

AALS Civil Procedure Conference: The Many Faces of Contemporary Civil Procedure  
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Plenary: Shaking the Foundation: Escaping Civil Procedure?  
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**Civil Procedure as Conflict Resolution: Studying, Teaching and  
Researching the Canon of Dispute Resolution**

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I. Introduction

A. Legal disputes do not begin with “legal cases”; they are the “tip” of the conflict resolution iceberg.

-“mapping” the dispute resolution pyramid

From avoidance to self-help, violence, naming, blaming, claiming,  
Reframing, “gaming”, starting lawsuits, using alternative or “appropriate”  
Methods- negotiation (dyadic), Mediation, arbitration and adjudication  
(Triadic), voluntary vs. compulsory process, public or private,  
Primary, secondary and hybrid processes (mini-trials, summary judge  
and jury trials, med-arb, neutral evaluation,)  
Trials and appeals only a small sub-set of methods of disputing and  
“Resolution” or management and handling

B. Law defines “cases” as disputes that are “legalized” and formally proceduralized;  
sociology, anthropology and socio-legal studies see “cases” as derived from potential conflicts  
that are socially constructed to become legal disputes. (See Felstiner, et. Al. “Naming, Blaming  
and Claiming”–teaching the social construction of legal disputes)

-the “formation” of a legal dispute from individual or disputant (group)  
perspective

“Framing” a legal dispute–beginning, role of lawyers in “transforming”  
Conflicts into disputes and cases

-the “management” or handling of legal and other disputes and conflicts from  
Social perspective–institutions and processes created to deal with disputes  
And conflicts

-the sociology, anthropology, political science and psychology of  
dispute institutions (Deutsch, Abel, Nader, Shapiro)

C. Civil Procedure as “legal process” (Hart & Sacks); “process pluralism” (Fuller, Menkel-Meadow)-the “jurisprudence” and social context of legal disputing

- “Rules of Civil Procedure” as “made” not “given”
  - contrast to other forms of process or “rules”
  - Robert’s Rules of Order
  - Larry’s Rules of Consensus Building (See Susskind et. Al. *The Consensus Building Handbook*)
  - varieties of dispute processing and alternative methods Of managing, handling and resolving (Sander, Galanter)

## II. The “Canon” of Dispute Resolution for Civil Procedure

A. History- “legal process” school/jurisprudence of procedure (Fuller, Hart & Sacks, etc.)

B. Key concepts and ideas

- social construction of disputes and conflicts
- social functions of conflicts and disputes
- adversarialism (Hampshire)
- fair process (political theory, Habermas)
- goals of procedural system (justice or peace? Or both?)
  - is “procedural justice” more universal than substantive justice?
- metrics of process (how do we evaluate or know if we have “good process”—what is “due” process?)
- relationship of “process” to substance
- transsubstantive process possible or need contextual variety?
- dialectics of process- movement from theory to practice and Reform to reform
  - history of civil procedure—forms of action
  - history of rules development
  - history of current reforms-“appropriate” not “alternative”
- Dispute resolution
  - discovery
  - formalism vs. informalism
  - adversarialism (Tannen) vs “problem solving”
- circularity and reactions of all reforms (Mary Parker Follett) “Constructive conflict”
- game theory (Axelrod)- cooperate or defect in disputing, discovery, etc.
- “modes” of dispute processing (Elster and Menkel-Meadow)
  - principles, reasons, persuasion, rules, advocacy, decisions
  - trading, preferences, utility maximization, bargaining, consent
  - passions, emotions, beliefs- “affective” modes
- skills needed to be a “proceduralist” and lawyer
  - diagnosis, listening, analysis, negotiation, interviewing,

Counseling, conciliation, mediation, problem-solving,  
Textualist, advocate and creativity, process management,  
Facilitation, leadership

C. Institutions for Dispute Processing (see pyramid and map above)

- relation of all institutions of disputing to each other and to courts
- key issues in public (court sponsored dispute institutions) and  
Private dispute resolution

D. Issues in Dispute Resolution for Civil Procedure

- “baseline” measures of comparison and evaluation-purposes of procedural systems
  - “Litigation romanticists” (Fiss, Resnik, Luban) vs. “harmony” justice (Nader, Abel,)
  - Empirical studies of process (RAND, Federal Judicial Center Studies, “Procedural justice” literature (Tyler and Lind, et. Al.; Walker & Thibaut)
- relation of formal and informal institutions to each other
- power imbalances
  - race, class, gender, role of lawyers, role of law and rules?
- dialectics of creativity and rule development
  - case studies in class actions, settlements, case management, discovery And disclosure
  - ADR in courts, mandatory arbitration, “Michigan” mediation, Early Neutral evaluation
  - Local Rules under authority of ADR Acts of 1996, 1998; Rule 83
- on-going court reform—FJC and others, state activity
- Who decides? Clients, lawyers, judges, legislators, third parties
  - “Human externalities” in process decisions
- critiques of adversarialism
  - no longer two party cases—multi-party, multi-issue disputes
  - purpose of legal dispute resolution—“case” or underlying dispute
  - stability of solutions-Pareto optimality-efficiency
- economics of litigation and “alternatives”
  - case selection hypothesis
  - “Equilibrium” theory in dispute processing (Priest)
- ethics issues- roles of lawyers, clients, judges, magistrates, court mediators, Managers, administrators, parties, experts
- legal issues (confidentiality, secrecy-privacy in settlements, credentialing, Mandatory arbitration, “good faith participation” etc.)
- new forms of process (Consensus building, reg-neg, facilitated settlement Conferences, mini-trials, summary jury trials)
- “Fitting the Forum to the Fuss” (Rosenberg, Sander & Goldberg)
  - is contextualized process assignment possible?
- “comparative” procedure and process—US compared to civil, other legal systems

- And forms of conflict resolution
- policy issues—use of ADR in class actions, mass torts, employment, consumer, Securities
- e.g. September 11 Victims Compensation Fund, Smith Barney, Asbestos, Dalkon Shield, etc.

### III. Teaching Ideas

- A. Early classes-selection of actual disputes, conflicts in class, school, society
  - create and discuss alternative processes for handling
- B. Comparison of different sets of rules for different procedures
  - contrasting procedural “rights” and “remedies”
  - Robert’s Rules vs. Larry’s Rules (see above)
  - University Honor Code/grievance codes
  - Congressional rules
  - Student organization rules
  - Unions/Organizations
- C. Negotiation/game theory exercises (games of Strategy)—discovery, disclosure
  - incentives to cooperate/defect
- D. Court/arb/mediation “visits” and ethnographies—“empirical” knowledge/study
  - Of process
- E. Films—alternative modes of conflict resolution (“Little Injustices”, The Story of Qui Ju, The Heart of the Dragon, A Civil Action, etc.)
- F. Drafting exercises (usual, complaint, discovery, etc., but add: drafting ADR clause for individual contract, organization, employment Relation, etc.
- G. In class simulations/role plays: motions, mediation, negotiation, arbitration, Mini-trials, etc. “Judicial” and “other” processes
  - (CMM course at Georgetown in Section 3 “Process in Society”=
  - Civil Procedure plus (socio-legal studies and lawyering and ethics)
- H. Creative examinations (rule-drafting, policy analysis, client counseling
  - In different contexts, individual disputes, organizational, corporate, class Actions)
  - analysis of current rules’ intersections with more varied process (E.g. Rules 16, 23, 24, 26-37, 68, 83, local rules on ADR, Pre-trial procedures)
  - contrast to other rules systems (Lord Woolf reforms in UK; Australia, Civil law, international arbitration etc.)

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