2021

Getting Real About Procedure: Changing How We Think, Write and Teach About American Civil Procedure

Suzette M. Malveaux
University of Colorado Law School

Getting Real About Procedure: Changing How We Think, Write and Teach About American Civil Procedure

Author : Suzette M. Malveaux

Date : June 9, 2021

Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 **Hastings Const. L.Q.** 261 (2021).

It is time to do a gut check about the nature of civil procedure and due process in the United States. Much of the discourse among law proceduralists is divorced from the reality of how most Americans experience the court system, if they participate at all. With less than two percent of all civil cases brought in the federal courts, procedural scholars are being challenged to do some soul searching about our pedagogy and curriculum—largely centered on the federal civil system. The common proceduralist gaze falls on Supreme Court precedent and the Federal Rules of Civil Procedure—highbrow loci ripe for analysis.

But this focus misses the mark, argues Norman Spaulding in *The Ideal and the Actual in Procedural Due Process*. He flags that this perspective is "idealized, abstract, and ossified," unconnected to the way things actually work. This myopia not only calls into question the relevance of much current civil process pedagogy, but has serious repercussions for the vulnerable and marginalized.

This article is one of my favorites because it directly appeals to those of us who teach and write about civil process and challenges us to face some important questions. It compels us to reflect on what we teach and write about and why, and whose experiences and voices are amplified or muffled by those choices. The schism between the ideal and actual ways procedural due process works in the United States is profound, making it incumbent upon us to rethink our preoccupation with the former over the latter. Spaulding reminds us that far more than the legitimacy of our field is at stake; so too are the lives of those most in need of due process protections.

The "ideal" discourse of civil process and due process—with its emphasis on the Supreme Court, the Federal Rules and the gold star but vanishing jury trial—is not entirely unjustified. Pragmatic and historical considerations abound; the federal system is tested on the bar, functions as a model for state courts, and is easier to study empirically.

Spaulding argues, however, that these reasons cannot justify the nearly exclusive attention on federal procedural law. The difference between ideal and actual procedural justice is alarming and profound. This difference plays out in three fora where most Americans seek justice: state courts, arbitration and administrative agencies.

First, local, not federal, courts are the home for the vast number of case filings. Justice meted out in state courts is a far cry from what the casebooks and introductory Civ Pro courses tell their 1L students. Relying on a 2015 National Center on State Courts study, Spaulding highlights the distinctions between the federal ideal and the actual state court reality along various axes: subject matter, monetary value, access to counsel, and case disposition method.

The prototypical state court case involves a lender successfully securing a default judgment against a pro se defendant for a low-value monetary claim. Powerful actors such as employers, creditors, and landlords use the state courts for debt collection, enjoying very little merits review or adjudication. Abusive debt-collection practices may result in judges issuing arrest warrants, holding debtors in contempt of court, and even jailing them for failing to appear or pay private fines and public court-imposed fees. Everyday Americans—living paycheck to paycheck—are deprived their basic due process rights of notice and the right to be heard on the merits, instead languishing in jails on account of their poverty.

For example, the Department of Justice investigation of Ferguson, Missouri produced a report unearthing serious due

process violations and “coercive measures” used by the municipal courts to collect debts. The Report revealed inhumane treatment of African-Americans and draconian punishments for small violations. Spaulding reminds us of how the confluence of race and class inform what civil process is actually meted out in the courts and how the civil courts function as feeders into criminal courts, with grave consequences.

Second, given the proliferation of contracts of adhesion in consumer and employment matters, many Americans are required to resolve their disputes in arbitration rather than in the courts. Unfortunately, most people do not experience the often-touted benefits of arbitration (cheaper, faster, more flexible, and more participatory). Evidence indicates that powerful companies win 80% of the time. With the explosion of class-action bans in arbitration agreements, individuals with little money and small-value claims are unable to share the litigation cost and collectively pursue their claims. Consequently, low-wage and vulnerable workers cannot afford to challenge their employers in the arbitral forum and are denied any remedy, resulting in underenforcement of the law. Again, gender, race and class are strong markers of who will receive procedural injustice.

Third, a massive number of claims are processed by administrative bodies. Spaulding flags several procedural problems, including agency partiality, resource constraints, and delays. Those who suffer due process injustices include asylum seekers and immigrants who credibly fear persecution abroad, veterans who died waiting for benefits determinations, and workers denied worker’s compensation for injuries sustained on the job. Spaulding unmasks a different procedural reality than the one discussed in law reviews and 1L classrooms. Whether in state court, arbitration or an administrative hearing, the more vulnerable and powerless the population, the rougher the justice, if any, that is meted out.

Spaulding persuasively argues that procedural failure—its methodology and impact—must be studied and taught before it can be changed. Enter civil procedure scholars. He urges proceduralists to examine how drastic funding cuts to courts and advocacy organizations, a paucity of judges, failure of the organized bar to provide representation, and an ideological assault on adversary adjudication have undermined procedural justice.

But scholars must go beyond the diagnostic to understanding the human impact of procedural injustice, using qualitative as well as quantitative and doctrinal methods. Professors must open the classroom to the experiences of everyday people in the civil justice system. The principle that due process requires litigants be heard should inform our pedagogy and curriculum. The story of American civil process should not be told only by its makers but also by the people who experience it on the ground. The civil procedure course could model what due process looks like in reality by expanding the gamut of voices and perspectives in the classroom. This makes sense given the increasingly diverse population of the twenty-first century. The history of American civil process—including its use as a tool of racial subjugation at times—should be part of this inclusive and more accurate modern narrative.

Now, more than ever, it is important to get it right, given the high stakes. Spaulding looks forward to an unknown future in which artificial intelligence (AI) plays a greater role, warning us to take care not to reproduce the inequities and civil justice problems that already exist.

I commend Spaulding for shining light on the acute ideal/actual gap in the American civil justice system and its pernicious absence from our policy debates, scholarly literature and law school classrooms. Only when we face the truth can we truly be set free.

Cite as: Suzette M. Malveaux, *Getting Real About Procedure: Changing How We Think, Write and Teach About American Civil Procedure*, JOTWELL (June 9, 2021) (reviewing Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 **Hastings Const. L.Q.** 261 (2021)), https://courtslaw.jotwell.com/getting-real-about-procedure-changing-how-we-think-write-and-teach-about-american-civil-procedure/.