

## Substance In and Out of Procedure

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### Introduction

Robert Bone is a leading member of an influential generation of scholars who transformed the study of civil procedure. With dazzling fluency in economics,<sup>1</sup> history,<sup>2</sup> jurisprudence,<sup>3</sup> and more, Professor Bone has approached the subject with unmatched rigor and integrity. He is also uncommonly open-minded, he invariably treats colleagues of all sorts with respect, and he is one of the academy's kindest people. Having benefited in equal measure from Professor Bone's scholarship and his generosity as a mentor, I am deeply honored to comment on *Justifying Litigation Reform*, a fitting capstone to a superlative career.

*Justifying Litigation Reform* exemplifies both Professor Bone's multidisciplinary sophistication and the constancy of his theoretical vision. Built upon forty years of scholarship, the book's account of procedural reform properly pursued will extend Professor Bone's impact on the field decades into the future. At a time when barely cloaked ideological preference drives most normative legal analysis, Professor Bone's argument for

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1. See generally, e.g., ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* (2003).
2. See generally, e.g., Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).
3. See generally, e.g., 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 (1995).

what procedure ought to be stands out for its deep and admirable commitment to principle.

My essay focuses on Professor Bone's important assertion about the relationship between procedure's "is" and what procedure ought to be, one that entails a set of claims about the relationship between substance and procedure.<sup>4</sup> When rule-makers engage in procedural reform, they are not free to do whatever they want. Rather, they must take seriously the purposes presently served by civil adjudication, one of numerous processes for social adjustment in American life. What civil adjudication does, in other words, has to inform what procedure should become. Put simply, civil adjudication's core purpose is "to resolve cases according to the substantive law."<sup>5</sup> Procedural reform must honor this purpose because procedures exist to enable civil adjudication to function. Rule-makers need to interpret substantive liability regimes, identify the interests they aim to promote, and account for these interests with the procedures they craft.

Plenty of procedural scholarship emphasizes process values, civil litigation's democratizing potential, and other matters independent of substantive outcomes. Above all, however, many proceduralists care most about the results civil adjudication generates. Professor Bone's treatment of the relationship between substance and procedure is thus invaluable. No other methodology enables proceduralists to approach the blurry line between them with anywhere near the theoretical rigor that Professor Bone's promises.

But Professor Bone has more than theory to offer. His methodology may chart a path out of our current procedural distress. Ideological conflict has flummoxed meaningful procedural reform for several decades, a time during which American civil

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4. See, e.g., Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236–37 (1931) (discussing the relationship between the law's "is" and its "ought").
  5. ROBERT G. BONE, JUSTIFYING LITIGATION REFORM (forthcoming 2023) (manuscript at 70) (on file with author) [hereinafter JUSTIFYING LITIGATION REFORM (Manuscript)].

adjudication has fallen into a state of crisis. Most lawsuits in this country have an unrepresented party on at least one side of the “v.”<sup>6</sup> a state of affairs that contributes to yawning inequality. For much of civil adjudication, as Norman Spaulding aptly observes, “there is alarming evidence of failure, and the more marginal the relevant population of individual claimants, the more systemic the failure[.]”<sup>7</sup>

I am optimistic that Professor Bone’s methodology offers a guide to procedural reform properly pursued. As with any account as ambitious as what *Justifying Litigation Reform* offers, questions remain. Professor Bone surely has good answers, and they will further buttress the persuasive case he makes.

A first set of questions involves the challenge of introducing substance into procedure. Professor Bone is confident that rule-makers can legitimately account for substantive interests as they craft procedural rules and do not need to abide by a trans-substantivity principle to protect against ideologically driven rule-making. Rule-makers can use what he calls “interpretation” to identify substantive values, then align procedures with these values, without crossing boundaries that define the legitimate scope of their authority. Does interpretation offer enough to generate consensus on what are often deeply contested matters of value that lie just below procedure’s surface? Even if interpretation’s constraints are meaningful, are the benefits of substance-specific rules sufficient to merit the considerable effort needed to craft them?

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6. David Freeman Engstrom, *Introduction: Civil Justice at the Crossroads*, in *LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE* 1, 3 (David Freeman Engstrom ed., 2023) (“In roughly three-quarters of civil cases filed in state courts, at least one side lacks a lawyer.” (first citing *PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT’L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* iv, vi, 32 (2015); and then citing *LEGAL SERVS. CORP., THE JUSTICE GAP. MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017))).
  7. Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 *HASTINGS CONST. L.Q.* 261, 266 (2021).

My other set of questions involve the challenge of keeping substantive value out of procedure. Can our civil justice system regain its health with procedural reform that simply enables civil adjudication to do a better job at realizing outcomes the substantive law commands? Or does civil adjudication need a new purpose, beyond what Professor Bone identifies for it, to slow the contributions litigation currently makes to yawning socioeconomic inequality? Civil adjudication's "is" must constrain its "ought," Professor Bone argues, and no plausible interpretation of what civil adjudication does could cast it as an institution primarily focused on socioeconomic equality. But is civil adjudication's "is" what Professor Bone describes? Or has Professor Bone idealized what civil adjudication does against the backdrop of a more concerning reality?

I ask these questions not to strike any note of skepticism but because Professor Bone, more so than any proceduralist, can answer them rigorously. He is the right person to show the way toward a better procedural future, as *Justifying Litigation Reform* makes amply evident.

## I. Problems With Bringing Substance into Procedure

### A. *A Summary of the Case Against Trans-Substantivity*

Professor Bone's case against trans-substantivity follows logically from his claims about the core purposes civil adjudication and, by extension, civil procedure serve. Best understood within the larger framework of American government, Professor Bone argues civil adjudication's various aspects reflect its core purpose: "to resolve cases according to the substantive law, subject to the constraint that any system of adjudication must honor procedural rights and other fairness constraints."<sup>8</sup>

As Professor Bone writes, "a procedural system should be judged in large part by how well" civil adjudication vindicates this core purpose.<sup>9</sup> If adjudicators were infallible, all-knowing

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8. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 71.

9. *Id.*

machines, civil adjudication would need no procedure. A plaintiff would file a case, and the justice machine would automatically generate an outcome perfectly aligned with what the substantive law requires. Human and institutional imperfections and the errors they cause make procedure necessary. It exists to enable civil adjudication to function most successfully. Hence procedure's "primary purpose": "*to manage the risk of outcome error in an optimal way.*"<sup>10</sup>

Error risk management involves several considerations. They include the "seriousness" of the harm caused when adjudication produces an erroneous outcome. This seriousness, in turn, depends on "the social importance of the substantive interests at stake."<sup>11</sup> Error risk management also accounts for "the likelihood that [an] error happens." Finally, optimal procedural design must consider "process costs."<sup>12</sup>

These fundamentals yield Professor Bone's case against trans-substantivity. Seriousness of harm and the likelihood that an error will occur depend, at least in part, on the contours of the particular substantive legal domain at stake in the litigation. A plausibility pleading rule, for instance, may produce few *false negatives*, or meritorious cases dismissed at the pleading stage, in breach of contract cases involving sophisticated commercial litigants. These parties will know a good deal about the circumstances of their agreement without discovery and can readily plead facts that "plausibly suggest" liability.<sup>13</sup> A notice pleading standard may attract cases that should not be filed, increasing process costs and the problem of *false positives* or meritless cases that succeed.

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10. *Id.* at 74.

11. *Id.* at 84.

12. *Id.*

13. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

By contrast, the plausibility pleading rule may generate more false negatives in employment-discrimination cases,<sup>14</sup> perhaps because liability turns on state-of-mind evidence only available through discovery.<sup>15</sup> Moreover, a false negative in an employment-discrimination case entails a greater harm than a false negative in the breach of contract case. Properly interpreted, the substantive law signals that a commercial plaintiff has only “ordinary interests,” of an economic nature, at stake. By contrast, discrimination entails a “serious moral wrong” that, properly interpreted, the substantive law values considerably higher.<sup>16</sup> A single, trans-substantive pleading rule, then, causes procedural doctrine to misfire. Substance-specific rules tailored to the two liability regimes—plausibility pleading for breach of contract cases, notice pleading for discrimination cases—would enable procedure to discharge its error risk management function more successfully.

*B. The Challenges of Substance-Specificity*

**1. Interpretation and Value Neutrality**

Professor Bone’s case against trans-substantivity faces a significant obstacle internal to his theory of procedural reform. He insists upon fit between procedure’s “is” and procedure’s “ought.” Procedural reformers should depart from entrenched features of our procedural system only if no “reasonable justification” for them exists.<sup>17</sup>

Trans-substantivity’s centrality in modern civil procedure dates back at least to Jeremy Bentham.<sup>18</sup> In fact, Bentham identified the same core purpose for civil adjudication that Professor

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14. Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2170 (2015).

15. *Id.* at 2123 n.22.

16. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 92–95.

17. *Id.* at 53.

18. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 385 (2010).

Bone posits. But this purpose—“the execution of the commands issued, the fulfillment of the predictions delivered, of the engagements taken, by the system of substantive law,” as Bentham put it<sup>19</sup>—led him and every subsequent generation of procedural reformer through 1938 to trans-substantivity.<sup>20</sup>

These earlier generations of reformers believed that substance specificity produced complexity that interfered with procedure’s error risk management function. Cases turned on whether lawyers stumbled on procedural technicalities, not what the applicable substantive law had to say about the relevant facts.<sup>21</sup> But trans-substantivity acquired another justification in 1934 when the locus for procedural reform shifted to court-supervised rule-makers. The principle guaranteed that rule-making by unelected technocrats would meet an adequate threshold of substantive value neutrality.<sup>22</sup> A license to engage in substance-specific rule-making would enable a rule-maker unsympathetic to the goals of antitrust law, for instance, to craft a restrictive procedural rule to thwart even meritorious antitrust cases. Court-supervised technocrats should not wield such power over substantive liability policy. Trans-substantivity ensured that they did not.

Litigators specialize a good deal more than they did in the 1930s,<sup>23</sup> so perhaps they can better handle the sort of procedural complexity that substance-specificity entails. But Professor Bone’s methodology for substance-specific rule-making requires exactly the weighing of substantive interests that trans-substantivity prevents in the name of rule-making’s legitimacy. As noted, error risk management assesses the harm caused by an

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19. 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 477 (1827).

20. Marcus, *supra* note 18, at 385–86, 389, 396–97 (quoting and discussing Bentham’s work).

21. *Id.* at 385, 389.

22. *Id.* at 395–99.

23. *E.g.*, Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1003–11 (1994).

erroneous outcome, an estimate that in turn accounts for the “social importance of the substantive interests at stake.”<sup>24</sup> To craft an antitrust-specific rule, in other words, rule-makers must determine the interests protected by the antitrust laws and their significance.

Professor Bone has argued convincingly that, since at least the 1970s, considerations of substantive value have so infused matters of procedural design that procedure has lost any plausible claim to value neutrality.<sup>25</sup> But trans-substantivity can coexist with generalized skepticism about the independence of substance from procedure.<sup>26</sup> Rule-makers knowing that their choices will have significant substantive implications and business-friendly rule-makers crafting a defendant-friendly rule for antitrust cases involve quite different intersections of substantive value with procedure.

But, Professor Bone’s account suggests, rule-makers do not need the crude protection trans-substantivity offers against nakedly ideological rule-making. The constraint of “interpretation” can legitimate substance-specific rule-making. The choice of appropriate pleading standards for civil rights and breach of contract cases, for instance, requires distinctions that “reflect judgments about relative value” concerning the social interests the different domains of substantive law encode.<sup>27</sup> “[T]hese judgments,” Professor Bone writes, “are interpretive. Assigning value to substantive interests requires interpreting the substantive law and the reasons why that law was adopted.”<sup>28</sup> “People

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24. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 84.

25. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 900 (1999).

26. Marcus, *supra* note 18, at 399–400.

27. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 84.

28. *Id.*



can disagree about such matters,” Professor Bone concedes, but “that does not mean any interpretation is as good as any other.”<sup>29</sup>

Rooted in Ronald Dworkin’s jurisprudence, the sort of interpretation Professor Bone envisions obliges an interpreter to fit an interpretation to existing legal materials, then justify that interpretation with a claim about the most normatively attractive principle that accounts for these materials as they are.<sup>30</sup> Fit only goes so far, as an interpreter’s “theory of fit will often fail to produce a unique interpretation.”<sup>31</sup> “In that case,” Dworkin noted, “substantive political theory . . . will play a decisive role.”<sup>32</sup> The interpreter justifies the interpretation by reference to their view of the “sounder principle of justice.”<sup>33</sup> In this respect, “interpretation in law is essentially political.”<sup>34</sup> Professor Bone surely accepts as much but nonetheless must believe that the constraints of interpretation are sufficient to render trans-substantivity obsolete.

But does a Dworkinian interpretive exercise have enough bite to succeed as a legitimizing constraint? Consider a contrast between breach of contract cases and police-misconduct cases brought pursuant to 42 U.S.C. § 1983. Consistent with other claims in his book, I assume Professor Bone would claim that, properly interpreted, substantive § 1983 doctrine values plaintiffs’ interests in moral terms. If so, rule-makers should adopt a notice-pleading standard for these cases, one that is less likely to produce false negatives.<sup>35</sup> By contrast, since contract law, properly interpreted, values the interests of commercial litigants

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29. *Id.*

30. *See id.* at 12; *see also* Cass Sunstein, *Second-Order Perfectionism*, 75 *FORDHAM L. REV.* 2867, 2872 (2007)

31. Ronald Dworkin, *Law as Interpretation*, 9 *CRITICAL INQUIRY* 179, 195 (1982).

32. *Id.*

33. *Id.* at 196.

34. *Id.*

35. *See* JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 95.

solely in economic terms, rule-makers could opt for a plausibility pleading threshold. False negatives in this context matter less.

A victim-protective interpretation, however, hardly fits key aspects of § 1983 doctrine, especially relative to contract law. Consider the following contrasts:

- A breach of contract plaintiff prevails if they show that the defendant breached the contract. This plaintiff does not have to establish a clear and unequivocal breach. By contrast, a police-misconduct plaintiff loses, even if the defendant violated their right, unless they can show that the right was “clearly established” at the time of violation.<sup>36</sup>
- If appellate guidance from factually similar breach of contract cases is lacking or unclear, a trial judge can still deny a motion to dismiss or for summary judgment if they believe that contract law, best extended, creates liability. Under similar circumstances a judge must dismiss a police misconduct case.<sup>37</sup>
- Defendants in breach of contract cases have no particular entitlement to protection from the burdens of litigation. Police defendants do.<sup>38</sup>

If anything, these features better fit a police-protective principle than a victim-protective one and thus counsel in favor of a heightened pleading standard, one designed to minimize false

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36. 8 ARTHUR L. CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 39.11 (rev. ed. 2023) (noting that “the final burden of persuasion by a preponderance of the evidence” should be borne by plaintiffs in a breach-of-contract claim); *see, e.g.*, *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

37. *See, e.g.*, *Zoll Medical Corp. v. Barracuda Networks, Inc.*, 585 F. Supp. 3d 128, 137–38 (D. Mass. 2022); *James v. N.J. State Police*, 957 F.3d 165, 170–71 (3d Cir. 2020).

38. *See, e.g.*, *Salt Lake City Corp. v. Sekisui SPR Americas*, No. 2:17-cv-01095-JNP-CMR, 2020 WL 11273020, at \*2 (D. Utah May 20, 2020) (slip. op.); *Mitchell v. Forsyth*, 472 U.S. 511, 525–526 (1985).

positives.<sup>39</sup> An interpreter could reject a police-protective principle as normatively unattractive but only by exercise of political judgment.

The interpretive exercise is unprincipled if a rule-maker could simply ignore the law's signals that disfavor police-misconduct plaintiffs' interests relative to breach-of-contract plaintiffs' interests. If a rule-maker could fit a victim-protective principle to § 1983 doctrine that evinces considerable concern for police defendants, then core features of the substantive liability regime impose a weak constraint on interpretive outcomes. Dworkin's critics, on the right and left, challenged the constraint his interpretive method placed on outcomes otherwise driven by ideology.<sup>40</sup> Why would the interpretation of substantive liability regimes yield sufficiently concrete and determinate answers about relative value sufficient to dispel concerns about illegitimately ideological rule-making, the sort that trans-substantivity presently disables?

## 2. Why Stop with Substance-Specificity?

If rule-makers indeed have the capacity to reach rigorous interpretive agreement, trans-substantivity may be obsolete. But rule-makers would act arbitrarily—at least as a matter of principle—if they stopped with substance specificity as they crafted more particularized rules. The harm and frequency of error may indeed vary from one substantive domain to the next. But a lot of other forces can produce disparate error rates, even within

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39. Judges straying from a commitment to trans-substantivity in the administration of pleading doctrine did so most prominently in § 1983 litigation involving law enforcement, at least before *Leatherman v. Tarrant County* in 1993. See Christopher M. Fairman, *Heightened Pleading*, 81 TEXAS L. REV. 551, 574 (2002). The sorts of features described above offered judges ample interpretive material to justify defendant-friendly procedure. See, e.g., *Elliott v. Perez*, 751 F.2d 1472, 1476 (5th Cir. 1985).

40. See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 119–130 (1997); Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1698 (1998).

particular substantive domains. If error risk management drives procedural design, should rule-makers follow Professor Bone's methodology all the way down and, to borrow a concept from Joanna Schwartz's work, craft "ecosystem-specific" rules?<sup>41</sup>

As Professor Schwartz documents, Philadelphia and Houston have the fourth- and fifth-largest police departments in the country, respectively, but plaintiffs sue Philadelphia police officers ten times as often as Houston police officers, and Philadelphia plaintiffs recover one hundred times more than their Houston counterparts.<sup>42</sup> Particular regard for constitutional rights in Houston surely does not explain the contrast.<sup>43</sup> Rather, Professor Schwartz argues, the disparities result from differences in the two cities' litigation "ecosystems." On Schwartz's account:

Civil rights ecosystems are . . . interconnected and interactive collections of people (including plaintiffs' attorneys, community organizers and activists, state and federal judges, state and federal juries, local government officials, and defense counsel), legal rules and remedies (including state tort law, § 1983 doctrine and defenses, and damages caps), and informal practices (including litigation, settlement, and indemnification decisions).<sup>44</sup>

Plaintiffs bring more cases in Philadelphia than in Houston because "[e]very aspect of Philadelphia's ecosystem," ranging from "more expansive interpretations of federal causes of action" to "defense counsel less likely to file dispositive motions," "is more conducive to civil rights litigation than Houston's ecosystem."<sup>45</sup>

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41. See generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539 (2020).

42. *Id.* at 1540–41.

43. See *id.* at 1542.

44. *Id.* at 1543.

45. *Id.* at 1579.

Assume a rule-maker contemplating a pleading rule for § 1983 police-misconduct litigation indeed interprets the substantive law to find particular concern for plaintiffs' moral interests encoded in it. The rule-maker should propose plaintiff-friendly pleading rules, to minimize the risk of false negatives. But this rule may yield different results in Philadelphia than in Houston due to ecosystem differences.<sup>46</sup> The Philadelphia ecosystem's efficiency at steering possible cases to competent lawyers may mean that few meritorious § 1983 claims against police officers presently go unfiled, even without the plaintiff-friendly pleading standard. The new plaintiff-friendly rule may simply fuel meritless filings, increasing false positives with no countervailing decline in false negatives.

Perhaps the new rule in Houston would produce a countervailing increase in meritorious lawsuits, but not necessarily. Various inefficiencies and restrictions in Houston may mean that meritorious cases never get filed. The new rule may make too modest an adjustment to correct the problem. Indeed, the new rule may actually increase false negatives. Given the ecosystem's hostility, perhaps plaintiffs' lawyers willing to file § 1983 claims in Houston do so with the goal of quick and modest settlements. The new rule may embolden these lawyers to file more cases. Alarmed at the spike in filings, the city might switch tactics and litigate every case to the hilt—not just the ones that would have gone unfiled previously, but also the ones the city had previously settled. Unprepared to do battle, the small number of overwhelmed plaintiffs' lawyers may simply fold.

The foregoing is rank speculation, of course. I would select the plaintiff-friendly pleading standard and hope for the best. But rule-makers should not act on speculation, at least as far as principle goes. If they pursue error risk-management with single-

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46. *Cf. id.* at 1546 (“The complexity and interconnected nature of civil rights ecosystems, and their regional variation, make it nearly impossible to design generally applicable legal rules that achieve precise policy goals or have a consistent impact.”).

minded focus, the same principle that requires trans-substantivity's demise should likewise require rule-makers to consider the many ecosystem-specific factors that have significant impacts on case selection and outcomes.

### 3. Trans-Substantivity and the Second Best

Ecosystem-specific rule-making would mean § 1983-specific rules for Houston and Philadelphia—and Los Angeles, New York, Chicago, Austin, and so on.<sup>47</sup> The exercise would entail astronomical administrative costs.<sup>48</sup> Moreover, as Professor Bone has argued before, localized rule-making creates a host of possible problems.<sup>49</sup> Such concerns offer a pragmatic justification for substance-specificity as the right stopping point. Perhaps substance-specificity enables procedure to vindicate its error risk management purpose better than when hamstrung by trans-substantivity, at an acceptable administrative cost and without localism's pathologies.

Of course, substance-specific rule-making itself likely entails considerable, perhaps prohibitive, administrative cost.<sup>50</sup> But

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47. An example is the § 1983-specific rules that the Southern District of New York promulgated for certain cases involving the New York Police Department. *See* S.D.N.Y. R. 83.10, *Plan for Certain § 1983 Cases Against the City of New York (Southern District Only)*, U.S. DISTRICT CT. S. DISTRICT N.Y. (Sept. 23, 2014), <https://www.nysd.uscourts.gov/sites/default/files/pdf/Local-Civil-Rule-83.10.Final.pdf> [<https://perma.cc/6N89-79CW>]. I thank Alexi Lahav for bringing these rules to my attention.

48. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 82–83.

49. Bone, *supra* note 25, at 931–33.

50. An effort to craft social-security-litigation-specific rules lasted from 2016 to 2022, even though no stakeholder made any plausible claim that the proposed rules would favor or disfavor any party to the litigation. Memorandum from John D. Bates, Chair, Advisory Comm. on Civ. Rules, to Hon. David G. Campbell, Chair, Committee on Rules of Prac. & Proc. 11–12, (May 27, 2020) (on file with the Judicial Conference of the United States). The changes addressed an obvious procedural misfit and were entirely technocratic in nature. Conditions

pragmatic concerns are not the only reason to question the substance-specific stopping point. The principled case for substance-specificity must rebut concerns prompted by second best theory.<sup>51</sup> If ideal conditions for rule-making do not exist due to administrative cost and other pathologies, “the best” rule-making “policy” may not be the “one that approximates an unobtainable ideal as closely as possible.”<sup>52</sup> Put differently, if pragmatic concerns require deviation from ideal rule-making, other deviations, including a rejection of substance-specificity, may better serve procedure’s core purpose.

Another police misconduct hypothetical illustrates this possibility. Assume that rule-makers adopt a § 1983-specific mandatory initial disclosures rule. The new rule requires government defendants to identify and reveal information about all witnesses and evidence they believe is “relevant to the subject matter of the action.”<sup>53</sup> In theory this rule would lower the rate of false negatives. Fewer plaintiffs will lose because they fail to request relevant evidence or depose the right witness. Professor Bone’s methodology favors this result if plaintiffs in § 1983 cases indeed have moral interests at stake.<sup>54</sup>

Depending on ecosystem dynamics, however, the new rule may have no effect or even cause harm. Assume that in Houston, an unfavorable ecosystem means that only a small number of unsophisticated lawyers file § 1983 cases despite rampant police misconduct. These lawyers rely on a volume business to make a living settling cases cheaply and quickly. The new rule offers them little benefit because they rarely litigate cases past the pleading stage. Moreover, Houston’s city attorney tells these

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were ideal for substance-specific rule-making, in other words, and still the process took six years.

51. *E.g.*, Gary Lawson, *The Epistemology of Second Best*, 100 TEXAS L. REV. 747, 748 (2022); Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 431 (2003).
52. Vermeule, *supra* note 51, at 431; *see also* Lawson, *supra* note 51, at 748.
53. ARIZ. R. CIV. P. 26.1(a)(8)–(9).
54. *But see infra* Part I(A).

plaintiffs' lawyers that, should they try to leverage the new rule to demand more and better settlements, the city will end an informal policy of offering quick, cheap settlements. Instead, the city attorney will outsource its defense to a private firm with a financial incentive to litigate aggressively. The same threat, added to the factors that already make Houston's ecosystem hostile to § 1983 litigation, nullifies the new rule's potential to attract new plaintiffs' lawyers to the field. The new rule thus has no impact on the risk of outcome error in Houston.

Various features of the Philadelphia litigation ecosystem have already attracted many skilled lawyers to civil rights litigation. Moreover, the ecosystem operates efficiently, meaning that most victims with meritorious claims find their ways to lawyers willing to file cases. Energized by the new rule, these lawyers file weaker cases. Philadelphia's city attorney settles most of them rather than weather additional discovery costs. False positives increase with no effect on false negatives. Or worse—the new rule may increase the rate of false negatives. Learning from Houston, Philadelphia's city attorney contracts out its § 1983 docket to an aggressive private firm. More highly resourced plaintiffs' firms prepared to go to the mattresses continue to file cases. But these lawyers, already adept at discovery, benefit little from the new rule. By contrast, less sophisticated plaintiffs' lawyers respond to the city's new approach to litigation defense by exiting the field altogether, leaving meritorious cases unfiled. Alternatively, if the new rule attracts weak or meritless cases, Philadelphia judges may react with heightened suspicion to the entire § 1983 docket. Meritorious cases that would have succeeded before now lose.

Again, all of this is rank speculation. My guess is that, overall, the new rule would help plaintiffs more than it would hurt them. But rule-makers could rebut second-best concerns rigorously only by knowing to an acceptable degree of empirical certainty how the new rule would interact with ecosystem-specific dynamics. This knowledge requires the very administrative costs



that make particularized rule-making all the way down implausible.

## II. Problems With Keeping Substance Out of Procedure

Professor Bone's case against trans-substantivity contemplates the introduction of substance into procedure. But in another sense his methodology keeps substance out of procedure. Because civil adjudication's core purpose "is to resolve cases according to the substantive law,"<sup>55</sup> procedure as civil adjudication's facilitator must take interests as encoded in the substantive law as fixed, at least in a weak sense. Nothing in Professor Bone's account rejects the possibility that, if a case assumes a new procedural form, the novelty may "enable[] courts and legislatures to confront new questions of liability policy that had previously lain quiescent or gone wholly unaddressed."<sup>56</sup> In other words, as Profs. Stephen Burbank and Tobias Wolff aptly put it, procedure may "catalyze innovation in the liability policies of the underlying substantive law."<sup>57</sup> But Professor Bone's priority of substance over procedure would oblige courts to justify innovation with a plausible interpretation of the applicable substantive legal regime. Professor Bone's methodology rejects the claim that procedure can validly pursue values independent from what the substantive law encodes, at least if doing so disrupts error risk management.

This ordering necessarily excludes from procedure an independent non-subordination or anti-subordination purpose.<sup>58</sup> This purpose would ask procedure either to protect against civil

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55. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 70.
  56. Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 61 (2010).
  57. *Id.* at 62. Geoffrey Hazard argued that this sort of innovation, especially to serve social justice interests, was enabled by trans-substantivity. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246-47 (1989). Hat tip to Alexi Lahav.
  58. Marcus, *supra* note 18, at 385.

adjudication's contributions to socioeconomic equality (non-subordination) or to work affirmatively against such inequality (anti-subordination). Substantive law's primacy means that procedure could advance non-subordination or anti-subordination goals, but only by fortunate happenstance as it engages in error-risk management. Procedure's secondary status in this respect, Professor Bone's account suggests, reflects civil adjudication's "is." No one could interpret what civil adjudication does and credibly claim that it exists to pursue non- or anti-subordination. However attractive, this purpose belongs to a different institution in our system of government.<sup>59</sup>

This priority of substance over procedure may pose problems for the current American procedural crisis. Procedures that privilege error risk management above all else may not just produce outcomes that mirror pre-existing inequalities, whether those in society or those encoded in the substantive law. They may amplify or even exaggerate them. Moreover, for broad tranches of the American civil justice docket, civil adjudication performs poorly at the task Professor Bone identifies for it. Should procedure's purpose be limited by an idealized version of civil adjudication's "is," when what civil adjudication actually does is often quite different and, amidst an American inequality crisis, deeply troubling?

*A. The Amplification of Existing Inequalities*

Assume that rule-makers have to figure out the right substance-specific pleading standard for § 1983 police misconduct litigation. They believe that, because substantive § 1983 doctrine treats police misconduct plaintiffs with disfavor relative to most other litigants, the best principle that justifies the doctrine is a police-protective one. (As discussed, Professor Bone may disagree with this interpretation, but its normative appeal depends on ideology.) Rule-makers thus believe they must craft a pleading

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59. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 63; *see also* Bone, *supra* note 25, at 948.

standard that protects police officer defendants from false positives.<sup>60</sup> They therefore opt for a heightened pleading standard.

The result may not mirror substance but distort it. The various aspects of substantive § 1983 doctrine evolved, at least between 1993 and the mid-2000s,<sup>61</sup> in litigation governed by a notice pleading standard.<sup>62</sup> Some courts may have strengthened qualified immunity's bite because they found the pleading standard insufficient to protect government officials against the burdens of discovery.<sup>63</sup> The substantive legal regime, in other words, may have developed with a set of procedural assumptions in mind.

Daryl Levinson's influential critique of "rights essentialism" faults constitutional law theory that insists that rights come before remedies. Rather, he argues, remedial concerns have constitutive significance for rights elaboration. An interpretive exercise that starts and ends with the substantive legal regime before turning to procedure risks something like "substantive law essentialism"—a neglect of the reciprocal relationship, in terms of law elaboration, between substance and procedure.<sup>64</sup> To peg procedural reform to an interpretation of the substantive legal regime risks a procedure that exaggerates underlying imbalances in that regime.

### B. *The Ideal and the Real in Civil Adjudication's "Is"*

An insistence that procedure serve values of non-subordination or anti-subordination would protect against such

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60. *E.g.*, *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

61. *Leatherman v. Tarrant County*, 954 F.2d 1054 (5th Cir. 1992).

62. *Id.* at 1057.

63. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982) (reasoning that a goal of qualified immunity is to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery").

64. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884 (1999). Another hat tip to Alexi Lahav for encouraging the development of this point.

exaggerations when they would otherwise deepen preexisting inequalities. But, as the claim goes, no one could interpret what civil adjudication does in a manner consistent with a non- or anti-subordination purpose. It exists to realize values in the substantive law.

To what extent does Professor Bone's assertion about civil adjudication's purpose flow from an idealized version of what it does? At present American civil adjudication does not actually resolve cases according to the substantive law very well. It fails routinely in debt collection and eviction cases, which together total half of the American civil docket.<sup>65</sup> Whether and how often outcomes in millions of debt collection cases match substantive legal entitlements are entirely unknown. Most consumer-debt defendants default, often for reasons that have nothing to do with the strength of claims and defenses.<sup>66</sup> When defendants do file answers, one study documented, creditor plaintiffs routinely

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65. These cases proceed almost entirely in state court, and thus data on case filings are hard to assemble. Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, DAEDALUS, Summer 2014, at 129, 129–31. One study used 2013 data to determine that eviction (19%) and debt collection (25%) cases together compose 44% of the state courts' dockets. PAULA HANNAFORD-AGOR, COURT STATISTICS PROJECT, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES 1 (2019). In an average year, landlords file 3.6 million eviction cases. Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Porton & Matthew Desmond, *Estimating Eviction Prevalence Across the United States*, PROC. NAT'L ACAD. SCIS. U.S., May 24, 2022, at 1, 1. Using these numbers for a crude estimate, there are about 4.7 million consumer debt cases each year in the United States. Roughly, the 8.3 million eviction and consumer debt cases together exceed the federal courts' civil docket (in 2021, approximately 345,000 cases) by a factor of 24. See *U.S. District Courts—Judicial Business 2021*, U.S. CTS. (2021), <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021> [<https://perma.cc/WH62-F83L>] (noting a 27% decrease in civil case filings in federal court in 2021).

66. FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (Jul. 2010).

voluntarily dismiss their complaints rather than assume the costs of litigating a contested dispute.<sup>67</sup>

The situation is probably worse in eviction adjudication, to potentially disastrous consequences.<sup>68</sup> Tenants almost never secure relief for breaches of the implied warrant of habitability, a defense eviction adjudication has almost entirely failed.<sup>69</sup> The dynamics of eviction adjudication have systematically negated other substantive legal protections tenants ostensibly enjoy.<sup>70</sup>

Professor Bone rightly acknowledges these problems. But he insists that these litigation conditions are pathological precisely because, properly interpreted, civil adjudication exists to vindicate the substantive law.<sup>71</sup> Two features of debt collection litigation, high case volume and gross disparities of litigating power, are problematic because they skew error risk systemically to favor institutional plaintiffs.<sup>72</sup> Civil adjudication's purpose gives procedural reform its obvious goal: to reallocate error risk more optimally.<sup>73</sup>

At what point, though, do the pathologies become so entrenched and extensive that they actually constitute civil

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67. See Mary Spector, *Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257, 262–63 (2011) (noting that when a default judgment is not possible, plaintiffs choose to dismiss rather than litigate); Judith Fox, *Do We Have a Debt Collection Crisis - Some Cautionary Tales of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 385 (2012) (“It was common to see dismissals without prejudice in cases where the defendant filed an answer.”).

68. E.g., GRACE HIMMELSTEIN & MATTHEW DESMOND, *EVICTION AND HEALTH: A VICIOUS CYCLE EXACERBATED BY A PANDEMIC 3* (Health Affairs, Apr. 1, 2021).

69. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 150 (2020).

70. Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847, 888–96 (2023).

71. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 66.

72. *Id.* at 156.

73. *Id.* at 157–159.

adjudication's purpose?<sup>74</sup> In eviction adjudication, for instance, outcomes fail to match what the substantive law commands as if by design. Consider the following features common in many jurisdictions:

- Tenants have many fewer days to file answers to complaints than defendants in other litigation have, denying tenants reasonable time to locate legal help;<sup>75</sup>
- Some jurisdictions assign eviction cases to adjudicators without legal training;<sup>76</sup>
- Tenants often must place allegedly unpaid rent amounts in escrow before they can raise an implied warrant of habitability defense;<sup>77</sup> and
- Merits hearings usually happen within a very short time of the complaint's filing, often no more than one

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74. Cf. Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, in A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 32, 38 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) (“The recognition of procedure’s relationship to violence makes abundantly clear that procedural choices protect or reform particular relationships of power rather than simply reconciling internal process values in a neutral fashion.”).

75. Compare FLA. STAT. § 51.011 (five days’ notice in eviction cases), with FLA. R. CIV. P. 1.140(a) (twenty days’ notice). Compare CAL. CODE CIV. P. § 1167(a) (five days’ notice in eviction cases), with *id.* § 412.20(a)(3) (thirty days’ notice).

76. In Texas and Louisiana, for instance, eviction cases are filed in Justice Courts. TEX. PROP. CODE § 24.004 (West 2013); LA. STAT. ANN. § 13:2586 (2018). A person does not need to be a law school graduate or admitted to the bar to serve as a justice of the peace. *E.g.*, Homepage of Texas Justice Court Training Center, TEX. ST. UNIV., <https://www.tjctc.org/justices-of-the-peace.html> [<https://perma.cc/X3MZ-64CB>]; LA. STAT. ANN. § 13:2582 (2020).

77. David A. Super, *The Rise and Fall of the Implied Warrant of Habitability*, 99 CAL. L. REV. 389, 424 (2011).

or two months in contested cases.<sup>78</sup> In Texas, for instance, a trial must commence no fewer than ten and no more than twenty-one days after a landlord files a petition for eviction and can only be delayed up to seven days.<sup>79</sup>

Analyzing these features, an interpreter could quite reasonably conclude that eviction adjudication proceeds not to resolve cases according to the substantive law, but to maximize landlord control over rental properties.<sup>80</sup> A procedural reform designed, say, to vindicate implied warranty of habitability defenses more effectively would actually disrupt this purpose.

### C. *The Inadequacy of Error Risk Management*

Can procedure offer a solution to what ails much of present-day civil adjudication without having to admit any purpose other than error risk management into the mix? If tenants routinely default and get evicted for unjust reasons, give them thirty days instead of five to file answers. If debt buyers routinely secure default judgments without any chain of title evidence, require them to attach the requisite documentation to their complaints.<sup>81</sup> These sorts of procedural reforms likely have considerable value

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78. *E.g.*, CALIFORNIA COURTS SELF-HELP GUIDE, *What to Expect at an Eviction Trial: Tenant*, <https://selfhelp.courts.ca.gov/eviction-tenant/trial> [https://perma.cc/T3ZE-3DE9]; TENANT RESOURCE CENTER, *Your Rights: Court Date*, [https://www.tenantresourcecenter.org/court\\_date](https://www.tenantresourcecenter.org/court_date) [https://perma.cc/53KJ-JUXZ].

79. HARRIS COUNTY JUSTICE OF THE PEACE COURTS, *Filing Eviction Cases*, <http://www.jp.hctx.net/evictions/filing.htm>.

80. The historical reason for summary eviction proceedings seems to be that they replaced self-help, which was fraught with violence. *E.g.*, *Lindsey v. Normet*, 405 U.S. 56, 71 (1971).

81. *E.g.*, MICH. JUST. FOR ALL COMM'N, ADVANCING JUSTICE FOR ALL IN DEBT COLLECTION LAWSUITS 19–20 (2022), [https://www.courts.michigan.gov/4ac33d/siteassets/reports/special-initiatives/justice-for-all/jfa\\_advancing\\_justice\\_for\\_all\\_in\\_debt\\_collection\\_lawsuits.pdf](https://www.courts.michigan.gov/4ac33d/siteassets/reports/special-initiatives/justice-for-all/jfa_advancing_justice_for_all_in_debt_collection_lawsuits.pdf) [https://perma.cc/KUH2-36H3].

and deserve serious consideration.<sup>82</sup> They would strengthen adjudication's capacity to vindicate its error risk management function in domains where disparities in resources and other litigation dynamics routinely thwart it.

But can error risk management do enough work?<sup>83</sup> An extended hypothetical illustrates how procedural reform limited by an error risk management purpose may be unable to resist changes that exacerbate inequality. Assume that six months from now Apple develops text message integrity software. This software ensures that messages actually come from the person or entity purporting to send them, and it can confirm the legitimacy of links and attachments included in or appended to messages. This software is close to foolproof. Other companies quickly follow suit, and within a year Americans view text messaging as particularly trustworthy.

Recent scholarship has persuaded rule-makers that the personal service of process norm rests on outdated assumptions about communication.<sup>84</sup> They seize on Americans' newfound confidence to craft a new service-by-text rule. Rather than pay for a process server, a plaintiff can simply serve the complaint by text, providing notice just as effectively as personal service at no

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82. Full disclosure—I presently work as an associate reporter on the American Law Institute's *Principles of the Law, High-Volume Civil Adjudication* project. This project is studying an array of possible reforms, including procedural ones, to improve debt collection, eviction, and other high-volume litigation. See *Principles of the Law, High-Volume Civil Adjudication*, AM. L. INST. (2022), <https://www.ali.org/projects/show/high-volume-civil-adjudication/> [<https://perma.cc/RMJ7-FDKG>].

83. For skepticism that adjustments of the scale of procedural reform can fix what ails American civil justice, see, e.g., Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 133–34 (2019) (“[C]ourt simplification, self-help, unbundled legal services, design thinking, and similar ideas address only short-term symptoms and perpetuate the underlying problems.”).

84. See generally Robin J. Effron, *The Invisible Circumstances of Notice*, 99 N.C. L. REV. 1521 (2021).



cost. “Sewer service” problems almost entirely disappear.<sup>85</sup> Litigation over proper service boils down to the technologically verifiable matter of whether the plaintiff texted the defendant at a number the defendant actively monitors.

By the terms of Professor Bone’s methodology, rule-makers should promulgate the new service-by-text rule. At a minimum, the new rule achieves the same quality of notice at lower process costs. It may actually lower false positive rates. With “sewer service” harder to pull off, the instances when defendants default in meritless cases because they never receive the complaint decrease.

But the cost savings this new rule creates may contribute to economic subordination. To an institutional plaintiff in consumer debt cases, the cost of litigating includes the filing fee (assume \$50); lawyers’ fees for drafting the complaint, filing a motion for a default judgment, and attending a default judgment hearing (assume \$500); and, in many states, the cost of personal service (assume \$100).<sup>86</sup> This total cost of \$650 places a bottom limit—say, \$1500—on the amount for which an institutional creditor is willing to sue.<sup>87</sup>

Service by text would eliminate the process server expense and thus cut the costs of litigation by 15%. These savings would lower the bottom limit and make a new tranche of consumer debts litigable, fueling litigation’s contribution to inequality. But a rule-maker could not resist the new rule for error risk management reasons. If courts routinely enter default judgments in meritless cases, process-server costs as a barrier to filing may protect against some false positives. But more targeted procedural

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85. *E.g.*, Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813 (2018).

86. *Debt Claims*, WISE CNTY. TEX., <https://www.co.wise.tx.us/253/Debt-Claims> [<https://perma.cc/E2KY-F9F6>].

87. For data on the amounts at stake in consumer debt litigation, see Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1739 (2022).

reforms can do this work far better, not just in the tranche of potential cases currently just below the bottom limit, but for all consumer debt cases.<sup>88</sup> No procedural designer would use essentially arbitrary service of process costs, ones that only protect against false positives in the cases for the lowest amounts, to do the job.

Professor Bone's differentiation among types of interests at stake in litigation offers a possible response. Most cases involving economic relations do not entail moral rights. But, while credit card companies and debt buyers have mere monetary interests, consumer defendants have "interests that the law values in moral terms."<sup>89</sup> This asymmetry obliges rule-makers to care much more about false positives than false negatives. The existing personal service requirement that keeps these cases out better vindicates the policies in the substantive law given the weight consumer debtors' moral interests must enjoy, even if it means that creditors cannot recover in plenty of instances when they have a legal entitlement to the money owed.

Here is where questions about interpretation's constraints return. A carveout that treats consumer debtors' interests differently than those of other parties to contracts requires an identifiable commitment in the substantive law to consumer debtors' moral interests. Professor Bone locates this commitment in the "[m]ultiple federal and state statutes" that "impose regulations on the credit industry to protect impoverished debtors from overreaching and abusive creditors."<sup>90</sup> Legal regimes regulating consumer debt may evince moral concern for debtors, but some skeptics find in them creditor-friendly preferences that have contributed to our current litigation crisis.<sup>91</sup> Moreover, webs of

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88. *E.g.*, MICH. JUST. FOR ALL COMM'N, *supra* note 81, at 19–20.

89. JUSTIFYING LITIGATION REFORM (Manuscript), *supra* note 5, at 155.

90. *Id.* at 155 n.282.

91. *E.g.*, Dalie Jimenez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. LEGIS. 41, 188 (2015) (concluding that the pathologies that have fueled consumer debt litigation are "primarily a result of regulatory failure");

federal and state regulations ostensibly protect the weaker parties to transactions in numerous markets, including those for securities, consumer products, insurance, and more. By their best interpretation, do all of these legal regimes intend to convey that weaker parties to these transactions have moral interests that procedure should particularly favor? If so, American civil procedure, with its distinctively neoliberal turn since the 1970s, has largely failed to realize the redistributive obligations encoded in numerous substantive regimes.<sup>92</sup> If not, what distinguishes the legal regulation of consumer debt as an interpretive matter from other substantive legal domains?

If the new service-by-text rule would lower process costs with no effect on error rates, a rule-maker could not reject it solely on grounds that the rule would amplify civil adjudication's contribution to economic inequality. To do so would elevate a freestanding non- or anti-subordination purpose over error risk management. To insist on procedure's subordination to substance in this manner, to fit an interpretation of civil adjudication's idealized "is" and not what it has become, amounts to a unilateral normative disarmament.

## Conclusion

My questions about substance in and out of procedure result from the simple fact that Professor Bone's book contains multitudes. I know of no other account that offers such a holistic, and holistically satisfying, guide to how to think about civil adjudication and procedural reform properly pursued. At a minimum, Professor Bone provides a methodology for thinking rigorously and productively about the relationship between substance and procedure. I expect Professor Bone can answer my questions with ease. Even without such response, his map of the blurry substance/procedure boundary is a major contribution. But his

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Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1434–39 (2020) (critiquing federal laws involving consumer debt).

92. See generally Luke Norris, *Neoliberal Civil Procedure*, 12 IRVINE L. REV. 471 (2022).

methodology is surely unique in its capacity to chart a path toward a stronger civil adjudication system. Procedural reformers who follow Professor Bone's vision will achieve greater justice and fairness in procedure, acting rigorously and with principle as they do so. When they do so, their work will prove a fitting tribute to a unique, and uniquely wonderful, career.