

## The Process Is the Problem

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### INTRODUCTION

Malcolm Feeley's pathbreaking book *The Process Is the Punishment* is a classic study of the gap between the law on the books and the law in action. In particular, Feeley exposes the tension between the ideal of "due process," which seeks to allow individuals an opportunity to be heard at a meaningful time and in a meaningful manner, with the reality of how criminal processes and procedures impact a litigant navigating through the criminal justice process in powerful ways. Although due process protections in theory protect defendants and preserve the ideal of serving justice, they developed largely without regard to cost. Feeley's book highlights the challenges and costs of invoking due process rights in various criminal settings.

Acknowledging the paucity of trials in the routine flow of criminal cases, Feeley's ethnographic exploration of lower criminal courts in New Haven reveals that most of the court's work gets done in the process of arraignment and other pretrial processes. In these settings, cases are often dismissed, guilt is pleaded, and fines are imposed. Feeley's exploration of the decision making at pretrial detention and release, the appointment of public defenders, adjudication, sentencing, and pretrial processes reveals that defendants often incur the costs of loss of pay, inconvenience, auto impoundment charges, and attorneys' fees. Efforts to slow the process and make it truly deliberative might lead to harsher treatment of defendants and more lost time for complainants and victims. Expanded procedures designed to improve the criminal process are not invoked because they might be counterproductive. Mechanisms to inhibit discretion by institutional actors and litigants do not perform their expected functions. Defendants suffer the indignities of dispute and defense, and often navigate a distinctly unfamiliar courtroom setting.

Feeley's in-depth exploration of lower criminal courts leads him to conclude that the process is the punishment. That is, the cost to criminal defendants of invoking their due process rights in lower criminal courts ultimately ends up being greater than the benefits of the rights themselves (Feeley 1979). In doing so, Feeley reveals how the costs of the pretrial process are not only important sanctions in their own

right, but also how they in turn shape and are shaped by the nature of the court organization and the conceptions of substantive justice.

Feeley's book highlights a paradox that our criminal justice system continues to wrestle with: in the name of "due process," American law tries to establish rules that guard against the possibility that innocent individuals will suffer sanctions and endure unfair consequences. Our criminal justice system seeks to curb this fear by fostering an ideal of perfectibility and a preoccupation with procedure. The reality, however, is that the process is so complex and cumbersome that these due process protections serve limited functions in the vast majority of criminal cases. The costs of invoking many due process rights render many of these rights shallow symbols of fairness that are often not invoked.

As perceptive as Feeley's account is, he focused only on criminal courts. What about civil courts in the United States? Are procedural protections and due process rights in the civil justice system so costly that they make achieving substantive relief difficult? Similar to the criminal context, United States Supreme Court cases seek to preserve due process protections in civil courts. Moreover, the drafters of the Federal Rules of Civil Procedure in 1938 tried to create a system that leads to efficient, speedy, and just results. The following examines how process impacts the civil justice system, both among courts and in alternative dispute forums. I argue that in the civil context, the process is not the punishment, but rather the problem. Focusing largely on the procedural rules in court and alternative dispute processes, this article highlights how the United States Supreme Court has trimmed procedural protections in civil courts and alternative disputing forums. With the advocacy and support of private organizations and the defense bar, due process rights and procedural protections have been redefined, and consequently citizens' access to justice is significantly undermined. When individuals do invoke their procedural and due process rights and seek substantive relief in court or arbitration, they are subject to a process filtered with organizational values and influence in subtle and sometimes not-so-subtle ways.

#### 4.1 THE DEFORMATION OF CIVIL PROCEDURE IN THE UNITED STATES

The establishment of the Federal Rules of Civil Procedure in 1938 reflected a policy of citizen access for civil disputes. The Federal Rules promote the resolution of disputes on the merits rather than on the basis of the technicalities that characterized earlier procedural systems. Concerned that the outcomes of trials turned not on the merits of the case but on the skills of lawyers or the financial resources of the parties, the drafters were determined to implement a system that would allow the parties to obtain the "fullest possible knowledge of the issues and facts before trial" (Bell et al. 1992, 6). The drafters believed that wide-ranging discovery would ensure a fair and just determination in cases and remedy the imbalance of power between the wealthy

and the poor. As noted in FRCP Rule 1, the federal rules contemplate a system that ensures a “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. Pro. 1. Similar to criminal courts, the procedures established in non-criminal courts in the United States – at least when such rules were promulgated in 1938 – was to ensure that a procedurally fair system leads to substantively just results.

However, over the past twenty-five years, there has been a dramatic shift in the way the Federal Rules are conceptualized and interpreted by the United States Supreme Court. This shift has led to an increasingly early procedural disposition of cases prior to trial. Moreover, litigants have far less access to courts. Even though litigants enjoy more consumer and civil rights protections than ever before, litigants using the civil justice system encounter a procedural system that narrows a person’s ability to effectuate these rights. The Supreme Court’s shift has been in line with large corporations’ desire for less discovery and fewer trials. Trials are now few and far between. The focus on case disposition has led to a series of procedural hurdles and transformed the relatively uncluttered pretrial process that the drafters of the rules established into one where the process is now the problem. The following highlights how the various phases of civil procedure have changed in ways that limit due process rights and access to justice.

#### 4.1.1 *The Pleading Process is the Problem*

Recent Supreme Court decisions in *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009) made plaintiffs’ ability to survive a motion to dismiss at the pleading stage for failing to state a claim upon which relief could be granted much harder. Since 1938, Rule 8, the core federal pleading provision, required only “a short and plain statement . . . showing that the pleader is entitled to relief” (Federal R. Civ. Proc. Rule 8(a)(2)). The rulemakers drafted this rule in this manner in order to make it easy for plaintiffs to enter federal courts without technicality or formality. Thus, pleadings were to simply give “notice” to the other side of the claims.

Subsequent discovery and motion practice would eliminate non-meritorious claims. The Supreme Court in *Conley v. Gibson* (1957, 47) indicated that complaints should simply “give a defendant fair notice of what the . . . claim is and the grounds upon which it rests.” As long as there were “no set of facts” such that plaintiffs could not establish its claim, the motion to dismiss should be dismissed.

*Twombly* and *Iqbal* radically changed the pleading standard from a “notice” pleading standard to a heightened “plausibility pleading” standard. As opposed to simply providing notice of a claim, the plaintiff’s complaint requires facts, not conclusions, “showing” a “plausible” claim. In particular, these cases read in tandem suggest that the long-standing principle that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Moreover, only a complaint that states a plausible claim for relief will survive

a motion to dismiss. Determining whether a complaint states a plausible claim for relief will “be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense” (Iqbal 2009, 679). In an attempt to textually ground its holding in Rule 8(a)(2), these cases suggest this rule requires that a complaint contain a statement “showing that the pleader is entitled to relief.” The Supreme Court offered a two-pronged approach that requires courts to eliminate conclusory allegations from a complaint and evaluate whether the remaining claims give rise to an entitlement to relief.

One of the great contributions of Feeley’s *The Process Is the Punishment* is the subtle focus on the costs of due process rights. The costs of the Supreme Court’s decisions in *Twombly* and *Iqbal* on civil procedure are potentially significant. Prevailing empirical research as to the impact of these recent Supreme Court decisions on litigant behavior is inconclusive. In particular, there are serious methodological challenges to studying the impact of these cases on pleadings, such as case selection effects, sample size problems, and nonrepresentative samples.

More basically, we do not know in how many cases the plaintiffs’ lawyers choose not to file a lawsuit because they fear they cannot plead facts in a complaint that satisfy the heightened pleading standard. There is some research that suggests that defendants are filing motions to dismiss at higher rates, but these motions are not necessarily being granted at higher rates than prior to when *Twombly* and *Iqbal* were decided (Gelbach 2012; Hubbard 2017). There is also research that shows that plaintiffs’ complaints now enumerate fewer causes of action (Boyd et al. 2013) and that tort causes of action are now pled in more lengthy and complex ways (Hazelton 2015). Much more empirical research is needed to tease out the full impact of *Twombly* and *Iqbal*.

What is clear, however, is that these changes are more likely to negatively impact plaintiffs than defendants. If we accept that at least some cases never end up being filed because of a concern over failing to satisfy *Twombly* and *Iqbal*, then this heightened pleading standard ultimately denies court access to those who, although have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries.

Higher pleadings standards make it especially difficult for *pro se* plaintiffs or plaintiffs challenging or bringing discrimination lawsuits (Moore 2010, 2012; Gelbach 2012; Hubbard 2017). Without the benefit of discovery, it is often difficult to plead the facts plausibly suggesting illegal conduct. Defendants often possess information suggesting disparate treatment or impact in their institutional policies and practices. Thus, these cases are particularly vulnerable to motions to dismiss under the standard set forth in *Twombly* and *Iqbal*.

Moreover, courts are supposed to use “judicial experience and common sense” to evaluate plausibility. This standard is very subjective and fails to give judges enough guidance on how to determine whether a complaint should be dismissed. To the

extent there are significant differences in perception among racial groups over the existence and pervasiveness of racial discrimination, plaintiffs may be at a disadvantage in court, especially when the majority of judges are white.

The fact that civil rights cases are at risk of being dismissed in federal courts is an important problem because it potentially undermines civil rights enforcement and compromises deterrence. Under the legislative scheme of most civil rights statutes, individuals are empowered to act as private attorney general and seek relief. Thus, similar to the criminal defendants Feeley studied in New Haven, while plaintiffs are afforded many due process rights, statutory or otherwise, litigants in the civil justice system face an uphill battle trying to survive a motion to dismiss and have their case heard in court. The heightened pleading standard, therefore, undermines the fundamental right to be heard, which is a core part of conceptions of due process in the United States. Moreover, denying plaintiffs access to the courts undermines the preference to have cases decided on the merits as opposed to procedural technicalities. The current pleading procedure as set forth by *Twombly* and *Iqbal* appears to be the problem, not the punishment.

#### 4.1.2 *The Civil Discovery Procedures are the Problem*

The rules of discovery have taken a similar path to pleading. Discovery rules were initially broad in order to allow broad access to information to help people prove their cases. However, discovery rules have become increasingly limited because of concerns over excessive and costly discovery. Due in part to the careful lobbying of the defense bar and large corporations who have actively influenced the rule-making process, the Supreme Court and those involved in revising the Federal Rules continue to retract the scope of discovery.

While pretrial discovery did not occur at common law the majority of the time, the introduction of the Federal Rules of Civil Procedure in 1938 was, ironically, supposed to lower the cost of litigation (Beisner 2010). As one scholar notes, “[b]y mandating a full exchange of information, the drafters thought they could help less powerful litigants prove their legal claims and thus redress the imbalance” (Blaner 1998, 8). At least since the 1970s, the scope of permissible discovery extended to “any matter, not privileged which is relevant to the subject matter involved in the pending action,” subject to many other specific rules and trial court discretion to restrain excessive or abusive discovery. Fed. R. Civ. P. 26(b)(1), 398 U.S. 977, 982 (1970) (amended 2000).

However, plaintiffs’ ability to conduct discovery has shrunk in the past thirty years. Under the 2000 amendment to Rule 26(b)(1), the default definition of the scope of discovery was narrowed to “any matter, not privileged, that is relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b)(1). This was part of a series of amendments that sought to curb costs and excessive discovery. The Federal Rules did note, however, “[f]or good cause, the court may order discovery of any matter relevant to

the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). These amendments in 2000, coupled with changes in 1983 and 1993 to the Federal Rules,<sup>1</sup> reflect a general trend toward managing the discovery process in a way that reduces costs and prevents abusive tactics by lawyers.

The narrowing of the scope of permissible discovery is continuing with recent amendments. On December 1, 2015, new amendments to discovery rules in the Federal Rules of Civil Procedure went into effect that alter discovery and increase the burden on plaintiffs. The new rules alter the presumptions and burdens of proof in discovery proceedings as well as impose specific limitations on how discovery is conducted.

The biggest change alters the scope of discoverable information, which of course impacts virtually every discovery activity. The prior standard permitted the production of any matter relevant to the subject matter as long as the discovery appears reasonably calculated to lead to the discovery of admissible evidence. The new rule eliminates the language referring to the likelihood of leading to the discovery of admissible evidence, and instead requires that discovery be “proportional” to the needs of the case. When evaluating “proportionality,” courts are now permitted to consider the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and most notably, whether the burden or expense of the proposed discovery outweighs its likely benefit.

The costs of these changes will be largely absorbed by plaintiffs. The revised rule places a larger burden on the requesting party to demonstrate proportionality. In the past, the concept of “proportionality” was used in Rule 26(c). Previously, Rule 26(c) authorized a party to seek a protective order by arguing that the burden or expense of discovery outweighs its likely benefit. By moving the concept of proportionality into the definition of the scope of discovery under FRCP Rule 26(b), defendants have an additional weapon that they can use to limit every discovery request. Moreover, the enumerated factors that parties may use when evaluating whether discovery is proportional provides defendants specific grounds to avoid producing relevant information that plaintiffs may need to prove their cases.

At a minimum, the revised rule undoubtedly shifts the procedural burden to the requesting party to raise the issue with the court in the face of a proportionality objection by a responding party. This challenge is especially glaring in cases where the information is largely in the defendant’s possession, such as civil rights, discrimination, employment, and product liability cases. In those situations, plaintiffs

<sup>1</sup> Though not the focus of this article, I want to note that the 1980, 1983, and 1993 amendments were in large part a response to private organizations and the defense bar calling for less discovery abuse. These amendments in part centered around disclosure rules and the level of involvement and oversight judges should maintain in the process.

have to argue that the likely benefit of the unknown information outweighs the quantifiable cost to the defendant. Defendants can simply object and argue that the information is too expensive or burdensome to produce even if the information is relevant and critical to plaintiffs' case. The changes will also likely increase the costs for plaintiffs who will have to file additional motions to compel and engage in discovery battles with opposing counsel over the right to gain access to documents. Given that many states adopt or incorporate the Federal Rules as their own, state and federal courts will maintain discovery procedures that are problematic and against the ideal of allowing individuals access to courts. In sum, although the Federal Rules affords litigants the opportunity to conduct discovery, the process here becomes harder and more problematic, especially for plaintiffs involved in complex litigation or where the defendant holds a disproportionate amount of information compared to the plaintiff.

#### 4.1.3 *The Motion for Summary Judgment Process is the Problem*

Summary judgment was initially instituted into the Federal Rules as a method for promptly disposing of lawsuits in which there was no genuine issue of material fact and a party was entitled to a judgment as a matter of law. Passed in 1938, Federal Rule of Civil Procedure Rule 56 opened the door to prompt adjudication by allowing a party to defeat unfounded claims or defenses with little expense. Evaluating the state of summary proceedings around the country, Charles E. Clarke, one of the individuals involved in drafting the Federal Rules in 1938, framed the value of summary adjudicatory proceedings in the following way: "Except where trial is necessary to settle an issue of fact, the judicial process is, by this procedure, made to function more quickly and with less complexity than in the ordinary long drawn out suit" (Clarke and Samenow 1929, 423).

At the outset, when the rule was created, there were concerns over its wide scope, the vague standard for determining whether an issue of fact existed, and the significant level of discretion judges maintained to dismiss a lawsuit (Wood 2011). The potential problems posed by judicial discretion did not occur during the first forty years after Rule 56 was adopted. Federal judges approached summary judgment very cautiously and set a high bar for granting relief. Federal judges perceived summary judgments as threatening a denial of such fundamental guarantees as the right to confront witnesses and the right of a jury to make inferences and determinate credibility. In 1962, the Supreme Court discouraged summary judgments in anti-trust cases by noting "[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'" (*Poller v. CBS, Inc.* 368 U.S. 464, 473 (1962)).

The problem is that this procedural rule, through judicial decisions, has evolved in a way that makes it hard to accomplish the original goal of Rule 56. Significant resources go into preparing summary judgment motions, courts spend considerable

time evaluating such motions before ruling, and appellate courts often deal with appeals from parties who insist that the trial court overlooked a critical disputed issue of material fact or misapplied the law. In particular, the summary judgment standard changed in 1986, when the Supreme Court added another procedural weapon to the arsenal of defendants. In a trilogy of cases addressing the standards for summary judgment, *Celotex Corp. v. Catrett*, *Anderson v. Liberty Lobby*, and *Matsushita Electrical Industrial Corp. v. Zenith Radio*, the Court expanded the applicability of summary judgment under Rule 56. Collectively, these cases eased the initial burden placed on the party moving for summary judgment and allowed the district court discretion in determining the existence of issues that required a trial. Prior to these three cases, the Supreme Court's decision in *Adickes v. S. H. Kress & Co.* (1969) put the responsibility on the moving party to "carry its burden of showing the absence of any genuine issue of fact." 398 U.S. 144, 153 (1969).

*Celotex* relieved the defendant moving for summary judgment of any significant burden of production to establish the absence of a material issue of fact, and placed the burden of production on the nonmoving party to come forward with evidence of facts in dispute. Thus, a defendant's initial burden of production could be satisfied even without submitted sworn testimony revealing the absence of a genuine issue of material fact. In *Anderson*, the Supreme Court held that to avoid summary judgment in a case presenting a "clear and convincing" standard of proof at trial, the non-movant must show that the record would sustain a verdict in her favor over the heightened clear and convincing burden. In *Matsushita*, the Supreme Court upheld summary judgment despite un rebutted expert reports supporting the plaintiffs' claims because "the [expert's] claim was one that simply makes no economic sense" 475 U.S. at 574, 587 (1986). The Court noted that a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" 475 U.S. at 586. Thus, courts can at the summary judgment stage evaluate the merits of expert testimony as opposed to simply determining whether triable issues of material fact remain.

As a result of these three cases, summary judgment, which prior to the Federal Rules was largely a plaintiff's motion, has become largely a defendant's motion (Denlow 1998). The category of issues being decided by judges as a matter of law is now enlarged. Due process rights, such as having an opportunity to have your case heard in court and the constitutional right to a jury, are compromised as parties increasingly engage in summary judgment motions. Indeed, discovery is now guided by preparing for winning or defending against summary judgment, not trial. An American Bar Association survey in 2009 revealed that 50 percent of plaintiffs' lawyers, 47 percent of defense lawyers, and 44 percent of all other lawyers believe that discovery's primary utility is to develop evidence for summary judgment, not to prepare for trial (Hornby 2010).

These cases impact litigation strategy in significant ways. A plaintiff maximizes her position through the possibility of trial. A defendant maximizes her

position by discouraging and avoiding trial. Summary judgment provides defendants with a major tactical advantage because it creates leverage over plaintiffs. Summary judgment creates an additional hurdle for a plaintiff because it forces her to engage in a paper mini-trial just to ensure that her case will continue. This allows the defendant a preview of the key elements of plaintiff's case. Even when summary judgment motions are unsuccessful, summary judgments are expensive to prepare, time-consuming, and can drain plaintiffs' will to continue to trial. Moreover, they often lead to delays in the case. Often a defendant will not engage in meaningful settlement discussions until a plaintiff survives summary judgment.

Summary judgment was established to try to expedite cases and reduce costs. However, the Supreme Court's decisions made litigating cases lengthier and costlier. Similar to Feeley's inquiry into lower criminal courts, the trilogy of summary judgment cases impacts the information balance between, and incentives operating on, both parties. In turn, these cases impact the range of decisions facing litigants, from the filing of lawsuits to the choice between settling and litigating a claim through to trial. Although a party has the right to pursue a case with the idea that jurors will evaluate her case, the summary judgment standard makes it more likely the case will be resolved by a judge. Once again, the process is not the punishment, but the problem.

#### 4.1.4 *The Class Action Process is the Problem*

The class action rule as set forth in Rule 23 of the Federal Rule of Civil Procedure has often been thought of as a device to protect the liberties of ordinary citizens. Class actions represent the law's best effort at procedural democracy and access to justice for marginalized groups, whether they are consumers, employees, or small business owners that would otherwise be unable to have their claims and grievances adjudicated in court. Big businesses are often immunized from complying with the law because those with small claims and limited resources are unlikely to challenge them. Moreover, individually, litigation costs and attorneys' fees may exceed the value of the recovery. Even if individuals are able to seek redress for individual harms, they cannot successfully challenge widespread misconduct in the absence of collective action. Although individual cases may motivate employers to change their relevant policies and practices to avoid similar lawsuits, this comes nowhere near the remedies and scope of injunctive relief plaintiffs can craft in class or group-based actions. During the golden era of class actions in the 1960s and early 1970s, public interest lawyers used the class action rule to integrate school systems, deinstitutionalize mental health facilities, reform conditions of confinement for inmates in prison systems, challenge discriminatory public accommodation and housing laws, and deal with various kinds of employment discrimination. Thus, FRCP 23 was a procedural mechanism to enhance substantive justice.

This procedural weapon for plaintiffs has been largely curtailed by a series of legislative and judicial decisions. Wary of having to defend aggregate litigation claims, private organizations used the legislative process and court cases to narrow the likelihood that a class action will be certified. Courts increased standards relating to the certification of damages and injunctive classes, and created new standing requirements for consumer class actions. Congress also enacted a series of laws such as the Private Securities Litigation Reform Act and the Class Action Fairness Act that have essentially pushed litigants towards non-collective, non-adjudicatory remedies.

In particular, when George W. Bush signed into law the Class Action Fairness Act (CAFA) in 2005, he indicated that this law was a “critical step toward ending the lawsuit culture in our country” (White House signing ceremony, Feb. 18, 2005). CAFA is the product of significant institutional lobbying by businesses. Concerned with the perceived rate with which state courts grant class certification, CAFA seeks to curb perceived abuses of the class action device. In particular, CAFA expands federal diversity jurisdiction over interstate class actions and also expands removal powers.

CAFA is especially illustrative of how procedural changes impact one’s ability to achieve substantive justice. Prior to the passage of CAFA, there were specific restrictions that applied if a defendant wanted to remove a case from state to federal court. First, a defendant could not remove a case if the defendant was a resident of the state in which the lawsuit was originally filed. Also, if there were multiple defendants, all the defendants had to consent to removal for the removal to be proper. Lastly, Congress issued an express, one-year time restriction on the removal of cases when the original jurisdiction was based on diversity as opposed to a federal question.

CAFA essentially removes all three of these requirements. In doing so, CAFA removes the traditional barriers to federal jurisdiction for many class action cases. The class action may be removed without regard to whether any defendant is a citizen of the state in which the action is brought. This essentially curtails the past practice of plaintiffs’ attorneys who frequently would name a plaintiff or defendant in the action in order to avoid diversity jurisdiction. Also, the defendant may remove a case without the consent of other defendants. Finally, CAFA eliminates the one-year limitation on removal of claims based upon diversity jurisdiction. Once again, we see the procedure is the problem for litigants seeking access to courts and substantive relief. By expanding federal diversity jurisdiction and removal capabilities, CAFA makes it easier for defendants to remove cases from state court to federal court, where federal judges are less liberal in granting certification to multistate, state-law-based class action lawsuits.

Legislative curtailment of class action as a procedural weapon is coupled by Supreme Court decisions that disapprove massive class actions. The most significant recent decision is *Wal-Mart Stores, Inc. v. Dukes* (2011). In this case, former and current female employees brought a class action against Wal-Mart Stores, Inc. on

behalf of approximately 1.5 million women, alleging nationwide gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The plaintiffs argued that Wal-Mart gives its local managers undue discretion when making pay and promotion decisions, and that this results in women being underpaid and disproportionately denied promotions.

The Supreme Court concluded that the case failed to meet the requirement of a class action. In doing so, the Supreme Court in *Wal-Mart* made class certification much more difficult by raising the standard for satisfying the “commonality” requirement that the class has a common question that it seeks resolution toward. The Court indicated Wal-Mart plaintiffs were required to prove, with significant evidence, that there exists a general policy of discrimination in order to receive certification. Moreover, the class members must each suffer the “same injury” rather than the same Title VII violation.

Thus, class members must make common contentions whose resolution will decide critical issues affecting each one of the claims. The court elevated the evidentiary burden that plaintiffs face when trying to certify that there are common questions of fact. By requiring a higher level of commonality and raising the evidentiary burden at the outset than was previously thought necessary by class members, the Supreme Court made it very hard for litigants to reach the commonality requirement in the future.<sup>2</sup> It is important to note that nothing in the history of the rule, the language of FRCP Rule 23, or prior case law suggests that these limitations should exist. Shifting the burden of pretrial persuasion reflects a very subtle way that class certification may be denied before a decision on the merits.

The Supreme Court’s decision in *Wal-Mart* impacts the procedures relating to class action lawsuits. Class certification is now another procedural hurdle for plaintiffs to gain entry into federal courts. The Court’s decision in *Wal-Mart* reduces the prospect of class certification and the likelihood that a class action will be brought. Plaintiffs’ attorneys will have to invest significant resources in discovery before moving for certification. Because fewer cases will be certified, plaintiffs will have less settlement leverage in these large cases. The broader impact of *Wal-Mart* as well as legislation such as CAFA is that they reduce defendants’ potential exposure to class-wide liability. They also reduce the deterrent effect of class actions generally. Similar to pleading, discovery, and summary judgment, what was supposed to be a procedural tool to broaden a litigant’s ability to seek access to justice is now an impediment.

#### 4.1.5 *Alternative Dispute Resolution Processes are the Problem*

Given the problems with the civil justice system, many suggest using alternative dispute resolution processes such as mediation or arbitration to resolve disputes

<sup>2</sup> The commonality requirement could have been discriminatory bias as a result of a policy of excessive subjectivity as opposed to requiring a common contention of discriminatory bias on the part of the same supervisor.

that would otherwise go to court. Alternative dispute resolution advocates argue that such venues provide a more informal, faster, and flexible forum that gives the parties greater voice and involvement in the resolution of their case. Despite these worthy goals, arbitration has become a procedural tool for private organizations (Talesh 2013). Moreover, courts and legislators have allowed arbitration to gain legitimacy in society. Beginning as early as the 1940s, private organizations began inserting in their contracts arbitration provisions forcing or mandating disputes be arbitrated before the American Arbitration Association or the National Arbitration Forum rather than litigated in courts (Gilles 2012). Initially, courts were hesitant to enforce arbitration provisions. However, by the 1980s, the Supreme Court, relying largely on the Federal Arbitration Act, reinterpreted this law and other statutes to permit rather than forbid enforcement of arbitration contracts. In the 1980s and 1990s, the United States Supreme Court deferred and upheld arbitration clauses, often finding that the Federal Arbitration Act applies in state as well as federal court proceedings and preempts state legislation affecting arbitration. The Supreme Court consistently maintains the position that procedural protections in arbitration systems preserve all parties' ability to achieve substantive justice.

Most recently, businesses have begun inserting class action waivers into contractual arbitration provisions provided consumers. The Supreme Court in *AT&T Mobility v. Concepcion* (2011) upheld such provisions and essentially followed a long line of cases permitting arbitration of a variety of claims such as admiralty, age discrimination, and securities fraud. Thus, while plaintiffs in theory have the ability to use the procedural weapon of class actions to unite, form a class, and sue a defendant in court, the arbitration clause dismantles their ability to do so. More recently, in *American Express Co. v. Italian Colors Restaurant* (2013) the Supreme Court held that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. In 2018, the Supreme Court held in *Epic Systems Corp. v. Lewis* that employers can require employees to arbitrate disputes with the employer individually and waive their right to pursue or participate in class or collective actions against their employer. Coupled with the *Wal-Mart* decision, *AT&T*, *American Express*, and *Epic Systems Corp.* limit plaintiffs' ability to use class actions to seek relief. As a result, powerful businesses can impose no-class-action arbitration clauses on individuals who are trying to invoke their consumer rights but who have little to no bargaining power. Thus, despite the initial goals of improving a litigant's ability to achieve justice, arbitration forums are now being used as a tool to funnel cases from the public courthouse to the private courthouse where the economic "haves" are able to more directly control the process.

Scholars, policymakers, legislators, and advocates and opponents of arbitration argue over the pros and cons of arbitration and whether arbitration leads to increased

victories by businesses. However, less empirical attention is paid to how arbitration systems are set up with the support of legislators and how these arbitration systems are implemented in action. That is, there is less interrogation of the Supreme Court's claim that "the streamlined procedures of arbitration do not entail any consequential restrictions on substantive rights" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987). Do arbitration processes impact substantive justice? If so, how?

My own empirical work explores how the institutional design of arbitration systems help facilitate and inhibit consumer inequality in alternative disputing forums (Talesh 2009, 2012, 2014, 2015). Institutional design and the procedures put in place for arbitration systems matter. Process is equally problematic in alternative disputing forums, especially arbitration settings. I have examined how arbitration processes were codified into law for consumers to use when resolving warranty disputes, especially warranties issued by automobile manufacturers. My work pays particular attention to how private organizations often shape the content and meaning of legislation and regulatory rules that are designed to regulate them.

Drawing on neo-institutional ideas of organizational fields and legal endogeneity, I show how institutionalized logics operating among organizations play an important role in determining the form and structure of legislation and administrative processes. Focusing on the evolution of California's consumer protection laws, I review how institutional and political forces come together to shape the dispute resolution process in the consumer protection context. Although political mobilization and contestation remain prevalent in the legislative process, the political frames used by organizations lobbying the legislature reflect logics that are derived from institutionalized norms and structures developed by and through the organizational field.

In 1970, California passed the first consumer warranty protection law in the United States, the Song-Beverly Act, in order to limit manufacturers' ability to perpetuate social and economic advantage through the manufacturer-consumer relationship. The Song-Beverly Act specified that if manufacturers were unable to make repairs under warranties after being given a "reasonable number of attempts," consumers could seek relief in court and obtain full restitution or replacement, attorneys' fees, and a civil penalty. Despite granting consumers powerful legal weapons, the Song-Beverly Act did not specify the meaning of a "reasonable number of attempts."

In the early 1980s, the California legislature attempted to curb any ambiguity in the warranty law by creating a "lemon law" that established a "legal presumption" as to what constitutes a "reasonable number of attempts" to fix a problem that consumers could specifically invoke against automobile manufacturers. During the legislative lawmaking process automobile manufacturers alerted the legislature that they (the manufacturers) had during the 1970s created dispute resolution structures to resolve automobile warranty disputes outside court. This institutional

form of dispute resolution quickly spread, and by 1981 over 2,000 automotive dealers across the United States had jointly funded and controlled a third-party dispute resolution process to resolve warranty complaints. Manufacturers eventually used such third-party organizations to administer these programs in order to legitimize them.

As manufacturer advocacy coalitions lobbied the legislature concerning the terms of the lemon law, Ford, General Motors, and Chrysler framed the purpose and benefits of their dispute resolution processes in terms of legitimacy, efficiency, informality, and customer satisfaction, as opposed to consumer protection (Talesh 2009, 2014). Manufacturers collectively claimed that their institutional venues were primarily created to benefit consumers and to provide less costly, more effective ways of resolving disputes.

Without formally evaluating the merits of these procedures, the legislature subsequently incorporated these institutionalized organizational practices into legal doctrine by making consumer rights and remedies contingent on first using certified third-party manufacturer dispute resolution structures in compliance with cursory federal regulation. Specifically, the legal presumption as to what constitutes a “reasonable number of attempts” – the main purpose of the lemon law – could not be asserted in court unless the consumer first resorted to the existing “qualified third-party dispute resolution process” to the extent a manufacturer maintained one (Civil Code § 1793.22(c)). The lemon law provided that no civil penalties or attorneys’ fees could be recovered in dispute resolution processes unless the manufacturer-run program permits such recovery. Further, unlike the all (restitution, replacement) or nothing (no award) remedies at trial, arbitrators are permitted to award consumers the opportunity to allow manufacturers another repair attempt. Decisions under dispute resolution processes were binding on manufacturers but not consumers. Moreover, in a display of deference to manufacturer venues, the lemon law indicated if the consumer chose to reject the arbitrator’s ruling and sue, the arbitrator’s findings could be admitted at trial without any need for evidentiary foundation.

Once organizational logic as to what constitutes a fair process became formally codified into law, legislative amendments had less to do with protecting consumer rights and more to do with giving legal legitimacy to institutional venues through cursory regulatory monitoring and oversight, and bolstering the degree to which consumers, manufacturers, legislators, and regulators defer to institutional venues designed and funded by manufacturers (Talesh 2009, 2014). In particular, changes to the regulatory structure and certification process aimed at strengthening the legitimacy of these forums ultimately allowed arbitrators from manufacturer-sponsored programs to retain flexibility and final authority regarding the legal standards, statutory or otherwise, they chose to ultimately apply in particular cases. Thus, as businesses “legalized” their domains with law-like structures, business logics – anchored in informality, efficiency, discretion, and problem solving – flowed back

into core public legal institutions through the efforts of advocacy coalitions, who reframed the meaning of consumer protection for legislators and regulators.

Thus, my research offers an important intervention to those debating the benefits of using courts versus arbitration. Similar to courts, the rules – the procedures and processes parties use to seek relief in alternative forums – matter. Although consumers are afforded considerable rights in the lemon law context, the process – as set forth by automobile manufacturers and codified into law by legislators – is the problem. In response to powerful consumer protection laws aimed at manufacturers standing behind their warranties issued to consumers, my research shows how automobile manufacturers first created internal dispute resolution structures to adjudicate public legal rights outside the judicial process, and then ceded control of these structures to third-party dispute resolution organizations for legitimacy purposes (Talesh 2009, 2013). The legislature ultimately codified these privatized adjudicatory systems into law and afforded considerable deference to these quasi-private and quasi-public regimes. Thus, in the civil context, private organizations are impacting the meaning of process simultaneously among public and private institutions.

Through participant observation and interviews, I continued my analysis by comparing how two different alternative dispute resolution forums (one created and administered by private organizations in California, and the other administered and run by the state of Vermont) operating outside the court system resolve consumer disputes. In this respect, my work is similar to Feeley's exploration of lower criminal courts because I unpacked how law is constructed in these forums. Unlike the single-arbitrator system in private dispute resolution programs, Vermont uses an arbitration board consisting of a five-person panel of arbitrators (three citizens, an automotive dealer representative, and a technical expert).

I find that the institutional design of dispute resolution, and how business and consumer values and perspectives are translated by field actors in different dispute resolution systems, leads to two different meanings of law operating in California and Vermont. The former is influenced by business values while the latter balances business and consumer values. The implementation of different dispute resolution processes has a very real impact. As business values flow through California dispute resolution structures, organizational repeat players gain subtle opportunities for advantages.

Moreover, in terms of consumer outcomes in these hearings, consumers do far worse in private than in state-run disputing structures (Talesh 2012).

In California, managerial and business values of efficiency, managerial discretion and control, productivity, and customer retention flow into the rules, procedures, and meaning of law operating in dispute resolution structures mainly through the training and socialization process for California arbitrators. Third-party administrators hired by automobile manufacturers to run their dispute resolution programs teach a set of rationales and scripts that emphasize eliminating consumer emotion

and individual voice from the process and narrowing the fact-finding role of arbitrators. Arbitrator training programs reshape the meaning of law by building discretion and flexibility into legal procedure and remedies, while recontextualizing legal rules and arbitrator decision making around a set of business values. As a result, arbitrators are taught to deploy an altered version of the lemon law that mirrors formal law, but is filtered through business values and influence. Moreover, organizational repeat players gain subtle advantages through the operation of the dispute resolution structure (Talesh 2012).

In contrast to California's managerial justice adjudicatory model, Vermont uses a collaborative justice model that balances various interested stakeholders, reflecting both business *and* consumer values in a state-funded and designed dispute resolution structure. As a result, Vermont's structure is far less likely to emphasize business values at the expense of consumer interests and prevents many repeat player advantages enjoyed by manufacturers in California.

To the extent business values are introduced into the process by the presence of an automotive dealer and technical expert board members, they are balanced with competing consumer logics by the presence of three citizen arbitrators on Vermont arbitration board (the Lemon Law Board) and a program administrator who oversees the program. In particular, citizen arbitrators balance the fact-finding and deliberation process with a consumer perspective that often allows emotion and individual voice to enter the process. Furthermore, the technical expert on the Lemon Law Board counterbalances manufacturers' repeat player advantages, e.g., greater knowledge, experience, and ability to offer expert testimony or reports.

Professional training is a key mechanism for the diffusion of organizational constructions of law in manufacturer-sponsored training programs. The dispute resolution programs in California and Vermont train and socialize their arbitrators in different ways. In California, arbitrators are taught to disregard any prior knowledge of legal processes and strictly follow what they are taught in the training processes. Trainers emphasize discretion and flexibility with respect to applying formal law in these processes. This philosophical orientation is a key mechanism for explaining how organizations shape the meaning of law.

Conversely, Vermont's panel of arbitrators receives minimal formal training and socialization. The little training they do receive largely focuses on assuring that they apply formal law. Vermont arbitrators believe the effectiveness of the Lemon Law Board is contingent on the right mixture of people offering different consumer and business perspectives while still operating within the strictures of formal law. The legitimacy of California's dispute resolution training programs administered by the third-party administrators is based on the idea that professional training and socialization produces impartial and neutral decision makers. In Vermont, these same core legal principles rest on interest representation and balancing consumer and business logics in the structure. Thus, the different adjudicative orientations in

California and Vermont facilitate and inhibit the conditions under which and the degree to which business values are more or less likely to flow into law.

Similar to Feeley's account of lower criminal courts in New Haven, manufacturer-sponsored and state-run dispute resolution programs in California and Vermont both devote attention to preserving due process during their training. However, in the manufacturer-sponsored hearings, other non-legal values like efficiency, rationality, and discretion alter how policies and procedures should be implemented.

For example, the amount of independent expert information offered into evidence concerning automobile defects is guided by a series of business values. California training programs teach arbitrators that they may appoint a technical expert to examine a vehicle and issue an expert report if necessary. However, by focusing on efficiency, time delay, and resource conservation, trainers dissuade arbitrators from using technical experts (Talesh 2012).

By framing technical experts as potentially unnecessary or an inefficient use of time, California training programs exclude neutral technical experts who may have the requisite experience and mechanical equipment to identify vehicle problems, while leaving evaluation to the lay knowledge of arbitrators who usually have only manufacturer testimony to rely on. In fact, manufacturers that I interviewed indicate that they often bring mechanical experts to hearings.

Under these circumstances, arbitrators are especially captive to manufacturers' technical evaluations and testimony because they are trained to avoid appointing independent experts. In this way, the dispute resolution structure subtly gives repeat players control over the degree and scope of technical information admitted into the hearing. Moreover, California state regulators repeatedly lamented in interviews how efficiency concerns guide the way facts are offered into evidence and hinder the overall fairness of the third-party administrators' dispute resolution programs. In Vermont, arbitrators indicate having a technical expert on the Lemon Law Board prevents parties from misleading the Board regarding technical defects or problems with vehicles, combats information asymmetry between manufacturers and consumers, and leads to better evaluation of the technical issues involved in the case.

The dispute resolution design also impacts how cases are resolved in these two disputing processes. For example, while both Vermont and California dispute resolution programs emphasize impartiality and neutrality, they construe the meaning of these terms differently. The divergent fact-finding approaches arbitrators deploy in both states illustrate the way impartiality and neutrality mean different things. In California, impartiality and neutrality are considered compromised when arbitrators actively investigate facts. California arbitrators are instructed to rely solely on parties' production of relevant factual evidence. In Vermont, actively investigating facts is considered a necessary component for establishing impartiality and neutrality. Vermont arbitrators indicate it is their responsibility to actively gather

information and facts regardless of whether the parties offer information on their own. According to Vermont arbitrators, active investigation assures a procedurally fair and neutral process (Talesh 2012).

This distinction is important because passive arbitrators in California provide structural advantages for repeat players whereas the inquisitorial role of arbitrators in Vermont offsets repeat player advantages. Active investigation by Vermont arbitrators also counterbalances any experiential and informational advantage manufacturers maintain, such as manufacturers' unilateral access to repair history records and ability to bring experts or expert reports into evidence. Actively investigating facts in Vermont also includes preventing intimidation from repeat players against one-shotters during questioning. Thus, according to the arbitrators and training programs in California and Vermont, active fact-finding preserves arbitrator impartiality and neutrality in Vermont whereas active investigation compromises the process in California.

My empirical research highlights other differences and how dispute resolution system design matters (Talesh 2012, 2013, 2014, 2015). However, overall, my data suggests that the design of Vermont's arbitration process has less tendency to emphasize business interests at the expense of consumer interests, and prevents some of the repeat player advantages enjoyed by manufacturers in California. In terms of consumer outcomes, consumers win twice as often in state-run dispute resolution structures as in private-run structures (Talesh 2012).

Similar to lower criminal courts (Feeley 1979), the design of the dispute resolution process may facilitate or inhibit whether a consumer ultimately prevails. Arbitration does not always work well and does not always work poorly. Consumers do not always win or lose.

Rather, the process really matters, and in the lemon law context, the arbitration process in California is problematic, while the Vermont process seems to curb some of the repeat player advantages enjoyed by manufacturers in California. Through the legislative process and subsequent control of the arbitration system through organizational surrogates such as third-party administrators, private organizations have been able to redefine and control consumer rights in California.

In a world where private actors are increasingly involved in handling functions traditionally run by the government, organizational repeat players no longer simply play for favorable rules in the public arena, but rather play for removing the entire disputing game from the public arena into the private arena, actively create the terms of legal compliance, and reshape the meaning of consumer rights and remedies. This is a critical way in which the "haves" come out ahead. However, contrary to most studies that demonstrate how repeat players gain advantages in disputing structures, my comparative research design also allows me to explore how dispute resolution structures can also inhibit repeat player advantages. Simply

stated, I reach a similar conclusion to Feeley's conclusion in *The Process is the Punishment*: process matters.

In this instance, the institutional design can facilitate and inhibit repeat player advantages.

#### 4.2 CONCLUSION

In the tradition of Feeley's approach in *The Process Is the Punishment*, this article exposes the tension between the ideal of "due process," which seeks to allow individuals an opportunity to be heard at a meaningful time and in a meaningful manner, with the reality of how civil processes and procedures impact a litigant navigating through the civil justice system.

When the Federal Rules were established in 1938, they embodied a desire for creating a system that would allow parties to seek justice in a public forum. The drafters of the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits. The rules for the most part were comprehensible, plainly worded, and nontechnical. As Federal Rule 1 notes, the goal was "just, speedy, and inexpensive determination of every action and proceeding." Court cases initially protected an individual's due process rights, especially the opportunity to be heard at a meaningful time and in a meaningful manner. The broad "notice" pleading was followed by liberal discovery rules that enabled parties to seek information relevant to the subject matter of the lawsuit and have equal access. Litigation was resolved based on the facts. A summary judgment procedure was available only for situations where there was truly no genuine dispute as to material fact. The ideal model of federal civil dispute resolution was a trial, often by a jury. Procedures were established to preserve this ideal. Coupled with these procedural protections was the establishment of powerful civil and consumer rights that provide substantive protections and private causes of action.

Even though the process was supposed to preserve due process and procedural protections so that individuals can seek access to justice, this article demonstrates that the process is now an impediment or problem. Advocating an agenda that seeks to curtail individuals' access to courts or simply move the case to private arbitration, private organizations succeed in the legislative process and use the court system to recreate a system in their favor.

The Supreme Court plays a critical role. *Twombly* and *Iqbal* heightened pleading requirements for plaintiffs and emboldened defendants to bring more motions to dismiss. Discovery rules continue to narrow the permissible scope of inquiry and encourage defendants to raise objections and entrench litigation in discovery battles. Summary judgment is now a weapon for defendants to end cases prior to trial under a standard that increasingly puts pressure on plaintiffs. Supreme Court decisions concerning class actions and legislation such as CAFA

make it harder for plaintiffs to constitute class action lawsuits. Moreover, the Federal Arbitration Act, mandatory arbitration clauses, and a series of Supreme Court decisions concerning arbitration often redirect litigants to private dispute resolution venues where large bureaucratic organizations are more likely to come out ahead. Thus, when people invoke their civil or consumer rights, they bear the costs of dealing with a procedural system tilted in the direction of businesses.

Thus, I am left reaching a similar conclusion to the one that Malcolm Feeley found in *The Process Is the Punishment*: procedure affects substance. The procedural costs of invoking your rights in civil courts end up being greater than the rights themselves. The cost of invoking your rights in the civil context is that a litigant will likely adjudicate her case in a private forum via arbitration. If a litigant is permitted to sue in court, she faces a system flooded with procedural hurdles. As the federal rules recognized during its creation, American law has always been motivated by the ideals of rule of law, access to justice, a level litigation playing field, and equal justice under law. It sought to preserve these goals through procedural rights and due process protections under the Constitution. However, similar to Feeley's conclusion in the criminal context, these rules have been altered in civil litigation in ways that make achieving substantive justice very difficult. Moreover, similar to Feeley's conclusion in the criminal context, the civil litigation system is so complex, cumbersome, and expensive that these procedural protections serve limited functions at best. As long as the process is the problem, the adjudicative ideal will continue to conflict with the substantive goals civil and consumer rights enforcement.

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STATUTES

Civil Code § 1793.22(c)

