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Jeffrey A. Parness  
r0100837@mail.niu.edu

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# EVOLVING VIEWS OF CIVIL LITIGATION: Future Civil Procedure Courses

Jeffrey A. Parness\*

## I. INTRODUCTION

In a recent article in this journal,<sup>1</sup> Professor Mary Brigid McManamon examines the history of the required civil procedure course in American law schools. This examination is undertaken, at least in part, “to provoke debate”<sup>2</sup> on “the direction we should now take,”<sup>3</sup> given contemporary criticism, in law school civil procedure courses. This criticism is illustrated for Professor McManamon in a book review authored by Professor William N. Eskridge, Jr.<sup>4</sup> While herself providing no “brilliant suggestions,”<sup>5</sup> she concludes her examination by urging others “to be creative to provide the procedural course that makes the most sense, not one that is merely the old course in a slightly new shape.”<sup>6</sup> Professor McManamon strongly suggests, in encouraging further “reflections on the future of the Civil Procedure course,”<sup>7</sup> that reformers keep in mind the observation by Professor Judith Resnik, a scholar in this area and an author of civil procedure text books, that our attitudes about civil litigation are ever changing. Professor McManamon pronounces: “After all, our view of the role of litigation in our society has changed dramatically over the years. . . . Perhaps we should communicate this change to our students.”<sup>8</sup>

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\* Professor of Law, Northern Illinois University College of Law. B.A., Colby College; J.D., University of Chicago.

1. Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998).

2. *Id.* at 440.

3. *Id.* at 437.

4. William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945 (1989), noted in McManamon, *supra* note 1, at 437 n.252 (reviewing ROBERT M. COVER ET AL., PROCEDURE (1988)).

5. McManamon, *supra* note 1, at 437.

6. *Id.* at 440.

7. *Id.* at 401.

8. *Id.* at 440, 440 n. 252. For “an interesting discussion of our changing attitudes toward the courts,” McManamon references Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

## II. BACKGROUND

The perspective on civil litigation which has shaped most, if not all, civil procedure courses was described by Professor McManamon as follows:

Litigation serves as a major vehicle for lawmaking in our government and for articulation of social values. It is for that reason important to study it to comprehend the rest of law studies. That is, it is through the forge of the judiciary that our law takes shape, and to understand that law, we must understand how the forge works. Thus, if we look at our course as one about the nature of our society, we may gain some insights into ourselves and our process that will enable us to make it better.<sup>9</sup>

In observing the dramatic changes in viewing civil litigation, Professor Resnik laments a "failing faith"<sup>10</sup> in civil litigation as a significant vehicle for lawmaking and for the articulation of social values. In particular, she urges that we not abandon efforts "to foster judicial decisions 'on the merits' by simplifying procedure"<sup>11</sup> for cases where "'alternative dispute resolution' techniques . . . [are not] preferable to trials, judges, and litigation."<sup>12</sup> Revivals of faith in adjudication are deemed especially important for civil litigation involving disputants who: (1) are not "rational, competent actors who make deliberate decisions calculated to enhance their positions,"<sup>13</sup> (2) do not "have access to resources (in terms of dollars and of power) which . . . enable the generation of information and . . . give the disputants the opportunity to exercise choices,"<sup>14</sup> and (3) do not have attorneys whose "interests . . . coincide with" their own.<sup>15</sup> Professor Resnik also stresses the extreme importance of reviving that faith in settings where it cannot be assumed that "competition . . . between opponents . . . will lead to the triumph of truth—or at least to the emergence of insights with normative power."<sup>16</sup> Adjudication, according to Professor Resnik, "is far from perfect."<sup>17</sup> She considers the adjudicatory process constrained, containing "some theory . . . of what counts as permissible and impermissible."<sup>18</sup> For Professor Resnik, alternative dispute resolution mechanisms contain

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9. *Id.* at 438.

10. Resnik, *supra* note 8, at 494.

11. *Id.* at 497 (footnote omitted).

12. *Id.* (footnote omitted).

13. *Id.* at 513.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 545.

18. *Id.* at 546.

insufficient “constrained decisionmaking” procedures, especially in the aforesaid cases.<sup>19</sup>

Professor Eskridge acknowledges, and seemingly accepts, many of Professor Resnik’s concerns about the changing views on the role of civil litigation.<sup>20</sup> Also, he does not challenge, at least not directly, Professor McManamon’s notion that the study of civil procedure is most important because civil litigation serves as a major “vehicle for lawmaking”<sup>21</sup> and for the “articulation of social values.”<sup>22</sup> Professor Eskridge’s main contemporary criticism of the basic civil procedure course is that, regardless of the fact that the “urgency” of Field and Kaplan’s three pedagogical ideas has been undermined by developments in legal theory and education, almost all textbooks continue to be founded on these ideas.<sup>23</sup>

In Professor Eskridge’s view, the three ideas underlying most civil procedure texts are: (1) the organization of the materials is based upon the phases of a lawsuit, with a focus on the “nuts and bolts of procedural doctrine . . . arranged . . . in roughly the order in which they would be implicated in a lawsuit”;<sup>24</sup> (2) the materials concentrate on a “single, modern system of procedure,” namely, the Federal Rules;<sup>25</sup> and, (3) the materials are critical of the federal rules at the margins, though not at the “core.”<sup>26</sup>

According to Professor Eskridge, one relevant development in legal theory and education that has undermined these pedagogical ideas is “the establishment of clinical programs at most law schools.”<sup>27</sup> These programs have shown that actual case studies are “better tools than appellate decisions for teaching the doctrine and mechanics of procedure.”<sup>28</sup> Another development, which has had a similar effect, is “the increased reliance on extra-legal arguments in legal scholarship”<sup>29</sup> that has offered civil procedure

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19. *Id.* at 556.

20. *See* Eskridge, *supra* note 4, at 959 (finding “valid” Professor Owen Fiss’ lament that adjudication is becoming less available for a “not insubstantial number of cases involving group or public rights,” as well as Fiss’ thesis that trial judges ought not be eager to press parties to settle these cases and ought to scrutinize settlements of such cases to assure the results are just). Professor Eskridge employs Professor Resnik’s “failing faith” language, observing a perceived popular dissatisfaction with the operation of the Federal Rules of Civil Procedure. *See id.* at 949.

21. McManamon, *supra* note 1, at 438.

22. *Id.*

23. *See* Eskridge, *supra* note 4, at 948.

24. *Id.*

25. *Id.*

26. *See id.*

27. *Id.*

28. *Id.*

29. *Id.* at 949.

teachers “more intellectual options for exploring [the] larger [conceptual] issues.”<sup>30</sup> Finally, there is a “failing faith” that satisfaction does, or even may, result from the use of transsubstantive rules,<sup>31</sup> so that many no longer share Field and Kaplan’s “pride in the grand generality of procedural rules.”<sup>32</sup>

Given his sympathy for increased opportunities for adjudication of certain forms of civil cases and his disenchantment with the Field and Kaplan pedagogy, Professor Eskridge was stirred to “intellectual excitement”<sup>33</sup> by the then new textbook, *Procedure*, authored by Professors Resnik, Owen M. Fiss and Robert M. Cover.<sup>34</sup> The book focuses on the “themes and structures of procedure, rather than the history and mechanics of doctrine.”<sup>35</sup> It is not organized linearly, but rather by “larger conceptual themes.”<sup>36</sup> Also, the book relies far less on appellate decisions, utilizing more “case studies, excerpts from transcripts, and articles.”<sup>37</sup>

Whatever the view of the role of contemporary civil litigation, Professor McManamon posits that the civil procedure course should remain a requirement; it should in no way be “subordinate to the other classes that students take,”<sup>38</sup> wherein at the core there remains the study of the process of civil litigation as “a major vehicle for lawmaking . . . and for articulation of social values.”<sup>39</sup> In the study of civil litigation, the focus is on judges because “it is through the forge of the judiciary that our law takes shape.”<sup>40</sup> Judicial lawmaking cannot be understood well without understanding “how the forge works.”<sup>41</sup>

### III. A “CREATIVE” SUGGESTION

Accepting Professor McManamon’s invitation to think creatively about the civil procedure curriculum that “makes the most sense,”<sup>42</sup> let me posit a

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30. *Id.* (describing that options beyond a “tight internal rigor and comprehensive analysis of legal doctrine” include study of “philosophy and ethics, psychology, economics, and social and political theory”).

31. *See id.*

32. *Id.*

33. *Id.* at 951.

34. COVER ET AL., *supra* note 4.

35. Eskridge, *supra* note 4, at 950.

36. *Id.*

37. *Id.* at 951.

38. McManamon, *supra* note 1, at 438.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 440.

second civil procedure course that would follow the basic course whose history and contours Professor McManamon describes so well. In this second course, the focus would shift from judges to lawyers (and secondarily to their clients). A study of civil claim settlements, not of judicial lawmaking, would lie at the core of such a course. It is through the forge of lawyers during settlement talks that most civil dispute resolutions take shape. Such a study could explore and contrast the work of lawyers involved in both civil and non-civil litigation before general jurisdiction trial courts.

To facilitate the establishment of this second course as a required component of the law school curriculum (which it need not be in my view) some responsible parsing of the initial civil procedure course could liberate the necessary credit hours. Is there some good reason why significant chunks of the conflict of laws and federal courts courses are examined in so much depth in the basic civil procedure course today?<sup>43</sup> Is there some good reason why topics that are exclusively or chiefly germane to federal court practice in the district courts<sup>44</sup> (and are thus inapplicable to much American trial court civil litigation) often consume a great deal of time and energy in today's basic civil procedure course? Such parsing would do more than change the setting in which certain topics are explored. The suggested second civil procedure course would encompass "nuts and bolts," (or "larger conceptual issues," if preferred) which remain largely unaddressed in today's entire civil procedure curriculum, including advanced civil procedure textbooks.<sup>45</sup> The result would be more than a "slightly new" shape.<sup>46</sup>

If, in civil litigation, it is imperative to comprehend how judges are involved in lawmaking and articulation of social values, it seems equally

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43. Consider, e.g., federal constitutional limits on personal jurisdiction; federal constitutional dictates about choice of law (*Erie*, Full Faith and Credit); and, the meaning of federal question cases, both constitutionally and statutorily.

44. Consider, e.g., the intricacies of general diversity subject matter jurisdiction and of supplemental subject matter jurisdiction.

45. See RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (3d. ed. 1998); LINDA S. MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* (1996); JAY H. TIDMARSH & ROGER TRANSGRUUD, *COMPLEX LITIGATION* (1998). These books all focus on the types of complex civil litigation that are often based in the federal district courts and prosecuted, only occasionally, by major law firms. Most law students today will never work on such cases. By contrast, a great number of law students will be called upon in the years immediately following graduation to assist in facilitating civil claim settlements on a regular basis. However, the laws guiding civil claim settlements are only briefly reviewed in contemporary law school texts (e.g., not in basic civil procedure or contracts texts, and not in skills training texts which typically focus on the "how to," while the legal guidelines such as for pleadings, discovery and summary judgment motions, are assumed to be known).

46. See McManamon, *supra* note 1, at 440.

imperative, at least for those interested in correlating legal studies and lawyering, to comprehend how lawyers are involved in claim settlements. As with lawmaking, here too there are choices for teachers about which nuts and bolts and larger conceptual issues one should present. Beyond the opportunities for both pragmatism and intellectual challenge, the study of civil claim settlement processes offer other significant pedagogical rewards.

The law school examination of civil claim settlement processes would be unique, or at least quite different, from other courses in that its focus is on an area of professional legal work rather than on a discrete area of the law. An understanding of a civil claim settlement requires a study of a mixture of substantive,<sup>47</sup> procedural,<sup>48</sup> and ethics<sup>49</sup> laws. There is no pigeonholing here, as there is not in the practice of law. Such a course would raise relevant issues, and keys to understanding these issues could be explored, regardless of their origins. Consequently where appropriate, students would review contract and tort laws (e.g., oral agreements and contribution). However, the overlap with traditional first year courses would be minimal. Also, there would be minimal overlap with other traditional courses, as unstudied or understudied issues of state and federal civil procedure laws and lawyer professional responsibility laws must be examined. Even for the study of civil claim settlement materials that are first addressed in other traditional courses, their examination in a later civil procedure course should prompt further recognition of the "seamless web" of legal issues in a unique way. The materials should compare not only issues of federal and state laws, but also issues of varying laws within any single government. Thus, the study can explore and contrast premarital agreements, employment pacts, and consumer contracts, all of which anticipate procedural issues such as arbitration and choice of law, in the event civil claims later arise.

The exploration of the public policies underlying the substantive, procedural, and ethics laws relevant to civil claim settlements can trigger reflections on larger conceptual issues as well as on "nuts and bolts." The nuts and bolts materials are easily imagined, such as the following: what parties settle under what circumstances; how settlements are effected (e.g., the necessity of a written agreement); public access to settlement pacts; and, how settlements are enforced. Conceptually, students can reflect on both separation of powers, such as the constitutionality of certain recent tort

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47. Included are constitutional, statutory, and common law precedents in such areas as the authority to settle.

48. Included are criminal, civil, and regulatory precedents in such areas as the enforcement of settlements.

49. Included are both high court rules and statutes regulating legal professionals in such areas as fees and fee collections.

reform efforts, and individual rights, such as jury trial and procedural due process rights that may be infringed by compulsory arbitration agreements. The comparative approach to the study of procedural laws (which is taken by Cover, Fiss and Resnik) can even be employed, as when exploring the limits on attorney representational authority or the differing contractual requirements, when civil claims are settled in civil, criminal, and administrative case settings.

A civil claim settlement course should not be an "old course in a slightly new shape."<sup>50</sup> The course would be inter-disciplinary in character. Pigeonholing would be eschewed and the limits of transsubstantive procedural rules often could be recognized. Further, the course would be adaptable so that one may explore both the pragmatic and the theoretical. Finally, the study of substantive, procedural, and ethics laws on civil claim settlements would provide significant opportunities to reflect on law reform. Hopefully, a brief review of available topics will further demonstrate the potential for "intellectual excitement" about these new approaches to teaching civil procedure.<sup>51</sup> For example, a civil claim settlement course could address the following major topics:

1. Introduction: Contracting for Widgets and for the Release of Civil Claims;
2. The Settlement of Procedural Law Issues Before Civil Claims Arise;
3. The Settlement of Substantive Law Issues Before Civil Claims Arise;
4. Civil Claim Settlement Talks;
5. Authority to Settle Pending Civil Claims;
6. Contractual Requirements When Existing Civil Claims Are Settled;
7. Secrecy and Civil Claim Settlements;
8. Effects of Partial Settlements on the Viability of Remaining Claims;
9. Effects of Partial Settlements on Later Trials;
10. Non-Party Interests in Civil Claim Settlements: Lawyers and Other Lienholders;
11. The Enforcement of Civil Claim Settlements;

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50. McManamon, *supra* note 1, at 440.

51. The exemplary topics were culled from the materials used in my own advanced civil procedure course (the name of which was perhaps ill-chosen, as Civil Claim Settlements seems more appropriate). A more complete course description is on file with the author. A book, *Advanced Civil Procedure: Civil Claim Settlement Laws*, will be published soon by Carolina Academic Press.



## 12. The Unintended Effects of Civil Claim Settlements on Later Civil Litigation.

The introductory materials could first ask how different an agreement to purchase and sell widgets is from an agreement to resolve an existing civil claim. In the latter, there is a public, not private, arena when a lawsuit is pending. As such, there is also the presence, if not involvement, of a third person decisionmaker, a possible breach of a legal duty, and there may be the need to resolve the interests of apparent outsiders, including the attorneys and other lienholders.<sup>52</sup> Further, conduct involving the breach of a duty owed to a neighbor may also establish the breach of a duty owed to the public at large, recognized perhaps in criminal or regulatory provisions. Thus, at times, a private civil claim may be resolved during a government-initiated criminal or administrative proceeding. Therefore, using this approach, it should quickly become apparent to students that widget and civil claim agreements may be guided by very different legal standards.

Next, the introductory materials could generally inquire as to the relevant lawmaker(s) on issues of civil claim settlement, thereby illustrating the mix of substantive, procedural and ethics laws. Because several lawmakers (for example, the legislature, supplemented by the judiciary via common lawmaking; the court rules committees, often overseen by the legislature; and the high court, sometimes aided by a rules committee) have at least some relevant powers and, because these powers often depend upon characterization (i.e., legal ethics laws are exclusively for the high court, and substantive laws are ultimately for the legislature), the substance, procedure and ethics trichotomy is quite important in determining who should be the appropriate lawmaker in a particular situation.<sup>53</sup> Whatever the characterization, lawmaking powers can be shared. For example, at times both the high court and legislature make civil procedure laws for the trial courts.<sup>54</sup> The substance, procedure and ethics trichotomy is also employed to

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52. In fact, where there are no significant restrictions on the settlement monies subject to liens, the lienholders rather than the claimants may be the true bargaining parties. *See, e.g.*, *Burrell v. Southern Truss*, 679 N.E.2d 1230, 1233 (Ill. 1997) (demonstrating, through a state legislator's statement, how a \$100,000 settlement could result in no money for the claimant once the attorney's, hospital's, physician's, and home health care liens were met).

53. Here, the differing allocations of lawmaking authority germane to civil adjudication within state governments (and quite distinct from federal allocations) can be explored, as such an examination is usually lacking in the basic civil procedure course focusing on the judiciary as the "forge."

54. In Illinois, for example, both the Code of Civil Procedure, 735 ILL. COMP. STAT. 5/1-101 to 5/21-104 (West 1992 & Supp. 1999) and the Supreme Court Rules significantly govern trial court civil procedure. *See, e.g.*, *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1146 (Ill. 1992).

resolve choice of law issues relating to civil claim settlements because dispute resolvers in one jurisdiction are frequently asked to determine a civil claim having significant connections with a second jurisdiction. A conflict of law analysis will often trigger different characterizations than a separation of powers analysis.

The difficulties in differentiating between substance, procedure and ethics in order to resolve settlement issues relating to an existing multi-jurisdictional civil claim can be well illustrated early in the course. This can be done through consideration of a very practical, yet complex, issue that involves the power of a lawyer to bind a client to a civil claim settlement. For example, consider a case where there is settlement of an Illinois civil claim by an agreement between lawyers that is incorporated into a Wisconsin court judgment. If that agreement later is challenged by one of the parties, whose law and what type of law governs? Are all disputes about the agreement to resolve an Illinois civil claim necessarily governed by Illinois contract law, the contract law of Wisconsin (where the agreement was reached), or by the procedural or ethics law governing lawyers? In addition, if ethics laws govern, is it the law of the lawyer's licensing state or the law of the state where the relevant conduct occurred? Should it matter if the Illinois civil claim involved tort, contract or civil rights law? Should one be concerned with the timing of the agreement (during a court proceeding or outside of court) or, whether the settlement was reached as part of a criminal case plea bargain rather than during a civil or regulatory proceeding? Incidentally, difficulties in differentiating substantive, procedural and ethics laws are reduced, but not wholly eliminated, even where all the relevant conduct occurred in Illinois.<sup>55</sup> Similar difficulties arise during the examination of differences between settling existing civil claims and settling, in advance, both procedural and substantive issues that are relevant to anticipated future civil claims.

Such an introduction forbodes similar separation of powers and choice of law inquiries on a range of later topics, including:

1. Compulsory arbitration agreements in varied settings;
2. Employment, prenuptial and civil rights;

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55. Consider, e.g., whether a lawyer's civil litigation conduct may not be subject to regulation, at least in part, by lawmaking in the areas of civil procedure (in Illinois, both the General Assembly and the Supreme Court), commercial transactions (in Illinois, chiefly the General Assembly), and attorney professional conduct norms (in Illinois, exclusively the Supreme Court). On Illinois lawmaking concerning a lawyer's civil litigation conduct, see Jeffrey A. Parness & Bruce Elliott Keller, *Increased and Accessible Illinois Judicial Rulemaking*, 8 N. ILL. U. L. REV. 817 (1988).

3. Pacts requiring secrecy in civil claim settlements, which may or may not conceal public health hazards;
4. The possible invalidity of certain forms of settlement arrangements;
5. "Mary Carter" agreements;<sup>56</sup> and
6. The potential for judicial enforcement of civil claim settlements.

Within these and other topics there is also a great deal of opportunity for engaging in public policy debates, law reform explorations, and challenging and practical simulations that utilize "real case studies."<sup>57</sup> Civil claim settlement law guidelines are often difficult both to articulate and to implement, and they tend to vary significantly from legal constraints on widge agreements.

In confronting the "seamless web" of laws on civil claim settlements that practicing lawyers do (since their clients do not usually announce at the door whether they have a contracts or a civil procedure or a civil rights problem), students will also be challenged to coordinate both general and special laws, whose origins may differ, and where cross references are often lacking. Consider the multiplicity of statutes on compulsory arbitration agreements, which often exist within even a single jurisdiction. Beyond the Federal Arbitration Act<sup>58</sup> which generally applies<sup>59</sup> even where most relevant conduct occurs in a single state,<sup>60</sup> there is usually a general state arbitration act<sup>61</sup> that is typically modeled after the Uniform Arbitration Act<sup>62</sup> and is not very different in key components from the federal statute. Also, there may be special state statutes that may<sup>63</sup> or may not<sup>64</sup> expressly refer to compulsory arbitration pacts.

56. "Mary Carter:" (or loan receipt) agreements are defined, and their history is reviewed, in *Dosdourian v. Carsten*, 624 So. 2d 241, 243-45 (Fla. 1993) (describing somewhat secret settlement wherein ultimate liability of settling defendant depends on recovery from nonsettling defendant).

57. Eskridge, *supra* note 4, at 948 (explaining that "[c]linical education has demonstrated that real cases studies . . . are better tools than appellate decisions for teaching the doctrine and the mechanics of procedure").

58. 9 U.S.C. §§ 1 to 307 (1994 & Supp. 1997).

59. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

60. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

61. *See, e.g.*, 710 ILL. COMP. STAT. ANN. 5/1 to 5/23 (West 1993).

62. UNIF. ARBITRATION ACT § 1, 9 U.L.A. 76 (1957 & Supp. 1967).

63. *See, e.g.*, DEL. CODE ANN. tit. 10, §§ 5701, 5725 (1974) (illustrating that the pro-arbitration policy is inapplicable to "labor contracts . . . negotiated by . . . labor organizations or collective bargaining agents").

64. *See, e.g.*, 210 ILL. COMP. STAT. ANN. 45/3-607 (West 1993) (entitling claimants under Nursing Home Care Act to a trial by jury and providing that "any waiver of the right . . . prior to the commencement of an action, shall be null and void, and without legal force or effect").

## IV. CONCLUSION

There is reason to think that Professors McManamon, Resnik and Eskridge might each welcome an independent civil procedure course chiefly focused on civil claim settlements. Professor McManamon wonders whether alternative dispute resolution processes are as “easy to grasp” as some have opined.<sup>65</sup> She counsels that we should not fear creativity and “that we should not be afraid to question our Langdellian universe.”<sup>66</sup> In conclusion, Professor McManamon urges civil procedure teachers to “communicate . . . to our students” the dramatic changes in civil litigation over the years in ways that make “the most sense.”<sup>67</sup>

While expressing and urging us to maintain continuing faith in traditional trial court adjudication for many types of civil claims, Professor Resnik clearly understands that “[i]n the bulk of civil litigation, the parties’ decisions to settle are not subjected to review.”<sup>68</sup> She posits that because of the “public, visible nature” of all trial court cases and their “public dimension,”<sup>69</sup> wherein the parties and others typically settle their differences within “our publicly-financed system of dispute resolution,”<sup>70</sup> more inquiry is needed into “the sources and scope of judicial authority” over settlement.<sup>71</sup> Her own inquiry leads her to encourage the development of written rules guiding civil claim settlements, especially guidelines which would reduce the “echoes of the ambiguity about the judicial role in settlement” that presently exists,<sup>72</sup> so that constraints may be put in place to better ensure that settlements are not “achieved under conditions of imbalance, lawyer ineptitude, indeterminacy, and judicial coercion.”<sup>73</sup>

Professor Eskridge seemingly would also welcome an independent procedure course, and not one limited simply to civil procedure, which focuses on the differing approaches needed for settling different types of existing and future civil claims, with some emphases on distinguishing between “private rights” claims<sup>74</sup> and claims involving “public rights.”<sup>75</sup>

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65. McManamon, *supra* note 1, at 438.

66. *Id.* at 440.

67. *Id.*

68. Resnik, *supra* note 8, at 552.

69. *Id.* at 553-54.

70. *Id.* at 554.

71. *Id.* at 550.

72. *Id.* at 551.

73. *Id.* at 545 (questioning whether adjustment under these circumstances is better than adjudication).

74. See Eskridge, *supra* note 4, at 955-56 (involving “disputes between isolated litigants” treated as “discrete individuals,” wherein the “structure of the adjudication is triadic” and is geared toward returning “the parties to a position of repose and security”).

Such a course certainly could never give any set of civil procedure laws “deferential, if not canonical, treatment,”<sup>76</sup> for, as Professor Resnik has lamented, civil procedure rules and statutes are largely silent about settlement.<sup>77</sup> In such a course, “themes and structures of procedure” more likely will influence course direction rather than phrases or lines,<sup>78</sup> as there is no singular arrangement implicated for a settlement, even with regard to a “typical” civil claim.<sup>79</sup> There are significant opportunities in such a course for the exploration of “metaprocedure,” as well as the “seamless web” and for a “practical focus on a vivid litigation experience.”<sup>80</sup>

Professor McManamon has encouraged us to “debate,” and to suggest procedure courses that make “the most sense,” though they may “question our Langdellian universe.”<sup>81</sup> We should begin. Is it now time for a civil claim settlement course, intradisciplinary in nature, with emphases on: comparative federal and state laws; the anticipation and resolution of typical (private rights) civil claims; and simulated exercises significantly incorporating perplexing settlement law issues that most lawyers (in and outside of litigation) face today?

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75. See *id.* at 958-60 (including disputes where there are group, not individual, rights; constitutional “values that transcend the interests of” the named parties; and, remedies sought that involve changing “a lawless context into a just one” or transforming “relationships in a publicly desirable way”).

76. *Id.* at 950.

77. See Resnik, *supra* note 8, at 496.

78. Eskridge, *supra* note 4, at 950.

79. See *id.* at 959 (defining a “typical” civil claim as one “where a few parties are fighting over money, usually \$10,000 or less”).

80. *Id.* at 954.

81. McManamon, *supra* note 1, at 440.