

ARTICLES

"SUBSTANCE" AND "PROCEDURE" REVISITED WITH SOME AFTERTHOUGHTS ON THE CONSTITUTIONAL PROBLEMS OF "IRREBUTTABLE PRESUMPTIONS"

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*We were all brought up on sophisticated talk about the fluidity of
the line between substance and procedure.*

—John Hart Ely

One of the most common concepts in the last century of legal exposition in both judicial opinions and scholarly analysis is the dichotomy between procedural law and substantive law.¹ Indeed, the distinction has been adopted as the appropriate test to resolve a variety of points of controversy in various areas of the law.² One would think that, considering the commonness of the distinction and its practical impact in many actual cases, there would have emerged some consensus about what constitutes procedure and what constitutes substance. At the least, one would anticipate

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1. This probably sounds so obvious as to be beyond need of citation, given *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and what came before and after it. Actually it is inaccurate by a decade or two, at least in America. The dichotomous concepts of procedure and substance were virtually unheard in the United States in the 1880's. See *infra* note 42. A reasonably complete outline of the history of these concepts is a major part of this Article.

2. Most particularly, conflicts—see *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 122 (1971)—and issues of conformity to state law in diversity actions in the federal courts, as evidenced by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. For the best analysis of the area, see Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

finding some clearly defined and closely reasoned schools of thought, identifiable and in competition with one another over well-analyzed points of disagreement. This is not the case, however. Even the history of the concept is the subject of widespread misunderstanding, and the closest thing there is to a developed school of thought concerning the meaning of the procedure-substance dichotomy is really an abdication of analysis, wilfully embraced.³

This Article seeks to do three things: (1) trace the development of the dichotomy to put the suggested analysis in historical context, (2) create a workable model for distinguishing between procedure and substance in various contexts, and (3) indicate some areas where the clarified distinction may have implications beyond descriptive analysis.

I. ORIGIN

In an influential article written in 1941,⁴ Professor Edgar H. Ailes claimed to trace the roots of the procedure-substance dichotomy to the thirteenth century and followed what he understood to be the dichotomy's development through a number of continental writers over the centuries to its appearance in English courts in the early eighteenth century.⁵ His approach reflected the then-prevailing thought concerning the concepts of substantive law and procedural law. That he was mistaken has not prevented this view from dominating to this day.

What Ailes actually, if unknowingly, traced was the history of the right-remedy distinction.⁶ The distinction between a right and a remedy for the violation of that right is indeed as old as the thirteenth century.⁷ The contours of this distinction were devel-

3. The realists, best represented by Walter Wheeler Cook, are most responsible for the abdication. See *infra* text accompanying notes 44-52 and especially note 48.

4. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392 (1941).

5. *Id.* at 396-401.

6. The sources cited by Ailes for continental developments before 1840 are Bel-leperche, *id.* at 397-98, Bartolus, *id.* at 398 n.19, Baldus, *id.*, and Story, *id.* at 398 n.20, and a report of a case in the Parliament of Paris. Story relies on Rodenburg, Hertius, and Strykius. *Id.* In each of the cited writings, except the Parliament of Paris case, the dichotomy considered is represented by some variant of the Latin phrases "*ea quae ad litis decisionem pertinent*"—those things classified as the law of decision between the parties (as to winner and loser "rights") and "*ea quae ad litis ordinationem pertinent*"—those things classified as the law of bringing the rights into practice (remedies). Story's treatment of these concepts in his outlining the right-remedy distinction is undoubtedly accurate. See *infra* text accompanying notes 19-23.

7. Ailes' Parliament of Paris case (1265), applying the *lex fori* to defeat an "esso-in" (a kind of continuance), is the earliest known case of a court dealing with the kind of problem which precipitated the dichotomy. Ailes, *supra* note 4, at 396-97. Though the court there ruled that the *lex fori* would control because the esso-in was

oped by continental theorists chiefly in the context of international law and what we would today call conflicts of law.⁸ As we will see, it was imported directly into Anglo-American conflicts theory, chiefly through the work of Joseph Story.⁹

The procedure-substance dichotomy is different from the right-remedy distinction. The dichotomy was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General*,¹⁰ *sub nom* the distinction between substantive law and adjective law.¹¹ Bentham there makes clear that he believes he is drawing a new distinction in the descriptive organization and analysis of the concept of law,¹² and an examination of the leading pre-Bentham sources on English legal theory supports his claim.¹³

The difference between the traditional right-remedy distinction and the procedure-substance dichotomy may strike some as subtle, but it is very important. Bentham interpreted the definition of the possible range of remedies that might be accorded for a violation of a right as being part of the substantive law,¹⁴ whereas

"de processu causae" (concerning the processes of the case—a phrase which might have led to the procedure-substance dichotomy if it had been adopted as standard), by the time of Belleperche's writing 43 years later, the "*decisionem-ordinationem*" language had emerged as the slogan which it remained for over 500 years. *Id.* One may infer that it was already a slogan by 1308 because Belleperche, writing in French, uses the Latin phrases in his text, attributing them to "les docteurs." For a quote of the pertinent text in the original French, see *id.* at 397-98.

8. See *supra* notes 6-7.

9. See *infra* text accompanying notes 19-23.

10. COLLECTED WORKS OF JEREMY BENTHAM: OF LAWS IN GENERAL (H.L.A. Hart ed. 1970) [hereinafter cited as OF LAWS IN GENERAL]. The 1782 date of completion is given in Hart's *Introduction*, at xxxi.

11. Bentham's substantive-adjective dichotomy was part of an extremely elaborate conceptual analysis of the phenomenon of law, and Bentham arrived at the dichotomy with a full understanding of the anomalies represented by laws against suborning perjury and other such "enclitic" laws which appear substantive but presuppose other laws. His plan was to classify all such laws as "adjective," so that procedure was only a part, though the major part, of adjective law. See OF LAWS IN GENERAL, *supra* note 10, at 142. I have dealt with this anomaly in a separate section with a slightly different result. See *infra* text accompanying note 58.

12. This originality is a major point of the entire structure of *Of Laws in General*. For Bentham's claims to coinage of numerous terms, at least as to terms of art as applied to the phenomenon of law, see all those instances, particularly in Chapter XI, where Bentham explains a point and then states such laws "may be termed" or "may be styled" such and such. For "substantive" and "adjective," see OF LAWS IN GENERAL, *supra* note 10, at 142 (and for the word "procedure," see *id.* at 140, 142 n.k; see also *infra* note 16).

13. A partial list of sources where no such distinction appears would include M. BACON, A NEW ABRIDGEMENT OF THE LAW (5th ed. 1798); W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765); E. COKE, INSTITUTES OF THE LAW OF ENGLAND (1628); and M. HALE, PLEAS OF THE CROWN (1682).

14. We are now arrived at the notion of an object which might in a certain sense admit to the appellation of a law. It may even be looked upon as constituting a law and something more: since there are to be found in it two distinguishable parts: the directive part, which must of

under traditional right-remedy theory such a determination was clearly part of the remedial law,¹⁵ as were those things Bentham would have called adjective or procedural.¹⁶ At the very least, confusion of the two concepts leads to blurred thinking. At worst, if decisions of actual disputes are made to turn on one set of concepts or the other, confusion could lead to unpredictable and undesirable results, even if the application of those concepts intended when the original rule was promulgated would have led to desirable results. By the early twentieth century, however, this confusion was the rule rather than the exception.¹⁷

There seems to have been no widespread confusion between Bentham's concepts and the traditional ones before the 1830s, perhaps because the English speaking writers who knew the continental theorists did not know much of Bentham,¹⁸ and vice versa. For instance, Joseph Story published his great treatise on *Conflict of Laws*¹⁹ in 1834. In his chapter on Jurisdiction and Remedies, Story has a number of sections on the right-remedy distinction.²⁰ He never once mentions "substance," "substantive law," "procedure," "procedural law," or "adjective law" (or Jeremy Bentham).²¹ He does speak of the "manner [in which] suits arising

itself be a complete expression of will, and an article of a different nature, a "prediction." . . . [W]hat has been done by the law as yet amounts to nothing: as an expression of will, it is impotent; as a prediction, it is false. The will of the legislator concerning the matter in question has indeed been declared: and *punishment has been threatened in the case of non-compliance with such will*: but as to the means of carrying such threats into execution, nothing of this sort hath as yet been made appear.

OF LAWS IN GENERAL, *supra* note 10, at 137 (emphasis added).

15. J. STORY, CONFLICT OF LAWS § 557, at 468-70 (1834).

16. Bentham also coined the term "procedure" as a legal term of art. In *Of Laws in General*, he stated:

In the language of the English law the word *procedure* is not much in use: questions which arise in the courts with relation to laws of this stamp are styled *questions of practice*: . . . and the subordinate laws which are made by judges with relation to this head, *rules of practice*. The word *procedure*, though not so familiar, seems more characteristic and determinate.

OF LAWS IN GENERAL, *supra* note 10, at 142 n.k. See also *id.* at 140.

17. For an example of the confusion of the terms, see the discussion in *Barnet v. New York Central & H.R.R.*, 222 N.Y. 195, 199-200, 118 N.E. 625, 626-27 (1918).

18. One cannot cast too much blame on such writers for not recognizing Bentham's substantive-adjective distinction. Though references to it are made in other works, the only full exposition is in *Of Laws in General*, which was not published until the 20th century. The manuscript was discovered in 1939 by Professor Charles Warren Everett and first published by him under the erroneous title *The Limits of Jurisprudence Defined* in 1945. See Hart, *Introduction*, in OF LAWS IN GENERAL, *supra* note 10, at xxxi.

19. J. STORY, *supra* note 15.

20. *Id.* §§ 556-583, at 468-90.

21. The word "procedure" as a French word does appear in some of the quotations from Story's French sources. See, e.g., the quote from Boullenois in 1580, *id.* at

from foreign causes are to be instituted, and proceedings to be had" and of the "modes of proceeding and forms of suit."²² It is clear that, following the continental authorities which he cites in abundance, these notions are for Story merely a part of the law of remedies. Indeed, what is striking is the absence of any categorical expression at all for what Bentham would have denominated adjective law. "Modes of proceeding" is, taken in context, too narrow and must be supplemented with the phrase "forms of suit."²³ Clearly, Story was quite conversant with the right-remedy distinction, yet he was unaware of anything like a distinction between substantive law and adjective law as Bentham had described them.

John Austin may have been partly responsible for the later confusion of the right-remedy distinction with the procedure-substance dichotomy. In Lecture XLV of his famous lecture series at University College, London, given around 1832, he puts forth an idea of his own, which may quite easily be mistaken for the right-remedy distinction,²⁴ and then erroneously asserts that his notion is what Bentham meant by the substantive-adjective dichotomy.²⁵

486. Bentham may have been led to adopt the term because of his own French connections. Not only was he fluent in French and greatly influenced by French ideas, but some of his works were first published in French translation.

22. *Id.* § 556, at 468.

23. Bentham made the same point in coining the word "procedure." *See supra* note 16.

24. In Lecture XLV, Austin described his "primary right-secondary right" distinction, indicating that primary laws create primary rights and secondary laws create secondary rights for the vindication of violations of primary rights. A reader could quite easily conclude that secondary rights are actually remedies for the violation of primary rights, and therefore equate Austin's scheme with the right-remedy distinction. Austin then goes on to assert that his primary-secondary classification is the same as Bentham's substantive-adjective distinction. Austin's idea is that a primary law creates a primary right independent of sanction (unlike Bentham, Austin totally ignored the possible role of rewards or bounties as components of anything he would recognize as properly called law).

In the case of simple battery, this primary right is the right not to get punched in the nose. If this right is violated, a secondary law gives rise to a secondary right to the payment of damages. Under this approach, both the law of *decisionem* and *ordinationem* (traditional right and remedy) deal exclusively with the law applied to violations of Austin's primary right in a litigation context and are thus both concerned with Austin's "secondary rights." *See generally* J. AUSTIN, LECTURES ON JURISPRUDENCE 179-86 (R. Campbell ed. 1874).

25. Bentham's response to Austin's claim that "primary-secondary" is the same as "substantive-adjective" might well have been something like this:

John, your primary right-secondary right observation is very interesting, but I do not understand why you say one law gives rise to the primary right and a separate law gives rise to the secondary right. It strikes me as more satisfying to say that a single law (the law forbidding battery on pain of paying damages) gives rise to the primary right to physical integrity and the conditional (secondary if you insist) right to damages if the primary right is violated. Otherwise, your primary right and corresponding primary duty (the duty not to punch) are the prod-

However, it is hard to pin blame on Austin for the general confusion since Lecture XLV was not printed until 1863.²⁶

The major culprits in fostering confusion seem to have been John Westlake (who appears to have planted the seed in the general legal environment, at least in print), John Alderson Foote, and Albert Venn Dicey (who most effectively disseminated it). Westlake's *Treatise on Private International Law*²⁷ contains the seeds of the confusion. His chapter XIV is entitled "Procedure,"

uct of a law which, if viewed as separate and independent, is a purely hortatory proposition. Since I don't think I believe that a purely hortatory proposition by itself can properly be called a law, I therefore would assert that a single substantive law can give rise to both your primary right and your conditional (secondary) right. I concede, if a purely hortatory proposition can be fairly counted a law, that since a version of such a primary exhortation can be framed for each law (at least each law depending on punishment to conform conduct to its command), you can argue that such is the only "substantive" law in the sense of standing alone and not presupposing any other law, and that all definitions of the range of remedies for violation of the primary exhortation, if viewed as flowing from a second separable law, would be adjective.

. . . But that is not what I meant at all.

My own view is that a purely hortatory proposition can sometimes count as a law, but that laws of the non-hortatory type must account for most laws in anything that can be called a legal system. Further, when a sanction or reward is in fact (as it generally is) associated with the primary exhortation, such a structure is most satisfying when seen as a single law, not the product of two independent laws as Austin would have it. *Nota bene*, this does not address the separability of Bentham's "principal" law (addressed to the subjects of the substantive command of a law) and his "subsidiary" law (addressed to judges instructing them to carry out the promised sanction of the principal law in case of violation). See OF LAWS IN GENERAL, *supra* note 10, at 139-43.

26. Perhaps Austin cannot escape completely. Bentham was born in 1748 and died in 1832, the year Austin commenced his lectures. Austin was then 42 and first holder of the chair of Jurisprudence at the University College, London (of which Bentham was a founder). Austin had been close to Bentham and his circle for some time, particularly to John Stuart Mill, who, though only 26, had edited Bentham's *Rationale of Judicial Evidence* for publication in 1828. Though Austin presented 57 lectures in his University College, London series, he published only the first six plus an outline of the rest under the title *The Province Of Jurisprudence Determined* in 1832. Nothing else was published before Austin's death in 1859. Austin's widow, Sarah Taylor Austin, published an edition of the 1832 lectures in 1863, which contained the first publication of Lecture XLV in writing.

John Westlake was born in 1828, and thus was only four years old when Austin's lectures were given. See generally the *Introduction* in J. AUSTIN, *supra* note 24.

Westlake was raised in Cornwall and was graduated from Trinity College, Cambridge, in 1850, and called to the bar as a member of Lincoln's Inn in 1854. See DICTIONARY OF NATIONAL BIOGRAPHY 569 (Supp. 1912-1921).

There seems to be no reason to believe that this establishment barrister was connected closely enough with any of the radical reformist Benthamite crew at the University of London or elsewhere that he would have studied private notes of Austin's lectures prior to the publication of his treatise, *Private International Law*, in 1858. What is more likely is that parts of Bentham's vocabulary had begun to filter into fairly common usage among younger English legal thinkers, whether still attached to Bentham's ideas or not.

27. J. WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW (1st ed. 1858).

but it begins with a standard quote from Bartolus referring to the law of remedy, that is, "ordinationem."²⁸ It is true that after the quote from Bartolus, Westlake's first edition contained a sentence which might be interpreted as showing a perception of the difference between the concepts of remedy and procedure, but the distinction was not developed in any way to expel confusion. Further, later editions were amended in such a way as to show that the confusion in fact existed in Westlake's mind.²⁹

Foote published his treatise in 1878.³⁰ Part IV, which seems generally to concern the right-remedy distinction of traditional theory, is entitled "Procedure."³¹ It is true that within that section he defined procedure such that he might mean something narrower than traditional notions of remedy.³² However, the opacity of this potential distinction in his text, coupled with the facial generality of his title to Part IV, contributed to the growing confusion.³³

If Foote and Westlake were a little unclear, Dicey is crystal clear. Dicey's treatise on conflict of laws was first published in 1896.³⁴ The lucidity of its explanations made it the most commonly used treatise for decades. And, in Chapter XXXI of that work, Dicey lucidly defines the term "procedure" to mean what would earlier have been referred to as the law of remedies.³⁵ To substantiate the standard nature of this approach, he cites Story, Westlake, Foote, a then recent casebook by H.B. Nelson, and a

28. *Id.* at 390.

29. Compare J. WESTLAKE, *supra* note 27, at 390 (1st ed. 1858) ("[T]he principle of enforcing foreign rights, be it comity or justice, can be carried no higher than to place them on a level with domestic rights, entitling the party to the same remedies and subject to the same rules of procedure.") with *id.* (4th ed. 1905) ("[T]he principle of enforcing foreign rights, be it comity or justice, can be carried no higher than to place them on a level with domestic rights, entitling the party to the same remedies and subject to the rules incident to those remedies.").

30. J. FOOTE, A CONCISE TREATISE ON PRIVATE INTERNATIONAL JURISPRUDENCE, BASED ON THE DECISIONS OF THE ENGLISH COURTS (1st ed. 1878).

31. *Id.* at 412-41, especially the first sentence of the section.

32. The subject of procedure, understanding by procedure the process by which a remedy is to be obtained, includes the determination of the following elements:-(i.) the name in which and against which the action is to be brought; (ii.) the time within which it must be brought; (iii.) the mode of suing and enforcing process; (iv.) the evidence admissible and necessary to support an action; (v.) the recognition and enforcement of foreign judgments. It will be convenient to consider how far the *lex fori* is supreme with respect to each of these subdivisions.

Id. at 413.

33. This is not to say that some of Foote's analysis of the concept of procedure is not of significant value. See *infra* note 62.

34. A. DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (1st ed. 1896).

35. *Id.* at 711.

single case which never once uses the word "procedure."³⁶

At this point, one might ask how Bentham's substantive law-adjective law distinction became compromised or confused. Granted that "remedial law" was made synonymous with "procedural law" by Dicey in a way that might obscure the fact that such use included the value judgment that damages are better servants of public policy than *weirgelt*, one must concede that Bentham himself does not use the term "procedure" as a perfect synonym for "adjective law,"³⁷ and that neither Westlake nor Dicey refers to "substantive law." The very vocabulary of the "procedure-substance dichotomy" we now take so much for granted did not yet seem to exist. However, Dicey does use the following language to contrast substance with "procedure":

Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.³⁸

One can easily see how this language might suggest a dichotomy between procedure and substance.

Equally obvious is the identity of Dicey's procedure-substance dichotomy with the older right-remedy distinction. In the field of conflicts, this was to remain the dominant meaning of the procedure-substance dichotomy after Dicey. This had not generally been the case in the field of jurisprudence,³⁹ however, and there soon emerged an objection to the way the terms were employed in conflicts, perhaps due to a closer reading of Bentham. That objection came from Sir John Salmond in 1902 in his treatise on jurisprudence.⁴⁰ In Chapter XXII, writing almost inexplicably without footnote or reference to either Bentham or Dicey, Salmond fashions a response to Dicey which one imagines Bentham would have been glad to endorse:

To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available.

What, then, is the true nature of the distinction? The law

36. *Id.* at 712, 713 n.2, citing *Don v. Lippman*, 7 Eng. Rep. 303, 5 Cl. & F. 1 (H.L. 1837).

37. See *supra* note 11.

38. A. DICEY, *supra* note 34, at 712.

39. English jurisprudential thought appears to have maintained Bentham's approach even while confusion was spreading in conflicts. See, e.g., T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* ch. XV (1880) (*Private Law: Adjective*). Thus, the thinking in England evolved in two parallel traditions insulated from one another. Of course, none of this seems to have had much impact on American consciousness until very late. See *infra* note 42.

40. J. SALMOND, *JURISPRUDENCE* (1902).

of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—*jus quod ad actiones pertinet*—using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law is concerned with affairs inside the courts of justice; substantive law deals with matters in the world outside.

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A glance at the actual contents of the law of procedure will enable us to judge of the accuracy of this explanation. Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions. What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure. For the first relates to the subject-matter of litigation, the second to the process merely. Whether an offense is punishable by fine or by imprisonment is a question of substantive law, for the existence and measure of criminal liability are matters pertaining to the end and purpose of the administration of justice. But whether an offense is punishable summarily or only on indictment is a question of procedure: it is a question not as to what courts will do, but as to how they will do it. Finally, it may be observed that, whereas the abolition of capital punishment would be an alteration of the substantive law, the abolition of imprisonment for debt was merely an alteration in the law of procedure. For punishment is one of the ends of the administration of justice, while imprisonment for debt was merely an instrument for enforcing payment.⁴¹

There are some important details in this quote aside from its eloquent defense of Bentham's concepts against confusion with the right-remedy distinction. First, Salmond writes as if the vocabulary of the procedure-substance dichotomy were commonplace, standard, almost already a form of slogan. We must assume that by Salmond's time this had become so, but Salmond speaks as if this had been so time out of mind, while it does not appear to have been in general usage until after Dicey.⁴²

41. *Id.* at 577-78.

42. While it is true that Bentham and his followers used the word "procedure" among themselves and Westlake used it in 1858, the following quote from *Kring v.*

Whatever the explanation, I cannot avoid thinking that the manner in which Salmond wrote this passage, and the manner in which Dicey wrote his, contributed to the misconception that the procedure-substance dichotomy was as timeless a construct as the dichotomy between right and wrong. Both writers were widely read and tremendously influential in the first decade of the twentieth century.

The second thing that stands out about Salmond is that he makes no rule of decision turn on the procedure-substance dichotomy. For him it is enough that it is a reasonably precise descriptive construct illuminating something important about the structure of law. If there are policy implications in the concepts behind this, such that the outcome of a controversy might properly be made to turn on the distinction, he makes no attempt to identify them. For Salmond, the use of the dichotomy and the concept it entails is the light they throw on the texture of the concept of law. Any utilitarian applications beyond that he leaves to others. Note the contrast with Dicey in this regard. Dicey has fastened the labels onto concepts which for centuries had not only had analytic uses, but had also been used to draw the line between the winning and losing side of issues presented in actual controversies.⁴³ It may not be so surprising, therefore, that when the procedure-substance dichotomy begins to appear in cases it is largely in conflicts cases. And it is used, when used with any precision at all, as a synonym for the right-remedy distinction which supposedly had been the deciding criterion on the proper law to apply in various conflicts situations for generations.

The effect of confusing procedure-substance with right-remedy was considerable. When an analytic construct is adopted as a

Missouri, 107 U.S. 221 (1882), is instructive as to its general usage among lawyers in the United States:

The word "procedure," as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: "S.2 The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence, and Practice." And in defining Practice, in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;" and Evidence, he says, as part of procedure, "signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.

Id. at 231-32.

43. See the historical sources cited in Ailes, *supra* note 4 and discussed *supra* note 6.

test to resolve cases, it is very likely that the distinctions and similarities reflected in the construct are not precisely the appropriate ones for a wise resolution of many of the cases to which it is applied. The result can either be a straightforward recognition that a different test is called for, or the reduction of the analytic construct to a nose of wax in order to reach an outcome intuited to be proper. The right-remedy distinction was already in the latter position before its confusion with the procedure-substance dichotomy.⁴⁴ It is not surprising that the change of terminology, accompanied by a whole competing definitional system for its components springing from the Bentham-Salmond writings, quickly resulted in abject confusion.

Such confusion may be understandable in the light of history. What is startling is that a whole school of thought arose reveling in this confusion. The school's main thesis seemed to be that confusion meant flexibility of judicial decisionmaking in the areas where the concepts had been adopted as decisional tests, that flexibility was good, and that therefore confusion was good.

Consider, for example, the following passage from Professor Walter Wheeler Cook's 1933 article, which remains the leading article on the procedure-substance dichotomy in the conflicts area:

In the case of the alleged distinction between "substantive law" and "procedural law", it needs first of all to be noted that for some purposes the basis for any such classification disappears entirely and all can be treated or regarded as "substantive." For example, if I wish to show the importance of studying "pleading" and "practice" in law schools, I may point out that just as the occurrence of certain events called offer, acceptance, and the giving of consideration give rise to a "substantive legal obligation" to perform a contract, so the occurrence of all the events of a properly conducted law suit—service of process, pleadings, proof, instructions of the judge to the jury, verdict of the jury, and judgment—gives rise to a new "substantive obligation", a "debt of record", on which suit can be brought. From this point of view, if I define as "substantive" the law which determines what facts give rise to legal obligations, all rules of law may be classified as "substantive". Shall I therefore conclude with Chamberlayne that the distinction between procedural and substantive law is "illusory and artificial"? Not so, unless I qualify my statement by adding, "for the purpose in hand." For other purposes it may become vital and important, and so "real" and "natural".

This brings us to a third part of the reason for the confusion in nearly all discussions, *viz.*, the tacit assumption that the precise point at which the line between the two is to be drawn is

44. See, e.g., *Melan v. Fitz James*, 126 Eng. Rep. 822 (Common Pleas 1797). This case is discussed in J. STORY, *supra* note 15, at 476.

the same for all purposes. This assumption is of course connected with the other assumptions already mentioned, namely, that the "line" is to be "discovered" rather than "drawn" and that it can be located without keeping in mind the purpose of the classification. If once we recognize that the "line" can be drawn only in the light of the purpose in view, it can not be assumed without discussion that as our purposes change the line can be drawn at precisely the same point. To do this is to forget that a word is the "skin of a living thought," and that "words [and the concepts for which the words stand] are flexible," and should be defined so as best to meet our needs.

. . . .

If now in the light of the foregoing we examine into the distinction between "substantive law" and "remedial and procedural law" as that distinction is involved in legal problems, we find that this distinction is drawn for a number of different purposes, each involving its own social, economic, or political problems.

. . . .

In the light of this analysis, we shall not be surprised on examination of the decisions of the courts to find that what is held "procedural" in one rule is treated as "substantive" in another, and as a matter of fact this is precisely what we do find. For example, where the problem is whether a statute shifting the burden of proving contributory negligence from the plaintiff to the defendant is to be given a retroactive effect, and whether to do so will be constitutional, the answer of the courts usually is that since the statute affects procedure only and not substantive law, it is to be given a retroactive effect and to do so is constitutional.⁴⁵

In fairness to Professor Cook, one must be sympathetic to the results which he wished would flow from his analysis. Conflicts had swallowed a bad doctrine long before he arrived on the scene, and something needed to be done. The main problem was that neither the procedure-substance dichotomy nor the right-remedy distinction, even had they been clearly refined, could, as categorical dichotomies, reflect the balancing calculus appropriate to a proper choice of law decision in every case. But the rule that the *lex fori* controlled one and the *lex loci* governed the other was so deeply ingrained that a frontal attack on it must have seemed out of the question. So Cook tried to slip in such a balancing approach under the blanket of the relativity of language. I find this approach to a cure at least as dangerous as the disease itself.

Cook was aiming at "mechanical jurisprudence," an endemic disease of legal thinking which had become acute in the late nine-

45. Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 336-37, 341, 345 (1933).

teenth and early twentieth centuries.⁴⁶ Mechanical jurisprudence is characterized by the unquestioning reception of an over-general rule and the definition of the terms of that rule without regard to social policies fostered by the principle behind the rule. Thus, the application of the rule to actual cases may be indefensible on any rationale, except that the rule is the law and the law must be applied. The rule becomes a bed of Procrustes for actual cases. The best way to cure mechanical jurisprudence is by fostering a more sophisticated rule, or by recognizing the inappropriateness of a pure rule approach.⁴⁷ Cook's cure (and the "realist" response in general)⁴⁸ was to encourage courts, not to review and recast the rule in more sophisticated terms, but to retain the rule in form and eviscerate it by a dose of linguistic relativism. One vice of this approach is that it encourages judges to think they have legitimate discretion to bend words beyond the bounds of intellectual honesty in a good cause. A second vice of this approach is that it may ultimately destroy the possibility of establishing stable, well-defined concepts, not only for purposes of constructing rules or

46. See Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Cook, *supra* note 45, at 344 n.42 (citing Pound).

47. For some modern thinking on the "principal" alternative to a rule-structured system, see T. BENDITT, *LAW AS RULE AND PRINCIPLE* (1978); Denbeaux & Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 439, 441-44 (1979); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972); Greenawalt, *Discretion and the Judicial Decision: Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

48. In discussing Professor Cook's observations, I have purposely selected the most sophisticated version of the realist position. Other more extreme examples are illustrated by the following quotation:

The terms "substance" and "procedure" have no inherent meaning. They may mean one thing for purposes of constitutional law and another thing for other local purposes. Whatever the label that may be attached to a given matter from these two points of view, there is no reason whatsoever why such labels should be attached to conflict of laws situations. If the legal relations between two parties are to be ascertained with reference to the law of State X, the rights so created should be enforced by the courts of other states, unless the local machinery would be obstructed thereby; or, in an extreme case, if the enforcement or recognition of such rights would be shocking to the local community. Whatever rules of State X bear substantially upon the rights of the parties should be recognized and enforced, subject to the two provisos above mentioned, without reference to the fact whether the particular matter for purposes of constitutional law or local law in the State of X or the state of the forum happens to be labelled "substantive" or "procedural."

Letter from E. Lorenzen to Ailes (Oct. 31, 1929), *cited in* Ailes, *supra* note 4, at 526. "The differentiation between substantive and adjective law is an illusion, although the prevalence of this illusion (as of any other) has results in human behavior, and must be taken account of." K. LLEWELLYN, *THE BRAMBLE BUSH* 84 (1930). "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none." T. CHAMBERLAYNE, *EVIDENCE* § 171 (1911).

principles to resolve controversies, but equally important, for purposes of accurate exposition and description.

In the four and one-half decades since his article, Cook's approach has almost completely occupied the field.⁴⁹ This should seem doubly surprising when we realize that invoking the procedure-substance dichotomy has become commonplace in many areas other than conflicts, notably in the line of cases and articles spawned by *Erie Railroad Co. v. Tompkins*.⁵⁰ Indeed, the procedure-substance dichotomy is used to organize law school curricula and is included in statutes.⁵¹ Yet organized confusion is the official doctrine. In a leading article on *Erie* and its progeny in 1974, Professor John Hart Ely observed: "We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure."⁵²

49. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.2(C),(C)(1), at 55-59 (2d ed. 1980).

There were occasional hints at dissent. See, e.g., Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153 (1944), especially the following passage from *id.* at 154 n.4: "But it seems obvious that rules which declare legal relations when all relevant facts are treated as known because assumed or proved are different, not in degree but in kind, from those which deal only with the methods, means and machinery for making them known." See also the concurring opinion of Justice Harlan in *Hanna v. Plummer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring), which seeks to equate the core of the idea of substance with rules regulating primary private activity.

It is a pity that Wesley Hohfeld never set forth a full exposition of his ideas concerning substantive law and adjective law before his death in 1918. An examination of the suggestions of his ideas on that subject in Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537 (1913), and in the supplemental notes to that article to be found in W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING 137 (W. Cook ed. 1923), suggest an approach, which, had it been fully exposed, would seem to have been an attempt to combine the best insights of both Austin and Bentham more or less along the lines of the suggested Bentham response to Austin, *supra* note 25. Hohfeld's great influence might have been enough to prevent the concepts of procedure and substance from being cut adrift from all dependable content by the realists in the 1920s and 1930s, but his observations were too fragmentary to have much impact. Indeed, I have never seen them cited.

50. 304 U.S. 64 (1938).

51. See, e.g., Rules Enabling Act of 1934, 28 U.S.C. § 2072 (1976) ("The Supreme Court shall have the power to prescribe by general rules, the . . . procedure of the [Federal courts] . . . Such rules shall not abridge, enlarge or modify any substantive right . . .")

52. Ely, *supra* note 2, at 724. Independent from the issues of statutory construction with which his article mainly deals, Ely recognizes, at least theoretically, the need for some more stable content to the concepts of procedure and substance than the standard realist approach would provide. He further approves of Justice Harlan's ideas in his concurrence in *Hanna v. Plummer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring), as a proper beginning to such an approach and, perhaps most importantly, he recognizes that a single rule can be substantive in form but have justifications which are fairly classified as procedural. To say that Ely does not go beyond that in generating a complete analytic structure is hardly a criticism in the context of the article which he did write.

What follows below does not describe the right-remedy distinction, and therefore is not what was referred to as the distinction between procedure and its dichotomous term by Austin, Westlake, Dicey, and Beale. It is, I hope, much too precise to satisfy Cook and the other realists. It seems to come close to the original ideas of Bentham regarding the substantive law-adjective law classification. What it reflects most closely is Salmond's ideas, but I hope it goes beyond them. I hope it lays ground for consensus on a more fully and precisely espoused concept.

II. THE CONCEPTS

To begin, law in general performs at least two functions: deterrence of controversies between human beings, and resolution of such controversies.⁵³ These functions are correlative. By providing a dispute-resolving mechanism with more or less predictable results, and to a lesser degree by providing a set of norms which would mandate results if efficiently applied, the law creates guides for behavior which may deter or restructure conduct which otherwise would give rise to the controversies the law would then be called upon to resolve. The important point is that the concept of law presupposes the possibility of human controversies and the desirability of resolving and deterring them through a system of law.

Human controversies arise through interactions of human beings whether they are simple and easily recognized as discrete, as in a common auto accident case, or quite complex and difficult to pin down to precise episodic boundaries, as in the Arab-Israeli dispute. A controversy may involve only two human beings or a great number operating in various combinations. But no matter how complex, at root, the episode that gave rise to any controversy always involves human beings and can be described factually.

I use the term "factual" here to describe a proposition for which potentially there is empirical evidence and which entails no value judgment. Any episode which gives rise to a controversy, even the simplest, can be described in terms of literally billions of fact propositions. Take a simple battery. John punches Mary in the nose. We could describe the touching, the words accompanying it, and the space-time coordinates of each molecule in both

53. This Article deals only with the concept of procedural law in the context of dispute resolution and does not consider the idea of procedure in the context of law-making, that is, those things that must be done or happen in a given legal system before a rule or principle may legitimately be regarded as having become law. Further, the Article does not deal with situations, such as negligence, where we might choose to use a jury to perform a particularized normative function even if all facts were known.

bodies from micro-second to micro-second. Clearly, many of these billions of facts would not be of interest to us if our purpose were to resolve an ensuing controversy between John and Mary. How do we decide which details of the episode which gave rise to the controversy are germane, or material, and which are not? That is the province of the lawmaking process and one of the central components of the substantive law. It is not my purpose to describe how we should go about doing this if we wish to do it wisely. But to have law, we must decide which facts are material,⁵⁴ and those propositions, principles, or formulae which reflect the decision that we care about the touching, but not the color of Mary's skin, or vice versa, are part of substantive law.

Deciding we care about the touching, and only the touching, would still not give us substantive law, because we would not thereby know whether to punish John or pin a medal on him. There must also be a value judgment about the selected material facts, usually combined in certain clusters according to some definable rule for combining the facts. If there is a "touching" and "intent" and no "privilege" or "self-defense," that is bad (or good, if you wish). Lastly, there must be (or usually will be) a provision for a remedy or range of potentially acceptable remedies reflecting the value judgment. That, too, is part of the substantive law. But we must be careful to distinguish between the declaration concerning the appropriate remedy, which is substantive, both reflecting and conditioning the value judgment behind the definition of the right, and the procedural mechanisms for bringing the remedy into being. To elucidate this distinction we must introduce the main construct of my proposed model definition of the procedure-substance dichotomy: the omniscient, omnipotent judge.

III. THE MODEL

Suppose a being from another planet arrived on earth and offered to hire him, her, or itself out to a sovereign for the purposes of dispute resolution within the sovereign's territory. Suppose further that this being possessed two startling characteristics: first, the ability to perceive immediately all the details of any interaction to which he directed his attention, including subjective states of mind, and second, the ability to impose any change in the status quo by mere willpower. Frightening to contemplate, perhaps, but it must be remembered that such an omniscient, om-

54. The form in which I have made the text assertion raises the issue of whether a hortatory command from the sovereign without possibility of remedy can ever count as a law. I believe that there may be instances where such hortatory commands can properly count as law but only in the context of a legal system where most laws are of the non-hortatory type. See *supra* note 25.

nipotent being would not actually be God. If he decided for himself in what ways he would use his overwhelming power he might be good or evil incarnate, or something in between. Omniscience concerning the past, present, and future, coupled with total power to manipulate, would not insure that any manipulations would be done morally, justly, or wisely. In any event, in our story, the being does not even wish to attempt to determine for himself how he will use his power. Rather, he says to the sovereign (be it king or legislature): "You give me your wishes in terms of rules for decision, including what constitutes the kind of dispute you want resolved, and I will scan the territory, identify such disputes, decide them by the criteria you give me, and then mandate the result by the criteria of remedy you give me." Granted that the result of such efficiency might be total deterrence or mass psychosis, we would have substantive law as before, but no procedural law whatsoever. Anything we would still have to tell the being to get him to work is purely substantive.

What has just been said defines a set of decisions and doctrines which are analytically purely substantive. Generally, everything else is procedural, but not necessarily purely procedural. What if, as sovereign, we turn to the being and say: "Thank you for your offer, but we don't want to deprive our subjects of all room for private action free from immediate scrutiny. That wouldn't allow them to maximize certain potentials of development which we happen to value. So, sir, we wish you to use your power to the utmost, with this exception. You are not to resolve any disputes until the disputants ask you to do so."

Here we would have the establishment of a rudimentary procedural law, requiring at least that the disputants do something to ask for assistance. We would have to then define how the asking had to be done in order to effectively invoke the being's power. The important thing here is that we have made a decision to create a procedure where none was necessary, that is, to consciously select a less accurate and less time efficient mode of dispute resolution in order to promote some other goal.⁵⁵ Whenever our

55. In one sense, most procedural rules reflect some cost-benefit judgment between maximum rationality of fact reconstruction on the one hand, and time efficiency/finality on the other. Any procedural system which is to be usable for human dispute resolution must reflect at least some relative value of efficiency and finality. The election of one procedural rule over another only on the basis of efficiency or finality is limited in our system at both the state and federal levels by the due process guarantee. This limitation, wise though it may be, reflects a pricing decision about purely procedural values. I take the judgment among competing possible rules based *only* on these criteria of accuracy, time efficiency, and finality to be an inherent part of the dilemma of creating a procedural law for dispute resolution absent an omniscient, omnipotent being, and therefore take such judgments to be both necessary and inevitable in the process of formulating pure procedure. Such judgments are corol-

choice of a procedure is not motivated solely by considerations of rational accuracy or time efficiency, but reflects protection of some other value which would be injured by maximized accuracy or time efficiency, or both,⁵⁶ we are making a substantive decision, though one of a different sort than the core substantive decisions which are dealt with above.

Through the expedient of the model of the omniscient, omnipotent being we can thus describe with some precision three distinct types of law: (1) pure substantive, that is, what we would have to tell even an omniscient, omnipotent judge, (2) pure procedural, which includes everything necessary to the dispute resolution mechanism which is both necessitated by the absence of the omniscient, omnipotent being and prescribed in order to maximize the useable rationality of fact reconstruction and fact prediction (where relevant to the remedy provided by the substantive law), and (3) procedural rules stemming from what is essentially a substantive decision, including all examples of rules electing procedures less efficient to the rational process than possible alternatives, chosen in order to protect some value deemed of greater importance than efficiency by the lawmaker. This includes, among others, all rules of testimonial privilege and assorted other rules of evidence based on policy grounds, all conditional or absolute forum closing rules, surety requirements preventing otherwise justiciable disputes from reaching the dispute resolution mechanism, many decisions concerning the allocation of the burden of introducing evidence and the burden of persuasion, and all decisions to impose a standard of proof as to a material fact issue greater than a preponderance of the evidence.

Now we must add a fourth important distinction, because just as some procedural laws are substantively based, some substantive laws are promulgated for procedural reasons. There exist many substantive laws that we might very well want to recast if we actually had the omniscient, omnipotent fact finder available. Take for example the statute of frauds. In such a statute, a contract for a sale of goods of the value in excess of \$500 must typically be in writing to be enforceable. Such a rule is a rule of substantive law. Such an agreement not reflected by a writing is simply not a contract in the legal sense. We could tell our omniscient factfinder to

laries of the notion that the procedural system is one for dispute resolution in a human context. Therefore, I do not take the election among possible rules based on such considerations *alone* to change the nature of the rule from pure procedural to substantively-based procedural, since the judgment is inevitably present in the election of any rule of procedure for a human dispute resolution process.

56. The values reflected in most such substantively-based procedural rules, such as those of privilege, seem to be most often threatened by attempts at accuracy rather than attempts to increase time efficiency.

ignore such an agreement and any disputes arising from it. However, we might feel that if we could be certain that the agreement had been reached, we would wish to enforce it. We might feel that we had adopted the original substantive rule primarily if not wholly in response to that characteristic of the human condition which makes the reproduction of past facts so difficult. If we would change a substantive law in the presence of an omniscient factfinder, it is a substantive rule passed for procedural reasons, influenced by our recognition of the limits of certainty of procedures actually available in reality. Such a rule is a rule of substance promulgated for procedural reasons.⁵⁷ Thus we see that we can distinguish between procedure and substance, and further between two important kinds of procedural rules and substantive rules: core substantive rules and procedurally-based substantive rules; core procedural rules and substantively-based procedural rules.

A final difficult question awaits us. What are we to make of such things as the crime of subornation of perjury, or the tort of malicious prosecution? Bentham would have classified them as part of the adjective law, since their existence presupposes some substantive law and a procedure which can be abused. They would not have been substantive in Bentham's sense of being able to stand alone or to have meaning independent of a procedural law. It is true that if we had an omniscient, omnipotent being handy, such laws could not exist, but the decision to define them as wrongs and to punish them (or to allow a right of action based on them) seems to be exactly analogous, given the absence of such a being, to the process of substantive law definition already explored. The necessity to have such law springs from the necessity to protect the procedural law from abuse, but we undertake the same process of fact category definition, value judgment, and definition of range of remedies in these situations as in other substantive definitions. I suppose that the protection of the integrity of a procedural system must be recognized as one proper end of the substantive law, given that a procedural system must exist. Thus, while the logically peculiar position of these rules must be recognized, perhaps by dubbing them enclitic substantive laws, (using Bentham's own synonym for the term "adjective"),⁵⁸ I foresee very little debate that they are properly classed as part of the substantive law. Although their enclitic nature is curious, this seems to carry with it little in the way of implication that there are any

57. For an express recognition that some substantive laws are passed for procedural reasons, see Ackerman, *The Conclusive Presumption Shuffle*, 125 U. PA. L. REV. 761, 781 (1977). See also *supra* note 52.

58. See *supra* note 11.

purposes for which they should be treated differently than the mine run of substantive laws.

We now face a sticky question . . . what about other sanctions applied to procedural rules? Take a request for the production of documents—the procedural law says that the plaintiff has a right to a particular document and the defendant has a corresponding duty to produce it. If the defendant violates that duty, it could be made the subject of what we have just called a substantive law (albeit an enclitic substantive law), in that the defendant could be made subject to criminal prosecution, to an independent suit for treble damages, or to another remedy obtained by an independent proceeding. Instead, the sanction is applied within the context of the original action: the defendant will be precluded from proof, or judgment in the original action will be entered against him, or costs awarded to the plaintiff, or some combination of these sanctions.

If malicious prosecution as an independent right of action is best regarded as part of the substantive law, should the sanctions for violations of the procedural law be regarded as part of the substantive law? I think not, but I am not entirely sure why. Certainly the process of defining sanction has the same components (fact category definition, value judgment, and definition of remedy range) which we have already identified as characteristic of the process of substantive lawmaking. It is true that the fact category definition springs from the creation of the procedural law, but that is true of enclitic substantive laws as well. One could argue that enclitic substantive laws are usually enforceable only in an independent proceeding, but that is too thin a reed on which to base a distinction. After all, one might not want to say that an independent action for a bill of discovery was part of the substantive law. It is true that the range of possible sanctions is traditionally more limited when merely enforcing procedural rules than when enforcing what are identified as enclitic substantive rights, but that is becoming less true as time goes on.

I suppose the distinction rests on the existence of one of two things: whether the sanction is penal in the criminal sense,⁵⁹ or whether the rule giving rise to the sanction is intended to be enforceable in the courts of another sovereign by the normal conflicts of law principles. If the sanction is penal in the sense of carrying a sanction of fine or imprisonment primarily to punish,

59. Or perhaps more appropriately, "penal within the rules of private international law," Cardozo, J., in *Louks v. Standard Oil Co.*, 224 N.Y. 99, 99, 120 N.E. 198, 198 (1918). The continued vitality and limits of such a concept are somewhat problematical and beyond the scope of this Article. See generally Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932).

or if the rule manifests the intent of the rulemaker to create an independently enforceable right, it is substantive. If it is not penal, or if it does not manifest an intent to create an independent right of action, it is procedural. Criminal contempt would thus be part of the enclitic substantive law, civil contempt part of the law of procedure, all sanctions not exportable by way of action in a foreign court part of the law of procedure, and those sanctions recognized as exportable part of enclitic substantive law.

Distinguishing between a sanction entailed in the procedural law and an enclitic substantive law is most difficult because the model of the omniscient, omnipotent being does not help draw the line between the two. The best one can do is reason by analogy to the structures exposed by the model.

IV. SPECIAL PROBLEMS—TIME BARS

Classification of time bar doctrines has always given courts problems,⁶⁰ and those problems have been compounded by the failure to distinguish, at least as separate conceptual categories,⁶¹ between limitations and proscriptions.⁶² Doctrines of time bar are usually in part substantively based—they reflect normative judgments about the value of repose and the impropriety of sleeping on one's rights. However, if the only result of adopting a time bar rule in a system is to close the door of *that* system's courts to the case involved, one is dealing with a substantively based procedural rule. If the effect or intended effect of the time bar is to close the doors of all courts in the world—to cut off or dissolve the right of action—one is dealing with a substantive rule (though one partially procedurally based, insofar as time bars also reflect a concern for the effect of time lapse on accuracy of fact reconstruction). The first type of time bar is a limitation, and the second is a proscription.

Whether a given time bar is a limitation or a proscription

60. See, e.g., *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955).

61. See, e.g., the struggle to deal with "statutes of limitation" as either "procedural" or "substantive" without reference to the separable concepts of limitation and proscription in R. WEINTRAUB, *supra* note 49, § 3.2(C)(2), at 59-67.

62. It would be hard to blame anyone for failing to perceive this distinction clearly from the literature. Some realization that different statutes were intended to have different effects was present in the works of pre-nineteenth century continental writers, and, in fact, these authors were often more sophisticated on the point than many modern writers. See J. STORY, *supra* note 15, §§ 580-581, at 485-87, and authorities cited therein, especially Baldus. For Story, the terms "limitation" and "prescription" are synonymous. It is Foote who rather elegantly exposes the distinction, J. FOOTE, *supra* note 31, at 420-24, and Dicey who attaches the word "prescription" to statutes intended as substantive cutoffs, A. DICEY, *supra* note 34, at 713. I have changed Dicey's last label from prescription to proscription because I believe that "proscription" much more clearly indicates what Dicey intended.

should be a matter of construction determined by examining legislative intent. However, in conflicts doctrine (where the issue most often arises, since the result is usually the same either way when considering a domestic time bar in a domestic case in a domestic court), the existing presumption states that a time bar is procedural (intended as a limitation) in spite of the likelihood that most legislators probably think they are creating a proscription when voting.⁶³

V. SPECIAL PROBLEMS—CARRY-OVER BENEFITS (RES JUDICATA—COLLATERAL ESTOPPEL)

Although one would expect the law dealing with the carry-over effects of judgments to be classed as procedural, it seems to me that the most basic principle of the law of *res judicata* is substantive, though this principle is rarely important on an operational or conscious level in an actual case. This principle is that which forbids double recovery for one controversy, together with any ancillary rules for determining what constitutes one controversy and one remedy (such as election of remedy doctrines). These things reflect core normative judgments, and we would have to make sure an omniscient, omnipotent judge understood them. On the other hand, doctrines prohibiting splitting a claim even if the result is not double recovery (merger and bar) are different. They can only arise if there is a procedural system to be invoked more than once—they would be meaningless in the face of an omniscient judge, and are not enforced as enclitic substantive laws by independent action and remedy. They are therefore procedural. It is true that their *raison d'être* is the prevention of potential abuse of a procedural system through multiplicity of action and vexation, not through inaccuracy of result. However, I do not think this affects their proper classification as purely procedural rules.⁶⁴ The same can be said for doctrines of collateral estoppel, though what is being protected against there is both vexation and the revelation that the original factfinding results of

63. This piece of armchair group psychoanalysis has quite respectable antecedents. See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). Actually, I think it very likely that, were most legislators to think, they would probably think they were creating proscriptions to the extent that they could, and creating door-closing rules for every other case by virtue of the undifferentiated and singular language of the individual statute. If this were true, it would suggest that the shortest candidate period is generally the appropriate time bar to be applied in a conflicts situation. However, exploring this further is beyond the scope of this article.

64. The reasons that these time efficiency/finality considerations do not change the proper classification to substantively-based procedure are fully set out *supra* note 55.

the procedural system are often not accurate to any significant degree of confidence.

That exhausts my general observations. The results of the foregoing analysis may be summarized in the following chart:

What we would have to tell an
Omniscient, Omnipotent Factfinder:

What we would not need if we had an
Omniscient, Omnipotent Factfinder:

| SUBSTANTIVE | | PROCEDURAL | |
|--|---|--|---|
| Pure Substantive (including Enclitic Substantive Rules) | Procedurally Based Substantive | Substantively Based procedural rules (including sanctions for violations) | Pure Procedural (including sanctions for violations of pure procedural rules) |
| Normative Rules we would choose to tell the Omniscient, Omnipotent Factfinder (including remedy). | Normative Rules we would change if we had an Omniscient, Omnipotent Factfinder (including remedy). | Procedural rules adopted for reasons other than accuracy maximization within normal time constraints. <u>Examples:</u> limitations splitting rules collateral estoppel | Rules of suit, fact reconstruction, and execution which we need because of non- existence of Omniscient, Omnipotent Factfinder and which reflect a desire to bring results of cases into congruity with substantive law, modified only by time efficiency constraints of normal process. Most rules of pleading, discovery, evidence, execution, etc. |
| Choice of Law rules | Proscription | | |
| Whole case res judicata (single remedy doctrine). | | | |

VI. SOME USES AND IMPLICATIONS: THE CONSTITUTIONAL REVIEW OF SO-CALLED "IRREBUTTABLE PRESUMPTIONS"

Because I believe that one use of legal scholarship is to set forth satisfying analytical structures which give a feeling of better understanding of the phenomenon of law, I could appropriately stop here.⁶⁵ However, like most others who put forth such struc-

65. This is an esthetic claim, and in response to those who say that legal scholars should do something besides build pretty castles in the air, I would say that it is at least as satisfying and justifiable an enterprise as painting pretty pictures or composing pretty symphonies. Further, at root base pure science is practiced for the same

tures, I also feel that mine have implications beyond the esthetic. These implications reach the whole *Erie* area,⁶⁶ and touch another: the constitutionality of presumptions and other burden-imposing devices when used against criminal defendants.⁶⁷ For present purposes, however, I will confine myself to a single subject, the constitutionality of "irrebuttable presumptions."

A procedurally based substantive rule of law is always an example of that much maligned concept, the irrebuttable presumption.⁶⁸ By definition, we have a procedurally based substantive law only when we are sure (from normal sources of information regarding statutory construction) that the primary value judgment of the legislature was different from that apparently reflected in the law as drawn, and that the law was therefore passed because of potential proof problems. Thus, there is a functional reality to saying that all those subject to the law as drawn are irrebuttably presumed to be within the ambit of the law as it would have been drawn absent proof problems. This does not change the law into a

esthetic reasons; for instance, it would be difficult to provide a justification beyond esthetics for most cosmological speculation. Still, it is tenable if one thinks it necessary to claim that esthetically appealing structures appeal in part because of an intuited usefulness beyond the esthetic.

66. I believe that a utilization of the analytic structures suggested above might prove very useful, for instance, in an efficient and elegant exposition of an Ely-like approach to the interrelationship between the Rules of Decision Act, 28 U.S.C. § 1652 (1976), and the Rules Enabling Act, 28 U.S.C. § 2072 (1976), and a differentiation between constitutionally mandated conformity to state substantive law in diversity cases on the one hand, and court-mandated prudential conformity to important state substantively-based procedural law on the other.

67. Such devices are generally substantively-based procedural rules and raise the issue of how far the state may go in officially declaring under the substantive law that defendants are guilty only if one or another condition is true, and then rigging the procedural system to convict a significant number of those concerning whom the condition is false. See, e.g., Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 177-78 (1969), and the questions raised in response by P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 917 (1982).

68. See C. MCCORMICK, EVIDENCE § 342, at 804 (E. Cleary 2d ed. 1972), and authorities cited therein. Traditional evidence learning properly classifies such devices as rules of substantive law. As for maligning, consider the following passage from Wigmore.

In strictness there cannot be such a thing as a "conclusive presumption." Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule of apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence The term has no place in the principles of evidence . . . and should be discarded.

IX J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2492 (Chadbourn rev. 1981).

procedural law, but it does raise a different issue of constitutional limitation: To what degree may the legislature disadvantage admitted sheep through substantive lawmaking because of difficulties in proving who is a wolf? This is a fundamentally different question than asking what limits there are on honest, primary, legislative judgments concerning what constitutes a wolf, an inherent legislative function that only the barest backstop of judicial review should limit. The former question, on the other hand, much more directly implicates the values reflected in the requirements of equal protection and due process, which are a primary domain of judicial review. Granting that the court must be careful not to determine that a law is a procedurally-based substantive law when it is *tenably* a pure substantive law, if a law is shown to be a procedurally-based substantive law,⁶⁹ it should be judged according to standards appropriately tailored to such a situation.

The recent handling of this issue in the Supreme Court of the United States has failed to generate a coherent approach to this problem. At least in part, I believe, this stems from a conceptual poverty which has forced the Court, at least at one level, to choose between a substantive or a procedural characterization of such laws, with linked standards of review—the *de minimis*, equal protection based, "rational basis" test if they are characterized as substantive, and a "denial of due process" test which almost automatically overturns such laws if they are characterized as procedural.⁷⁰ First, in *Carrington v. Rash*,⁷¹ the Court, speaking

69. The problems with procedurally-based substantive laws have been felt, intuited, touched on, and partially treated under a variety of labels for a long time. Though none of this literature is systematically exhaustive or completely satisfactory, some of it is extremely valuable. The classic article is Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949), wherein the authors develop the standard concepts of "over-inclusiveness" and "under-inclusiveness" of legislative classifications. All efforts in this area seek standards for review of impermissible substantive means to a legislative end and therefore require some tenable approach concerning how courts may determine legislative ends for purposes of such review. One of the standard criticisms of any attempt at such judicial review is the difficulty of determining what end or ends actually motivated the legislature. See Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1549 n.91 (1974) [hereinafter cited as Note, *Irrebuttable Presumption*]. Suffice it to say that regardless of the problems in many cases, the motivation for promulgation of some laws can be inferred as confidently from available sources of legislative history as many other propositions we feel comfortable in treating as facts for purposes of the law in other important contexts.

70. It must be admitted that the opinions, concurring opinions, and dissents in the cases treated *infra* notes 71–87 are not, as a whole, models of consistency, clarity, or coherence. The procedure-substance dichotomy is not often expressly addressed in these writings, but it seems to pervade all of them, occasionally rising to the surface in such expressions as those given *infra* note 81. This situation is recognized expressly in Note, *Irrebuttable Presumption*, *supra* note 69, at 1544. See also, Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection*, 72 MICH. L. REV. 800, 821–25 (1974) [hereinafter cited as Note, *Conclusive Presumption*].

through Justice Stewart, struck down a Texas constitutional provision which denied a serviceman any possibility of becoming a resident for voting purposes if he had not resided in Texas when he entered the service. The Court found that deprivation of voting rights on the basis of serviceman status was a denial of equal protection (even if substantive).⁷² However, the opinion raised a possible procedural classification by stating that the statute also created an impermissible irrebuttable presumption.⁷³

Later, *Dandridge v. Williams*⁷⁴ made the irrebuttable presumption reference in *Carrington* look like a mere rhetorical flourish. The *Dandridge* majority, again through Justice Stewart, upheld a maximum limit on Aid for Families with Dependent Children (AFDC) regardless of family size in the face of an attack that the limit created an irrational assumption about need in large families. The analysis in *Dandridge's* majority opinion tends toward a reading that all such laws are substantive and, because of this, should be judged by the rational basis test (absent more particular circumstances triggering closer scrutiny, such as a restriction of free speech).

However, starting with *Bell v. Burson*⁷⁵ and continuing through *Stanley v. Illinois*,⁷⁶ *Vlandis v. Kline*,⁷⁷ *United States Department of Agriculture v. Murry*,⁷⁸ and *Cleveland Board of Education v. LaFleur*,⁷⁹ a shifting majority of the Court⁸⁰ characterized a number of laws in varying contexts as creating "irrebuttable presumptions" because they excluded from legal benefits persons who were the same in terms of the core legislative judgments as persons who were allowed benefits, without provision for an opportunity to be heard. The analysis in these cases treated such laws, by implication and occasionally expressly, as matters of "procedure."⁸¹ Justice Rehnquist dissented in *Vlandis*, claiming

71. 380 U.S. 89 (1965).

72. *Id.* at 96.

73. *Id.*

74. 397 U.S. 471 (1970).

75. 402 U.S. 535 (1971).

76. 405 U.S. 645 (1972).

77. 412 U.S. 441 (1973).

78. 413 U.S. 508 (1973).

79. 414 U.S. 632 (1974).

80. The shifting majority always included Justices Marshall, Brennan, and, interestingly, Stewart.

81. See, e.g., the opinion of Justice White in *Stanley* where he characterized the challenged rule that children of unwed fathers automatically became wards of the state on the death of the mother as "procedure by presumption" in regard to the unfitness of the father. 405 U.S. at 656. Note also the following quote from the concurring opinion of Justice Marshall in *Vlandis*, where he asserts that the case "concerns nothing more than the procedures by which the State determines whether or not a person is a resident for tuition purposes." 412 U.S. at 455.

that the majority was resurrecting the discredited doctrine of "substantive due process."⁸²

Finally in *Weinberger v. Salfi*,⁸³ Rehnquist wrote a majority opinion⁸⁴ which, it is fair to say, repudiated the above cases.⁸⁵ Raising the specter that the *Bell-Vlandis* approach might invalidate all imperfect classifications, Rehnquist returned the characterization of such classifications to "substantive"⁸⁶ and the standard of review to "rational basis."

The *Salfi* approach has been the dominant view since it was written.⁸⁷ However, both the *Salfi* approach and the *Bell-Vlandis* approach seem to be flawed. The *Bell-Vlandis* approach is flawed because the majority never developed any theory of limiting principle regarding either the divination of core purpose or the variety of circumstances where some degree of over- or under-inclusiveness might be appropriate, and the *Salfi* approach is flawed because it has the practical effect of insulating all procedurally based substantive rules from any meaningful constitutional review by applying to them the minimal backstop standard appropriate only to core substantive judgments.

Though Justice Rehnquist in *Salfi* was right in generally classifying such rules of law as substantive, he overlooked the crucial subcategory of substantive law, and the instincts of the majority in the *Bell-Vlandis* line of cases (though not necessarily all of their analysis) seem to me to have been headed closer to the right constitutional direction.

A procedurally-based substantive rule inextricably implicates both the equal protection guarantees and the due process guarantees of the Constitution. It is properly analyzed as a potential denial of equal protection because admittedly different cases are treated alike, and it is properly analyzed as a potential denial of due process because parties are denied access to any procedural system to show rationally the existence of admittedly important factual differences between cases. This does not necessarily mean

82. 412 U.S. at 467-68.

83. 422 U.S. 749 (1975).

84. The *Salfi* majority included an apparently converted Justice Stewart.

85. Certainly the rationale of those cases is repudiated, though Justice Rehnquist does make a fig-leaf attempt to distinguish them.

86. 422 U.S. at 784.

87. See e.g., *Schweiker v. Wilson*, 450 U.S. 221 (1981); *Califano v. Boles*, 443 U.S. 282 (1979); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Califano v. Jobst*, 434 U.S. 47 (1977); *Knebel v. Hein*, 429 U.S. 288 (1977); *Mathews v. De Castro*, 429 U.S. 181 (1976). The only two post-*Salfi* decisions striking down classifications both claimed to find impingements upon some specially protected right, though they did not seem to impinge more than some of the sustained classifications. See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Matthews v. Lucas*, 427 U.S. 495 (1976).

that all procedurally based substantive laws are *ipso facto* unconstitutional. It does mean that nothing by way of the standard of review should depend on whether one calls them substantive or (erroneously) procedural. And it does mean that it is inappropriate to claim that *only* the due process or the equal protection guarantees are implicated as a result of one classification or the other. Further, it is inappropriate to make anything turn on an election of one clause or the other as a basis for decision. Rather, an appropriate system of review must be worked out from scratch once the nature of such laws is realized, without reference to any distinct line of cases interpreting either the due process clause or the equal protection clause independently.

There is some interesting recent scholarly literature which gives an indication of what such an approach to this issue might look like.⁸⁸ I have my own ideas on this subject which I will save for another day. However, whether such an approach has a chance of actually being adopted by the Supreme Court is dependent in part on the Court extricating itself from some of the conceptual binds it has itself created. Perhaps the analysis put forth in this Article can aid in this regard.

88. See Ackerman, *supra* note 57; Gordon & Tenenbaum, *Conclusive Presumption Analysis: The Principle of Individual Opportunity*, 71 NW. L. REV. 579 (1976); Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Tribe, *Childhood, Suspect Classifications and Conclusive Presumptions, Three Linked Riddles*, LAW & CONTEMP. PROBS., Summer 1975, at 8. Interestingly the authors of Note, *Conclusive Presumption*, *supra* note 70, actually began forging what might count as such an approach out of what they criticize as the not very coherent approach of Justice Marshall in his opinions in the relevant cases *supra* notes 71-79. They abandon the effort, however, as violative of what seems to be their main belief that such laws are simply substantive and most appropriately reviewed by the rational basis test. *Id.* at 1550-54. See also the troubled observations of Justice Powell in his dissenting opinion in *Schweiker v. Wilson*, 450 U.S. 221, 239-47 (1981) (Powell, J., dissenting); Bennett, "Mere" Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979) (arguing that an appropriately "toothy" interpretation of the rational basis test would suffice). See also, or perhaps *see contra*, Tushnet, *Truth, Justice and the American Way: An Interpretation of the Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1323-26 (1979).