The Crying of Rule 49

Edward M. Morgan

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Ed Morgan*

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I *Crossing the border*

This article crosses – criss-crosses, actually – the border between law and literature. Its goal is to mirror the dizzying array of procedural doctrines under discussion with an equally dizzying set of comparisons. Contemporary international litigation is compared to a 1960s work of fiction, Canadian civil procedure is compared to American social movements, civil liability for polluting the environment on one side of the border is juxtaposed with the pollution of the civil liability environment on the other side, and so on. My hope is to demonstrate both the exhaustion of meaning and the replenishment of forms taken by international law and the legal procedures used to create it.[1]

The starting point for this article is the problem of cross-border liability for environmental damage. More specifically, the focus is on the case of *United States* v. *Ivey*,[2] in which a Canadian court considered for the first time the prospect of enforcing a judgment obtained in the United States under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[3] Relying on one of the conflict of laws' most traditional doctrines, the Canadian-based defendants maintained that the US judgment for the costs of a waste disposal operation in Michigan was unenforceable against them because CERCLA is 'less a liability system dependent on the assignment of fault or responsibility than a site-specific taxation system.'[4] The Ontario Superior Court dismissed this reference to the Revenue Rule,[5] choosing instead to focus on the question of whether

* Associate Professor, University of Toronto Faculty of Law.

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1 The reference here is intentionally made to two companion pieces by author John Barth that describe the state of contemporary literature movements of which Thomas Pynchon is a prominent example: J. Barth, 'The Literature of Exhaustion' *Atlantic* 220:2 (August 1967) 29; and J. Barth, 'The Literature of Replenishment' *Atlantic* 245:1 (January 1980) 65.

2 26 O.R. (3d) 523 (Ont. Sup. Ct.).

3 42 U.S.C. §9607(a) (1980).

4 *Ivey*, supra note 2 at 544.

5 In Canada, the rule that one state will not enforce another state's tax laws or judgments was embraced by the Supreme Court in *U.S.A.* v. *Harden* (1963), 44 W.W.R. 630 (S.C.C.). In the United States, the same rule is generally traced to the concurring

or not the original US case was jurisdictionally correct and therefore transportable across international state lines.[6]

In coming to its conclusion, the court in *Ivey* crossed a number of borders at once. In the first place, it literally crossed the international boundary, permitting the enforcement of a foreign judgment in Canada on the basis of a conflict of laws doctrine whose rationale lies in the constitutional requirement of full faith and credit among sister provinces.[7] Moreover, *Ivey* crossed from public law to private rights, perceiving the question of environmental liability under CERCLA to be restitutionary rather than regulatory and therefore capable of traversing the partially porous legal border.[8] Finally, and most importantly for the present study, *Ivey* effectively moved the issue of cross-border environmental law across the frontier separating substance from procedure. When an environmental clean-up case goes international, the question now to be asked is not whether the case is substantively right for enforcement[9] but whether disclosure, service, jurisdictional contacts, and other process requirements have been met.[10]

This article uses the procedural issues articulated in a leading environmental case as a jumping-off point for exploring the nature of cross-border litigation and, indeed, civil process more generally. It examines the various 'crossings' engaged by the *Ivey* case and places them within parallel movements in domestic civil procedure. The study, therefore, strives to do two things at once. First, it will highlight the fluidity of rulings on cross-border civil claims and demonstrate that this fluidity in international legal process, in turn, emerges from a more fundamental fluctuation between a policy of protecting insular legal systems and one of fostering cooperative legal systems. Second, it will compare this to the

judgment of Learned Hand J. in *Moore* v. *Mitchell*, 30 F.2d 600 at 604 (2d Cir. 1929), aff'd, 50 S.Ct. 175 (1930). The Revenue Rule in both countries comes from the seminal judgment of Lord Mansfield in *Holman* v. *Johnson* (1775), 98 E.R. 1120 at 1121.

6 *Ivey*, supra note 2, at 7–8, citing *Morguard Investments Ltd.* v. *DeSavoy*, [1990] 3 S.C.R. 1077 [hereinafter *Morguard*] ('real and substantial connection' test for jurisdiction and enforcement).

7 The full faith and credit rule set out by the Supreme Court of Canada in *Morguard* (ibid.) had already been applied to the enforcement of US judgments in other provinces. See *Moses* v. *Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.).

8 *Ivey*, supra note 2, citing *United States* v. *Monsanto*, 878 F.2d 160 at 174–5 (4th Cir., 1988) ('CERCLA ... creates a reimbursement obligation'), thus distinguishing *Huntington* v. *Attrill*, [1893] A.C. 150 at 157 (H.L.) (non-enforcement in England of 'all suites in favour of the [foreign] State for the recovery of pecuniary penalties').

9 See *Lloyd's* v. *Meinzer* (2001), 55 O.R. (3d) 688 at para. 61 (Ont. C.A.) (international enforcement in fraud case turns on whether judgment raises the 'necessary moral opprobrium').

10 See, *e.g.*, *United States* v. *Friedland*, [1996] B.J.C. 2845 (B.C.S.C.) (granting interim injunction in British Columbia for CERCLA claim in Colorado).

fluidity of all contemporary civil procedure and will demonstrate that the fluidity of domestic civil process likewise emerges from a more fundamental fluctuation between a policy of protecting litigants' rights and one of fostering dispute resolution.

The cross-border case law, in other words, is used as a mirror or pool in which to reflect on civil process everywhere. It is a particularly narcissistic legal exercise, with process rules gazing back at themselves. The irony, however, is that the thematic fluidity of the international as well as the domestic procedural cases makes it hard for the self-contemplative picture to actually come into focus. The law's structures seem covered in a constantly moving *Ivey*.

II *Procedural signs*

Thomas Pynchon's 1966 novella *The Crying of Lot 49*[11] is set in a fictional California town whose very name – San Narciso – denotes a society infatuated with its own image in much the same way as international proceduralists are infatuated with theirs.[12] It also reflects Pynchon's own obsession with metaphoric signs that seem to point everywhere[13] and nowhere[14] at once.[15] In the Narcissus story, a youth mistakes his own reflection in a pool for that of someone else and becomes, in Marshall McLuhan's terms, 'a servomechanism of his own extended or repeated image.'[16] The nymph Echo attempts to woo him away from himself, but

11 All references herein are to the Bantam Books edition: T. Pynchon, *The Crying of Lot 49* (Philadelphia: Bantam Books, 1966) [hereinafter *Lot 49*].

12 T. Schaub, *Pynchon: The Voice of Ambiguity* (Urbana: University of Illinois Press, 1981) at 25: 'Pynchon's direct evocation of the Narcissus myth is a clear statement ... [of] a culture in love with a dream-image of itself.'

13 *Lot 49,* supra note 11 at 13 ('But if there was any vital difference between it and the rest of Southern California, it was invisible on first glance.'); at 12 ('Like many named places in California it was ... census tracts, special purpose bond-issue districts, shopping nuclei, all overlaid with access roads to its own freeway.').

14 Ibid. at 12 ('it was less an identifiable city than a grouping of concepts'). The first view of San Narciso is difficult to fathom: *Lot 49* at 13 ('Smog hung all around the horizon ... she and the Chevy seemed parked at the center of an odd, religious instant.'). M. Couturier, 'The Death of the Real in *The Crying of Lot 49*' (1987) 20–21 Pynchon Notes 5 at 15 [hereinafter 'Death of the Real']: 'The city is not real; it is textual.'

15 The very evocation of Narcissus suggests competing interpretive possibilities for Pynchon's metaphoric sign, since the classical account and the psychoanalytic are one. J.K. Grant, *A Companion to* The Crying of Lot 49 (Athens: University of Georgia Press, 1994) at 28 [hereinafter *Companion*]: 'Ovid's account of the story of Narcissus and Echo ... and Freud's essay "On Narcissism" offer "competing paradigms" within or against which Pynchon's own manipulation of symbolic possibilities can be read.'

16 M. McLuhan, *Understanding Media: the Extensions of Man,* 2d ed. (New York: New American Library, 1964) at 51.

he is unable to respond even to fragments of his own voice.[17] When Pynchon's symbolically overburdened characters discover the society that is San Narciso and take up lodgings in the Echo Courts motel (complete with a nymph displayed on its own tacky sign of the times),[18] the multiplicity of signs and signifiers becomes almost overwhelming. One does not know whether to experience the signage as Echo or as Narcissus – that is, as metaphoric links to an external reality or as a closed and self-referential system of images.[19]

In law,[20] there is generally thought to be no such confusion. Whether legal signposts are seen to be outgrowths of certain social practices[21] or are perceived as a pre-existing matter of the rights of individuals as against one another,[22] they are understood to be linked to political or

17 McLuhan therefore postulates that Narcissus 'had adapted to his extension of himself and had become a closed system' (Ibid.).

18 Perhaps most important of all in this over-determined scene is that the sign on the motel is in a continuous state of motion: *Lot 49*, supra note 11 at 14–5 ('A representation in painted sheet metal of a nymph holding a white blossom towered thirty feet into the air; the sign, lit up despite the sun, said "Echo Courts" ... [and contained] a concealed blower system that kept the nymph's gauze chiton in constant agitation'). On Pynchon's work as a sign of the times, see P.-Y. Petillon, 'A Re-cognition of Her Errand into the Wilderness' in P. O'Donnell, ed., *New Essays on* The Crying of Lot 49 (New York: Cambridge University Press, 1991) 127 at 129 [hereinafter 'Re-cognition'] ('*The Crying of Lot 49* captures the particular "mood" of the times; it conjures up the "time-ghost" (Pynchon's own translation of the German *Zeitgeist*)').

19 R. Watson, 'Who Bids for Tristero? The Conversion of Pynchon's Oedipa Maas' (1983) 17 So. Humanities Rev. 59 at 70 (Oedipa caught between 'Narcissus, mistaking the creations of her own confused perceptions for external reality' and 'Echo, a real warning from an all-too-real creature').

20 This essay deals primarily with the procedural and private international law of Canada, but attempts to situate that law within the discursive framework of American law and scholarship. It is not intended to present an analysis whereby one system examines another in an express attempt to learn from parallel doctrines (see M. Tushnet, 'The Possibilities of Comparative Constitutional Law' (1998) 108 Yale L.J. 1225, describing give and take between foreign and American constitutional law) but, rather, takes for granted that general problems of law and interpretation are common among the two legal systems. See P. Glenn, 'Persuasive Authority' (1987) 32 McGill L.J. 261 (describing Canadian tendency to cite non-binding foreign law as part of domestic law-making).

21 See, *e.g.*, R. Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986) (justifying adjudication as a form of interpretation giving integrity to social practices). In Canada, see P. Weiler, 'The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law' (1990) 40 U.T.L.J. 117 (identifying social attitudes as linked to legal interpretations); J. Fudge & H. Glasbeek, 'The Politics of Rights: A Politics with Little Class' (1992) 1 Soc. & Legal Stud. 45 (linking law to the politics of class struggle).

22 R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) (linking constitutional rights to private law rights of contract, tort and property). In Canada, see A. Brudner, 'What are Reasonable Limits to Equality Rights?' (1986) 64 Can.Bar Rev. 469 (rights of equal protection and treatment traced to natural law theory); D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) at 15–7, 48–52 (describing 'proportionality and rationality principles' as the 'inner logic' of constitutional law and, of consequently, all legal relations).

economic life.[23] One would think that this is particularly the case with an emerging field such as international environmental litigation, where socio-economic developments and legal trends go almost directly hand in hand. It is the ambition of this article to closely examine and to challenge this presumption about international litigation and civil process more generally.

In the Pynchon novella for which this article is named,[24] a housewife named Oedipa Maas[25] is presented with a legal task: she has been appointed executor[26] of the will of a real estate mogul and former college boyfriend named Pierce Inverarity.[27] Like her Sophoclean namesake,

23 H. Steiner & P. Alston, *International Human Rights in Context*, 2d ed. (New York: Oxford University Press, 2000) at 3 (describing human rights cases as 'Global Snapshots'); L. Tribe, *American Constitutional Law,* 2d ed. (Mineola, NY: Foundation Press, 1988) at 1720 ('Thus, if constitutional law is understood as a snapshot of the deepest norms by which we govern our political lives ...'). On occasion, not only the law but the scholarship of constitutionalism is described in similar terms. In Canada see, *e.g.*, R. Devlin, 'Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson' (1996) 22 Queen's L.J. 81 at 83 ('Because of these strengths and weaknesses they provide us with an opportunity to take a snapshot of the state of contemporary Canadian constitutional theorizing').

24 The convention of naming is itself a theme in Pynchon's work. See T. Tanner, *Thomas Pynchon* (New York: Methuen, 1982) at 60 ('"Character" and identity are not stable in his fiction, and the wild names he gives his "characters," which seem to either signify too much (Oedipus and Newton indeed!) or too little (like comic-strip figures), are a gesture against the tyranny of naming itself').

25 This feminized version of a name associated with the most male of Freudian complexes has given rise to diverse commentary, from the sublime – see D. Moddelmog, 'The Oedipus Myth and Reader Response in Pynchon's *The Crying of Lot 49*' (1987) 23 Papers on Lang. & Lit. 240 (the name forces the question '[i]s Oedipa Oedipal?'), and W. Plater, *The Grim Phoenix: Reconstructing Thomas Pynchon* (Bloomington: Indiana University Press, 1978) at 150 (Oedipa suggests 'the hermaphroditic unity of opposites') – to the ridiculous, see Tanner, *Thomas Pynchon*, supra note 24 at 60 (Oedipa Maas is pronounced '"Oedipa my ass"; she is no Oedipus at all'). The surname Maas has also been the subject of some speculation. See J. Chambers, *Thomas Pynchon* (New York: Twayne Publishers, 1992) at 101 (noting that Maas is the Dutch word for *mesh* or *web*, through which one can escape or in which one can get caught), and Tanner, ibid. at 60 (noting that Maas suggests 'mass' as the Newtonian term denoting a quantity of inertia, '[s]o the name suggests at once activity and passivity').

26 *Lot 49,* supra note 11 at 1 ('or she supposed executrix'). For some critics, the brief musing over gender and legalese reflects the manipulation of sexual identities that is common in Pynchon; see Couturier, 'Death of the Real,' supra note 14 at 24. For others it is simply a warning not to oversimplify anything, including the protagonist, who, although in the book's opening sentence she 'had just come home from a Tupperware party' (*Lot 49* at 1), nevertheless expresses a fleeting feminist annoyance at the mix-up in legal terminology. Grant, *Companion,* supra note 15 at 6–7.

27 The letter from the estate's lawyer, of course, 'pierces' Oedipa's world as the opening salvo of the book. The surname Inverarity, however, seems more problematic. See F. Kermode, 'The Use of Codes in *The Crying of Lot 49*' in H. Bloom, ed., *Thomas Pynchon: Modern Critical Views* (New York: Chelsea House Publishers, 1986) XX at 11 (the name Inverarity suggests 'either untruth or *dans le vrai*').

Oedipa has a riddle of interpretation to solve,[28] and she spends the remainder of the book seeking to resolve the mystery, which turns out to implicate herself and everyone like her.[29] The problem is that it is a mystery that defies rationality and can therefore never be resolved.[30] Although the work is set in the form of a detective novel,[31] it has an eccentrically reversed plot (an inversed rarity)[32] in which the sense of mystery only increases as Oedipa and the reader learn more of the story.[33] The enterprise of the plot is seductive,[34] but the knowledge needed to unravel it seems endless.[35]

As already indicated, procedural rules appear to be in a similarly endless state of motion. Moreover, this is not just a matter of legal change serving the society's parallel historical changes, or a reflection of the fact that legal procedure is a construction of varying social times.[36] Rather, it

28 E. Mendelson, 'The Sacred, the Profane, and *The Crying of Lot 49*' in E. Mendelson, ed., *Pynchon: A Collection of Critical Essays* (Englewood Cliffs, NJ: Prentice Hall, 1978) 112 at 118 (Oedipus 'begins his search for the solution of a problem (a problem, like Oedipa's, involving a dead man) as an almost detached observer, only to discover how deeply implicated he is in what he finds').

29 Toward the end of the book, after Oedipa has gone through several weeks of unearthing apparent plots and counter-plots in the trail of Pierce Inverarity's affairs, Pynchon suggests a society-wide scope to her paranoiac perceptions, as well as to his own ruminations: *Lot 49*, supra note 11 at 134 ('She had dedicated herself, weeks ago, to making sense of what Inverarity had left behind, never suspecting that the legacy was America').

30 C. Nicholson & R. Stevenson, 'Words You Never Wanted to Hear: Fiction, History and Narratology in *The Crying of Lot 49*' (1985) 16 Pynchon Notes 89 at 107 ('Oedipa discovers that a determination to reduce the riddling complexity of her experience to satisfyingly rational and unitary conclusions is one that only brings trouble on herself').

31 Tanner, *Thomas Pynchon,* supra note 24 at 56 ('The model for the story would seem to be the Californian detective story ... But in fact it works in a reverse direction').

32 Oedipa asserts that there is 'high magic to low puns.' *Lot 49*, supra note 11 at 96. See also R. Poirier, 'The Importance of Thomas Pynchon' in G. Levine & D. Leverenz, eds., *Mindful Pleasures: Essays on Thomas Pynchon* (Boston: Little, Brown, 1976) 15 at 22, for the suggestion that this twist on Inverarity's name may be a stamp collectors' term.

33 N.K. Hayles, '"A Metaphor of God Knew How Many Parts": The Engine That Drives *The Crying of Lot 49*' in P. O'Donnell, ed., *New Essays on* The Crying of Lot 49 (New York: Cambridge University Press, 1991) 97 [hereinafter 'Metaphor'] ('A sense of mystery or irresolution hands over the novel even after one has read and reread it many times'). Grant, *Companion*, supra note 15 at 8 ('Oedipa's engagement with the "tangled" assets of Pierce's estate is frequently said to be equivalent to the reader's engagement with the novel').

34 *Lot 49*, supra note 11 at 18: '... it's all part of a plot, an elaboration, *seduction*, plot.'

35 Ibid. at 56 ('You can put together clues, develop a thesis, or several ... You could waste your life that way and never touched the truth'). Pynchon has written that his own grasp on his central scientific concept and metaphor of entropy has become 'less sure the more' he reads about it. T. Pynchon, *Slow Learner* (Boston: Little, Brown, 1984) at 14.

36 See H. Koh, 'Two Cheers for Feminist Procedure' (1993) 61 U.Cin.L.Rev. 1201 at 1202 ('Do practices that appear to be natural or invisible suddenly become visible and socially constructed?'). For a more general discussion of the socially constructed nature of procedural rules see R. Brooks, *Critical Procedure* (Durham, NC: Carolina Academic

would seem that procedural law – in both its international and its ordinary domestic guises – is virtually incapable of being pinned down; its policy ends and embedded social messages are in a constant state of fluctuation. The deeper we delve into it and identify its objectives, the less we actually seem to know.

The metaphor around which this article is structured is that of Pynchon's Oedipa moving from her suburban habitat across the tracks to San Narciso and Inverarity's world.[37] In much the same way, the law moves from the old and familiar to the new and innovative. International liability, therefore, travels from its home in sovereign legal systems to *Ivey*'s inroads into cross-border recognition and cooperation, and domestic civil procedure journeys from its old and established world of rights protection to its newly constructed terrain of conflict resolution. In crossing the tracks, Oedipa attempts to interpret a world that is in a state of continual fluctuation;[38] everything, from her perspective as the holder of legal office,[39] comes across as the blur of being caught between forces in motion.[40] It is this blur of analysis, this inability to focus across the borders erected and traversed by the law, that this article attempts to demonstrate and to explore.

III *The unstable world of procedure*

As Lon Fuller stated in a famous essay on adjudication, civil process 'should be viewed as a form of social ordering.'[41] However, the fact that

Press, 1998) at xxiii–xxix (introducing critical race and feminist theory approaches to procedure). In Canada see J. Fudge, 'The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles' (1987) 25 Osgoode Hall L.J. 485 at 532–3 (constitutional rights depend on the ideological preferences of the decision maker).

37 *The Crying of Lot 49* has been called 'a Beat novel, the last of the Beat novels – call it a post-Beat novel,' and Oedipa's experience has been said to reflect that of Jack Kerouac in *On the Road*, 'moving "across the tracks" toward an invisible, hidden America.' Petillon, 'Re-cognition,' supra note 18 at 130, 132.

38 San Narciso is alternately described as a place of complete stillness and one of constant motion, a city where '[n]othing was happening' and a 'swirl of houses and streets.' *Lot 49*, supra note 11 at 13.

39 From her perspective inside the investigation of Inverarity's affairs, Oedipa ultimately comes up against 'irreducible constraints that limit interpretation and circumscribe action.' Hayles, 'Metaphor,' supra note 33 at 97. See also Tanner, *Thomas Pynchon*, supra note 24 at 76 ('One of the things Pynchon manages to do so brilliantly is to make us participate in the beset and bewildered consciousness which is the unavoidable affliction of his characters').

40 Petillon, 'Re-cognition,' supra note 18 at 135 ('Pynchon's achievement is not just that he is able to suggest ... the sense of being between two worlds, but that he has managed to build that thematic "in-betweenness" into the very structure of his work').

41 L. Fuller, 'The Forms and Limits of Adjudication' rpt. (1978) 92 Harv.L.Rev. 353 at 355–6 [hereinafter 'Forms and Limits'] ('More fundamentally, however, adjudication

'the foundation of [civil] jurisdiction is physical power,'[42] and that the police power of the state provides the enforcement backup for the rulings of courts,[43] is not itself enough for civil process. A background theme of all procedural design is that legal process must be accepted in its own right – that is, the authority of adjudication must be imminent in the process itself, as Fuller would have it.[44] Thus, before one examines the development of certain procedural rules, it is helpful to know what form of order it is that is being developed.

The character of the social order is likewise present as a background theme in *The Crying of Lot 49*. Specifically, as a book whose primary subject matter is communication,[45] it focuses on the postal office[46] – tracing its development, as a socio-political organization, from the early systems of the Holy Roman Empire to the Pony Express to the modern governmental service.[47] Communication is thus associated with history,[48]

should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated').

42 *McDonald* v. *Mabee*, 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608 at 609 (1917) (*per* Holmes J.).

43 *Brown* v. *Allen*, 344 U.S. 443 at 540 (1953) (Jackson J. concurring): 'We are not final because we are infallible, but we are infallible only because we are final.' But see F. James & G. Hazard, *Civil Procedure*, 3d ed. (Boston: Little, Brown, 1985) at 281 ('the coercion available through civil litigation actually is so feeble that someone determined to resist can thwart all but the most energetic efforts to enforce a civil judgment').

44 Fuller, 'Forms and Limits,' supra note 41 at 392 (explaining the form and the limits of the form of both state-enforced adjudication and consent-based arbitration as being essentially the same).

45 See T. Schaub, '"A Gentle Chill, An Ambiguity": *The Crying of Lot 49*' in H. Bloom, ed., *Critical Essays on Thomas Pynchon* (Boston: G.K. Hall, 1981) 57 at 57 ('Oedipa's efforts to disentangle Inverarity's estate involve her in a study of her society; she comes to realize that her world is a vast communications system ...').

46 Tracing the past is a compulsion for many of Pynchon's characters, including Herbert Stencil, the protagonist of Pynchon's first novel. See T. Pynchon, *V* (New York: Perennial Library, 1963). By engaging in the activity of historical tracing, Oedipa becomes a Stencil. See Chambers, *Thomas Pynchon*, supra note 25 at 100 (drawing the comparison between the two characters).

47 See Chambers, ibid. at 101 (describing Oedipa's ability to trace the 'postal system in Europe to an American system ... the Pony Express and Wells Fargo ... and finally to the current ... California system') and, more generally, Petillon, 'Re-cognition, supra note 18 at 151 ('Although [*Lot 49*] is from a topical point of view a novel of 1957–1964, enclosed in it ... one finds a whole micro-encyclopedia of past historical events').

48 Mr. Thoth, an elderly resident of a nursing home, suggests to Oedipa that the history of written communication is a brutal one. '"I was dreaming," Mr. Thoth told her, "about my grandfather... He rode for the Pony Express, back in the gold rush days... That cruel old man," said Mr. Thoth, "was an Indian killer."' *Lot 49*, supra note 11 at 66. As if to drive home the political point, the old man's memory awakens to a name that cannot be discounted in a book over-determined by names: 'His horse was named Adolf, I remember that.' Ibid. The name Thoth, it has been noted, refers to the Egyptian god of scribes and is also associated with Hermes, the god of cryptology. See R. Newman, *Understanding Thomas Pynchon* (Columbia: University of South Carolina Press, 1986) at 76 (Thoth 'resides in a nursing home and, like the state of the written word, decays').

and with Inverarity's 'need to possess, to alter the land, to bring new skylines, personal antagonisms, growth rates into being';[49] in other words, with law and society.[50] That the social order Oedipa seeks is, like doctrines of procedure, both layered with historical trappings and continuously seeking to reveal its true self;[51] it is illustrated graphically in a renowned scene in which she and the estate's lawyer play a sexual guessing game. Oedipa first dons innumerable layers of clothing and accessories, then successively removes an item for each question answered by the lawyer about the plot of a TV show in which he appeared thirty years earlier.[52] Oedipa becomes, in other words, a caricature of a social order that is at once overdressed and exposed at the historical core.[53] It is this inner value that the lawyer's game – here dubbed 'Strip Botticelli,'[54] there called Civil Procedure – seeks to expose.[55]

Procedural rules generally struggle against the accusation of arbitrariness by self-consciously dressing themselves in their own policy goals, thereby attempting to identify their own points of inherent authority.[56] The problem is that the goals of procedure, like Oedipa's garments and accessories,[57] are legion.[58] Property, contract, and tort all have readily

49 *Lot 49*, supra note 11 at 134.

50 Chambers, *Thomas Pynchon,* supra note 25 at 100 (describing Inverarity's capitalist impulse as 'a kind of modern day colonialism').

51 Many commentators on Pynchon have noted that his works are overflowing with historical and literary allusions. See, *e.g.*, M. Hite, *Ideas of Order in the Novels of Thomas Pynchon* (Columbus: Ohio State University Press, 1983) at 91 ('But as the narrative moves forward, it leaves a mass of "descriptive residue" in its wake, and this residue constitutes a world').

52 *Lot 49*, supra note 11 at 20 ('A lawyer in a courtroom, in front of any jury, becomes an actor, right? Raymond Burr is an actor, impersonating a lawyer, who in front of a jury becomes an actor').

53 Tanner, *Thomas Pynchon,* supra note 24 at 58 (describing Oedipa as 'a grotesque image of an insanely eclectic culture').

54 *Lot 49*, supra note 11 at 24 ('Anyone for Strip Botticelli?').

55 Tanner, *Thomas Pynchon,* supra note 24 at 58 ('When – if – history is "undressed," what will it look like?').

56 This policy orientation of civil procedure can be traced at least to the English *Judicature Acts* of 1873 and 1875, which effected the merger of law and equity, simplified pleading, abolished (for the most part) the forms of action, and allowed for judicial rule-making powers. See X. Hepburn, *The Historical Development of Code Pleading* (Place: Publisher, 1897) at 177–94. The policy-oriented direction of civil reform ultimately found its most prominent expression in the adoption by the US Supreme Court in 1938 of the Federal Rules of Civil Procedure, 308 U.S. 645–766, under authority of the Enabling Act of 1934, 28 U.S.C. §2072. See C. Clark, 'A New Federal Civil Procedure' (1935) 44 Yale L.J. 387.

57 *Lot 49*, supra note 11 at 26 ('So it went: the succession of film fragments on the tube, the progressive removal of clothing that seemed to bring her no nearer nudity ...').

58 The end goals of civil procedure have been described in various ways, including the protection of dignity and participation, deterrence of wrongdoing, and effectuation of

identifiable substantive goals, such as the protection of personal holdings and autonomy, the fostering of private economic ordering, and the redistribution of accident costs. Civil procedure, by contrast, seems like an empty vessel willing to be filled by whatever forms of order the rule makers or their society can conjure.[59] In a legal world where adjudicators typically engage in interpretation and application by reaching directly behind the specific rules to access their social purposes,[60] the multiplicity of unshared social ends creates a problem for civil process and its social ordering even as it attempts to address it.

Despite the various public law, mass tort, and, indeed, international contexts in which civil process often functions, it is the classic two-party private adjudication that remains the model of procedure.[61] The rules governing civil litigation,[62] while complex and, as indicated, economically

the law's substantive rights. F. Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights' [1973] Duke L.J. 1153 at 1172–7. Efficiency and wealth maximization have also been identified as goals of procedural doctrine (R. Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 J.Legal Stud. 399), as have equality and even socio-political tradition: J. Mashaw, 'The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews* v. *Eldridge*: Three Factors in Search of a Theory of Value' (1976) 44 U.Chi.L.Rev. 28 at 46–59. In the context of modern class actions, polycentric administration has been said to be the new policy end and structural paradigm of civil procedure. L. George, 'Sweet Uses of Adversity: *Parklane Hosiery* and the Collateral Class Action' (1980) 32 Stan.L.Rev. 655 at 686. The law-making function of class actions and other public law litigation has also led scholars to identify a legislative end to contemporary litigation. S. Yeazell, 'Group Litigation and Social Context: Toward a History of the Class Action' (1977) 77 Colum.L.Rev. 866. Even the broad political restructuring of society has been posited as an end of civil process in the context of civil rights litigation. D. Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1976) 85 Yale L.J. 470.

59 W. Felstiner, 'Influences of Social Organization on Dispute Processing' (1974) 9 Law & Soc'y Rev. 63 ('[D]ispute processing practices prevailing in any particular society are a product of its values, its psychological imperatives, its history and its economic, political and social organization. It is unlikely that any general theory encompassing all of these factors will be developed ...').

60 W. Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' [1978] Wisc.L.Rev. 29 (describing the adjudicative function as 'Purposivism,' as distinct from 'Positivism').

61 A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv.L.Rev. 1281 at 1283 ('The predominating influence of the private law model can be seen even in constitutional litigation, which, from its first appearance in *Marbury* v. *Madison*, was understood as an outgrowth of the judicial duty to decide otherwise-existing private disputes').

62 This article uses the Ontario Rules of Civil Procedure, R.R.O. 1990, reg. 194, as amended [hereinafter 'Ont. Rules'], as the model for procedural rules, although reference is made throughout to the relevant cognates in the US Federal Rules of Civil Procedure, 308 U.S. 645–766 (1938), as amended [hereinafter 'US Fed. Rules']. The two sets of rules are substantially similar and, for present purposes, serve the same function.

and politically multi-purposed, can largely be grouped around two fundamental themes: rights enforcement and conflict resolution.[63] The former theme has as its central concern the substantive legal relationship between the parties and finds its clearest expression in those rules pertaining to discovery,[64] interim relief,[65] summary judgment,[66] and enforcement of orders.[67] While this theme could focus on the plaintiff as the holder of legal entitlement or on the defendant as the perpetrator of aberrant behaviour, the rules in this group generally emphasize legal protections and the imposition of liability. By contrast, the latter theme has as its central concern the consensual termination of litigation and finds its clearest expression in rules relating to trial scheduling,[68] payment of costs,[69] joinder of claims, and joinder of parties.[70] While this theme could focus on the parties as the strategic actors or on the court as the medium for encouraging compromise, the rules in this group generally emphasize the time and cost of the litigation process itself.

On a close reading of the rules of procedure, one starts to suspect that the dichotomy of themes that is discernible among the rules is, in turn, further replicated within each of them. Thus, for example, the seemingly nondescript rules relating to pleadings[71] or practice on motions[72] almost

63 K. Scott, 'Two Models of Civil Process' (1975) 27 Stan.L.Rev. 937 (identifying the 'Conflict Resolution Model' and the 'Behavior Modification Model'). In Fuller's terminology, these are outgrowths of two forms of social ordering. Fuller, 'Forms and Limits,' supra note 41 (identifying 'organization by common aims' and 'organization by reciprocity').

64 Ont. Rule 30, US Fed. Rule 34 (documentary discovery); Ont. Rule 31, US Fed. Rule 30 (oral examinations for discovery); Ont. Rule 32, US Fed. Rule 34 (inspection of property); Ont. Rule 33, US Fed. Rule 35 (medical examinations); Ont. Rule 35, US Fed. Rule 33 (written examinations).

65 Ont. Rule 40, US Fed. Rule 65(b) (interlocutory injunction); Ont. Rule 41, US Fed. Rule 66 (appointment of receiver).

66 Ont. Rule 20, US Fed. Rule 56 (summary judgment); Ont. Rule 21, US Fed. Rule 38(c) (determine of issue before trial); Ont. Rule 22, US Fed. Rule 10 (stated case); Ont. Rule 19, US Fed. Rule 55 (default proceedings).

67 Ont. Rule 60, US Fed. Rule 69 (enforcement); Ont. Rule 64, US Fed. Rule 64 (mortgage actions).

68 Ont. Rule 50, US Fed. Rule 16 (pre-trial conference); Ont. Rule 48, US Fed. Rule 40 (listing for trial); Ont. Rule 46, US Fed. Rule 82 (venue of trial).

69 Ont. Rule 57, US Fed. Rule 54 (costs between party and party); Ont. Rule 56, US Fed. Rule 67 (security for costs); Ont. Rule 58, US Fed. Rule 54 (assessment of costs).

70 Ont. Rule 5, US Fed. Rule 18 (joinder of claims); Ont. Rule 6, US Fed. Rule 42 (consolidation of actions); Ont. Rule 7, US Fed. Rule 17 (parties under disability); Ont. Rule 10, US Fed. Rule 17 (representation orders).

71 Ont. Rule 25, US Fed. Rule 7 (pleadings in an action); Ont. Rule 26, US Fed. Rule 15 (amendment of pleadings); Ont. Rule 27, US Fed. Rule 13 (counterclaim); Ont. Rule 28, US Fed. Rule 13 (crossclaim); Ont. Rule 29, US Fed. Rule 14 (third-party claim).

72 Ont. Rule 37, US Fed. Rule 7 (motions procedure and jurisdiction); Ont. Rule 36, US Fed. Rule 43 (taking evidence before trial); Ont. Rule 39, US Fed. Rule 6 (applications or originating motions); Ont. Rule 39, US Fed. Rule 43(e) (evidence on motions).

invariably contain within them specific directions that combine content regulation[73] with timing parameters.[74] The suggestion embodied in each of these provisions is one of a thematic hybrid of substantive law enforcement and encouragement of compromise. The procedural rules aim at producing a new social or relational order, but it is always unclear whether that order brings the parties together in curtailment of their initial positions or whether it ensures their separation in vindication of their legal rights. Each reading raises a suspicion of the other.

A prime example of the seemingly conflicted operation of civil procedure is found in Ontario's Rule 49.[75] This rule, which provides a mechanism for issuing[76] and accepting[77] an offer to settle, as well as incentives for acceptance of an offer,[78] comes roughly midway through the seventy-seven rules that make up Ontario civil practice.[79] As a rule that deals explicitly with settlement of actions, it appears at first to lie entirely on one side of the compromise/enforcement thematic divide. However, closer observation reveals the rule to be concerned with such matters as

73 *E.g.*, Ont. Rule 25.06 (1), US Fed. Rule 10 (pleading material facts); Ont. Rule 25.06 (2), US Fed. Rule 8(a)(2) (pleading conclusions of law); Ont. Rule 25.06 (4), US Fed. Rule 8(e)(2) (inconsistent pleadings); Ont. Rule 37.06, US Fed. Rule 7(b) (content of notice of motion); Ont. Rule 37.10, US Fed. Rule 7(b) (materials for use on motion).

74 *E.g.*, Ont. Rule 25.04, US Fed. Rule 6 (time for delivery of pleadings); Ont. Rule 25.05, US Fed. Rule 7(a) (close of pleadings); Ont. Rule 37.07 (6), US Fed. Rule 6(d) (minimum notice period); Ont. Rule 37.10 (3), US Fed. Rule 36 (timing of responding party's record); Ont. Rule 37.12 (4), US Fed. Rule 12(a), (b) (timing of opposed motions in writing).

75 G. Watson & M. McGowan, *Ontario Civil Practice* (Toronto: Carswell, 2000) at 819 ('[Rule 49 (offer to settle)] represents a major innovation of the 1985 Rules and has had a significant impact on the conduct of litigation in terms of encouraging and facilitating settlements'). The nearest equivalent under the US Federal Rules of Civil Procedure is Rule 68, which provides that a plaintiff must pay a defendant's post–settlement offer attorney's fees if the defendant's offer is refused and a judgment more favourable than the offer is not obtained. See T. Chung, 'Settlement of Litigation Under Rule 68: An Economic Analysis' (1996) 25 U.C.J.Leg.Stud. 261. A number of states have a version of an offer to settle rule, and the American Bar Association has proposed a uniform state procedural rule. See R. Fagg, 'Montana Offer of Judgment Rule: Let's Provide Bona Fide Settlement Incentives' (1999) 60 Mont.L.Rev. 39.

76 Ont. Rule 49.02, US Fed. Rule 68 (where offer to settle available).

77 Ont. Rule 49.07 (1), US Fed. Rule 68 (acceptance of offer); Ont. Rule 49.07 (2), US Fed. Rule 68 (counter-offer).

78 Ont. Rule 49.07 (5), US Fed. Rule 68 (costs consequences of acceptance); Ont. Rule 49.10, US Fed. Rule 68 (cost consequences of non-acceptance); Ont. Rule 49.11, US Fed. Rule 68 (cost consequences for non-participating defendants). The incentives and counter-incentives of offers containing escalating costs provisions have been the subject of some discussion and proposed reforms by the Rules Secretariat of the Ontario Civil Rules Committee. See The Advocates Society, 'Second Request for Input – Amendment to Rule 49,' 20 May 2003, online: The Advocates Society, <http://www.advsoc.on.ca>.

79 There are eighty-six equivalent US Federal Rules.

the timing of a settlement offer's disclosure to court[80] and the means of enforcing acceptance of an offer.[81] One sees in the signposts of Rule 49, therefore, a suggestion that enforcement of existing rights and of newly created rights is as important as the abandoning of claims of right that is patent in a settlement offer. In a field of law codified to maximize the logic of its intricate design,[82] there is nevertheless a potential counter-message to every message expressed by a given rule.

Since the rules fluctuate between enforcement and compromise, the litigants are inevitably pulled together and pushed apart. Each rule seems to contain within it not one but two forms of social ordering, each of which on its own would suffice as an organizing idea. The effect of reading the rules, then, is one of continuous motion between an apparent embarrassment of social and relational riches. Each social order contains the suggestion of a contrary social order, making the interpretation of procedural codes less of a logical and more of a paranoiac exercise. Rules of settlement are shadowed[83] by rules of enforcement; rules about compromise are haunted by the spectre of rules about rights.

Wading through the rules, a lawyer might sense, as does Oedipa in her first visit to San Narciso, a nagging if not quite identifiable sensation that 'revelation was in progress all around her.'[84] Oedipa's heightened sensitivities to the complex, multiple meanings of nearly every feature of Inverarity's world make her acutely aware that things, much like Rule 49 and its family, are not what they seem.[85] Such awareness of an interpretive universe in which everything 'turn[s] curious'[86] is, of course, unnerving, as signs of an alternative purpose can be read in virtually every other

80 Ont. Rule 49.06, US Fed. Rule 68 (no disclosure of offer to court until all issues of liability are determined).

81 Ont. Rule 49.09, US Fed. Rule 68 (failure to comply with accepted offer).

82 On the organizational and clarification aspirations of the codification process for civil procedure, see James & Hazard, *Civil Procedure*, supra note 43 at 18 ('The code was intended to authorize a single court in a single action to draw on the properly applicable rules ... [a]nd ... to make available all the appropriate remedies in that action').

83 In Inverarity's final telephone call to Oedipa, he simulates a 'Lamont Cranston voice' (*Lot 49*, supra note 11 at 3). Lamont Cranston was the actor who played radio's 'The Shadow': P. Abernathy, 'Entropy in Pynchon's *The Crying of Lot 49*' (1972) 14 Critique 18 at 19.

84 *Lot 49*, supra note 11 at 28.

85 As one Pynchon scholar has put it, following Oedipa 'we might feel that we are "not in Kansas anymore," but entering Derrida country.' Petillon, 'Re-cognition,' supra note 18 at 158.

86 *Lot 49*, supra note 11 at 28 ('Things then did not delay in turning curious'). See also the echo of Lewis Carroll in Petillon, 'Re-cognition,' supra note 18 at 142 ('Things gradually become "curiouser and curiouser" for Oedipa as she falls down the rabbit hole into an alternative world').

sign: from human bones found at the bottom of a lake[87] to graffiti on a bathroom wall[88] to the procedural rules governing negotiations with the opposing party.[89] Her legal office has made her the interpreter of a testamentary domain that appears inherently unstable. The innumerable signs of San Narciso, civil process, and the worlds they represent are nothing if not haunting and ambiguous.[90]

IV *Procedural portrait of a nation*

If procedure, taken on its own, imparts an ambiguous social portrait, it is in measuring the relationship of the society to other societies with which civil process collides that the law promises to bring the portrait into focus.[91] As in the *Ivey* case, when litigation crosses jurisdictional bounds it brings to the surface the nature of the social relationships, if not between the litigants, then between the jurisdictions themselves. If litigants seem simultaneously pulled together and pushed apart by the Rules, the ability of the law to stand outside the society in cross-border cases holds out the hope of gaining perspective on the nature of legal authority. Thus, one goal of any study of international procedural cases is to attempt to come to terms with the conceptual grounds of procedure itself. Does the source of its authority reside in the parties and their respective rights and subordinate the border they straddle, or does it lie in the society asserting the right to resolve disputes on its own as the legal equal to its neighbour?

In much the same way, Oedipa seeks to grasp the elusive meaning of the will under which she holds office[92] by understanding its source of authority.[93] The authority of the will, of course, is in the desire of the

87 *Lot 49*, ibid. at 41 ('"These bones came from Italy. A Straight sale. Some of them," waving out at the lake, "are down there, to decorate the bottom for the Scuba nuts."').

88 Ibid. at 34 ('Beneath the notice, faintly in pencil, was a symbol she'd never seen before').

89 Ibid. at 43–4 ('"If he stops here, don't bully him, he's my client."').

90 J. Johnston, 'Toward the Schizo-Text: Paranoia as Semiotic Regime in *The Crying of Lot 49*' in P. O'Donnell, ed., *New Essays on* The Crying of Lot 49 (New York: Cambridge University Press, 1991) 47 at 52 [hereinafter 'Schizo-Text'] ('But if the signs in *The Crying of Lot 49* are haunting and ambiguous for its main character, they are no less uncertain for the reader who must assume the position of interpreter').

91 Like negligence for Cardozo J., procedural rights 'in the air, so to speak, will not do.' *Palsgraf* v. *Long Island Railroad Co.*, 248 N.Y. 339 at 341, 162 N.E. 99 (N.Y.C.A., 1928). For a perspective on law as a fundamentally relational phenomenon, see J. Nedelsky, 'Reconceiving Rights as Relationship' (1993) 1 Rev.Con.Stud. 1.

92 See Petillon, 'Re-cognition,' supra note 18 at 129 ('[t]he protagonist's fate inside the story is but a mirror-image of the reader's predicament as he (or she) works his (or her) way through the novel's labyrinths ...').

93 B. Duyfhuizen, 'Hushing Sick Transmissions: Disrupting Story in *The Crying of Lot 49*' in P. O'Donnell, ed., *New Essays on* The Crying of Lot 49 (New York: Cambridge

testator to transmit his worldly possessions beyond death[94] – to Oedipa this means his assets, his life story,[95] San Narciso,[96] her own fears,[97] her own life story,[98] the country itself.[99] The world to which this transmission sends Oedipa is so riddled with clues and signs that are seemingly open for interpretation[100] that she expresses herself like a lawyer swirling in procedural doctrine: overexposed to 'compiled memories of clues, announcements, intimations, but never the central truth itself ...'[101] Since the orderly transfer of property is not in issue in the traditional legal sense – 'there are no squabbling relatives ... there is only Oedipa'[102] – she need not concern herself with 'ordinary' legal process. Rather, Oedipa's task is to occupy the interpretive world outside of Inverarity's life and to gage the authoritative voice that crosses (Pierces) the borders into this world.[103] She is mandated to measure the inter-jurisdictional relationship between his life and his legacy.

University Press, 1991) 79 at 81 [hereinafter 'Hushing'] ('From the very outset, when Oedipa discovers that she has to execute Pierce Inverarity's will, questions proliferate faster than answers').

94 J. Baudrillard, 'Symbolic Exchange and Death' in M. Poster, ed., *Jean Baudrillard: Selected Writings* (Stanford, CA: Stanford University Press, 1988) 119.

95 *Lot 49*, supra note 11 at 134 ('Though she could never again call back any image of the dead man to dress up, pose, talk to and make answer, neither would she lose a new compassion for the cul-de-sac he'd tried to find a way out of, for the enigma his efforts had created').

96 Ibid. at 133 ('But did it matter now if he'd owned all of San Narciso? San Narciso was a name; an incident among our climatic records of dreams ...').

97 Ibid. at 134 ('Or he might even have tried to survive death, as a paranoia; as a pure conspiracy against someone he loved').

98 Duyfhuizen, 'Hushing.' supra note 93 at 82 ('The "text," in the present case of Pierce Inverarity, is the literal will, which is both a metaphor for his life story and a metonym for Oedipa's life story').

99 *Lot 49*, supra note 11 at 135 ('What was left to inherit? That America coded in Inverarity's testament, whose was that?'). Pynchon's novel seems, on one hand, to be grounded in the American scene: see Petillon, 'Re-cognition,' supra note 18 at 127 ('... from the same people who brought you the Merry Pranksters and the Hell's Angels, the Grateful Dead and Ravi Shankar ...'). On the other hand, the problems of communication and interpretation with which Pynchon deals seem endemic to contemporary societies: see Petillon, ibid. at 128 ('In some ways, the French reader felt almost at home in *The Crying of Lot 49*').

100 *Lot 49*, ibid. at 58 ('[t]hese follow-ups were no more disquieting than other revelations which now seemed to come crowding in exponentially, as if the more she collected the more would come to her ...').

101 Ibid. at 69.

102 Duyfhuizen, 'Hushing,' supra note 93 at 81.

103 *Lot 49*, supra note 11 at 58 ('If it was really Pierce's attempt to leave an organized something behind after his own annihilation, then it was part of her duty, wasn't it ... to bring the estate into pulsing stelliferous meaning, all in a soaring dome around her?').

Inter-jurisdictional relationships are measured by Canadian procedural rules along two distinct axes: (a) the provinces to each other and to the national as a whole and (b) the nation to its neighbours.[104] In terms of the historical imagery,[105] two competing pictures tend to emerge from the case law under each of these respective headings. On the one hand there is a paradigm of autonomous and rigidly circumscribed provinces premised on the constitutional compact,[106] which is, in turn, similar in nature to the traditional relations between neighbouring sovereigns and treaty partners.[107] The picture of 'legality' is one of reverse entropy: the overheated, random collision of parties and their jurisdictional disputes crystallizes in the frozen structure of constitutional and international governance.[108]

On the other hand, there is an equally cogent paradigm of overflowing and interlocked federal and provincial powers premised on overarching constitutionalism,[109] which is, in turn, more similar to a human rights

104 For the classic statement of the interplay between the the federal–provincial and the international relations axes, see *Ontario (A.G.)* v. *Canada (A.G.)*, [1937] A.C. 326, 354 (P.C.) (the Labour Conventions Case): 'While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.'

105 On the notion that historiography is an imagistic construction of the contemporary mind, see L. Dolezel, *Heterocosmica* (Baltimore: Johns Hopkins University Press, 1998) at 14 ('Possible worlds of historiography are *counterfactual scenarios* that help us to understand actual-world history.') and 158 ('These free, imaginative transformations create an absurd, carnivalisque, and politically aggressive fictional history, of the same kind as ... Thomas Pynchon's *Gravity's Rainbow* (1973)'). For a historical analysis of international human rights law similar to the one pursued here with respect to constitutional law, see E. Morgan, 'Internalization of Customary International Law: An Historical Perspective' (1987) 12 Yale J.Int'l Law 63 (tracing international legal authority to two concepts of legal authority: state compact and popular sovereignty).

106 T.J.J. Loranger, *Letters Upon the Interpretation of the Federal Constitution* (Quebec: Monitoring Chronicle Office, 1884) at 132 ('In constituting themselves into a confederation, the provinces did not intend to renounce, and in fact never did renounce their autonomy'). See generally A. Silver, *The French-Canadian Idea of Confederation, 1864–1900* (Toronto: University of Toronto Press, 1982).

107 For the suggestion that provinces sit in relation to each other in a way that mirrors international sovereigns, see *Mellenger* v. *New Brunswick Development Corp.*, [1971] 2 All E.R. 593 at 595–6 ('Each provincial government, within its own sphere, retained its independence and autonomy, directly under the Crown. The Crown is sovereign in New Brunswick for provincial powers'). On the territorial insular relations envisioned by classical Anglo-Canadian international law, see *R.* v. *Libman*, [1985] 2 S.C.R. 178 ('The primary basis of ... jurisdiction is territorial. The reasons for this are obvious. States [are] ... hesitant to incur the displeasure of other states by indiscriminate attempts to control activities that take place wholly within the boundaries of those other countries').

108 For further use of this image see P. Hogg, 'The *Dolphin Delivery* Case: The Application of the Charter to Private Action' (1987) 51 Sask.L.Rev. 273 (private acts become subject to constitutional review when they have 'crystallized' into a common law rule).

109 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885) at 162 ('Federalism, lastly, means legalism ... the prevalence of a spirit of legality

vision of international affairs than to classical forms of international relations.[110] The picture here is that of entropy, or energy being released: the frozen framework of constitutional strictures unleashes itself into an uncontrolled vapour of colliding litigants and jurisdictions.[111] To follow the trail of procedural rules across borders involves a constitutional analysis before an international one; but, as can be seen, the paradigms are in motion and difficult to sort out.

Likewise, Oedipa travels the route of American culture from suburban order to urban chaos and back – in the words of one critic, 'beyond the "hedge" to the "edge."'[112] Her quest vacillates continually between the crystallized order of her suburban life as a 'Young Republican'[113] and the chaotic energy of 'a hundred lightly-concealed entranceways, a hundred alienations ... in her Republic.'[114] True to the legal doctrine that is its parallel, communication in Oedipa's world is associated with the concept of entropy.[115] Oedipa craves the sensitivity necessary to sort the random, overheated molecules of information drift[116] into patterned units of chilled coherence[117] and finally back again to the steaming profusion of chaotic motion.[118] Communications are continually being sorted[119] as the undifferentiated fast molecules of communicative signs (like litigating parties across borders) are pulled from the differentiated slow molecules (like

among the people'). For a contemporary expression of the view that sovereignty lies uniquely with the federal tier of government as the umbrella legal authority, see R. Sullivan, 'Interpreting the Territorial Limitations on the Provinces' (1985) 7 S.C.L.R. 511.

110 For the suggestion that provinces sit in relation to each other in a way that is distinctly different than international sovereigns, see *Showlag* v. *Mansur*, [1994] 2 All E.R. 129 (P.C.) (treaty partners different than sister states for purposes of conflict of laws).

111 Even where constitutionalized norms enter the common law analysis, it is in the nature of these judicial developments that there be interminable collision between principles of apparently equal weight. Compare *Ex parte Island Records Ltd.*, [1978] 3 All E.R. 824 (C.A.) (Anton Piller order against 'bootleg' record makers accused of criminal passing off), and *Rank Film Distributors Ltd.* v. *Video Information Centre*, [1981] 2 All E.R. 76 (H.L.) (Anton Piller order contrary to common law privilege against self-incrimination where criminal offence alleged).

112 Petillon, 'Re-cognition,' supra note 18 at 137–8 ('As she travels – and American culture from 1957 to 1964 along with her ...').

113 *Lot 49*, supra note 11 at 53 ('... Oedipa whispered, embarrassed, "I'm a Young Republican."').

114 Ibid. at 135.

115 Ibid. at 77 ('She did gather that there were two distinct kinds of this entropy. One having to do with heat-engines, the other to do with communication').

116 Ibid. at 79 ('The true sensitive is the one that can share in the man's hallucinations, that's all').

117 Ibid. at 77 ('As the Demon sat and sorted his molecules into hot and cold, the system was said to lose energy').

118 Ibid. at 79 ('You think about all those Chinese. Teeming. That profusion of life. It makes it sexier, right?').

119 For Oedipa, sorting out signs and other communicative efforts is the only form of work. Ibid. at 62 ('"Sorting isn't work?" Oedipa said. "Tell them down at the post office ..."').

the jurisdictionally divided society)[120] and then mixed back again. By engaging in such sorting, the engine of legal procedure is constantly 'violating the Second Law of Thermodynamics, getting something for nothing, causing perpetual motion.'[121]

It is with two concepts of the nation in mind – inter-provincial pact and overarching constitutionalism – that one approaches the preliminary analysis of cross-border procedural rules. Likewise, it is with two views of society that Oedipa confronts Inverarity's world. The first is represented by the standard communication system of ordinary postal service,[122] while the second is embodied in the alternative postal system that corresponds with the secretive society dubbed 'the Tristero.'[123] For Oedipa, these two conceptions are like a husband and a lover: she is comfortably at home with one and has a 'tryst' with the other.[124] The suggestion is that jurisdictional relationships may, like everything else, be simultaneously frozen and pushed apart, overheated and pulled together, or any combination of the two.

The leading case on procedure and inter-provincial jurisdiction is the decision of the Supreme Court of Canada in *Hunt* v. *T & N Plc.*[125] At issue was the constitutionality of a so-called blocking statute legislated by Quebec to prohibit production of corporate documents in litigation outside the province.[126] Originally enacted as a response to the extraterritorial reach of US anti-trust law,[127] the Quebec statute raised a threshold question of jurisdiction and procedure: Is it applicable to, or subject to challenge in, British Columbia proceedings?[128] Reflecting, perhaps, the extent to which the flow of Canadian commerce, persons, and their con-

120 Ibid. at 62 ('The Demon could sit in a box among air molecules that were moving at all different random speeds, and sort out the fast molecules from the slow ones').

121 Ibid.

122 Ibid. at 34 ('Delivering the mail is a government monopoly').

123 Tanner, *Thomas Pynchon,* supra note 24 at 65 ('... a rebellious, insurgent counterforce which dedicates itself to subverting muffling, "muting" the official system – the Tristero').

124 Johnston, 'Schizo-Text,' supra note 90 at 58 ('... these encounters constitute the novel's episodic plot and ... they may even add up to Oedipa's "seduction"'). Oedipa learns that historically, the Tristero was spelled 'Trystero.': *Lot 49*, supra note 11 at 52.

125 [1993] 4 S.C.R. 289 at para. 1. [hereinafter *Hunt*] The case is literally a portrait of the nation, the point of reflection being made in the first sentence of the judgment by LaForest J.: 'Legal systems and rules are a reflection and expression of the fundamental values of a society ...'

126 *Business Concerns Records Act*, R.S.Q. c. D-12.

127 *Hunt*, supra note 125 at para. 62 ('... precipitated by the aggressively extraterritorial long arm anti-trust statutes of the United States').

128 The argument against jurisdiction in the Supreme Court of Canada was premised on *Canada (A.G.)* v. *Canard*, [1976] 1 S.C.R. 170, where it was held that the Supreme Court's jurisdiction in an appeal from a provincial court of appeal is limited to what the court below could have done. *Hunt*, supra note 125 at para. 25.

comitant disputes has been north–south rather than east–west,[129] the Supreme Court approached the issue of provincial court jurisdiction over the constitutionality of another province's law as one of first instance.

The Supreme Court's substantive approach to the blocking statute problem accentuated the self-contained authority of each of the provinces within its territorial boundaries. Emphasizing the sovereignty and comity aspects of private international law, the court pointed out that the constitutional requirement that a provincial enactment be directed at matters 'in the province'[130] is akin to the international requirement that there be a territorial nexus to any assertion of jurisdiction.[131] By reaching into British Columbia civil discovery, the Quebec legislation was seen to have invaded a foundational portion of its sister province's domestic process terrain.[132] Restraint of Quebec's long arm statute and protection of British Columbia's insular civil process went together naturally in a confederation of sovereign equals.

Before getting to that point the Court first had to cross the jurisdictional threshold, since the plaintiff had taken the unusual approach of challenging the Quebec statute not in the enacting province's own court but in that of its sister. In assessing British Columbia's procedural invasion of Quebec, the Court took note of 'the essentially unitary nature of the Canadian court system,'[133] in which the courts of each province draw authority from the same source. It was this common judicial sovereignty that prevented Quebec from complaining about the British

129 Indeed, one set of commentators has noted that the *Hunt* case reflects the application to inter-provincial relations of the neoliberal ideology generally applied to international free trade. J. Bakan, B. Ryder, D. Schneiderman, & M. Young, 'Developments in Constitutional Law: The 1993–94 Term' (1995) 6 S.C.L.R. 67, esp. at 119—25 [hereinafter 'Developments'].

130 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 at s. 92 (13) (provincial legislative competence over 'property and civil rights in the province').

131 *Hunt*, supra note 125 at para. 58, citing *Indyka* v. *Indyka*, [1969] 1 A.C. 33 (H.L.) (test of real and substantial connection developed for private international law jurisdiction).

132 For the identification of discovery as being of foundational importance in civil process, see *Boxer* v. *Reesor* (1983), 43 B.C.L.R. 352 (B.C.S.C.), adopting and confirming *Compagnie Financière et Commerciale du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).

133 *Hunt*, supra note 125 at 295. This unitary quality is inherited from the inherent jurisdiction of the English High Court. In *Canada (A.G.)* v. *Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 347 (the *Jabour* case), the Supreme Court of Canada stated that the superior courts of each province are 'the descendants of the Royal Courts of Justice as courts of general jurisdiction.' On the origins of the provincial superior courts' general jurisdiction over both provincial and federal matters, see *Valin* v. *Langlois* (1879), 3 S.C.R. 1 at 20 (superior courts of the province 'are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures').

Columbia court that would otherwise suffer Quebec's own legislated extraterritorial effects. The jurisdictional identities of the two provinces were held to be so equal that they effectively merged into one, allowing the BC Superior Court to be truly superior to the Quebec legislature, whose statute was declared inoperative.

Accordingly, in the substantive portion of the judgment the picture of the nation was of separate but equal jurisdictions, whereas in the procedural portion of the judgment the picture was of unitary and unequal courts. The procedures themselves, however, were designed with a view to accentuating the equality and distinctiveness of each provincial society *vis-à-vis* the others. In other words, the case captured a national portrait in motion.[134] At the very instant that the nation was emerging with equal and insular legislative jurisdictions, it grew unequal and long arm judicial jurisdictions, ultimately taking shape with multiple equivalent parts. The movement that caused a blur on the legal screen was from diversity to unity and then back from unity to diversity. The court's gaze is on the regions and on the nation, with the fast pace of the movement forward and back erasing the line of distinction.

If one is searching for clarity, the Supreme Court provided a rather unsatisfying *Hunt*. It is unclear in the judgment whether the sovereignty of the law is located in a state of chaotic divisions among competing local authorities or whether it is located in a state of orderly diversity among equally functioning legal systems. Likewise, it is unclear whether the initial movement is toward a state of order in a unitary system or whether it is toward a state of chaos as one province's legal system is allowed to swallow its sister systems. Finally, it is unclear whether the second, reverse movement is in the direction of orderly boundaries for each of the nation's jurisdictions or in the direction of an uncontrolled obliteration of all local rules. The movement of the law, as described in *Hunt,* is so fast and furious that an image of its authority simply cannot be pinned down.

Not only that, but the substantive and the jurisdictional portions of the *Hunt* judgment seem to have equal weight, neither taking priority over the other. Thus, it is impossible to determine whether the portrait of process is as the servant of substance,[135] a key unlocking the constitu-

134 In part acknowledging the practical difficulties of his ruling, LaForest J. stated, ibid. at 40: 'Unfortunately, there are intractable "chicken and egg" problems: if the extraterritorial effects of the law are themselves a prerequisite to the British Columbia court taking jurisdiction, then who is to determine that such extraterritorial effects exist in a particular case?'

135 In the context of conflicts of law, procedure is often the key to substantive change. See *Alberta Treasury Branches* v. *Granoff* (1984), 58 B.C.L.R. 370 (B.C.C.A.) (British Columbia statute prohibiting claim for balancing of debt after seizure of security by creditor is procedural, not substantive); also *Golden Acres* v. *Queensland Estates*, [1969] Q.L.R. 378 (Q.S.C.) (Queensland statute prohibiting claim for commission by unlicensed sales agent is procedural, not substantive).

tional challenge, or whether substance is the submissive partner of procedure, following as a matter of course the tough jurisdictional decision.[136] Long arm jurisdiction opens the way to provincial equality, which, in turn, drives the permissive procedures in which one province's rules dominate another's. Procedure and substance stalk each other in a mutual *Hunt,* seeming to alternate in their respective dominance and subordination until the very distinction threatens to fade away. Quebec and the rest of the provinces, local norms and national rules, separation and unity, all oscillate across the slippery constitutional surface, referring constantly to each other but rarely standing still long enough to take in any coherent political scenery.

As Oedipa comes to learn, every communication above ground contains within it the suggestion of a counter-communication below.[137] The face of the nation can literally be portrayed in two distinct ways, as the telltale sign of the Tristero – the defective postage stamp – is personified by the changed expressions (from pleasure to fear) on the philatelic portrait 'Columbus Announcing His Discovery.'[138] The two worlds of unity and diversity, plot and counter-plot, exist simultaneously.[139] Indeed, Oedipa's legal analysis is accompanied by enough aggression,[140] mood swings,[141] fantasies,[142] hysteria,[143] and neurosis[144] that the reality of it all is constantly in question.[145] The legal narrative, like Oedipa's observation of

136 In the context of conflicts of law, procedure is just as often the key to preserving the substantive *status quo*. See *Canadian Acceptance Corp.* v. *Matte* (1957), 9 D.L.R. (2d) 304 (Sask. C.A.) (Saskatchewan statute prohibiting creditor's recovery for balance of debt after seizure of security is substantive, not procedural); also *Block Bros. Realty* v. *Mollard* (1981), 122 D.L.R. (3d) 323 (B.C.C.A.) (Alberta statute prohibiting payment of commission to non–provincially licensed salesperson is substantive, not procedural).

137 Johnston, 'Schizo-Text,' supra note 90 at 54 ('[T]he Tristero figures or stands for some radical otherness of difference').

138 *Lot 49*, supra note 11 at 131 ('[T]he faces of three courtiers, receiving the news at the right-hand side of the stamp, had been subtly altered to express uncontrollable fright').

139 Ibid. at 88 ('You know what a miracle is ... [A]nother world's intrusion into this one').

140 *E.g.*, Bloody Chiclitz, the corporate president: ibid. at 59 ('Being led in this by the president of the company, Mr. Clayton ("Bloody") Chiclitz himself'). See also Grant, *Companion*, supra note 15 at 66 ('Chiclitz' name will seem mysterious to those readers not familiar with the threatening question, "Do you want a mouthful of bloody Chiclets?"').

141 *E.g.*, Manny Di Preso, the lawyer: *Lot 49*, supra note 11 at 40 ('"I'm not so crazy I don't know trouble," Di Presso said').

142 *E.g.*, the Paranoids, a rock band: ibid. at 36 ('The trip out was uneventful except for two or three collisions the Paranoids almost had owing to Serge, the driver, not being able to see through his hair').

143 *E.g.*, Dr. Hilarius, the psychiatrist: ibid. at 7 ('It was Dr. Hilarius, her shrink or psychotherapist. But he sounded like Pierce doing a Gestapo officer').

144 *E.g.*, Genghis Cohen, the stamp collector: ibid. at 68 ('Oedipa got rung up by this Genghis Cohen, who even over the phone she could tell was disturbed').

145 Tanner, *Thomas Pynchon*, supra note 24 at 71 ('The Tristero system might be a great hoax; but it might be "all true"').

the signs Inverarity left behind, oscillates between two visions of the nation that seemingly cannot coexist.[146]

V *Legal sovereignty and its equals*

To put the *Ivey* litigation in perspective, one must appreciate not only the difficult thematic content of the *Hunt* judgment but the thrust of a series of Supreme Court of Canada decisions through the 1990s that effected a wide-ranging reform of the conflicts of law.[147] The others, raising issues of inter-provincial enforcement of judgments,[148] anti-suit injunctions and *forum conveniens,*[149] and choice of law in tort,[150] all similarly explore the deeper structure of federalism,[151] making a point of characterizing the country as possessing a distinct persona that differentiates it from its English roots.[152] The suggestion is one of a nation capable of recreating the inherited common law in its own image.

The theme that initially emerges from the Supreme Court's conflicts of law cases is one of national distinctness. The Court stresses union of the provinces over protection of their respective territories[153] and asserts the need to revise private international law doctrine to conform with the demands of national sovereignty.[154] Both the isolationism of the English unitary state and the imperial reach of traditional English law[155] give way

146 *Lot 49*, supra note 11 at 137 ('Oedipa in the orbiting ecstasy of a true paranoia').

147 In *Hunt*, the court analogized the question of provincial court jurisdiction to the ordinary power of courts in conflicts cases to consider foreign law as 'fact.' *Hunt*, supra note 125 at paras. 29–32.

148 *Morguard*, supra note 6

149 *Amchem Products* v. *Workers Compensation Board* (1993), 102 D.L.R. (4th) 6 (S.C.C.) [hereinafter *Amchem*].

150 *Tolofson* v. *Jensen* (1994), 120 D.L.R. (4th) 289 (S.C.C.) [hereinafter *Tolofson*].

151 *Hunt*, supra note 125 at 296 ('full faith and credit' is 'inherent in the structure of the Canadian federation ...'). On the political implications of this rhetorical approach by the court, see Bakan, Ryder, Schneiderman, & Young, 'Developments,' supra note 129 at 119–25.

152 *Morguard*, supra note 6 at 271 (traditional conflicts rules emphasizing sovereignty 'fly in the face of the obvious intention of the Constitution to create a single country').

153 *Hunt*, supra note 125 at para. 63 ('Indeed, the federal Parliament is expressly permitted by our Constitution to legislate with internationally extraterritorial effect. But this appeal is concerned with the provinces within Confederation').

154 *Tolofson*, supra note 152 at 315 ('The nature of our constitutional arrangements – a single country with different provinces exercising territorial legislative jurisdiction – would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country').

155 This combination of historical qualities, where England is seen as both isolationist and imperial, is portrayed in virtually all of the Supreme Court of Canada's attempts to reform common law jurisdictional rules. See, *e.g.*, *Libman*, supra note 107 (common law courts' prohibition on extraterritorial criminal jurisdiction arises from historically

to a cross-jurisdictional embrace of the provinces as a political and economic family, distinct in their sovereign community from other equivalent sovereigns. In narcissistic fashion, Canadian law looks at what it thinks is another nation's (*i.e.*, England's) image, but it actually gazes with fascination at the reflection of itself.

Identity, of course, is typically defined in terms of what it is not. Thus, for example, in Pynchon's world male characters (*e.g.*, Mike Fallopian)[156] give birth, usually to contrary ideas about national identity and history. Likewise, male figures (*e.g.*, Stanley Koteks)[157] reflect female hygiene and, as engineers, sanitize society's waste. Indeed, waste itself defines the social system as advocating a silent, alternative communication ('We Await Silent Tristero's Empire').[158] One must, in defining a society, define what it throws away, or what is its waste.[159] Oedipa contemplates the clues and counter-clues, conspiracies and counter-conspiracies, that are the communicative wealth of San Narciso, but at the same time she observes and ponders the country's disinherited, its wasted:[160] 'What is left to inherit?' she asks.[161] The societal identity is contemplated with reference to that from which it appears to be distinct.

As the waste disposal controversy in *Ivey* illustrates, the most natural procedural setting in which to view the image of national distinctiveness is in cases pertaining not to domestic conflicts but to international ones. What one might expect to find in such cases is that there can be little, if

isolated nature of British isles); and *Tolofson*, supra note 152 at 307 (English choice of law rule favouring *lex fori* traced to England's 'dominant position in the world').

156 *Lot 49*, supra note 11 at 31 ('A frail young man ... introduced himself as Mike Fallopian, and began proselytizing for an organization ... for the commanding officer of the Confederate man-of-war "Disgruntled"').

157 Ibid. at 63–4 ('Sure this Koteks is part of some underground ... In school they get brainwashed ... into believing the Myth of the American Inventor'). Koteks works for a company that 'stifles your really creative engineer' (ibid. at 61), stifling individuality and difference even as its employees embody it. Grant, *Companion*, supra note 15 at 67 ('[D]ifference constitutes a culture's best defense against stagnation').

158 See Koteks' admonishment of Oedipa: '"It's W.A.S.T.E., lady," he told her, "an acronym, not 'waste,' and we had best not go into it any further."' *Lot 49*, supra not 11 at 63. Waste is identified as a distinctive practice of America, or of a society based on mobility rather than tradition. See P. Coates, 'Unfinished Business: Thomas Pynchon and the Quest for Revolution' (1986)160 New Left Rev. 122 at 126 ('[T]he United States ... is a culture that throws away things rather than repairing them, replicating thereby the initial gesture of departure from the native land'). Of course, what is distinctive of America, in Pynchon, is counter-America.

159 M. Thompson, *Rubbish Theory* (Toronto: Oxford University Press, 1972) at 9 ('... what goes in those [rejected] regions [of social life] is crucial for any understanding of society').

160 Tanner, *Thomas Pynchon*, supra note 24 at 71 ('There is the America of San Narciso, but is there perhaps another America? An America of the "disinherited"').

161 *Lot 49*, supra note 11 at 135 ('That America coded in Inverarity's testament, whose was that?').

any, reconciliation between independently sovereign legal systems whose differing rules of process reflect divergent national policies.[162] There may be, for example, procedural versions of the explicit clash of legal systems that arises when extraterritorial anti-trust enforcement bumps up against legal support for national monopolies[163] or foreign property rights.[164] International conflicts cases, premised as they are on comity among sovereigns,[165] should predictably crystallize a sense of national distinction among the different jurisdictions in play.

In looking into this prospect it is worth proceeding in two stages, crossing the border a number of times in the process. In international legal terms, a society can see its own reflection by examining the way it appears in the eyes of other similarly situated courts or, alternatively, by contemplating its own jurisdiction in comparison with that of other similarly situated societies. Bringing the point down to North American litigation, US courts have occasionally had to gaze across the border in order to size up Canada, and Canadian courts have on occasion had to gaze across the border in order to size up themselves, all in an attempt to find an appropriate jurisdiction for civil litigation. It is interesting to look at each of these cross-border reflections in turn.

The most prominent subject matter giving rise to this exercise is not environmental liability; in that developing field, *Ivey* has snaked across the border on its own. Rather, the most prolific field of legal activity has been in the area of securities fraud litigation, where Canada has provided an abundant source of defendants for US-based plaintiffs. Most of the cases focus on the doctrine of *forum non conveniens,* where a moving party must convince a court, among other things, that an alternative forum

162 For a discussion of the two views of procedural rules, one as a product of and thus wedded to social and political policy and the other as a product of and thus grounded in transnational rights, see E. Morgan, 'Discovery' (1999) 10 E.J.I.L. 583 at 598–603 (considering the discoverability requirement under 28 U.S.C. §1782).

163 See, *e.g.*, *Laker Airways* v. *Sabena, Belgian World Airlines*, 731 F. 2d 909 (D.C. Cir. 1984) (upholding anti-suit injunction prohibiting litigation of anti-trust issue in English courts); *British Airways* v. *Laker Airways Ltd.*, [1985] A.C. 58 (H.L.) (upholding English jurisdiction and protective legislation over national airline despite US anti-trust litigation). The House of Lords has noted that '[i]t is axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack.' *Rio Tinto Zinc Corp.* v. *Westinghouse Electric Corp.*, [1978] A.C. 547 at 617 (H.L.).

164 See *United States* v. *Imperial Chemical Industries*, 105 F. Supp. 215 (S.D.N.Y. 1952) (anti-trust enforcement aimed at monopolistic registrations of British patents); *British Nylon* v. *Imperial Chemical Industries*, [1953] Ch. 19 (C.A.) (upholding enforcement of British patents in face of US anti-trust ruling).

165 *Lemenda Ltd.* v. *African Middle East Co.*, [1988] Q.B. 448 (H.C.) (international comity prevents foreign law from being imposed contrary to English public policy); *Zeevi and Sons* v. *Grindlays Bank (Uganda)*, 333 N.E. 2d 168 at paras. 6, 8 (N.Y.C.A. 1975) ('Laws of foreign governments have extraterritorial jurisdiction only by comity').

exists for the claim.[166] Thus, procedures on one side of the border must be explicitly held up for measurement against those on the other.

In evaluating Canadian alternatives to US litigation, US federal courts have come to a surprisingly diverse set of conclusions. In particular, in determining whether Ontario's class action procedures serve the same purposes as their US counterparts, some courts have determined that doctrinal gaps in Canadian law makes the relevant class certification procedure 'virtually meaningless.'[167] The northern version of the class action, in this view, becomes little more than an aggregate of claims subject to individualized assessments of liability. Other courts, by contrast, have found that '[i]f anything, in fact, it looks easier to get class certification under Ontario law than under U.S. law.'[168] Canadian class actions, in this view, present a far lower threshold than their American counterparts for the plaintiffs to constitute themselves as a class and to move the action forward on a collective basis.

How is it possible, one might reasonably ask, for the identical jurisdiction to be evaluated so differently by various US courts? It turns out that none of these courts purports to reject either a foreign jurisdiction or the domestic federal one; the analysis is rarely, if ever, posed as a matter of one jurisdiction sitting in harsh judgment of another. Instead, the courts straddle the border in a game of deference; either they defer to the sovereignty of the foreign nation whose law they respect, or they defer to the sovereignty of the US law whose policies they are bound to enforce.

This schism in the conflicts rulings starts at the very beginning of transnational litigation, with the threshold question of jurisdiction.[169] In particular, the issue of subject matter jurisdiction has become the first battle ground for US plaintiff classes and their Canadian targets. The subject matter jurisdiction cases, in turn, are inherently ambiguous with respect to the alleged misdeeds of companies trading on foreign markets. The courts are split between those that require the Canadian conduct causing the plaintiffs' losses to be no more than 'merely preparatory'[170]

166 *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 at n. 22 (1981) (setting out basic requirements for the doctrine of *forum non conveniens*). For the Canadian equivalent, see *Amchem*, supra note 151.

167 *Tafton* v. *Deacon Barclays de Zoete Wedd Ltd.*, [1994] WL 746199 (N.D. Cal.), online: WL (rejecting Ontario as an appropriate alternative jurisdiction due to the lack of a Canadian 'fraud on the market' doctrine).

168 *Hillger* v. *Philips Services Corporation*, 1999 WL 304690 at 6 (S.D.N.Y.), online: WL (accepting Ontario as an appropriate alternative jurisdiction).

169 *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947) (setting out requirements for civil jurisdiction in conflicts cases). For the Canadian equivalent, see *Moran* v. *Pyle National (Canada) Ltd.* (1973), 43 D.L.R. (3d) 239 (S.C.C.).

170 *Bersch* v. *Drexel Firestone, Inc.*, 519 F. 2d 974 (2d Cir. 1975) (preparatory work on prospectus outside the United States does not undermine US civil jurisdiction).

and those that require some further 'tipping factor' to weigh in favour of US jurisdiction.[171]

The substantive securities law policies that drive these holdings are equally inconclusive. As a starting point, it is true, if not entirely responsive to the issues raised by the cases, to say with the Fifth Circuit that US securities legislation is for the most part 'designed to protect American investors and markets, as opposed to the victims of any fraud that somehow touches on the United States.'[172] On the other hand, it is equally true to say with the Second Circuit that any 'conduct' of the defendant or 'effect' of its actions in the United States, or any 'admixture or combination of the two,'[173] can establish subject matter jurisdiction in a field where neither the governing statute nor the rules promulgated under it provides guidance to the question of extraterritorial application.[174] It seems obvious in reading the cases that the location of fraudulent conduct and its effects on the cross-border market could be anywhere the court wants them to be. The securities market, and the law by which it is governed, is portrayed as cutting across international frontiers or as bisected by foreign borders, depending on the impulse tapped by the case.[175]

The cross-border US cases provide a mirror image of the internally contradictory theme found in *Ivey, Hunt,* and, indeed, all of the Supreme Court of Canada's recent attempts to reform the conflicts of law. In the court's view, the provinces constitute a distinctive national unit, different in both form and substance from other nations; at the same time, the Court sees nations generally transformed by a global economy that has caused their distinctive identities to meld.[176] Like its US counterparts, the Canadian court perceives the country as simultaneously incomparable to its political equivalents and identical to its trading partners across the border.

171 *Europe & Overseas Commodity Traders, S.A.* v. *Banque Paribas London*, 147 F. 3d 118 (2d Cir. 1998) (sale of shares on an American exchange constitutes requisite tipping factor in favour of US jurisdiction).

172 *Robinson* v. *TCI/US West Communications Inc.*, 117 F. 3d 900 (5th Cir. 1997).

173 *Itoba Ltd.* v. *LEP Group PLC*, 54 F. 3d 118 at 121 (2d Cir. 1995) [hereinafter *Itoba*].

174 *In re Gaming Lottery Securities Litigation*, 1999 WL 102755 at 11 (S.D.N.Y.), online: WL, citing *Itoba*, ibid. at 121 (pointing out that US securities legislation is silent on the question of international defendants).

175 In a graphic illustration, some courts have belittled attempts 'to bring their foreign opponents into a United States forum': *Diatronics, Inc.* v. *Elbit Computers, Ltd.*, 649 F. Supp. 122 at 129 (S.D.N.Y. 1986), quoting *Ionescu* v. *E.F. Hutton & Co. (France) S.A.*, 465 F. Supp. 139 at 145 (S.D.N.Y. 1986), aff'd 812 F. 2d 712 (2d Cir. 1987); others have emphasized the 'strength of the United States' interest in enforcing its securities laws to ensure the integrity of its financial markets': *SEC* v. *Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

176 For perhaps the most well known expression by the Supreme Court of Canada of the idea of transnational unity, see *Libman*, supra note 107 at 214 ('In a shrinking world, we are all our brother's keepers').

The most prominent example is the 1990 *Morguard* decision,[177] in which the Supreme Court of Canada created a full faith and credit requirement for foreign judgments out of a silent constitutional text. In coming to this result, the Court first distinguished Canadian provinces from territorial sovereigns[178] and then aligned inter-provincial relations with current international relations.[179] Accordingly, it presented federalism as distinct from internationalism[180] while, at the same time, it built up its enthusiasm for the changed economic times and circumstances on which global relations are founded.[181]

The upshot of all of this was that the Court pursued changes in conflicts doctrine by pursuing two contradictory themes. On the constitutional side, the *Morguard* case stands for the proposition that the provinces represent an economic union and can ill afford to treat each other as if they are truly foreign when it comes to mutual enforcement of judgments. On the international side, however, the Supreme Court stressed the volume of cross-border commerce, giving rise to the felt need 'to facilitate the flow of wealth, skills and people across [increasingly irrelevant] state lines.'[182] In this global economy, the court surmised, Canada can ill afford to treat its trading partners as if they are not part of the same continental and, indeed, transcontinental market. Thus, the second theme to emerge from the international conflicts cases is that of continental similarity. The country may be constitutionally distinct from other countries, but at the same time it is no different from the rest of the nations it encounters in trade.

In a process that can only be described as reverse narcissism, Canadian law here looks at what it thinks is the nation's own image but is actually gazing with fascination at the reflection of someone else (*i.e.*, the United States).[183] Like so many acts of communication and cultural transmission,

177 Supra note 6.

178 Ibid. at 262, citing *Emanuel* v. *Symon*, [1908] 1 K.B. 302 (C.A.) (states have exclusive jurisdiction in their own territory).

179 *Morguard*, ibid. at 272 ('The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power').

180 Ibid. at 270 ('... a regime of mutual recognition of judgments across the country is inherent in a federation').

181 Ibid.at 269 ('Modern means of travel and communications have made many of these 19th century concerns appear parochial').

182 Ibid. at 270, citing A. Von Mehren & D. Trautman, 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 Harv. L. Rev. 1601 at 1603.

183 Indeed, in the first doctrinal development subsequent to *Morguard*, the courts refused to restrict the full faith and credit rule to inter-provincial enforcement of judgments and began applying it to judgments from American courts. See *Moses* v. *Shore Boat Builders Ltd*. (1993), 106 D.L.R. (4th) 654 (B.C.C.A.) (giving full faith and credit in British Columbia to judgment of Alaska Supreme Court).

civil process is a phenomenon in motion. One is reminded of Oedipa Maas's radio interview, conducted by her husband, in which he introduces her as 'Edna Mosh.' 'It'll come out the right way,' he assures her afterward. 'I was allowing for the distortion on these rigs, and then when they put it on tape.'[184] From speaker, to interpreter, to audience, to reinterpreter, and so on, the broadcast of identity – whether personal identity in the media or national identity in legal discourse – is a moving target. Each pronouncement yields a distorted interpretation, as the law stands on *Morguard* for thee than one thought it could handle.

As the case law on both sides of the border demonstrates, the sovereign authority of legal process both is grounded in and transcends the nation. The more is revealed about it the more one needs to know. Furthermore, transportation across competing visions is instantaneous, making a crystallized moment in process impossible to capture. It is, in fact, much like an upscale version of the elusive Rule 49, the concerns of the law being simultaneously the atomistic parties and the systemic need to embrace them. Internationally, the self-image of these procedural rules is one of motion between distinctive national societies and the all-embracing global one. Procedural rules and their internationalization are inevitably a work in process.

VI *The exhaustion of procedure*

There is no end to this chasing of the tale that is Rule 49 and all of its internationalized variants. In trying to capture civil procedure as either bringing people together or pulling them apart, the courts have cried out[185] the possibilities for legal sovereignty, but the answer has not been revealed.[186] Authority has been placed in the disputing parties and beyond them, in their regions and their nation, and in their distinct society and their global culture. The cases provide gestures of culture,[187] but they fall short of enlightening us as to the social meaning of the law.[188] Having

184 *Lot 49*, supra note 11 at 104.

185 Ibid. at 135 ('We say an auctioneer "cries" a sale').

186 Indeed, Oedipa, as interpreter, 'has to try to decide what kind of revelation or revelations, exactly, she is having.' Tanner, *Thomas Pynchon,* supra note 24 at 68. For Pynchon's graphic, if crude, portrayal of the improbability of revelation, see *Lot 49*, supra note 11 at 135 ('"Your fly is open," whispered Oedipa. She was not sure what she'd do when the bidder revealed himself').

187 *Lot 49*, supra note 11 at 138 ('[the auctioneer] spread his arms in a gesture that seemed to belong to the priesthood of some remote culture').

188 The identification of lot 49 as containing, for Oedipa, the significant asset in the auction of Inverarity's estate has been associated by critics with images of religious revelation. See Tanner, *Thomas Pynchon,* supra note 24 at 68 ('49 is the Pentecostal number (the Sunday seven weeks after Easter), but Pentecost derives from the Greek for "fifty," so the moment at the end of the book when the auctioneer's spread arms are

internationalized the thinking about procedure, the law still seems to be waiting for the sense of it all to emerge.[189] At the end of the analysis, international lawyers anticipate the very question of procedural meaning – the true connection to society and its politics – with which the *Ivey* inquiry began.

The many visible images of authority embedded in legal process cases seem to rebound endlessly around a self-enclosed conceptual space, never slowing down long enough to connect in a socially, economically, or politically meaningful way.[190] The more one sees the society and its processes pictured in the law, the less one seems able to actually grasp. Civil procedure, like Inverarity's world, is unstable in its multiplicity of designs,[191] and the international analysis, like Oedipa's inquiry,[192] has no moorings among its multiple sources of authority.[193]

Indeed, even looking for the socio-economic or political meaning of the law may be futile. As if to articulate this very point, Oedipa's husband, Mucho Maas, describes his frustration in deciphering a dream about a sign posted by the used car dealership where he works:

> In the dream I'd be going about a normal day's business and suddenly, with no warning, there'd be the sign. We were a member of the National Automobile Dealers' Association. N.A.D.A. Just this creaking metal sign that said nada, nada, against the blue sky. I used to wake up hollering.[194]

specifically likened to ... the priesthood is like the moment before a Pentecostal revelation when we would all be able to speak in tongues – and understand "the Word" directly'). See also Hayles, 'Metaphor,' supra note 33 at 121 ('That the text stops just short of fifty clearly implies that it cannot answer its own central question – whether there is a hidden reality behind the surface of our lives, or just the surface').

189 Pynchon's book ends with Oedipa waiting for an auctioneer to 'cry' out Inverarity's set of defective postage stamps (lot 49 at the auction). *Lot 49*, supra note 11 at 138. The defective stamps, Oedipa suspects, are the transmission method of the alternative communication system that is the Tristero; she has surmised that a bidder for this lot would finally confirm the 'reality' of the counter-postal movement. For the Pynchon reader, therefore, the story ends, literally, where the reader was before the book appeared: waiting for *The Crying of Lot 49*.

190 Ibid. at 136 ('For it was now like walking among matrices of a great digital computer, the zeroes and ones twined above, hanging like balanced mobiles right and left, ahead, thick, maybe endless').

191 From every angle, San Narciso is described by Oedipa as giving off 'a hieroglyphic sense of concealed meaning, of an intent to communicate.' Ibid. at 13.

192 See Johnston, 'Schizo-Text,' supra note 90 at 57–60 (describing Oedipa's alternative possibilities: reality or fantasy); *Lot 49*, supra note 11 at 137 ('For there either was some Tristero beyond the appearance of the legacy America, or there was just America and ... paranoia').

193 *Lot 49*, ibid. at 133 (Oedipa is described at end of her search as having 'lost her bearings').

194 Ibid. at 107.

Likewise, in international litigation, there may be NADA beyond what we see on the Mucho signposts of the case law. The singular Word, the social essence that Oedipa seeks,[195] is replaced in the unstable analysis of civil process by multiple meanings and signs.[196] Cross-border environmental liability and its national enforcement policies, Rule 49 and its vacillation between rights and compromise, the sovereignty of states and the sovereignty of the law that embraces them, all reverberate with an exhaustion of meaning. It is a tangle of *Ivey* with no substance underneath. The form of the law is replenished with each procedural step, but in this excess of replenishment the content is emptied out.

195 Ibid. at 87 (Oedipa wonders 'if the gemlike "clues" were only some kind of compensation. To make up for having lost the direct ... Word').

196 Tanner, *Thomas Pynchon,* supra note 24 at 63 (describing 'ever-increasing number of clues which point to other possible clues which point to other possible clues which ... there is no end to it').