agreements or consent to personal jurisdiction.<sup>312</sup>

Numerous developments in modern litigation have also led to adjustments of procedure based on the size or magnitude of the dispute.<sup>313</sup> The underlying premise is that the general form of procedure works well for most litigation in the middle range, but not for cases at the extremes.<sup>314</sup> Under this approach, cases are routed to special tracks on a case-size basis.<sup>315</sup> On the one hand, many changes have been made over the years to facilitate individualized treatment of the general rules of procedure for the distinctive needs of complex or contentious litigation.<sup>316</sup> The Manual for Complex Litigation, for instance,

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307. See Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1004–05 (1998).

308. See Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 403 (noting that since the 1970s, Congress has increasingly approved substance-specific procedural measures that are designed to explicitly achieve particular policy ends); Moskowitz, *supra* note 295, at 125; see also Burbank, *The Costs of Complexity*, *supra* note 41, at 1474.

309. See RESNIK, *supra* note 2, at 139; Lahav, *supra* note 27, at 860; Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 404–09; Tobias, *Transformation of Trans-Substantivity*, *supra* note 14, at 1505.

310. See Avraham & Hubbard, *supra* note 2, 906–08.

311. See FED. R. CIV. P. 30(a), 33(a).

312. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (noting that one ground for personal jurisdiction is “explicit consent” (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982))).

313. See Lahav, *supra* note 27, at 881–82; Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 14, at 394; Subrin, *Emerging Procedural Patterns*, *supra* note 34, at 2018.

314. Cooper, *supra* note 300, at 1800.

315. Compare Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 14, at 398 (suggesting that special procedural tracks on a case-size basis compromise transsubstantivity), with Marcus, *Trans-Substantivity in Federal Civil Procedure*, *supra* note 14, at 377 (observing that even different procedural tracks for different case sizes can remain transsubstantive, providing that the same rules apply regardless of the substance of the cases within each track); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526–27 (1986) (contending that the evolution of a “distinct set of rules for cases with multiple parties or complex issues” has “undermined” transsubstantivity in the Civil Rules).

316. See generally RESNIK, *supra* note 2, at 138, 140; Burbank, *The Costs of Complexity*, *supra* note 41.

specifically suggests that judges tailor numerous procedural rules to complicated cases.<sup>317</sup> The multi-district litigation statute<sup>318</sup> and the so-called *Lone Pine* orders<sup>319</sup> in the context of mass tort litigation are just two particular examples of special procedures that have been developed to handle protracted and complex cases. On the other hand, many jurisdictions adopt simple or fast tracks for cases involving relatively small amounts of money.<sup>320</sup> In such small-stakes cases, the procedures are usually less formal, the trial does not last more than an hour or two, and there are typically no lawyers involved. The purpose of those procedures is to facilitate rapid, inexpensive access to justice for small claims. Special rules for small claims are common in many countries and are a vital part of each of the fifty individual states' court systems.<sup>321</sup> For various reasons, the federal court system has not yet adopted such an expedited track for cases with limited monetary stakes;<sup>322</sup> the one exception is the federal tax court, which does use a simplified procedure for small claims.<sup>323</sup>

Lastly, the procedural categories constitute independent fields of regulation and study. But this does not mean, as has been suggested

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317. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.1 (2004); *see also* 15 WRIGHT ET AL., *supra* note 98, at § 3868; Marcus, *Processes of American Law*, *supra* note 14, at 1203–04; Tobias, *Transformation of Trans-Substantivity*, *supra* note 14, at 1505 (describing the Manual as “a monument to non-trans-substantivity”).

318. This statute refers to a federal case management procedure in which a federal panel transfers several complex civil cases involving one or more common questions to one federal district court. 28 U.S.C. § 1407; *see* 15 WRIGHT ET AL., *supra* note 98, at §§ 3861–3866; *see also* Avraham & Hubbard, *supra* note 2, at 936–37; *see generally* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297 (2020); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017).

319. Such orders require plaintiffs to make a preliminary showing that there is a sufficient evidentiary basis to justify the continued prosecution of what would likely be lengthy, expensive, and burdensome litigation. *See* 15 WRIGHT ET AL., *supra* note 98, at § 3866; Avraham & Hubbard, *supra* note 2, 940–42; Lahav, *supra* note 27, at 840–41.

320. *See, e.g.*, Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 14, at 398–405; Michael A. Friedrichs, *Fast Track: A Panacea for a Delayed and Cluttered Court System?*, 1 SAN DIEGO JUST. J. 443 (1993); Richard McMillan & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985).

321. *See* Moskowitz, *supra* note 295, at 125, 133–35.

322. *See* Minutes from the Civil Rules Advisory Committee, Jud. Conf. of the U.S. (Oct. 16–17, 2000), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV10-2000-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV10-2000-min.pdf) [<https://perma.cc/JJL6-DPDS>]; *see also* Subrin, *Limitations of Transsubstantive Procedure*, *supra* note 14, at 394 n.76, 400–02 (claiming that some federal courts have in fact adopted different case tracks); *cf.* Stephen N. Subrin, *The Law and the Rules*, N.Y. TIMES, Nov. 10, 1979, at 23 (calling for a less expensive process and claiming that application of the Civil Rules to all cases, big and small, has proved disastrous).

323. *See* AM. BAR ASS'N, THE ABA GUIDE TO RESOLVING LEGAL DISPUTES: INSIDE AND OUTSIDE THE COURTROOM 93–99 (2007) (noting that the procedures followed in the small claims division of the federal tax court are similar to those followed in other small claims courts).

earlier, that they are separate silos. Although it is an underappreciated feature of our procedural system, the fact of the matter is that, in many situations, different categories of procedure are interrelated.<sup>324</sup> There is a reciprocal influence between different sets of rules, mainly through the incorporation by reference of provisions from civil procedure.<sup>325</sup> As we have seen, while the rules for bankruptcy proceedings currently in effect represent a distinct category, bankruptcy litigation is still governed in large measure by the same rules that apply in general civil practice. Even the Federal Rules of Criminal Procedure refer specifically a few times to the rules set forth in the Federal Rules of Civil Procedure. The rule on criminal forfeiture, for example, states that prior publication and means of sending the notice to the defendant must take place as described in the relevant Civil Rules.<sup>326</sup> And before a final order of forfeiture, the Criminal Rules state that “the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure . . . . When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.”<sup>327</sup> Further, the Rules of the Supreme Court of the United States refer and rely on provisions from the Civil Rules. These rules state that the forms of pleadings and motions prescribed by the Federal Rules of Civil Procedure should be followed in any action invoking the Court’s original jurisdiction under Article III of the Constitution.<sup>328</sup>

#### CONCLUSION

The categorization of procedural law has been too long without a theory. Previous scholarly efforts have accepted unquestionably the different procedural spheres and have proceeded almost entirely within the confines of these separate domains. But it is striking to have no better reason for the procedural categories other than that they were laid down at some point in the past.<sup>329</sup> This is even more shocking since the way cases are divided up or aggregated together under the various sets of procedure can shape outcomes. To fill the gap, this Article breaks with the conventional wisdom and uncovers the role that the principles of

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324. Cf. Lahav, *supra* note 27, at 865, 869 (arguing that a consideration of related rules affected by changes in procedural design is necessary because the entire system is interconnected).

325. Cf. MERRYMAN & PÉREZ-PERDOMO, *supra* note 4, at 112 (“[C]ivil procedure is the heart of procedural law.”).

326. See FED. R. CRIM. P. 32.2.(b)(6).

327. FED. R. CRIM. P. 32.2.(c)(1)(B).

328. SUP. CT. R. 17.

329. Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”).

transsubstantivity and substance-specificity play in structuring our procedural system. The tension between the two conflicting principles calls for resolution through a dialectical union of the two that was overlooked by prior scholarship. This silent, but significant, interplay determined the evolution of procedural law and our rationales for the different categories of procedure.

Moreover, the tradeoff between transsubstantivity and substance-specificity continues to shape our procedural landscape. Behind the categories we find today, and at the heart of the whole procedural system, lies an unconscious judgment about the relative importance of these competing principles of procedural design. Thus, as history shows, over time new categories are created while others are absorbed into more dominant categories. These insights illustrate how a large portion of procedural law is in fact dynamic and open to reconsideration. There is nothing sacrosanct about the categories of procedure nor anything that compels us to accept the configurations as we currently find them. Rather, we need to reevaluate the different forms of process time and again in light of social changes and the evolving litigation environment. The choice to group and divide categories of cases under different categories of procedural rules is thus an active enterprise, not a static fact.

This theoretical understanding comes with important normative implications as it enables us to evaluate whether the different procedural categories are useful in their present-day forms or in need of revision. Do we want more uniformity in our procedures or, conversely, additional categories? Is there an optimal number of procedural categories? And should a distinct category be typed by the substantive law it takes on, the degree of its complexity, the stakes involved, or the nature of the litigants and their lawyers? These questions emphasize the difficulty in forming a complete picture of our procedural layout. Just as we have not yet found a unifying theory in physics, we have yet to find one that pieces together all the dimensions of procedural law.<sup>330</sup> What is certain, however, is that answering such questions requires the collective input of scholarly dialogues currently occurring in isolation. The organizational structure laid open here creates a common ground for these sorts of discussions and takes us a step forward in that direction.<sup>331</sup>

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330. Cf. William H.J. Hubbard, *Quantum Economics, Newtonian Economics, and Law*, 2017 MICH. ST. L. REV. 425 (2017) (analogizing Newtonian and quantum physics to neoclassical and behavioral economics in order to illuminate the future trajectory of law and economics).

331. “[I]n the road to reform, every inch made is better than none.” BENTHAM, *Principles of Judicial Procedure*, *supra* note 118, at 5.