Civil Procedure
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Professor Lonny Hoffman

Section 1

THE HISTORY OF THE CIVIL PROCEDURE COURSE: A Study In Evolving Pedagogy

Mary Brigid McManamon*

I. THE EARLIEST AMERICAN COURSE IN CIVIL PROCEDURE

A. The Practice Origins of Early American Law Schools

Despite the current position of most American law schools within the academic community, the original law schools were trade schools, not affiliated with universities. There were courses in law at early American colleges, but they did not, in general, provide a route to the practice of law. In the late eighteenth century, a number of colleges in the new Republic instituted professorships of law, as opposed to separate law schools.[11] The course of study under most—but not all—of these teachers, however, was about "the theory rather than the practice of law."[12] Such study was meant "to furnish a rational and useful entertainment to gentlemen of all professions,"[13] not to train practitioners.[14] Although, for example, Transylvania University's Law department was "intended for other than under graduates,"[15] in the early years of the American Republic, young men[16] generally entered the practice of law after a period of apprenticeship.[17] In turn, legal historians have found that "[f]ormalized apprenticeship . . . led to the establishment of private law schools. [These schools] were generally outgrowths of the law offices of practitioners who had shown themselves to be particularly skilled, or popular, as teachers."[18]

Education in early American law schools generally consisted of lectures or recitations on material assigned from available legal texts.[25] Instruction often began with Blackstone and would include other major treatises.[26] The pupils would study one text or topic at a time—*seriatim*—until they had completed their legal training.[27] This program generally took one or two years,[28] that is if the student stayed for the full cycle of lectures. Since law school was not a requirement for the practice of law, aspiring lawyers often began their studies in the middle of the curriculum and did not always stay for the full cycle.[29] Instead, apprenticeship was the most common means of admission to the bar.[30]

Assuming that an aspiring lawyer attended law school, what would he study? In 1921, at the behest of the American Bar Association, Alfred Z. Reed[31] published an analysis of early legal education in the United States.[32] He examined early law school curricula and found that "[t]he working classifications devised by early law schools were of two main types, according as a narrowly technical or an ambitiously broad field of study was contemplated."[33]

Whichever model a law school followed, instruction in civil procedure was integral to the curriculum. Reed discovered that a student who completed law school probably devoted ten to twenty percent of his time to studying pleading and practice.[34] The vast majority of that time was spent on common law pleading.[35]

The early course on Pleading was very different from our study of the subject today.[36] It included not only an examination of the rules of a much more complicated system of pleading, but also instruction in the various forms of action. It was in Pleading that the students would learn the differences between debt and assumpsit, for example. Thus, the basic procedural course included a large amount of what we regard as substantive material today. One historian noted that this organization of the law "will disconcert the modern reader."[37] He reminded us, however, that "substantive and adjective law were far from disentangled [at that time]."[38]

The students' exposure to pleading consisted of reading the popular text books on the subject, which included Blackstone,[39] Chitty's Pleading,[40] and Stephen's Pleading.[41] The actual practice of drafting the writs, for example, generally came during apprenticeship.[42]

B. Procedure in the Harvard Curriculum

1. The Procedure Offerings

In 1870, when Dean Langdell arrived at Harvard Law School, he had a rare opportunity to influence the development of American civil procedure. By adopting the case method, Harvard was destined to change the *way* schools taught law. With the new curriculum, Harvard Law School was in a position to affect *what* schools taught, and thus to help shape the attitudes of young practitioners and future policy makers. While Harvard proselytized other faculties to its way of teaching, its faculty produced both the professors and the books to go with it. Harvard graduates joined the faculties of most American law schools.[66] Furthermore, for many years, the only casebooks available were edited by Harvard professors.[67]

Harvard's ascendancy, moreover, came at an especially important moment in the development of American adjective law. Common law pleading had been under attack for years. Critics maintained that a problem with the old system was

> the unbending character of the different causes of action at common law, and the narrow and rigid way in which the judges administered the same. Every suitor had to elect his cause of action at his peril, for if he mistook it he was thrown out of court and saddled with the costs. Moreover, if the injury sustained did not fit any existing writ or cause of action, he was without remedy at law. . . . This had two results. It greatly extended chancery jurisdiction and it caused the invention of the writ of Trespass on the Case and the manifold applications of this writ by means of legal fictions, nearly all of a highly artificial character. Thus the old common-law pleading became highly technical, artificial and pedantic.[68]

The code pleading movement, started in the United States by David Dudley Field, had made great inroads on these problems. In particular, it was commended for merging equity and law and disposing of the ancient forms of action: "To escape from this mediaeval scholasticism and to remold legal procedure to suit modern practical life and relationships the codes have been adopted, the central and controlling feature being the reduction of all forms of action at law or suits in equity, to a 'single form of action.'"[69] From New York's adoption of the Field Code in 1848 until Langdell came to Harvard in

1870, twenty-five states and territories had enacted a procedure code.[70] The codes, however, also were coming under attack.[71]

With a fresh new look at the defects and the strengths of the systems in place, perhaps eager young minds could be influenced or given the insights to reform procedure. Unfortunately for those who wanted forward movement, Harvard did not provide any leadership in the field of procedure. Instead, the procedure course that Langdell put into the first year was the same one Harvard Law School had offered virtually every year since 1846, when a curriculum had come into existence there:[72] Pleading.[73] Despite the move toward merger, Langdell maintained Equity as a separate course and put it into the upper level.[74]

Harvard offered very little else to the student in the field of procedure. Code Pleading, which some considered "basely mechanical and beneath the attention of the scholarly mind,"[75] was not offered.

Other law schools followed this pattern, although quite a few schools offered Code Pleading as an upper-level course or as an alternative to Common Law Pleading.[81] However, Common Law Pleading had such a grip on the academy that even schools in code pleading states like Wisconsin, still required the students to take Common Law Pleading.[82] As for additional procedural courses, the curriculum at other schools remained as sparse as Harvard's.

III. THE TWENTIETH CENTURY

A. Problems Created by the Nineteenth-Century Procedure Curriculum: A Crisis of Faith

By the early twentieth century, there was strong and growing criticism of the procedure curriculum. For one thing, the introductory course at the leading law schools taught a procedure that was almost completely out of date. By 1900, not only had over half the states in the Union adopted code pleading,[137] but those states that had not yet adopted a procedural code "departed substantially from the common-law system."[138] Thus, while the students delved deeply into the old common law pleading rules, they were not being given the tools of their trade.[139]

C. The Modern Era

1. The Impact of the Federal Rules of Civil Procedure

As the 1930s waned, the debate still raged as to what was the ideal first-year procedure course.[192] Although there was "an apparent tendency to swing the trial practice material to the first year course,"[193] in 1936, the AALS Curriculum Committee reported that the member schools were "about evenly divided between the plan of giving . . . a course in common-law pleading and the plan of giving a broader procedure course in the first year."[194] In 1938, however, something happened that was destined to change the introductory procedure course: The Federal Rules of Civil Procedure were promulgated.

2. The New Paradigm

Before the 1930s, very few schools offered a course in Federal Jurisdiction. With the growth of federal litigation in the twentieth century and the promulgation of the new rules, the course increased in importance.[222] It had originally been a course on the ins and outs of federal practice. In the 1930s, Felix Frankfurter of the Harvard Law School attempted to change the course to one on public law, exploring the interesting tensions inherent in "Our Federalism."[223] Although subsequent Federal Jurisdiction casebooks were more theoretical than the earliest ones, the majority published before 1953 remained more or less procedural in orientation.[224] How much of federal procedure and jurisdiction could be offered in Civil Procedure without making the Federal Jurisdiction course redundant?

Proceduralists, moreover, recognized the "growing need for a course of study that emphasizes not only the inter-relationship of the procedural courses, but also the bearing thereon of certain phases of constitutional law, conflict of laws, and administrative law."[225] Procedure teachers proposed various solutions to meet this need. For example, in 1940, Percival William Viesselman of the University of Kansas added such topics as judicial power and subject matter jurisdiction to his upper-level book on Trial Practice.[226] In contrast, Edson Sunderland added material on "the organization, operation, and jurisdiction of courts and of the judicial power" to his book on Pleading.[227] In the late 1940s and early 1950s, the next generation of Michigan faculty proposed a new division of procedural topics. The so-called "Michigan plan"[228] divided most of the material into two courses:[229] a "traditional" course on Pleading and Joinder[230] and a new course on Jurisdiction and Judgments.[231] The latter course "includes material on federal jurisdiction that is not generally found in civil procedure books."[232] As such, it "would entail the elimination of a separate course in Federal Jurisdiction," and "[t]he course in Conflict of Laws would have to be rather drastically revised."[233]

The allocation of procedural topics was decided, however, at least for the modern era, in 1953, when two paradigmatic books were published in Civil Procedure and Federal Courts. Richard H. Field and Benjamin Kaplan of the Harvard Law School federalized the first-year course in Procedure.[234] This course was not repetitive of the upper-level course in Federal Jurisdiction because in the same year, Henry M. Hart, Jr., of Harvard and Herbert Wechsler of Columbia completed a change in the direction of the latter course.[235]

The Field and Kaplan book presented "a radical departure from traditional concepts of teaching civil procedure to the beginner."[236] First, instead of taking the earlier approach, which used a mixture of decisions from all jurisdictions, Field and Kaplan presented the procedure of a single system, the Federal Rules of Civil Procedure. Reviewers praised this move because it gave the students a sense of direction.[237] The advantages of using the federal system were also recognized: it was simple and it was influencing the procedure of the states. Second, the Field and Kaplan book defined the topics that we teach our students today in the basic Civil Procedure course. Not only did the authors include traditional topics, such as pleading, joinder, and directed verdicts, they added such federal subjects as federal subject matter jurisdiction and the impact on federal procedure of *Erie Railroad Co. v. Tompkins*.[238]

Meanwhile, Hart and Wechsler

> wrought substantial changes in the subject generally known as "Federal Jurisdiction" . . . . Departing from the usual pattern which focuses almost exclusively on the rules for entering and proceeding in the United States courts, this book explores "[t]he jurisdiction of courts in a federal system [as] an aspect of the distribution of power between the states and the federal government." Except as relevant to this theme, federal procedure is turned back to the procedure courses.[239]

This paradigmatic allocation of subjects between the two courses has not been universally accepted.[240]

By and large, however, the two paradigms published in 1953 have defined the basic scope of the Civil Procedure and Federal Courts courses to the present day.

PROCEDURALISM, CIVIL JUSTICE, AND AMERICAN LEGAL THOUGHT

PAUL MACMAHON*

3.1. *The Centrality of Procedure in American Civil Justice*

The obvious place to start is civil procedure. Civil procedure is at the heart of American legal curriculum. By "civil procedure," of course, I mean the rules and principles governing how a legal system enforces the rights and duties created by substantive law: in which court an action may be brought, the standards for pleading and summary judgment, the scope of pre-trial discovery, the allocation of responsibility for lawyers' fees, and so on. In the first-year curriculum, these procedural questions stand on a similar footing to questions of substantive law. This insight may seem either surprising or obvious to American readers, but I hope to establish that it is both true and significant.

American law schools aspire to be professional schools, so it is unsurprising that the rules governing litigation appear somewhere on the curriculum. However, students don't just learn civil procedure as preparation for the bar exam. Rather, it is an integral component of the standard first-year curriculum. Every American law student takes civil procedure, and the professors who teach the subject engage in vigorous scholarly debates and discuss a steady stream of major Supreme Court decisions.[61] The cultural prominence of civil procedure is impressed on the American law student from day one.[62] Law students are taught to approach procedural questions not simply as technical rules they need to learn if they are to argue about substantive questions. Rather, procedural questions are *themselves* the site of intellectually challenging arguments about justice, rights, efficiency, and sovereignty. This is true even in more doctrinally focused civil procedure courses that focus on the Federal Rules.

Often, American civil procedure courses begin with the topic of personal jurisdiction. What might otherwise seem a technical issue becomes, in the hands of any reasonably competent American law professor, a vehicle for exploring questions of state sovereignty, individual fairness, and legal method. Students become familiar with the formalistic territorial approach exemplified by *Pennoyer v. Neff*,[63] the "minimum contacts" revolution of *International Shoe*

Company v. Washington,[64] and the more recent reassertion of formal reasoning in cases like *Burnham v. Superior Court of California*.[65] The Supreme Court produced two major fresh personal jurisdiction decisions in 2011.[66] Immediately, the American student sees civil procedure as vital—worthy of strident debate by Supreme Court Justices[67]—rather than as a dry set of rules subservient to substantive law.

Another important topic for the first-year law student is pleading: what must the plaintiff include in the complaint to survive a pre-answer motion to dismiss for failure to state a claim? Again, this might sound at first like a minor question, but in America it raises basic questions about citizens' rights of access to the courts. Formally, the Federal Rules of Civil Procedure require only "notice pleading," but two recent Supreme Court decisions hold that plaintiffs ought, in fairness to defendants, to put more flesh on the bones of their complaints.[68] A federal-court plaintiff is now required to state a claim for relief that is facially plausible,[69] a development that has inspired a predictably vast amount of scholarly commentary.[70]

The focus on procedure does not end with the first year of law school. Students often have a variety of procedural options to choose from in their second and third years. Indeed, the elective course often considered most rigorous and demanding in American law schools—named "Federal Courts," "Federal Courts and the Federal System," "Federal Jurisdiction," or some variation thereon—includes a healthy dose of civil procedure, integrated with grand constitutional themes of federalism and separation of powers.[73] "Fed Courts" is a kind of finishing school for the elite law student interested in litigation. The class is most often anchored by a famous casebook penned in the 1950s by Hart and Wechsler,[74] though there are alternative texts.[75] The subject-matter of Federal Courts includes the following topics: the extent of federal-court jurisdiction; the States' sovereign immunity from suits and Congress' power to abrogate that immunity; Supreme Court review of state-court decisions; choice of law in the federal courts (including another helping of *Erie* doctrine); remedies for violations of constitutional rights; justiciability (ripeness, mootness, and the "political question" doctrine); and the power of federal district courts to abstain from exercising their jurisdiction. The course requires an understanding of the relations between, on the one hand, states and their court systems and, on the other, the federal government and its courts system. These relations are inseparable from ideological and political conflicts in American history, from the founding of the Republic, through the era of Jacksonian Democracy, the Civil War, the Reconstruction Period, the New Deal, the Civil Rights Era, and so on.

A PARTING REPRISE

LONNY SHEINKOPF HOFFMAN*

It is hard to imagine the semester is already at an end. Finals are just around the corner. Before long, you will be through your second and third years of law school and, thereafter, to lives as lawyers. Less than fifteen weeks ago our journey together began. We have covered much terrain since then, you and I; and yet, in perspective, what a short and fleeting span. Is it not presumptuous of me to think of having accomplished with you anything substantial, to say nothing of having made an indelible mark on your education and training? Still, in even less time, Lawrence managed to cross the Nefud desert and lead disparate tribal bands to successful revolt against the Turkish army in Aqaba. Our conquests have been less grandiose—less cinematic, to be sure—but still I say conquests we have made. After having come this far, we are entitled to sit back and reflect on the journey taken.

Between now and the time you enter the world as lawyers, there is twice as much schooling still before you to complete. Yet, in many respects, you have already taken the first and most difficult step. You have begun to lay a foundation for how to approach the law: intellectually, professionally and ethically. As your teacher, it is my hope that you will remember some of the lessons I intended to impart. What teacher does not wish it to be so! In the maddening rush through your first semester of law school, though, I fear you may have been distracted at times by what must have felt like a wild footrace to keep up with the course reading, by the demands of your other classes, and—dare I say—even of your own personal lives (yes, the world outside of school defiantly continued turning, unabated by your recent anointment as first-year law students). I want to take this opportunity, then, to spend a little time summarizing what I sought to accomplish in the course and what it is I would like you to take away from this experience. If I have done my job well,

* Assistant Professor of Law, University of Houston Law Center. For their thoughtful comments on earlier drafts of this essay, I thank Peter Linzer, John Mixon, Jennifer Rosato, Richard Saver, Michael Solimine and Leigh Van Horn. I am also indebted to several former students, Ed Berbarie, Damon Karam, Sharon Fast, Meghan Griffiths, Katherine Howard, Patrick Kemp, Kristin Lanoue, Lance Leisure and Jason Starks, for sharing their views about the course in Civil Procedure. Finally, I reserve special thanks to Laura Sheinkopf and Bobbi Samuels; their influences on my teaching are beyond measure. The University of Houston Foundation provided financial support for this project.

then much of what I am about to say will sound unnecessary and transparent, like I am clubbing you over the head with lessons already assimilated.

As I endeavored to stress from the outset, a single theme characterizes my pedagogic choices in organizing this course. That theme is that the most exciting, effective, and enriching way for me to teach the first-year class in Civil Procedure is to teach "by example." It is a concept with three different, but associated, meanings.

Teaching by example signifies that I place little emphasis on rote memorization of rules and doctrines, preferring instead to focus on how the law actually works. Acquiring knowledge of written law (that is, in the sense of the open-a-book-and-find-it variety) is a part of what is required of your legal studies, but it is only one part. Beyond knowledge, there is comprehension, application, analysis, synthesis and evaluation.[1] To encourage you toward more constructive and advanced learning, we worked with concrete exercises and hypothetical problems as a complement to our reading. By placing the law of procedure into a problem-oriented learning process, you were exposed to authentic examples of legal decision-making and asked, thereby, to respond to the material by thinking about law as lawyers must.

Teaching by example also means that I focus on a smaller number of subjects in procedure—that is, on a few *examples* of the law of procedure—rather than try to expose you to a smorgasbord of topics, not a single one of which you know in any detail or for which you have any appreciation of its true complexities. Through careful consideration and rigorous dissection of the material we do cover, my aim is for you to begin to acquire independent tools of legal reasoning that you may then apply on other occasions. Broadly stated, I seek to train and encourage you to think through and assess legal questions on your own and to help you construct a well deep with self-sustaining analytic abilities from which you will be able to draw for years and years to come.

The third, and last, respect in which I invoke teaching by example is as shorthand for saying that this course is concerned not only with the "law of procedure," but also with emphasizing and identifying the ethical boundaries and context in which legal problems and issues necessarily arise. The technical term for this is teaching ethical norms through the pervasive method.[2]

1. *See* TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I, COGNITIVE DOMAIN (Benjamin S. Bloom et al. eds., 1956) (classifying different degrees or levels of intellectual tasks relevant in learning); *see also* DONALD H. JONASSEN ET AL., HANDBOOK OF TASK ANALYSIS PROCEDURES, ch. 12 (1989) (discussing "Bloom's Taxonomy of Educational Objectives").

2. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, at xxix (1994) (observing that "[p]rofessional responsibility questions should be addressed in all substantive courses because they arise in all substantive fields, and because their resolution implicates values that are central to lawyers' personal and professional lives").

In plainer English, it means I do not believe it wise to teach a subject as powerful and as potent as Civil Procedure without trying to install some sense of the professional responsibilities that ought to flow from its embrace.

TEACHING BY EXAMPLE STRESSES ANALYSIS AND APPLICATION OVER MEMORIZATION OF RULES AND DOCTRINES

The first sense in which I mean I teach by example is that I value studying cases and problems not because they are vehicles for memorizing legal rules and doctrine, but because they can be used to introduce you to the kind of rigorous cognitive exercises in which all good lawyers must engage. Rather than working exclusively from the cases, statutes and rules contained in our casebook, we wrestled with hypothetical problems and exercises throughout the semester as a supplement to and overall framework for our studies. The goal was to have you not just think abstractly and passively about a legal issue or a set of facts, but to push you to create something tangible: draft a pleading, frame a request for relief, lodge an objection, or make an argument. My objective, thus, was to encourage you toward active learning—toward the constitution of the tangible. The end product of your study became something you could pick up and hold in your hand and in your mind; something you could turn over and critique, analyze, assess and improve upon; something more than just a summary you read about what someone else had done.

I have found that students do not come to this style of learning easily or with much enthusiasm. Conventional teaching, as typified by the lecturing model, is based on the idea that teachers impart knowledge into empty, expectant vessels waiting passively to be filled. Having been conditioned to accept this traditional form of educational instruction, what Paulo Freire and bell hooks have called the "banking system of education,"[3] most of the vessels find the traditional pedagogic approach unthreatening. In law school, the belief that course material can be imparted through straightforward recitation of the law comports jurisprudentially with a formalist view of our legal system. For formalists, rules and doctrines are assumed to be definite and ascertainable.[4] As a result, the lecturing style of teaching fits comfortably with a formalist approach to teaching law that assumes there are answers to be gleaned and conveyed from careful study of the relevant authorities; and answers, especially for those who have just begun their studies in the field, are welcome indeed.[5]

3. BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 5, 14 (1994).

4. *See generally* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (discussing the rise of formalism in America in the latter part of the nineteenth century).

5. Note that the "Socratic" style of teaching, usually associated with law school teaching,

It must surely, then, have caused a great deal of anxiety for many of you that this course always seemed woefully short of answers. Although those early dog days of August may seem a distant memory now, think back to our earliest classes and you may recall the confusion and uncertainty you felt then. Consider, for instance, how we treated the subject of Rule 8's pleading requirements. After you had read some of the relevant cases, I asked you to draft a complaint, based on the results of an in-class mock client interview we had previously conducted. Your first reaction to all of the demands being made on you to create and think, not merely to read and regurgitate, naturally might have been: "I have no idea what should go into a complaint. I'm not a lawyer. I've only just begun law school. Why can't we see an example of what a lawsuit should look like so that we can use it as a model for drafting this one?"

I must confess these reactions were hardly unexpected. The question you may be asking, then, is why did I insist on this exercise if I thought that many or most of you would dislike it or be even further frustrated by it? My explanation is thus: drafting a lawsuit forced you to wrestle with the actual application of the case law you read to a particular fact pattern you had been given, rather than just debating how close or how far any particular case was from the standard promulgated by Rule 8 and as refined by common law precedents. If I had asked you how much factual information needs to go into a pleading to satisfy Rule 8, based on your reading of the Supreme Court's precedents in *Conley v. Gibson*,[6] *Leatherman v. Tarrant County Narcotics & Coordination Unit*,[7] or of particularly important lower court decisions like Judge Keeton's in *Cash Energy, Inc. v. Weiner*,[8] what kind of answer would you have given? Indeed, is there an answer to this question in the abstract? By insisting that you take the doctrinal background and apply it to a particular fact pattern, you were forced to synthesize, as much as possible, the relevant authorities. In the language of educational theory, you were being asked to produce an authentic response to what you read about the law of procedure—

could just as easily as not be bottomed on a formalist view of law. One could prod students by asking a series of questions about the material covered and still maintain that the law is definite and ascertainable. Indeed, Christopher Columbus Langdell, the iconic image of formalism in the law school classroom, was also the popularizer of the Socratic style of teaching at Harvard Law School. *See generally* KRONMAN, *supra* note 4, at 170-74. Relating formalism to Socratic technique may be merely an entirely academic exercise anyway, insofar as the most reliable figures suggest that less than a third of professors teaching first-year courses rely primarily on the Socratic method, while nearly 95% of those teaching upper level classes lecture, at least some of the time, to their students. *See* Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28-29 (1996).

6. 355 U.S. 41 (1957).
7. 507 U.S. 163 (1993).
8. 768 F. Supp. 892 (D. Mass. 1991).

that is, you were directed to act as lawyers must act when addressing legal issues as they arise.

At the end of the exercise, most of you may not have fully digested the lesson. Many, of course, still yearned for a definitive answer about pleading and still urged that we pinpoint precisely how much detail must be included in a complaint. But even as old habits and attitudes die hard, the process of working through problems and trying your hand at drafting exercises—rather than viewing the question only from the perspective of a dry appellate record—slowly, but surely, began to make some sense. As the semester wore on, more and more of you gradually became less and less uncomfortable with the idea that we were not going to provide answers in class. Having undertaken one exercise after another, the thought eventually began to percolate around the room that there might be more than one right way to put together the allegations of a lawsuit, or to draft discovery requests, or to respond to a summary judgment motion, and on and on. You began to see that there was no Answer, in the sense of some all-encompassing Truth, whether we were talking about the requirements of notice pleading or most of the other topics we addressed. There are boundaries to the law with which one must be familiar, to be sure, but the rules rarely come in one-size-fits-all packages.

My preference for active learning and for framing the in-class conversation around constructive understanding gained through application and analysis over recitation of formal rules is hardly revolutionary. Long before I began teaching, formalism's once firm hold on law school classrooms already had been thoroughly loosened.[9] Today, it is surely right that most law professors favor more nuanced approaches to legal study than Christopher Columbus Langdell would have recognized or understood. Yet, if formalism's heyday has come and gone (as Jerome Frank[10] and, more recently, Andrew Taslitz[11] remind us), the ghost of our Langdellian past still haunts the modern law classroom. How could it be otherwise? I have argued elsewhere that the assumptions about law embodied in formalist thinking are firmly rooted into our societal constructs about the rule of law in general and, to a large extent, may be inherent in the essential base of legitimacy upon which our American judicial system rests.[12]

In the context of the law school classroom, students certainly welcome the traditional approach to legal study. They instinctively feel less threatened by more straightforward recitation of the subject matter. From the instructor's

9. *See generally* KRONMAN, *supra* note 4 (discussing the demise of formalism, and the role of legal realism, law and economics, and critical legal studies).

10. *See* Jerome Frank, *Both Ends Against the Middle*, 100 U. PA. L. REV. 20, 21 (1951).

11. *See* Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143, 143 (1991) (book review).

12. *See generally* Lonny Sheinkopf Hoffman, *A Window Into the Courts: Legal Process and the 2000 Presidential Election*, 95 NW. U. L. REV. 1533 (2001) (book review).

vantage point, teaching is not only made easier by reciting that which is knowable and certain, but it also serves as a measure of academic validation. "*I am sir Oracle—and when I ope my mouth let no dog bark.*"[13] If I, as your professor, lack some superior body of finite and complete knowledge (something upon which I may *profess*), what claim do I have to the podium? Answers—definite answers in the form of black and white rules and clear doctrinal principles—are instant gratification to the newcomer and barometers of accomplishment for the teacher. Formalism is dead; long live formalism.

As with much else in life, I think the more sensible view is to recognize that the pedagogic debate about formalism and its place in legal pedagogy is a matter of emphasis and degree. With other like-minded souls,[14] I believe I endeavor with greater fervor than most to move far away from a doctrinally-centered view of law. On the whole, I prefer application to answers; rigorous thinking to rote recitation of authorities. One of the perceived costs of this pedagogic orientation is that it engenders feelings among students of uncertainty and indeterminacy, at least in the short run. The law never seems settled with the rules pliable to the point of breaking. In practice, however, and over the long run, I think you will find that the kind of intellectual efforts we cultivated here will turn out to be the bread and butter of what you will be asked to do for your own clients. Our in-class efforts were meant, in some measure, to be a valuable practical experience and to provide a training ground of sorts for your future work. By insisting on placing legal questions in a concrete context, the main objective is to encourage students toward the kind of active, applicative learning I think ought to be an integral component of the legal education experience.

I have watched a handful of truly great lawyers represent their clients and, without exception, all of them share at least one remarkable skill: the sage ability to discern that in the hard cases it is usually the *facts*, and not the law, that matter most. The law is never irrelevant, of course, but where there is a legitimate dispute between two or more persons, the relevant rules serve only to frame the context of the debate; by themselves, they do not predetermine outcomes. Memorizing case holdings and legal doctrine will never lead you closer to becoming a great lawyer; and while a successful career surely is not defined solely by the ability to apply your knowledge of the facts of a particular case to the relevant law and then to analyze wisely, these are, nonetheless, essential traits that you must have if you are to be a valued counselor and advocate for others.

13. K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 105 (1960).

14. *See, e.g.*, Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the CaseFile Method*, 44 ST. LOUIS U. L.J. 1289 (2000) (discussing his CaseFile Method of study); *see also* EDWARD H. RABIN ET AL., FUNDAMENTALS OF MODERN PROPERTY LAW (4th ed. 2000) (applying problem-based approach to property law casebook).

TEACHING BY EXAMPLE EMPHASIZES CAREFUL ATTENTION TO DETAIL OVER A BROAD SWEEP THROUGH AN ENTIRE FIELD

The second sense in which I have tried to teach this course by example is by focusing in detail on a smaller number of subjects in procedure rather than undertaking a broad sweeping coverage of the entire field. I have grand ambitions here: to produce students capable of thinking on their own and, thereafter, capable, thinking lawyers. The ambition is grand precisely because it is all too often the case that law students are not trained in a manner that encourages the development of independent reasoning ability. Students then matriculate to the profession without having worked on strengthening this essential skill set. Rigorous teaching can and does take place in law school but the forum, more often than not, is a smaller setting than the first year, large class experience (such as seminars, other small, intensively-focused classes and independent study projects with faculty members). By the time students take these courses, however, attitudes toward law and legal study largely have been set. Eventually, experience in the workplace may fill the holes left by formal legal education but the costs borne will have been substantial: for the lawyer, for her employer and, most of all, for the client. To my mind, as educators, we should strive in the very beginning of a student's studies to inspire good intellectual habits by singing of the vast riches that can be mined from the development of keen analytic capabilities and from the cultivation of a temperament willing to endure the hard, lonely work that careful and rigorous study usually requires.

In consciously narrowing the number of procedure topics covered in the course, I recognize I am inviting controversy from both students and colleagues who may be concerned that an insufficient quantum of knowledge is being imparted. If I am going to make a convincing case for my pedagogic approach, then it is necessary to begin by recounting what was covered and what was left out from the class, though from having sat through the course you may already have some sense of the lacunas. Our syllabus provides a summary of the topics we examined, broken down into the eight main subject areas as they were addressed:

(i) Pleadings and related issues (fair notice and special pleading requirements; sanctions; answers and affirmative defenses; amendments; counterclaims and cross claims);

(ii) Personal jurisdiction and related issues (statutory and constitutional limits on the exercise of territorial jurisdiction; notice and service of process; venue and transfer; forum non conveniens);

(iii) Subject matter jurisdiction (diversity jurisdiction; federal question jurisdiction; supplemental jurisdiction and removal);

(iv) Choice of law (brief discussion of *Erie*);

(v) Pretrial discovery (scope of discovery; written discovery; depositions; initial disclosures and other timing issues; responding/objecting to discovery; discovery disputes);

(vi) Judgment as a matter of law;

(vii) Additional parties/claims; and

(viii) Preclusion law (brief discussion of general principles of res judicata and collateral estoppel).

Even this list is misleading insofar as we did not devote equal attention to all of these subject areas. Noticeably absent are several major topics that nearly all procedure casebooks and—I suspect—a good number of my procedure colleagues around the country do cover. Class actions and complex litigation were omitted entirely. We never addressed the subject of interpleader. The subject of prejudgment remedies was left out. We spent virtually no time either on trial practice and procedure or on appellate procedures, except as certain discrete subjects arose coincidentally with some other part of our conversation. I have no doubt that this list of topics not addressed surely could be expanded further and further. It is, quite clearly, then, an incomplete list. By extension, has not your exposure to the subject of Civil Procedure also been incomplete? Should you ask for your money back?

I have two answers to offer in defense of my pedagogic decision to focus on depth over coverage, although I hasten to add that I regard the former as less my reason for acting than is the latter.

I left off certain topics, not because I think they are unimportant, but rather for the more pedestrian reason that most of you, over the course of your entire careers, will either never come across these legal topics directly in practice, or you will address them very, very infrequently. For my own part, I find virtually the entire field of procedure fascinating. After this year is done, I would be delighted to work with you, through independent study or as a mentor on a law review note, regarding any of these or other topics. For those who know they will need more in-depth coverage of a subject, I encourage further exploration. If you are inclined toward banking law, then take our banking law offerings and immerse yourself in the mud of interpleader actions to your heart's content. My own, best pedagogic judgment, however, is that the topics we covered in class will arise most frequently in the practices of the

vast majority of students—and here I have tried to keep in mind that this room may be filled with as many future transactional lawyers as litigators—and that it is a better service to concentrate our efforts on the issues most of you are most likely to encounter.

There is a second answer I want to give to explain my pedagogic choice. It is, as I indicated before, the more compelling motivation for my adoption of this approach. Through my decision to focus on fewer topics in more detail, I endeavor to challenge you to truly learn something, to digest an issue fully and precisely so that you can draw upon your acquired skills in future study or work. I choose this path instead of seeking to expose you to "everything" related to procedure, as though that were even possible. I believe I have done my job well if I succeed in producing students who are able to think and reason through legal issues on their own, rather than merely attaining a passing familiarity with a topic but no real sense or understanding of it. In short, my guiding philosophy is that I care much more *that* you learn and *how* you learn than about *what* you learn.

Educational theorists would describe this approach as pushing students beyond the "zone of proximal development"; that is, beyond the level of learning they could otherwise obtain on their own.[15] Put another way, rather than merely urging fluency in the vocabulary of the law, I believe that as a teacher I ought to be asking, "What can I do to help students gain a more lasting and deeper intellectual framework than they would otherwise possess if they had not taken this course?" By teaching a smaller number of subjects in greater detail, my firm pedagogic belief is that students will leave more capable of applying their acquired legal acumen to any problem, whether the particular issues were addressed specifically in one of their law school classes or not.

I believe it bolsters the case for teaching procedure by example to say that the subjects one could cover in this course, to a large degree, are fungible. I have created my own list of must-cover topics. Other syllabi may look somewhat, or even markedly, different than mine. Rather than regard these differences as indictments, I view them as confirmations that the subject of procedure is an excellent tool for teaching students how to think critically. Because procedure cuts across the entire legal landscape, I am able to address the entire class at once, without regard to whether you will become estate law lawyers or tax lawyers, environmental lawyers or lawyers who specialize in tort law. It also does not matter whether your career choice is litigation or transactional work. Procedure is relevant to everyone. As a result, I can employ any number of subjects falling under the general rubric of procedure to aid in the development of the skills that are important to all students in

15. L. S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES 86-87 (Michael Cole et al. eds., 1978).

becoming successful lawyers and critical thinkers. I could not do the same if I were teaching an advanced course with a specific focus. It is precisely because the contexts in which you will encounter procedural issues are so vast and so innumerable, that I believe it makes little sense to try to pretend it is possible to cover all subjects in the field. Instead, my role is to help sharpen the intellectual tools that will serve you well in a number of different contexts.

There is time enough in later classes, and later in life, for you to become familiar in detail with particular questions and points of law. This course and law school, in general, are of most value if you are pushed to truly dissect a problem, to turn it upside down, to examine it from every side and then, finally, to carefully produce a thoughtful answer. This is a fundamental part of real teaching and learning. By contrast, I do not comprehend how students are served by wide, unfiltered sweeps through vast terrains. Even if the sole measure is how many right answers to legal doctrinal questions will students get after they have taken the final exam and moved on to other courses, conventional law school teaching, particularly as found throughout the first-year curriculum, usually disappoints.[16]

A Jewish fable recounts how a famous pianist once was asked how he managed to be so adept in playing the musical notes. To the question, he replied, "The notes I handle no better than many musicians, but the pauses between the notes—ah! That is where the art resides." In law, the pauses between the notes may be likened to the exacting skill of knowing when and how to slow down long enough to ponder a question more deeply than the next. The rules that may apply to any one particular case are readily ascertainable; any conscientious person ought to be able to find them, along with the pertinent case law. But it is the student who has not merely knowledge but a *command* of the law who is exceptional. Stand back! For when you hand her the same rule book, the words may fly off the page. Watch her wield the law, as a sharpened tool—no, better still, as a precisely tuned instrument—to reach the desired result for her client. Having mastered this rare ability, she is one of the few who is capable of recognizing and then invoking the enormous power that lies within the formal rules.

TEACHING BY EXAMPLE EMPHASIZES THE ETHICAL CHOICES AND RESPONSIBILITIES INVOLVED IN BEING A LAWYER

There is, finally, a third respect in which I have tried to teach Civil Procedure by example. I have stressed that there is much more to being a lawyer than merely knowing the law. There is also the challenge of recognizing and then acting on one's ethical obligations: to clients, to other lawyers and to the judicial system.

16. *See, e.g.*, Leslie, *supra* note 14, at 1293 (discussing results following pop quiz given to students).

One irreducible component of a lawyer's professional responsibilities is to treat people with respect and to honor the views, opinions and arguments of others. In the classroom, I regard respect—both as a matter between teacher and student and among students—as an essential element that must be nurtured. In this regard, consider Leigh Van Horn's description of how vibrant educational environments are created and sustained at the secondary school level in her book, *Creating Literary Communities in the Middle School*:

> There must be more to my role in developing and sustaining the community than my outward expressions of enthusiasm. The word "respect" is one that is frequently used by my students as they describe aspects of teacher behavior they consider important to their own growth. How is it that we show our students that we have respect for them? It occurs to me that respect is reflected in various ways—our willingness to participate in the learning experience as we work alongside our students, the emphasis we place on learning from one another, the way that we honor the products of our learning, and in the way that we care for one another.[17]

I have long felt that law academia has much to learn from the scholarship of teaching and education in other fields. Although we teach to different students, and for different purposes, what we do is fundamentally no different, in my estimation, than what any instructor must do to teach effectively. In my law school classroom, creating an environment of mutual respect is paramount. I never call on students to intimidate them. Rather, I do so to encourage students to wrestle outside of class with the ideas, arguments and issues about which they have read and to come prepared to defend a viewpoint (or, at least, be able to articulate various sides of a debate). I recognize that it is a tricky business at times, particularly since I want to encourage volunteers to answer as well, and not set up a culture that only the person who is "on" should be involved in the discussion. Moreover, it is obvious that some are not as keen on speaking out in class as others.

I regard it, therefore, as one of the most rewarding compliments I have received to be told that those who choose in other settings to be silent, out of fear, intimidation, or merely disinterest, choose instead to come to my class prepared and ready to engage in the daily classroom dialogue. This evidence of the blossoming of mutual respect—as it occurs between teacher and students, and among students—helps create the trust upon which a vibrant learning community depends. And make no mistake, the yield that is produced by the fostering of a healthy and dynamic learning environment truly should be valued at a price far above rubies. Students come prepared to converse, argue and debate, but also with a willingness to consider and listen to the viewpoints of others. Class discussions are made richer by having a greater and wider

17. LEIGH VAN HORN, CREATING LITERACY COMMUNITIES IN THE MIDDLE SCHOOL 18-19 (2001).

degree of student participation. Best of all, the dialogue often does not travel unilaterally merely from teacher to student and back again, but flows multilaterally. A chart of many of our discussions would trace a path from teacher to Student 1, then to Student 2, back to teacher, to Student 3, back to Student 1, and so forth. In this more complex web of dialogue and discussion, both individualized and collective learning experiences take root. As the professor, I cannot ask for more.

Building on our classroom experiences, I emphasized throughout the semester the importance of taking these lessons about respect and applying them to thinking about your soon-to-be future lives as lawyers. The responsibility of being a lawyer triggers professional obligations of decency, honesty, promptness, diligence, and general professional courtesy to other lawyers, to your clients, and to the judicial system. Some of these traits are naturally self-enforcing. In seven years of trial practice, I rarely saw a lawyer behave badly in court. Like the unruly child in grade school, unprofessionalism in lawyers tends to rear its ugly head only when the teacher is not looking. Acting professionally should not depend upon whether there is oversight, though. It should be instinctive and expected. Alas, we cannot depend entirely on people doing the right thing only for the sake of doing the right thing. As a result, there are punitive rules in place to deter malfeasance. The extent to which they do so, however, is a matter of some debate.

In addition to the exogenous rules the system imposes on all lawyers, I want to suggest there is another incentive that is particularly potent in encouraging lawyers to strive to take the highest ethical and professional road available. I am referring to the enormous power produced through the cultivation of an upright, honorable reputation. A personal story may help illustrate this point.

When I was in practice, I represented an investment brokerage house against one of its former clients. The client alleged that the company and her agent, in particular, had treated her very badly by churning the account. By this allegation it was meant that the agent (and through the agent, the company) encouraged her to make many small stock transactions that, on the whole, benefited the company and the agent more than the individual by generating commissions through investments that were not always client-appropriate and on which the returns were often sub-par.

One of my main client representatives was the compliance officer for the company. His job was to oversee all of the investments made by the brokerage agents on behalf of their clients, in order to ensure that these transactions were all proper and that everything done was in compliance with the existing securities laws, rules and regulations. During the pretrial phase of the case, I worked with this compliance officer to collect and then produce for the other side all of the documents that the company maintained that were relevant to the case. After I was satisfied I had done a thorough investigation to locate all

relevant records, I submitted all of the material that had been gathered to counsel for the claimant.

Opposing counsel and I disagreed on plenty of occasions throughout the case. Notwithstanding these differences, we managed to treat each other decently, courteously and respectfully. In effect, we amicably agreed to disagree. In this manner, each of us represented our respective clients' interests zealously, but still acted within the bounds of our professional obligations to each other.

The day of trial finally arrived. After opening statements, opposing counsel called their first witness to the stand. By mid-afternoon, several more witnesses had testified briefly and things appeared to be proceeding slowly, but surely, forward. Then, just before our afternoon break, opposing counsel called the company's compliance officer to the stand. The compliance officer had only been on the stand for about half an hour or so when the judges decided to take a brief fifteen-minute break. I never could have predicted what was to happen next.

Immediately upon the recess being called, the compliance officer approached me to ask if we could talk in private. For reasons that I do not think I will ever fully understand, for the first time ever in the case, the compliance officer confessed that he had withheld documents. As he now told me, about a month before this lawsuit had been filed, he had taken some files pertaining to the claimant and put them into his garage.

"Why are you telling me this only now?" I asked, stunned. Silence followed. "And why did you take them to your garage in the first place?" But he offered no explanation that made (or makes, even today) any sense.[18] In retrospect, my best guess as to why he decided to come forward at all rather than remain silent is that this man suddenly found himself jolted into confession. It was as though his appearance on the stand as a sworn witness somehow ignited within him a profound sense of ethical torment. Possibly, this feeling had already been building inside of him for some time, and his sitting on the witness chair was a final straw, the necessary spark, to cause this eruption. I do not know for sure, and I suspect I will never know. I certainly did not know at the time. What I did know was that he was about to return to the witness stand to continue testifying and I had to do something about this new information I had just been given.

Returning to the proceedings, I began by explaining I had just been informed by the witness—literally out in the hallway—that there were additional documents relating to the claimant at the compliance officer's home.

18. What surely makes the story stranger still is that when the documents were finally produced, it turned out that none were particularly probative of the claims being made in this case, although we had little sense of this at the time he made his abrupt announcement in the middle of the hearing. What mattered then, of course, was the appearance of impropriety.

I explained that I had not been told of the existence of these documents before and that, to my knowledge, no other company official had known about them. I expressed my commitment to proceed in whatever fashion the court and the claimant's lawyer thought best, given the extraordinary circumstances.

I can still recall the silence that followed my short remarks. It was palpable and tense. After some time, the lawyer representing the claimant spoke. "I am deeply troubled by this announcement," he began,

> and I beg the Court's indulgence to consider what is the best approach to take, under the circumstances. I suspect that an immediate suspension of the trial is in order so that we be given an opportunity to review these newly-discovered documents. After we have an opportunity to do so, I will be in a better position to advise the court on how I think we should proceed.

He then turned and looked directly at me.

> I want to add, however, that I do not doubt for a minute that Mr. Hoffman was as taken aback by this announcement as I have been. Throughout my dealings with him, I can say without qualification that he has always acted professionally and with the highest degree of integrity. We have not always agreed about all things in this case, but I am certain that if he had known about these missing records beforehand, he would never have kept it secret. I am not as confident about the integrity of his client, but this should cast no black mark on his record.

As I reflect on the moral of the story, I am reminded of my childhood little league experience. I was never a very good baseball player. When I found myself at bat (which was rare, since that necessitated having me occupy right field, which I did far less adeptly than occupying the right side of the dugout bench), I would often shut my eyes just before the pitcher's release. At times, I liken the experience of being a lawyer to standing there in the batter's box, unprotected and blind. More often than not, we do not see the pitch coming. It whizzes by, and the hot wind trailing behind sends a surge of adrenaline through the body, but it is already too late. The collision either has happened or it has not. Even if we manage to keep our eyes open, unexpected occurrences in our work, as in life, are inevitable.

One of the lessons I take away from my experience in this case is that we ought to act honorably not solely because it is the honorable and right thing to do. We ought to act honorably, as well, precisely because it is not possible to foresee all difficulties we will face in the future. If this sounds pretextual, it is not intended in that way. I did not treat my opposing counsel with respect because I anticipated problems would arise later in the case, and I certainly did not work at building a reputation as a lawyer whose word could be relied upon because I thought I might need to cash in down the road. But knowing that reputation matters—that for a lawyer it is often all that matters—can serve as a powerful reminder that even if there is no way to insure against all unforeseen occurrences, it is still prudent to try, in the main, to fortify ourselves in

advance. We are still going to get hit, of course, though probably not as frequently, and the resulting damage may often be sustainable.

CONCLUSION

One of my intellectual heroes, Karl Llewellyn, once spoke to his own class of students at Columbia, exhorting them to rise to the challenges they would face in law school and beyond:

> What I am trying to write in fire on the wall is that the task before you is immense, is overwhelming, and that the official courses of the school are not enough to compass it. "TEKEL: thou art weighed in the balance and found wanting." To do the work is not: to do the classes. Rather must you immerse yourself for all your hours in the law. Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in the law—it is your only hope.[19]

The effort required of you is great, but there is no other way around it. This is how it must be with your education and training. I can provide a suitable and encouraging forum in which learning can take place. I can create an environment that is conducive to rigorous thinking and study; but I cannot do it for you. As Llewellyn put it, "[W]e do not teach—you learn."[20] At the end of the day, when this course is over, and you have graduated from this place and entered the world as lawyers, you will be on your own. Still, take comfort: the work you have done here and the habits you form as students *can* carry you a great way. The question is only whether we have provided a brilliant space in which you may thrive, and whether, then, you will make the commitment to do so.

19. LLEWELLYN, *supra* note 13, at 110.
20. *Id.* at 109.

TEACHING FIRST-YEAR CIVIL PROCEDURE AND OTHER INTRODUCTORY COURSES BY THE PROBLEM METHOD

STEPHEN J. SHAPIRO†

II. THE CASE METHOD VS. THE PROBLEM METHOD

A. THE ACADEMIC DEBATE

The case method of legal instruction was introduced by Christopher Langdell in the 1870's at Harvard Law School.[5] Although it was not well-received at first,[6] by the beginning of the twentieth century it had become the predominant teaching method at American law schools, and it remains so to this day.[7] Although there is some variation in its use from professor to professor, it most commonly proceeds as follows: For each class, students are assigned several appellate opinions to read. In class, the professor usually starts by calling on one student to state the facts of the first case and then proceeds by questioning this, and other students, about the court's opinion. Using some form of Socratic dialogue,[8] the professor requires the students to dissect, defend and/or criticize the court's opinion. When the discussion of the first case is finished, the professor moves on to the second case, usually involving the same or related subject matter, sometimes by the same court and sometimes not. The professor then proceeds to have the class discuss the second case, much like the first, sometimes with the additional task of trying to rationalize any difference of results between the two cases.

The benefits of this approach are said to be that it teaches students to read and think carefully, logically and critically—i.e., to "think like a lawyer." It requires students to learn actively (compared to the textbook/lecture format which preceded it). In class, this means the students learn to think on their feet, and make and defend an argument. The case method also supposedly teaches students to learn to recognize the important facts and issues in a case and to separate these issues from red herrings and makeweight arguments. It also requires students to individually glean the substantive law in a particular field from the cases, rather than spoon feeding the law to students through lecture or text. It also requires the students to recognize that the law is a growing, changing body of doctrine.[9]

The case method, and the extent to which law faculty have come to rely on it, has also been subject to criticism. Critics, while admitting that the case method might do a good job of teaching students to understand and work with appellate opinions,[10] have noted that this skill forms only a small part of what lawyers actually do. Most lawyers do not get involved with a case at the appellate level, but rather most become involved at the beginning of the case. The client brings a problem to the lawyer, and the lawyer's job is to determine the relevant facts, and find and apply the appropriate law in order to either advise the client or help solve the client's problem.[11]

Students who have been taught by the case method usually get some exposure to problem solving, but often not until they take their

exams at the end of the semester. These exams typically involve a set of hypothetical facts constituting a legal problem, and one or more questions testing the student's ability to recognize the legal issues involved in the problem and requiring the students to discuss how the law (or a lawyer or judge) would handle these issues. The divergence between how students are taught and tested has lead to further criticism that the case method is not only ignoring the skills that lawyers need in practice, but also the skills that students need to succeed in law school.[12] The case method has also been criticized because it puts too much emphasis on cases as the source of substantive law, when more and more law is governed by statutes, rules and regulations.[13]

One proposed solution has been to turn, in whole or in part, to the problem method.[14] In the problem method, the students are given a set of facts, similar to a real life legal dispute (or a law school exam). Although students might still read (among other sources) some appellate cases to learn the law to be applied, the problems, rather than the cases, become the focus of the class discussion.[15]

The problem method is more often used in advanced, upper-level classes, than in first-year courses.[16] By the second and third year of law school, students have already developed a facility with legal analysis and at least a basic knowledge of the subject matter. The students can then take their basic knowledge and understanding, and learn the skill of applying these in a more realistic and complex factual situation.[17] At this point many students have become disenchanted or bored with the case method and appreciate the novelty of a new approach, especially one that more closely approximates what the students will soon be doing as lawyers.[18]

There are probably a number of reasons why the problem method has been used less frequently to teach first-year courses. For one thing, many faculty have found that this method works better with the smaller class size that is more typical in upper-level classes.[19]

There has also been a wider choice of published materials using the problem approach for advanced courses.[20] Another contributing factor is that first year students do not have the basic knowledge of several areas of the law, which is very helpful in working out complex problems that cut across several areas and issues. There may also be a feeling (not necessarily correct) among those accustomed to teaching by the case method, that the problem method is less efficient than the case method for teaching legal doctrine.[21] Many teachers of first-year subjects feel a tension between trying to acquaint the students with a vast body of substantive law and teaching the students skills, such as legal reasoning and problem solving. These faculty members are less likely to use the problem method if they view it as more time-consuming.

Many law professors who use the case method also employ a technique somewhat akin to the problem method: the in-class hypothetical. The in-class hypothetical is usually a very short, simplified problem, presented to the students in class by the professor. It is usually devised by the professor, either in advance or on the spur of the moment, but presented to the students in class rather than before class. The in-class hypothetical is generally designed either to illustrate a specific point raised during the class or to show how the results might differ if the facts of the particular case under discussion were slightly different.

The in-class hypothetical does give the students at least some of the benefits of the problem method. Students are required to take the legal doctrine learned from the case law and apply it to a different set of facts. There are, however, some limitations. In-class hypotheticals, both by necessity and design, are usually based on very simplified facts and focused on one narrow issue.[22] The hypotheticals do not, therefore, provide the students practice with analyzing the more complicated factual situations they are likely to encounter in law practice, or even the slightly more complicated facts of a law school exam. Even when so simplified, however, hypotheticals do not always produce good student response, since the students have not had an opportunity to prepare for the hypothetical.[23]

The U.S. Legal System: A Short Description

Federal Judicial Center

BACKGROUND

The U.S. Constitution establishes a federal system of government. The constitution gives specific powers to the federal (national) government. All power not delegated to the federal government remains with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes, and judiciary.

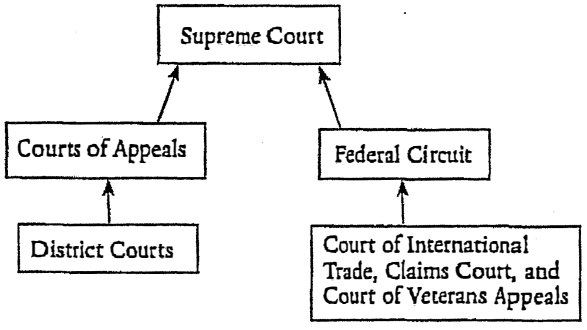
The U.S. Constitution establishes the judicial branch of the federal government and specifies the authority of the federal courts. Federal courts have exclusive jurisdiction only over certain types of cases, such as cases involving federal laws, controversies between states, and cases involving foreign governments. In certain other areas federal courts share jurisdiction with state courts. For example, both federal and state courts may decide cases involving parties who live in different states. State courts have exclusive jurisdiction over the vast majority of cases.

Parties have a right to trial by jury in all criminal and most civil cases. A jury usually consists of a panel of 12 citizens who hear the evidence and apply the law stated by the judge to reach a decision based on the facts as the jury has determined them from the evidence at trial. However, most legal disputes in the United States are resolved before a case reaches a jury. They are resolved by legal motion or settlement, not by trial.

STRUCTURE OF THE FEDERAL COURT SYSTEM

The U.S. Constitution establishes the U.S. Supreme Court and gives Congress the authority to establish the lower federal courts. Congress has established two levels of federal courts below the Supreme Court: the U.S. district courts and the U.S. circuit courts of appeals.

U.S. district courts are the courts of first instance in the federal system. There are 94 such district courts throughout the nation. At least one district court is located in each state. District judges sit individually to hear cases. In addition to district judges, bankruptcy judges (who hear only bankruptcy cases) and magistrate judges (who perform many judicial duties under the general supervision of district judges) are located within the district courts. U.S. circuit courts of appeals are on the next level. There are 12 of these regional intermediate appellate courts located in different parts of the



country. Panels of three judges hear appeals from the district courts. A party to a case may appeal as a matter of right to the circuit court of appeals (except that the government has no right of appeal in a criminal case if the verdict is "not guilty.") These regional circuit courts also hear appeals from decisions of federal administrative agencies. One non-regional circuit court (the Federal Circuit) hears appeals in specialized cases such as cases involving patent laws and claims against the federal government.

At the top of the federal court system is the U.S. Supreme Court, made up of nine justices who sit together to hear cases. At its discretion, the U.S. Supreme Court may hear appeals from the federal circuit courts of appeals as well as the highest state courts if the appeal involves the U.S. Constitution or federal law.

STRUCTURE OF STATE COURT SYSTEMS

The structure of state court systems varies from state to state. Each state court system has unique features; however, some generalizations can be made. Most states have courts of limited jurisdiction presided over by a single judge who hears minor civil and criminal cases. States also have general jurisdiction trial courts that are presided over by a single judge. These trial courts are usually called circuit courts or superior courts and hear major civil and criminal cases. Some states have specialized courts that hear only certain kinds of cases such as traffic or family law cases.

All states have a highest court, usually called a state supreme court, that serves as an appellate court. Many states also have an intermediate appellate court called a court of appeals that hears appeals from the trial court. A party in a case generally has one right of appeal.

COURT ADMINISTRATION

The judicial branches of the federal and state governments are separate from the legislative and executive branches. To insure judicial independence, the judicial branches of the federal and state governments control the administration of the courts. Court administration includes managing court budgets, prescribing rules of trial and appellate procedure, reviewing judicial discipline matters, offering continuing educational programs for judges, and studying court performance.

In the federal judiciary, the Judicial Conference of the United States, made up of 27 members (the Chief Justice of the United States and 26 judges from each geographic region of the United States) has overall administrative responsibility for the courts and has primary authority to make policy regarding the operation of the judicial branch of the government. The Judicial Conference is assisted by a large number of committees made up of federal judges (and sometimes also state court judges and attorneys) who study different parts of the federal court system and make recommendations. An important re-

sponsibility of the Judicial Conference is to recommend changes in the rules of procedure used by all federal courts.

Congress has created three administrative agencies within the judicial branch. The Administrative Office of the U.S. Courts manages the day-to-day operations of the courts, including such matters as payroll, equipment, and supplies. The Federal Judicial Center conducts educational and training programs for judges and court personnel and does research in the fields of court operations and administration. The U.S. Sentencing Commission develops advisory guidelines for federal judges in imposing criminal sentences.

In most state court systems, the state supreme court has overall administrative authority over the court system. It is assisted by an administrative office. The chief justice of the state supreme court usually appoints the director of the state court administrative office.

JUDGES

Justices of the U.S. Supreme Court and circuit and district judges are appointed by the President of the United States if approved by a majority vote of the U.S. Senate. These justices and judges serve "during good behavior"— in effect, a life term. Presidents usually nominate persons to be judges who are members of their own political party. Persons appointed are usually distinguished lawyers, law professors, or lower federal court or state court judges. Once these judges are appointed their salaries cannot be reduced. Federal judges may only be removed from office through an impeachment process in which charges are made by the House of Representatives and a trial is conducted by the Senate. In the entire history of the United States, only a few judges have been impeached and those removed were found to have committed serious misconduct. These protections allow federal judges to exercise independent judgment without political or outside interference or influence.

The methods of selecting state judges vary from state to state and are often different within a state, depending on the type of court. The most common selection systems are by commission nomination and by popular election. In the commission nomination system, judges are appointed by the governor (the state's chief executive) who must choose from a list of candidates selected by an independent commission made up of lawyers, legislators, lay citizens, and sometimes judges. In many states judges are selected by popular election. These elections may be partisan or non-partisan. Candidates for judicial appointment or election must meet certain qualifications, such as being a practicing lawyer for a certain number of years. With very few exceptions, state judges serve specified, renewable terms. All states have procedures governing judicial conduct, discipline, and removal.

In both the federal and state systems, judicial candidates are almost always lawyers with many years of experience. There is no specific course of training for judges and no examination. Some states require judges to attend continuing education programs to learn about developments in the law. Both the federal and state court systems offer beginning and continuing education programs for judges.

PROSECUTORS

Prosecutors in the federal system are part of the U.S. Department of Justice in the executive branch. The Attorney General of the United States, who heads the Department of Justice, is appointed by the President with Senate confirmation. The chief prosecutors in the federal court districts are called U.S. attorneys and are also appointed by the President with Senate confirmation. Within the Department of Justice is the Federal Bureau of Investigation, which investigates crimes against the United States.

Each state also has an attorney general in the state executive branch who is usually elected by the citizens of that state. There are also prosecutors in different regions of the state, called state's attorneys or district attorneys. These prosecutors are also usually elected.

LAWYERS

The U.S. legal system uses the adversarial process. Lawyers are essential to this process. Lawyers are responsible for presenting their clients' evidence and legal arguments to the court. Based on the lawyers' presentations, a trial judge or jury determines the facts and applies the law to reach a decision before judgment is entered.

Individuals are free to represent themselves in American courts, but lawyers are often necessary to present cases effectively. An individual who cannot afford to hire a lawyer may attempt to obtain one through a local legal aid society. Persons accused of crimes who cannot afford a lawyer are represented by a court-appointed attorney or by federal or state public defender offices.

American lawyers are licensed by the individual states in which they practice law. There is no national authority that licenses lawyers. Most states require applicants to hold a law degree (Juris Doctor) from an accredited law school. An American law degree is a post-graduate degree awarded at the end of a three-year course of study. (Normally individuals complete four years of college/university before attending law school). Also, most states require that applicants for a license to practice law pass a written bar examination and meet certain standards of character. Some states allow lawyers to become bar members based on membership in another state's bar. All states provide for out-of-state lawyers to practice in the state in a particular case under certain conditions. Lawyers can engage in any kind of practice. Although there is no formal distinction among types of legal practice, there is much informal specialization.

World-Wide Volkswagen v. Woodson – The Rest of the Story

72 NEB. L. REV. 1122 (1993)*

By Charles W. Adams**

* * *

I. THE ACCIDENT

Lloyd Hull knew he had a serious drinking problem. Ever since his retirement from the Navy two years before, it seemed as though he needed to get a little high, or better, every day. After getting off work on September 21, 1977, in Berryville, Arkansas, Lloyd was on his way to visit his older sister in Okarche, Oklahoma. Next to the bottle of Jim Beam on the front seat was a loaded .22 Magnum pistol for shooting jack rabbits on his sister's farm. Lloyd was driving a 1971 Ford Torino he had bought just the week before, paying $500 down. It had a large V-8 engine, good tires and brakes, and was in perfect working condition.

As he drove along, Lloyd took shots from the bottle of bourbon. After passing through Tulsa around nightfall, he relaxed as he got on the Turner Turnpike that runs to Oklahoma City. He was not in any particular hurry to get to his sister's place, and he was not paying attention to his speed. Later he assumed he must have been driving too fast on account of the liquor. Lloyd did not notice the small car ahead of him until he was nearly on top of it. By the time he managed to hit his brakes, it was too late to avoid the car. His Torino slammed into the other car, a little off center on the driver's side. Lloyd saw the small car continue down the road for a few seconds after the collision, come to a stop, and then catch on fire. Lloyd pulled over and watched the small car burn, but he did not get out of his Torino. He noticed that the needle on his speedometer was jammed at seventy-five miles per hour.

Harry Robinson suffered from arthritis. During the long winters in Massena, New York, a small town on the St. Lawrence Seaway next to Canada, his ankles and knees would swell up and bleed so badly that he had to stay in bed for two or three months at a time. His doctor had told him he needed a dry, warmer climate, and so he and his wife, Kay, had sold their restaurant and were moving to Tucson, Arizona, with their three children. Kay was driving the 1976 Audi 100 LS that she and Harry had purchased new the year before from Seaway Volkswagen in Massena. Their daughter, Eva, age thirteen, and oldest son, Sam, sixteen, rode with her. Harry had rented a U-Haul truck for the furniture, and he and their other son, Sidney, age fifteen, were riding in the truck about fifty yards ahead of the Audi.

Sam was in the front seat of the Audi, and he was the first to see the approaching headlights through the rear window. Sam yelled to his mother that the car behind was going to hit them, and as Kay looked in her rearview mirror, the Torino crashed into the back of the Audi. Sam saw the fire start in the area over the rear seat right after they were hit. Kay took her foot off the gas pedal and pulled the car off to the side of the road and put it in park. The fire covered the area above the rear seat and was spewing out gray sooty smoke. The blaze spread quickly over the rear seat, and the inside of the car got hot rapidly. Sam and Kay both tried to open their front doors but could not open either of them even though the doors were not locked. Somehow they had been jammed shut by the collision. Sam and Kay tried the rear doors, but they were jammed, too. Eva jumped from the back into the front seat. By that time flames were shooting out of the space where the seat back and the bottom cushion met in the rear seat. All the windows were rolled up, except for the side vent on Kay's side, and none of them would open either. Kay, Eva, and Sam were trapped.

By the time they tried to open all the doors and windows, the fire had spread to the front of the car. Kay lay down on the front seat and tried to kick out the side window, but could not. The car was full of smoke and she could not see anything. Sam tried desperately to break the window with his fist. Kay heard people moving outside the car, but she could not see them. She heard Eva's hair catch on fire; it

** Charles W. Adams is a Professor of Law at the University of Tulsa College of Law.

sounded like a torch. Harry Robinson noticed the Audi's headlights moving back and forth in the side mirrors of the U-Haul truck. His son, Sidney, looked out the right mirror and saw the flames ignite. He said, "That's Mama's car," and Harry pulled over and got out of the cab. The Audi was moving toward them sliding sideways, and fire and smoke were coming out of the trunk. The Audi came to a stop and rolled backwards onto the grass by the side of the road. Due to his arthritis, Harry was only able to hobble toward the car and Sidney reached it first. Harry tried to open the doors on the driver's side, and then moved around the car to try the doors on the other side. When he reached the passenger side, the rear window blew out, and the fire seemed to erupt at the back of the car. Harry could see his family struggling inside. Sam appeared to be banging his head against the window, trying to break out. Meanwhile, Sidney was pounding on the outside of the windshield with his fist. Just when it seemed that Kay, Eva, and Sam would never get out of the car alive, a hero came to their rescue.

Mike Miller first noticed the Ford Torino when he passed it on the right. As he looked over at the driver, Mike could tell he was drunk. At a curve further down the highway, the Torino nearly came to a stop and nearly went off the road, but it got back on the highway, practically running over some barrels beside the road. Then it picked up speed and passed Mike. A short time later Mike saw a ball of fire. He immediately stopped and ran over to the burning Audi, leaving his car door open and the engine running. As he ran, he thought perhaps he should have driven back to the tollgate at the entrance to the Turner Turnpike to report the accident instead of trying to help the people in the burning car himself.

By the time Mike reached the Audi, the passenger compartment was engulfed in flames and filled with smoke. All he could see inside were two dark figures moving around, but he could hear people in the car screaming and banging on the windows. Sidney was not doing any good beating on the windshield with his fist, so Mike pushed him aside and kicked at the windshield. As it started to cave in, he gave it another push and knocked a big hole through the windshield on the passenger side.

The fire was so intense by now that it looked as if there were a flamethrower in the back of the car with the blaze swirling around and concentrated on the driver's side. As flames curled around the hole that Mike had made in the windshield, two arms appeared. Mike reached down to grab Sam's arms above the elbows, but Mike's hands slipped off the burning flesh. He grabbed Sam again, this time by the wrists, and pulled his head and shoulders through the hole. While Mike dragged Sam off the hood of the car, another man on the scene, Etsel Warner, pulled Eva through the hole.

The fire continued to burn furiously, and Mike could not see anyone else through the thick black smoke in the car. Then he heard Harry yell, "Get my wife out of there." Mike looked through the hole and a hand suddenly appeared reaching through the smoke and flames. Kay had felt Sam and Eva go out of the car, and when nobody reached in for her, she figured that she must be on the wrong side. She moved over to the other side of the car and stuck her hand out. Mike grabbed her wrist and pulled as hard as he could. Luckily, Kay weighed only 98 pounds, and she practically flew through the hole and out of the inferno.

Mike helped the three victims move away from the burning car. After taking only a couple of steps, Mike heard a small explosion from inside the car. Mike did not look back, but kept walking, only faster, and he got the three victims to lie down. Kay and Eva had been wearing polyester blouses, which had melted and were stuck to their bodies.

The highway patrol arrived on the scene, then the fire department, and finally an ambulance. Highway Patrol Trooper Spencer walked to the Ford Torino to question Lloyd Hull, who had a two-inch gash on his lower lip, but was otherwise unhurt. Since Mr. Hull was obviously drunk, Trooper Spencer arrested him and took him to the hospital to have his lip sewn up, and then to jail, where he remained for fourteen days.

Kay, Sam, and Eva Robinson all received severe burns. Sam suffered first and second degree burns on his face, neck, upper back, and arms. A nostril was burned, and he had a deep scar on his right cheek, and keloid scars on his chin, arms, and hands. Because she had been in the burning car longer, Eva's injuries were more serious. She suffered third degree burns on her neck, shoulders, and arms. Her vocal chords were burned, and she required skin grafts on her back, shoulders, and right hand. Fortunately, though, Eva had covered her face, and it had not been burned as badly as it otherwise might

have been. Both Sam and Eva were hospitalized for six weeks in Tulsa, and spent many months undergoing physical therapy and reconstructive surgery.

Since Kay Robinson had been trapped in the burning car the longest, her burns were the most horrible of all. She had burns on forty-eight percent of her body – thirty-five percent of which were third degree. Kay was in the intensive care unit for seventy-seven days and was hospitalized in Tulsa for another several months. She underwent thirty-four operations, all but two of which were under general anesthetic, for skin grafts and other reconstructive surgery. Most of her fingers were amputated, and she had severe scarring over the entire upper part of her body. Eva and Kay also suffered severe psychological trauma both from the ordeal and from their permanent disfigurement.

With his wife and children hospitalized, Harry Robinson began the process of seeking redress for their injuries. The effort was to continue for more than fifteen years in state and federal trial courts in Oklahoma, a federal trial court in Arizona, the Oklahoma Supreme Court, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court. Along the way the litigation would produce a landmark Supreme Court decision in the area of personal jurisdiction, *World-Wide Volkswagen Corporation v. Woodson*.

II. Filing the Lawsuit

Harry Robinson first retained a Tulsa attorney named Charles Whitebook who brought in the Tulsa law firm of Greer and Greer, headed by two brothers who had specialized in personal injury litigation for many years. Jefferson Greer was the lead attorney, but his younger brother Frank devoted a significant amount of his time to the case as well. Mr. Greer was a prominent member of the personal injury plaintiffs' bar, having served as President of the Oklahoma Trial Lawyers Association in 1966 and as a Governor of The Association of Trial Lawyers of America in 1977. He had more than twenty years of experience trying personal injury cases and had handled some of the earliest products liability cases in Oklahoma.

Lloyd Hull was an obvious defendant, but he had no liability insurance, and consequently any judgment the Robinsons could obtain against him would be uncollectible. To obtain an enforceable judgment, the Robinsons would have to sue the manufacturer of the Audi on a products liability claim. To prevail, they would need to establish that the Audi was defective and that its defects had caused their injuries.

At the time of the Robinsons' accident, the law of products liability was undergoing fundamental change in Oklahoma. Prior to 1974, a manufacturer's liability under Oklahoma law for injuries caused by a defective product could be based upon one of only two theories: negligence, or breach of express or implied warranties of the manufacturer. In 1974, the Oklahoma Supreme Court adopted a rule of strict liability for manufacturers for defects in their products in *Kirkland v. General Motors Corporation*, relying on section 402A of the Restatement (Second) of Torts. Thus, if the Robinsons could establish that the Audi was defective, its manufacturer would be strictly liable for their injuries, regardless of negligence.

The dollar amounts of jury verdicts in personal injury cases had been increasing dramatically during the 1970s. In February 1978, a California jury returned a verdict for $128.5 million in *Grimshaw v. Ford Motor Company*. There were a number of similarities between the *Grimshaw* case and the Robinson's case against the manufacturer of the Audi. In *Grimshaw*, the gas tank of a 1972 Ford Pinto exploded when the Pinto was "rear-ended" while stalled on a freeway. The driver died as a result of the fire, and Richard Grimshaw, a thirteen-year-old passenger, suffered severe burns on his face and entire body. It was evident that there was the potential for the Robinsons to recover a substantial, perhaps multi-million dollar verdict. The extent of their injuries, the pain and suffering, and the psychological trauma would surely win a jury's sympathy. On the other hand, the Oklahoma law of products liability was in its early stages of development, and there were a number of unsettled legal issues. The trial would be complicated by the need for testimony by experts in automotive engineering and safety, as well as the usual medical experts and experts on damages. Moreover, the German auto manufacturers had earned a reputation for being particularly aggressive defendants. While Mr. Greer realized at the outset that the

case would be difficult to try, he could not have anticipated the extent of the obstacles he would encounter.

An aspect of the Robinsons' case that Mr. Greer immediately recognized as significant was the fact that the accident had occurred just a few miles outside of Tulsa County in Creek County, Oklahoma, making venue proper in Creek County. An oil boom had come to Creek County at the turn of the century, but had ended shortly after World War I, and it had been an especially depressed area during the 1930's. By the 1970's, Creek County was a blue-collar community that had become known to personal injury lawyers throughout the state as being particularly sympathetic to personal injury plaintiffs. The attractiveness of Creek County as a plaintiffs' venue was and is demonstrated by the numerous change of venue cases that have originated there. Mr. Greer regarded Creek County as one of the best venues in which to try a personal injury lawsuit in the United States. He rated it on a par with Dade County, Florida, or Cook County, Illinois, both notoriously high-verdict jurisdictions, and he estimated that a case in Creek County was worth twice as much as it would be in Tulsa County.

Mr. Greer knew he needed to be prepared for the defendants' attempt to defeat venue in Creek County through removal of the case to the United States District Court for the Northern District of Oklahoma in Tulsa, a standard defense strategy in cases involving nonresident defendants. Since the Robinsons had been citizens of New York, he would have to name defendants who were also citizens of New York to destroy diversity of citizenship and thereby block removal. After verifying that Seaway Volkswagen, Inc., the car dealer from whom the Robinsons had purchased the Audi, was incorporated in and had its principal place of business in New York, Mr. Greer named Seaway Volkswagen as one of the defendants in the case. He also named World-Wide Volkswagen, Inc., the distributor which supplied the Audi to Seaway Volkswagen, as another defendant. World-Wide Volkswagen was also a citizen of New York, since it was incorporated there. The other defendant originally named in the case was Volkswagen of America, Inc., which had imported the Audi from Germany and was a citizen of New Jersey.

Mr. Greer filed separate petitions on behalf of each of the Robinsons in the Bristow Division of the District Court of Creek County on October 18, 1977. The Presiding Judge was Charles S. Woodson. Each of the petitions alleged a single cause of action for products liability based on defects in the design and location of the Audi's gas tank.

On May 23, 1978, Mr. Greer filed amended petitions in which he added Volkswagenwerk Aktiengesellschaft (Volkswagen of Germany) as a defendant. At the time Mr. Greer understood that Volkswagen of Germany had manufactured the Audi. He later was informed through a conversation with defense counsel and in responses to his interrogatories that the manufacturer of the Audi was Audi NSU Auto Union Aktiengesellschaft (Audi NSU). Accordingly, on June 14, 1978, he obtained an order substituting Audi NSU for Volkswagen of Germany as the defendant manufacturer. The correct identity of the Audi's manufacturer would later become a crucial issue in the case.

Volkswagen of Germany, Volkswagen of America, and Audi NSU were affiliated companies, and all were represented in the United States by the prestigious Wall Street law firm of Herzfeld and Rubin. Rhodes, Hieronymus, Holloway and Wilson, a Tulsa law firm specializing in insurance defense, was retained as local counsel. Bert Jones, a senior partner at Rhodes, Hieronymous, took charge of the case in Tulsa. Separate counsel were needed for the other defendants, World-Wide and Seaway Volkswagen, and Mr. Jones recommended Tulsa lawyers Mike Barkley and Dan Rogers, respectively, to represent them.

Mike Barkley was twenty-nine years old at the time, and he had recently set up his own office. Before that, he had been an associate for several years at Rogers, Rogers and Jones, an insurance defense firm in which Dan Rogers was a named partner. Having been on his own for only a short while, Mike was thrilled to get the call from Mr. Jones concerning the case, and he was eager to defend his new client, World-Wide Volkswagen.

Volkswagen of America, World-Wide, and Seaway Volkswagen each filed special appearances to contest jurisdiction in Oklahoma and venue in Creek County, and after a hearing on December 21, 1977, Judge Woodson overruled their special appearances. Harry Robinson's deposition was taken on December 30, and the defendants learned that prior to the accident he and Kay Robinson had sold their

home and business in New York and had already purchased a new home in Arizona. On January 5, 1978, the defendants joined in a petition for removal to the United States District Court for the Northern District of Oklahoma, claiming that the Robinsons were no longer citizens of New York, and consequently, federal subject-matter jurisdiction existed based on diversity of citizenship.

Mr. Greer responded with a motion to remand in which he contended that although the Robinsons were in the process of changing their citizenship, they did not become citizens of Arizona until arriving there after their release from the hospital in Tulsa. He argued that when their petition was filed in Creek County, the Robinsons were still citizens of New York, like World-Wide Volkswagen and Seaway, and thus there could be no federal subject-matter jurisdiction based on diversity of citizenship.

[section on removal edited out]

III. The Battle Over Jurisdiction

Since removal had not been successful, World-Wide Volkswagen's only way to avoid trial in Creek County was by establishing that Oklahoma lacked personal jurisdiction over the company. On January 5, 1978, the same day the defendants had filed the petition for removal, World-Wide Volkswagen and Seaway Volkswagen had filed separate motions for Judge Woodson to reconsider his order overruling their special appearances. No action had been taken on the motions to reconsider while the case was in federal court, but once it was remanded to Creek County, Mike Barkley had the motions set for rehearing. . . .

In 1978, Oklahoma had two long-arm jurisdiction statutes that permitted its courts to exercise jurisdiction over nonresident defendants, sections 187 and 1701.03 of title 12 of the Oklahoma Statutes. Section 187 had been adopted in 1963 and was based on the Illinois long arm statute. Although section 187 authorized the assertion of personal jurisdiction over nonresidents with respect to causes of action arising from a variety of acts, none of these applied to World-Wide Volkswagen. Section 1701.03 had been adopted in 1965 as a part of the Uniform Interstate and International Procedure Act. It was somewhat broader than section 187 and authorized the exercise of personal jurisdiction over a nonresident defendant as to causes of action arising from either of the following:

> (3) causing tortious injury in this state by an act or omission in this state;
>
> (4) causing tortious injury in this state by an act or omission outside this state if the nonresident regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.

The Robinsons' injuries had occurred in Oklahoma, but the acts or omissions of World-Wide Volkswagen that were alleged to have caused the injuries would appear to have been in New York, rather than Oklahoma. Moreover, World-Wide Volkswagen's distribution franchise was limited to Connecticut, New York, and New Jersey, and it neither conducted business in Oklahoma nor derived any revenue from the state. Thus, there seemed to be a strong basis for arguing that World-Wide Volkswagen was not subject to personal jurisdiction under Oklahoma's long-arm statutes. On the other hand, only two years before, the Oklahoma Supreme Court had held that section 1701.03 authorized the assertion of jurisdiction over Volkswagen of America and a Volkswagen distributor in Texas in another products liability case.

[Attorney Claire] Eagan argued to Judge Woodson that Oklahoma did not have personal jurisdiction over her client under section 1701.03, because World-Wide Volkswagen did not sell any automobiles in Oklahoma. In addition, she maintained that construing section 1701.03 to extend personal jurisdiction over World-Wide Volkswagen would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Judge Woodson advised the inexperienced lawyer that the Fourteenth Amendment did not carry much weight in Creek County, and the motion to reconsider was denied.

Ms. Eagan was ready to abandon her effort, but Mike Barkley was convinced that Creek County had no jurisdiction over his client. He told her to prepare an application to assume original jurisdiction and a petition for a writ of prohibition and file it with the Oklahoma Supreme Court. Although Volkswagen of America and Audi NSU had also objected to jurisdiction at the trial court level, they did not join in World-Wide Volkswagen's petition to the Oklahoma Supreme Court. However, Seaway Volkswagen, the auto dealer, did join in the petition. Seaway Volkswagen's liability was based on its having sold a defective product that World-Wide Volkswagen had supplied, and therefore, it was entitled to indemnity from World-Wide Volkswagen. Moreover, as long as Seaway Volkswagen did not take a position that was adverse to World-Wide Volkswagen, it would be entitled to indemnification for its attorney's fees. Consequently, World-Wide Volkswagen assumed primary responsibility for defending the case against Seaway Volkswagen and itself, and Seaway Volkswagen took a passive role throughout the litigation, joining in all of World-Wide Volkswagen's actions.

The Oklahoma Supreme Court granted the application to assume original jurisdiction, but it denied the writ of prohibition. Mr. Greer maintained before the Oklahoma Supreme Court that jurisdiction existed under both paragraphs (3) and (4) of section 1701.03, citing the Illinois Supreme Court's holding in *Gray v. American Radiator & Standard Sanitary Corporation*. The Gray case involved an interpretation of the provision in the Illinois long-arm statute that authorized the assertion of jurisdiction arising from the "commission of a single tort within this State." Reasoning that a tort was not complete until a plaintiff sustained an injury, the Illinois Supreme Court decided that a defendant that had manufactured and sold a defective product in another state committed a tort in Illinois and was therefore subject to jurisdiction there, because the plaintiff's injury resulting from the defect was sustained in Illinois.

The Oklahoma Supreme Court ruled that a similar interpretation of paragraph (3) would render paragraph (4) nugatory, because it would make it impossible to have a tortious injury in the state caused by an act or omission outside the state. Nevertheless, it held that paragraph (4) conferred jurisdiction over World-Wide Volkswagen, because given the retail value of the Audi, World-Wide Volkswagen had derived substantial revenue from the Robinsons' use of the Audi in Oklahoma as well as from the sale of other automobiles that from time to time would foreseeably be used in Oklahoma. The Oklahoma Supreme Court explained its holding as follows:

> The product being sold and distributed by World-Wide and Seaway Volkswagen is by its very design and purpose so mobile that World-Wide and Seaway Volkswagen can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by World-Wide and Seaway Volkswagen were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that World-Wide and Seaway Volkswagen derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in concluding that World-Wide and Seaway Volkswagen derive substantial revenue from goods used or consumed in this State.

As soon as the Oklahoma Supreme Court's decision came down, Mr. Barkley told Ms. Eagan to pack her bags because they were going to New York. Mr. Barkley was still not ready to give up, and he wanted to obtain authorization from his client to petition the United States Supreme Court for certiorari.

When Mr. Barkley and Ms. Eagan met with World-Wide Volkswagen's corporate counsel and its insurer in New York, both refused to authorize them to incur any additional legal expenses contesting the jurisdictional issue. Their justification was that World-Wide Volkswagen was entitled to indemnification against Volkswagen of America and Audi NSU for the same reason that Seaway Volkswagen was entitled to be indemnified by World-Wide Volkswagen. Since World-Wide Volkswagen was not willing to pay to take the case to the United States Supreme Court, Ms. Eagan thought the battle over jurisdiction was finally at an end.

But Mr. Barkley took Ms. Eagan across the street to the offices of Herzfeld and Rubin, the law firm representing Volkswagen of America and Audi NSU. Mr. Barkley explained to the lawyers at Herzfeld and Rubin that if World-Wide and Seaway Volkswagen were dismissed for lack of personal jurisdiction, Volkswagen of America and Audi NSU could remove the case to federal court and avoid a trial before a "plaintiff's jury" in Creek County. He managed to convince them that it was in their clients' interests to underwrite the legal expenses of taking the case to the United States Supreme Court, particularly since their clients were already obligated to indemnify World-Wide and Seaway Volkswagen's legal expenses. As a result of Mike Barkley's meeting with Herzfeld and Rubin, Volkswagen of America and Audi NSU agreed to pay for World-Wide Volkswagen's petition for certiorari. In addition, Herzfeld and Rubin would participate in the preparation of the briefs, and a senior partner of Herzfeld and Rubin, Herbert Rubin, would argue World-Wide Volkswagen's cause before the Supreme Court instead of Mike Barkley. Had the "upstream" defendants not paid World-Wide Volkswagen's legal expenses, there would have been no *World-Wide Volkswagen Corp. v. Woodson* decision by the United States Supreme Court.

The work began on the petition for certiorari. The weakest link in the Oklahoma Supreme Court's opinion was its conclusion that World-Wide and Seaway Volkswagen derived substantial revenue from the use of automobiles in Oklahoma, since it was likely that no automobiles they had ever sold, aside from the Robinsons' Audi, had been used in Oklahoma. However, the Oklahoma Supreme Court is the final authority on matters of Oklahoma law, such as the meaning of the phrase "derives substantial revenue from goods used . . . in this state" in section 1701.03(4). The only issue the United States Supreme Court could address was whether Oklahoma's exercise of jurisdiction over World-Wide and Seaway Volkswagen violated their rights to due process of law under the Fourteenth Amendment to the United States Constitution.

The brief accompanying World-Wide and Seaway Volkswagen's petition for certiorari emphasized the Supreme Court's three most recent cases in which it had ruled in favor of defendants contesting personal jurisdiction. In *Hanson v. Denckla*, the Supreme Court first articulated the rule that for a defendant to be subject to a state court's jurisdiction, there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The Supreme Court again employed this "purposeful availment" requirement to strike down state courts' assertion of jurisdiction over nonresident defendants in *Shaffer v. Heitner* and *Kulko v. Superior Court*, and World-Wide and Seaway Volkswagen urged its application in their own case. They pointed out that the Robinsons were responsible for the Audi's entering Oklahoma, and argued that they should not be subject to jurisdiction in Oklahoma because of "a fortuitous event precipitated by the unilateral, voluntary act of the Robinsons in driving through that state." World-Wide and Seaway Volkswagen further argued the mere fact it may have been foreseeable that the Robinsons might drive to Oklahoma should not be enough to permit its courts to exercise jurisdiction over the companies; otherwise, any local seller would become subject to suit in every state where a purchaser might take a product. They contended that to provide a sufficient basis for jurisdiction, foreseeability had to be coupled with the "affiliating circumstances" that the seller purposefully availed itself of the benefits of the forum state.

Mr. Greer responded that World-Wide and Seaway Volkswagen were parts of a national network of Audi dealers, including one located in Tulsa on Route 66. Consequently, both World-Wide and Seaway Volkswagen could reasonably anticipate that purchasers of their automobiles would travel to Oklahoma and require servicing there. He also cited a number of cases upholding jurisdiction where torts committed in another state resulted in injuries in the forum state. The Robinsons' brief in opposition to the petition for certiorari concluded with an appeal to the Supreme Court that it not return to the restrictive jurisdictional doctrine of *Pennoyer v. Neff*, which the Supreme Court had rejected twenty years before.

The Supreme Court grants fewer than five percent of the thousands of petitions for certiorari that are filed with it each year. The chances of having one's case heard by the High Court are therefore ordinarily slim, but the likelihood that the Court would grant World-Wide Volkswagen's petition seemed

especially remote. Not only had the Supreme Court heard few cases involving personal jurisdiction over the preceding two decades, but it had denied numerous petitions for certiorari presenting issues similar to those raised by World-Wide Volkswagen.

One aspect of World-Wide Volkswagen's case, however, distinguished it from the others: it was the first petition for certiorari in a products liability case where the allegedly defective product had been brought into the forum state by a consumer, rather than by the manufacturer or a distributor. This would prove to be crucial to the Supreme Court's decision that Oklahoma lacked jurisdiction over World-Wide Volkswagen and Seaway. Another factor that may have influenced the Supreme Court was the coincidental filing of an appeal in *Rush v. Savchuk*, a case from Minnesota involving an issue of quasi in rem jurisdiction. The Supreme Court noted probable jurisdiction in *Rush v. Savchuk* on the same day that it granted World-Wide and Seaway Volkswagen's petition for certiorari, and ordered the two cases set for argument together.

World-Wide and Seaway Volkswagen's battle over jurisdiction ended with the Supreme Court's decision (*WWVW v. Woodson, infra*), which has become a staple of civil procedure courses and casebooks since 1980. But the battle over jurisdiction was only a preliminary skirmish in the many years of litigation that lay ahead for the parties who remained in the case.

Subsequent History

On remand, case went to trial. Jury rendered verdict for D. That was appealed & there was a second trial, but ultimately, after 20 years of litigation, Robinsons received nothing.

by
Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer

II. General Historical, Cultural, and Political Influences on Private Enforcement

For most of its history, by reason of the circumstances of its founding, the United States has depended far more on state and local laws and institutions than it has on federal laws and institutions for solutions to systemic problems unremedied by judge-made common law rules applied in actions between private parties. States have historically had primary or exclusive responsibility for the maintenance of order, the protection of public welfare, and the provision of government services. Moreover, although disagreements about the need for and permissible extent of national governmental institutions have existed since the founding, the federal Constitution reflects a preference for both limited government and decentralized government with regard to internal affairs.

There have been at least four periods in U.S. history when federal laws and institutions made notable encroachments on a landscape previously either free of legal regulation by statutory or administrative law or dominated by state institutions: (1) during and immediately after the Civil War in the 1860s, (2) during the Progressive Era that bridged the nineteenth and twentieth centuries, (3) during the Great Depression in the 1930s, and (4) during and following the Civil Rights and "Great Society" period in the 1960s. Despite enormous increases in federal regulation since the 1960s, the states of the United States continue to guard their prerogatives, even if inconsistently,[31] and it remains true that most law governing citizen-to-citizen relationships is state law and much of that is judge-made common law.

Cultural explanations, often emphasizing a litigious populace, an imperial judiciary, and an entrepreneurial bar, dominate discussions of the role of litigation in American society. Kagan is correct, however, that "adversarial legalism in the United States does not arise from a deep-rooted American propensity to bring lawsuits."[32] Notwithstanding a decades-long organized campaign by American business to demonize lawyers and litigation, there is robust empirical evidence supporting Kagan's observation that "[m]any, perhaps most, Americans are reluctant to sue . . . ."[33] Moreover, subsequent work in political science, discussed below, both confirms and extends his alternative explanation, namely that "American adversarial legalism arises from political traditions and legal arrangements that provide incentives to resort to adversarial legal weapons,"[34] making clear the centrality of purposefully designed private enforcement regimes to the increase of adversarial legalism. This work demonstrates that cultural explanations of private enforcement drastically oversimplify and that institutional considerations have been consequential.

In recently published work, Sean Farhang uses both statistical analysis of systematically collected data and qualitative empirical work focusing on federal civil rights legislation to show that the choice of private enforcement as opposed (or in addition) to administrative enforcement by the federal government tends to reflect concern in the dominant party in Congress about subversion of legislative preferences if enforcement were committed to an administrative agency under the control of an ideologically distant executive.[35] In a complex system of separated but interdependent governmental powers, it is as difficult to repeal as to enact legislation. Where, therefore, the status quo is "sticky," the choice of private over administrative enforcement may off-

protection to congressional policy long after the governing majority has been replaced by legislators with different preferences. Moreover, because private enforcement regimes create incentives for lawyers and litigants—again, "judicial enforcement" is a misnomer—they also provide some protection against subversion by an ideologically distant judiciary (in a system in which judges are politically appointed). Thus, as Farhang predicted, federal statutory private enforcement regimes are associated with periods of divided government, and the great majority of them endure through periods of control by the party that was in the minority when they were enacted.[56]

Although cultural explanations of adversarial legalism oversimplify, there is certainly a historic willingness of Americans, self-reliant and insistent on their rights, to take their grievances to court. Until the Progressive Era, however, there was virtually no federal statutory or administrative law available to solve unremedied systemic problems through private enforcement, and although the New Deal added to that store considerably, a variety of legal barriers hindered access to court. As we discuss below, the Federal Rules of Civil Procedure eliminated or lowered a number of those barriers. Litigation of consequence requires lawyers and thus financing, however, and those who can afford to litigate may not be the people most intent on righting the wrongs of society.

The vast increase in private enforcement actions under federal law that started in the late 1960s reflected in large part the congruence of three developments: (1) the enactment of many new federal statutes specifically authorizing (or interpreted to authorize) private rights of action, (2) the proliferation of means to finance private enforcement litigation, including Legal Services programs funded by the government, the growth of privately funded nonprofit advocacy organizations subvened through favorable tax treatment, particularly in the civil rights and environmental fields,[57] damages provisions sufficient to attract lawyers relying on contingency fee agreements, statutory attorneys' fee-shifting provisions favorable to prevailing plaintiffs, and the modern class action (which, as we discuss below, dramatically enlarged the scope for contingent financing), and (3) changes in the legal profession, attracted by these new opportunities to do well, sometimes by doing good, and freed of some of the most seriously anti-competitive aspects of self-regulation (i.e., a ban on advertising).[58] Much of the impetus for these developments came from the political dominance of the Democratic Party during the 1960s.

A great deal has changed since these developments promoted private enforcement in the United States. In a recent article about the demand for and supply of legal services, Gillian Hadfield observes that,

> the vast majority of the legal problems faced by (particularly poor) Americans fall outside of the "rule of law," with high proportions of people—many more than in the U.K., for example—simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics, and other dynamics in our complex society.[59]

To the extent that Hadfield's findings apply to private enforcement, it may be important to consider how, notwithstanding the "stickiness of the status quo," those with the power to determine the efficacy of private enforcement regimes in action may subvert the policy preferences of the enacting Congress. As we shall discuss, two related means are underfunding of the courts and judicial actions, often under cover of resource constraints, that compromise steps previously taken to afford effective access to court.

B. Procedure

The 1938 Federal Rules of Civil Procedure provided a system that could attract a great deal of private litigation, including litigation enforcing statutory and administrative law. In the years following 1938, a number of Supreme Court decisions, including *Hickman v. Taylor*[72] and *Conley v. Gibson*,[73] embraced the concepts of notice pleading and broad discovery. Eventually, however, notice pleading, broad discovery (unleashed further by amendments to the Federal Rules in 1970), and a restrictive view of summary judgment assumed a different complexion in light of statutory incentives to litigate (e.g., a host of new federal statutes with pro-plaintiff fee-shifting provisions), the modern class action, and a bar responsive to such incentives and assisted by decisions striking down anti-competitive regulations like the traditional ban on advertising.[74]

As the volume of federal litigation increased, and as the federal judiciary became more conservative,[75] the rulemakers responded by turning to one approach after another—from managerial judging, to sanctions, to summary judgment.[76] Although different in many respects, these approaches share the quest for greater definition of claims and defenses and the ability it affords courts to make rational judgments as to

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Issues, Knowns, and Unknowns 1 (RAND, Occasional Paper, 2010), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf; *see also* Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–76 (2011). From the perspective of access to court for private enforcement, insurance is not an important consideration for plaintiffs because of the combination of contingency fees and the American Rule; liability insurance that covers both indemnity and legal expenses is obviously important for defendants. Moreover, it is our impression that the incidence and coverage of pre-paid legal service plans is not consequential for these purposes. The same is true (at least for the present) of ALF. ALF has only recently made an appearance on the U.S. legal scene; it confronts significant barriers erected by the self-regulating legal profession. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 979–82 (2000); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011). In addition, to the extent that ALF is focused on investing in cases with the potential for substantial recoveries, it seeks entry into a market in which both the contingency fee and class actions are well-established. That may help to explain why a recent study found three segments of ALF business, two of which involved loans, one to (usually) personal-injury plaintiffs and one to plaintiffs' law firms, and one of which involved investment in commercial (inter-corporate) lawsuits. In their loan activities, ALF providers can be viewed as substituting for banks in a time of tight credit, charging (high) interest rather than taking a percentage of any recovery. *See* Garber, *supra*.

[72] 329 U.S. 495 (1947).

[73] 355 U.S. 41 (1957).

[74] *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 620 (2004).

[75] *See id.* at 625.

[76] *Id.* at 624.

whether a case should be permitted to proceed.[77] As discussed above, however, they make more difficult efforts to determine whether existing resources were inadequate to accommodate increasing caseloads. Assessing the cost of modern federal litigation as a basis for procedural reform is no easier, at least when the supposed cause of disproportionate cost is discovery.

Increasingly over the last 30 years, probably the greatest source of complaint voiced by critics of litigation has been the cost of federal civil litigation, with the primary culprit said to be the cost of discovery, particularly document discovery (most is born by the party from whom discovery is sought and cannot be shifted ex post from the winner to the loser). At the same time, however, thoughtful scholars and judges have pointed out the potential costs of cutting back on discovery.[78]

The rulemakers have responded to complaints about discovery with round after round of amendments designed to streamline the discovery process.[79] Most recently, they fashioned amendments to address a phenomenon that even skeptical empiricists understand may have changed the landscape and the conclusions about costs and benefits that one should draw from it: discovery of electronic documents, or e-discovery. Yet, we do not know what the impact of e-discovery has been, because anecdotes about discovery continue to dominate methodologically sound

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[77] *See id.*; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930–31 (1989).

[78] "We should keep clearly in mind that discovery is the American alternative to the administrative state. . . . Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct." Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997). Judge Patrick Higginbotham, former Chair of the Advisory Committee on Civil Rules, also emphasized the relationship of discovery to the ability to enforce congressional statutes: "Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress." Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).

[79] They introduced (but then restricted the ambit of) required disclosures (i.e., without waiting for a discovery demand), *see* FED. R. CIV. P. 26(a) (as amended in 1993 and 2000), presumptive limits on the number of interrogatories, *see* FED. R. CIV. P. 33(a) (as amended in 1993), and depositions, *see* FED. R. CIV. P. 30(a)(2) (as amended in 1993) and the length of depositions, *see* FED. R. CIV. P. 30(d)(2) (as amended in 2000), and even purported to reduce the universe of discoverable material (in the absence of a court order) from that which is relevant to the subject matter of the action to that which is relevant to a claim or defense. *See* FED. R. CIV. P. 26(b)(1) (as amended in 2000).

research—a phenomenon characteristic of discourse about all of American civil litigation.[80]

When evaluating criticisms of American litigation, it is important to understand that, as Robert Gordon recently put it, "[c]areful studies demonstrate that the 'litigation explosion' and 'liability crisis' are largely myths and that most lawyers' efforts go into representing businesses, not individuals; unfortunately, those studies have had no restraining effect on this epidemic of lawyers' open expression of disdain for law."[81] With respect to discovery in particular, empirical research conducted over 40 years has not demonstrated that it is a problem—disproportionately expensive—in more than a small slice of litigation.[82] Instead, study after study has found that discovery is a problem in precisely the types of cases that one would expect—high stakes, complex cases.[83] An October 2009 Federal Judicial Center survey of attorneys in recently closed federal civil cases again failed to support the story of ubiquitous abuse or skyrocketing cost.[84]

Notwithstanding the failure of empirical study to verify the oft-told tale of pervasive discovery abuse and pervasively crushing discovery expense, the Supreme Court invoked both, together with the supposed inability of federal judges to manage discovery, as reasons to change federal procedural law—but not the aspects of that law that govern discovery. Rather, in order that defendants in massive antitrust class actions might be spared putatively impositional discovery,[85] the Supreme Court made it more difficult for the plaintiffs in such cases to survive a motion to dismiss. They did so chiefly by resuscitating the distinctions between "facts" and "conclusions" that the drafters of the Federal Rules had rejected and by transforming the motion to dismiss for failure to state a claim upon which relief can be granted from a vehicle for testing the plaintiff's legal theory into a means to weed out complaints that, shorn of conclusions, do not set forth sufficient facts to make the plaintiff's claim plausible.[86] Thereafter, in another case where the Court

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[80] For a refreshing exception, see EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009).

[81] Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009).

[82] *See, e.g.*, Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1440–42 (1994).

[83] *See, e.g.*, *id.* at 1437.

[84] *See* LEE & WILLGING, *supra* note 80, at 40 (finding that median estimates of discovery costs related to total litigation costs were lower than the median responses to the question of what the proper ratio was between the costs of discovery and litigation costs).

[85] *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 646 (1989).

[86] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); Burbank, *supra* note 18, at 113.

was concerned about the costs of discovery—but there, the costs of diverting the time and attention of high government officials—the Court made clear what should have been obvious, namely that the new pleading regime applies to all federal civil cases.[87]

Notice pleading and broad discovery were created under the auspices of the Supreme Court acting pursuant to congressional delegation. Once firmly entrenched, they became part of the background against which Congress legislated, part of the foundation of congressional private enforcement regimes. They also became part of the status quo and thus were highly resistant to change through the lawmaking process that brought them forth—the Enabling Act[88] process. From this perspective, desiring to effect change, the Court was equally hobbled by the inertial power of the status quo and the limitations created by foundational assumptions and operating principles associated with the Enabling Act process. The Court effectively amended the Federal Rules on pleading through judicial decision because the Justices knew that, even if amendments through the prescribed process could survive congressional review, they would embroil the process and the Court in political controversy.

It is no surprise that the anecdotes one hears from the defenders of the Court's recent pleading decisions have to do only with the costs of litigation, not its benefits, or that there is no mention of the money that would be required to replace private litigation as a means of securing compensation and enforcing important social norms. Imagine the reaction of the Chamber of Commerce if the proposal were to give the Equal Employment Opportunity Commission adequate resources, raised through increased taxes, to enforce federal anti-discrimination law.

It is widely understood that private litigation plays an unusually large role in policy implementation in the U.S. as compared to a large majority of industrial democratic countries with predominantly parliamentary systems.[345] This disparity appears significant in relation to the institutional differences between separation-of-powers and parliamentary systems that we have been considering. The discussion here suggests the possibility that these institutional differences are at the root of the twin phenomena of a greater role for private litigation in American policy implementation (noted by Kagan), and a more limited and constrained American administrative state (noted by Wilson), as contrasted with the norm in democratic parliamentary systems. Focusing partly on separation-of-powers structures as an explanation for American "adversarial legalism," Kagan writes, "It is only a slight oversimplification to say that in the United States lawyers, legal rights, judges, and lawsuits are the functional equivalent of the large central bureaucracies that dominate governance in high-tax, activist welfare states."[346]

Interestingly, similar institutional arguments have been marshaled to explain growing private enforcement (based on the American model, it is often argued) in the European Union over the past several decades. Over about the last decade there has been mounting scholarship demonstrating growing reliance in the EU on regulation though the creation of rights that are privately enforceable in both judicial and administrative fora.[347] This body of work yields the following set of insights about the growth of private enforcement in the EU:

- It has been encouraged by decisions of the European Commission, the European Parliament, and the European Court of Justice.

- It has spanned the waterfront of policy areas, embracing the regulatory domains of environmental, anti-trust, securities, intellectual property, anti-discrimination, and consumer protection policy, among others.
- It has encouraged reliance upon procedural devices to aggregate claims and upon economic damages to incentivize private enforcement.
- It has involved expansion of private enforcement in adjudicatory venues at the institutional levels of both the EU and its member states.

Although there has been much talk of the "Americanization" of European law—with private enforcement being a characteristic frequently attributed to the American style of legal regulation—no one is arguing that the EU has converged with the U.S. in the degree of its reliance upon private enforcement, but only that the degree has increased materially in recent decades.

There is disagreement about what has caused this development, and in our discussion of the relationship between political institutions and private enforcement, we highlight an explanation grounded in political institutions that has been proffered by a number of scholars.[348] Putting aside other rival or supplementary hypotheses,[349] we synthesize the political institutions explanation as follows: Beginning in the mid-1980s, economic liberalization in the EU and the push for an integrated market had the gradual effect of displacing regulatory policymaking from member states to the governing institutions of the EU. The EU governing structure is highly fragmented, both vertically (between the EU and member states), and horizontally (between the EU Council, Parliament, Commission, and Court of Justice). Such fragmentation hampers the ability of those who make regulatory policy to effectuate decisive enforcement action, with EU influence upon the distant and heterogeneous bureaucracies of member states presenting a particular challenge. The EU government does not have an enforcement bureaucracy that penetrates the local level, and distrust of remote "Eurocrats" limits the likelihood that it will develop a strong one in the near future.

This institutional fragmentation, and the impediments that it creates for effective control by policymakers of an enforcement bureaucracy, may help to explain growing EU reliance on the alternative of private enforcement. The development of EU governing structures in Western Europe has introduced forms of state fragmentation, and public distrust of a far-off central government, that are familiar in the U.S. One outcome appears to have been growing reliance on American-style private enforcement, though surely in muted form.

[348] *See* Kagan, *supra* note 347, at 110; Kelemen, *supra* note 347, at 102; Kelemen & Sibbitt, *supra* note 347, at 106.

[349] For a discussion of other explanations, see Kelemen & Sibbitt, *supra* note 347.

HOW EQUITY CONQUERED COMMON LAW: THE FEDERAL RULES OF CIVIL PROCEDURE IN HISTORICAL PERSPECTIVE

STEPHEN N. SUBRIN†

I. COMMON LAW, EQUITY, AND THE FEDERAL RULES OF CIVIL PROCEDURE

Much of the formal litigation in England historically took place in a two-court system: "common law" or "law" courts, and "Chancery" or "equity" courts.[23] Although they were complementary, law and equity courts each had a distinct procedural system, jurisprudence, and outlook. The development of contemporary American civil procedure cannot be understood without acknowledging these differences. The more formalized common law procedure has been so ridiculed that we tend to ignore its development to meet important needs, some of which still endure, and that many of its underlying purposes still make sense. Conversely, especially during this century, equity has been touted in ways that obscure the underlying drawbacks to its use as the procedural model.

A. *Common Law Procedure*

The law courts had three identifying characteristics: the writ or formulary system, the jury, and single issue pleading.[24] Each matured in England between the thirteenth and sixteenth centuries and later influenced legal development in America. Each represented a means of confining and focusing disputes, rationalizing and organizing law, and of applying rules in an orderly, consistent, and predictable manner.

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[23] A rich variety of other courts also existed. *See* 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1047-89 (W. Lewis ed. 1898).

[24] *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 26-46 (1969). The three Central law courts were King's Bench, Exchequer, and Common Pleas. For a description of the courts, see *id.* at 20-22; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).

Subjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king's secretary, adviser, and agent. The Chancellor's staff, the Chancery, sold writs, "royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant."[25] Clerks organized complaints into categories, and particular writs came to be used for particular types of oft-repeated complaints.[26] Over time, "plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to."[27]

The writs gradually began to carry with them notions of what events would permit what result or remedy. Ultimately, an organized body of what is now commonly called substantive law evolved from the writs.[28] Distinct procedural characteristics developed for different writs. Each writ implied a wide range of procedural, remedial, and evidentiary incidents, such as subject matter and personal jurisdiction, burden of proof, and methods of execution.[29] The writ of novel disseisin, for instance, was designed to provide for the rapid ejection of one who was wrongfully on the plaintiff's land. It was accompanied by more expeditious procedures than the writ of right, which decided the ultimate issue of ownership.[30] The writ system also confined adjudication. The

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[25] S. MILSOM, *supra* note 24, at 22.

[26] *See* T. PLUCKNETT, *supra* note 24, at 353-54.

[27] S. MILSOM, *supra* note 24, at 25.

[28] *See* H. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1886) ("So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . . .").

[29] *See* F. MAITLAND, EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW, TWO COURSES OF LECTURES 296-98 (A. Chaytor & W. Whittaker eds. 1920).

[30] *See id.* at 318-23. "Seisin" has a meaning similar to, but different from, possession. Feudalism renders dysfunctional our concepts of "possession," "right," or "title." *See* S. MILSOM, *supra* note 24, at 103-05. Other examples of the common law attempt to integrate substantive rights and methods for their enforcement can be seen in the writs of covenant and replevin. In covenant, the requirement of a seal for proof probably improved the likelihood that only honest claims were pursued. *See id.* at 213. In replevin, the distrainee (the plaintiff who says that his goods were wrongfully taken) is entitled to immediate possession of the goods upon giving a "bond for the value of the chattels, conditioned on his loss of the suit and failure to return the chattels to the defendant." S. COHN, THE COMMON-LAW FOUNDATION OF CIVIL PROCEDURE 19 (1971); *see* F. MAITLAND, *supra* note 29, at 355. This, too, should discourage frivolous suits, as well as self-help. For contemporary suggestions to integrate different areas of substantive law with different procedures, see Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma,* 47 S. CAL. L. REV. 842, 900 (1974); Sander, *Varieties of Dispute Processing,* in THE POUND CONFERENCE, *supra* note 6, at 65.

obligation to choose only one writ at a time limited the scope of law suits, as did rules severely restricting the joinder of plaintiffs and defendants.[31]

Like the evolution of the writ, the development of the jury trial represented movement toward confinement, focus, rationality, and a legal system of defined rules to regulate human conduct. Before the development of the jury, parties at common law were tested before God through ordeal, battle, or the swearing of "compurgators."[32] With the inception of juries, disputants began telling their respective stories to their peers, who determined which version was correct. Because human beings (rather than God) were to hear and decide the case, an individual might have found it favorable to present facts that might have changed the minds of the now-human dispute resolvers. Once the idea emerged that a special set of circumstances could necessitate a different verdict, the seed of substantive law had been planted: specific facts would trigger specific legal consequences. The jury concept brought with it, therefore, the idea of consistent and predictable law application by human beings, rather than divine justice by mysterious means. It now became logical for a trial to focus on proof relevant to those specific facts at issue that carry with them a legal consequence.[33]

Common law also evolved as a technical pleading system designed to resolve a single issue. When it became apparent that specific facts should bring about specific legal results, it made sense to determine whether the plaintiff's story, if true, would permit recovery and, if so, what facts were in dispute. Assuming the defendant did not contest that he was properly brought before the correct court, but still disputed the case, the common law procedure permitted first a demurrer, and then confession and avoidance, or traverse.[34] Under single issue pleading, the parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue.[35]

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[31] *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 462 (3d ed. 1985) [hereinafter F. JAMES & G. HAZARD (3d)]; F. MAITLAND, *supra* note 29, at 298-99.

[32] *See* H. LEA, SUPERSTITION AND FORCE 252, 279 (3d ed. 1878); T. PLUCKNETT, *supra* note 24, at 114-18; C. REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 186-87 (1980).

[33] *See* S. MILSOM, *supra* note 24, at 30-32; T. PLUCKNETT, *supra* note 24, at 124-30.

[34] *See* S. COHN, *supra* note 30, at 47; T. PLUCKNETT, *supra* note 24, at 409-10, 413-14.

[35] *See* 1 J. CHITTY, TREATISE ON PLEADING 261-63 (1879); S. COHN, *supra* note 30, at 46-48; T. PLUCKNETT, *supra* note 24, at 405-15; C. REMBAR, *supra* note 32, at 224-28. *See generally* H. STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS: COMPRISING A SUMMARY VIEW OF THE WHOLE PROCEEDINGS IN A SUIT AT LAW (1824) (discussing the "science" of pleading under the common law system).

Lawyers well into the nineteenth century on both sides of the Atlantic viewed the "common law" procedural system as comprising the writ or form of action, the jury, and the technical pleading requirements that attempted to reduce cases to a single issue. This system became rigid and rarefied.[36] Due to the countless pleading rules, a party could easily lose on technical grounds.[37] Lawyers had to analogize to known writs and use "fictions" because of the rigidity of some forms of action.[38] Lawyers also found other ways around the common law rigidities, such as asserting the common count and general denials, which made a mockery of the common law's attempt to define, classify, and clarify.[39]

The common law procedural system, nonetheless, had its virtues. The formality and confining nature of the writs and pleading rules permitted judges, who were centralized in London, to attempt (and often to succeed) in forging a consistent, rational body of law, which provided lawyers with analytical cubbyholes.[40] The common law system, furthermore, permitted increased participation by the lay community. If the pleading resulted in the need for a factual determination, it could be sent to the county where the parties resided. A judge from the Central Court could easily carry the papers, reduced to a single issue, in his satchel, and convene a jury at an "assize."

The focusing of cases to a single issue also aided both judges and lawyers in their effort to understand and apply the law, as well as assisting lay jurors in resolving factual disputes. The use of known writs, each with their own process, substance, and remedy, allowed the integration of the ends sought and means used. The system presumably achieved—or at least tried to achieve—some degree of predictability about what legal consequences citizens could expect to flow from their conduct. Comparing the traditional common law system to that of his own day, Maitland (1850-1906) commented on the common law's attempt to control discretion: "Now-a-days all is regulated by general

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[36] *See* T. PLUCKNETT, *supra* note 24, at 410.

[37] *See* J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 331; C. REMBAR, *supra* note 32, at 225-31. On the number and subtlety of writs, see 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 564-67 (2d ed., reissued 1968).

[38] *See, e.g.*, C. REMBAR, *supra* note 32, at 224.

[39] *See* J. COUND, J. FRIEDENTHAL & A. MILLER, *supra* note 5, at 338-39; F. MAITLAND, *supra* note 29, at 300-01; S. MILSOM, *supra* note 24, at 247-52; C. REMBAR, *supra* note 32, at 207-12; Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 520-21 (1907).

[40] For an example of the relationship of writs and common law pleading to the development of the legal profession, see S. MILSOM, *supra* note 24, at 28-42; T. PLUCKNETT, *supra* note 24, at 216-17.

rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules."[41]

B. *Equity Procedure*

By the early sixteenth century it was apparent that the common law system was accompanied by a substantially different one called equity. Equity was administered by the Chancellor, as distinguished from the three central common law courts with their common law judges.[42] The contemporary English historian, Milsom, explains that one cannot find the precise beginning of the Equity Court, for, in a sense, it had been there all along.[43] As previously noted, although the writs had started as individualized commands from the Chancellor, by the fourteenth century several of the writs had become routinized.[44] Grievants, however, continued to petition the Chancellor for assistance in unusual circumstances, such as where the petitioner was aged or ill, or his adversary particularly influential.[45] Whereas the writ and single issue common law system forced disputes into narrow cubbyholes, these petitions to the Chancellor tended to tell more of the story behind a dispute. Bills in equity were written to persuade the Chancellor to relieve the petitioner from an alleged injustice that would result from rigorous application of the common law.[46] The bill in equity became the procedural vehicle for the exceptional case. The main staples of Chancery jurisdiction became the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships.[47]

The Equity Court became known as the Court of Conscience. Like ecclesiastical courts, it operated directly on the defendant's con-

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[41] F. MAITLAND, *supra* note 29, at 298.

[42] Around 1523, Christopher St. Germain explored the relationship of equity to the common law system in *Dialogues Between a Doctor of Divinity and a Student of the Common Law*. For a discussion of this work and its impact, see S. MILSOM, *supra* note 24, at 79-83; T. PLUCKNETT, *supra* note 24, at 279-80.

[43] *See* S. MILSOM, *supra* note 24, at 74-87.

[44] *See supra* notes 25-27 and accompanying text.

[45] *See* F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-75, 77.

[46] *See* F. MAITLAND, *supra* note 29, at 4-5; S. MILSOM, *supra* note 24, at 74-79; T. PLUCKNETT, *supra* note 24, at 688-89.

[47] *See* F. MAITLAND, *supra* note 29, at 7-8. Maitland illustrates equity jurisdiction with "an old rhyme": " 'These three give place in court of conscience/Fraud, accident, and breach of confidence.' " *Id.* at 7. The idea that more formal legal rules should be accompanied by a more discretionary approach in order to prevent injustice was not new. On the Jewish notion of justice and mercy, see 10 ENCYCLOPEADIA JUDAICA 476, 476-77 (1977). On the Greek notion of *epieikeia*, connoting "clemency, leniency, indulgence, or forgiveness," see G. MCDOWELL, *supra* note 9, at 15.

science.[48] This had far-reaching repercussions. In a common law suit, the self-interest of the parties was thought too great to permit them to testify.[49] The Chancellor, however, compelled the defendant personally to come before him to answer under oath each sentence of the petitioner's bill. There were also questions attached. This was a precursor to modern pretrial discovery.[50] Equity did not take testimony in open court, but relied on documents, such as the defendant's answers to questions.[51]

As the defendant was before the Chancellor to have his conscience searched, the Chancellor could order him personally to perform or not perform a specific act.[52] Such authority was necessary to enforce a trust. If the defendant was found to be holding land in trust for another, he could be compelled to give the use and profit of the property to the beneficiary.[53] The ability to fashion specific relief, both to undo past wrongs and to regulate future conduct, also distinguished equity from the law courts, which in most instances awarded only money damages.[54]

The Chancellors were usually bishops, and so the term "conscience" again became associated with equity.[55] Notwithstanding the writs and the common law that developed around the writs, the Chancellor was expected to consider all of the circumstances and interests of all affected parties. He consequently was also to consider the larger moral issues and questions of fairness.[56] The equity system did not revolve around the search for a single issue. Multiple parties could, and often had to, be joined.[57] There was now a considerably larger litiga-

[48] *See* 5 W. HOLDSWORTH, A HISTORY OF THE COMMON LAW 216 (2nd ed. 1937); S. MILSOM, *supra* note 24, at 81-82.

[49] *See* T. PLUCKNETT, *supra* note 24, at 689.

[50] *See* F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE 171-72 (2d ed. 1977) [hereinafter F. JAMES & G. HAZARD (2d)].

[51] *See id.;* C. REMBAR, *supra* note 32, at 298; Bowen, *supra* note 39, at 524-25.

[52] *See* S. MILSOM, *supra* note 24, at 81-82; T. PLUCKNETT, *supra* note 24, at 689. It is appropriate to use "he" for defendants because during this period women were usually treated as incompetent to be parties to a suit. *See* F. JAMES & G. HAZARD (2d), *supra* note 50, at 415.

[53] *See* C. REMBAR, *supra* note 32, at 296.

[54] *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22 (1973); F. MAITLAND, *supra* note 29, at 254-67; S. MILSOM, *supra* note 24, at 81-82; Bowen, *supra* note 39, at 517-18.

[55] *See* T. PLUCKNETT, *supra* note 24, at 685-86, who wrote: "[T]he ecclesiastical chancellors were certainly not common lawyers, and it must have been a perfectly natural instinct, then as now, for a bishop when faced by a conflict between law and morals, to decide upon lines of morality rather than technical law."

[56] *See* S. MILSOM, *supra* note 24, at 79-81. Sixteenth century theorists recognized "the appeal to the chancellor [as being] for the single [divine] justice, in circumstances in which the human [common law] machinery was going to fail." *Id.* at 80.

[57] *See* Bowen, *supra* note 39, at 516, 523-31 ("[I]t was a necessary maxim of the

tion package. This less individualized justice demanded and resulted in more discretionary power lodged in a single Chancellor, who resolved—often in a most leisurely manner—issues both of law and fact.[58] The lay jury was normally excluded.[59]

By the sixteenth century, the development of common law jurisprudence thus reflected a very different legal consciousness from equity. Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized. Just as the common law procedural rules and the growth of common law rights were related, so too were the wide-open equity procedures related to the scope of the Chancellor's discretion and his ability to create new legal principles. In equity, the Chancellor was required to look at more parties, issues, documents, and potential remedies, but he was less bound by precedent and was permitted to determine both questions of facts and law.[60] The equity approach distinctly differed from the writ-dominated system. Judges were given more power by being released from confinement to a single writ, a single form of action, and a single issue, nor by being as bound by precedent; and they did not share power with lay juries.[61]

In assessing the place of equity practice in the overall legal system, it is critical to realize the extent to which the common law system operated as a brake. One could not turn to equity if there was an adequate remedy at law.[62] Equity grew interstitially, to fill in the gaps of substantive common law (such as the absence of law relating to trusts) and to provide a broader array of remedies—specific performance, injunctions, and accountings. Equity thus provided a "gloss" or "appendix" to the more structured common law.[63] An expansive equity practice developed as a necessary companion to common law.[64]

Court of Chancery that all parties interested in the result must be parties to the suit.").

[58] *See* S. MILSOM, *supra* note 24, at 82-83 ("It is a regular institution, but not applying rules; rather it is using its discretion to disturb their effect.").

The length of equitable proceedings was notorious. This aspect of equitable proceedings has been attributed to the court's desire to effect complete rather than merely substantial justice, as well as the self-interest of Chancery officials who profited from lengthy suits. *See* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 373-74 (3rd ed. 1944).

[59] *See* S. COHN, *supra* note 30, at 1.

[60] *See* C. REMBAR, *supra* note 32, at 275.

[61] For summaries of the different approaches of law and equity, see L. FRIEDMAN, *supra* note 54, at 21-23; F. JAMES & G. HAZARD (3rd), *supra* note 31, at 11-14; S. MILSOM, *supra* note 24, at 74-83.

[62] *See* R. HUGHES, HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS 418-20 (2d ed. 1913).

[63] *See* F. MAITLAND, *supra* note 29, at 18-19.

[64] On occasion, a new equity rule would become part of the law applied in the common law courts. *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 16; T.

The disparities between law and equity were not always stark. Not all common law declarations were incisive, and common law pleading did not always isolate tidy issues; sometimes there was joinder of parties or issues. Conversely, equity often developed its own formal rules of both substance and process.[65] It is true, however, that when looked at as a whole, the common law writ/single issue system took seriously the importance of defining the case; integrating forms of action with procedure and remedy; confining the size of disputes; and articulating the legal and factual issues. In short, a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences.

This Article will explore flaws in equity and law when we examine the evolution of procedure in America. It is important to note here, however, that from the beginning, equity's expansiveness led to larger cases—and, consequently, more parties, issues, and documents, more costs, and longer delays—than were customary with common law practice.[66] This is not to minimize the problems associated with common law practice, or the need for a more flexible counterpart to the common law. The point is that a less structured multiparty, multi-issue practice has always had significant burdens.[67]

PLUCKNETT, *supra* note 24, at 689.

[65] For examples of permissible joinder of parties and forms of action at common law, see F. JAMES & G. HAZARD (2d), *supra* note 50, at 452-54, 463-64. Much of the writing of the legal realists emphasized the discretion inherent in all judging and dispute resolution. *See, e.g.*, the Chapters on "Rule-Skepticism," "Fact-Skepticism," and "The Prediction of Decisions" in W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM AND THE JUDICIAL PROCESS 48-182 (1968) (examining the realist movement's revolt against classical jurisprudence). *See infra* note 131 (on how equity practice became complicated).

[66] *See, e.g.*, 1 W. HOLDSWORTH, *supra* note 58, at 425-28; C. REMBAR, *supra* note 32, at 298-303; R. WALKER AND M. WALKER, THE ENGLISH LEGAL SYSTEM 31 (3rd ed. 1972); Bowen, *supra* note 39, at 524-27. One commentator has noted that some of the problem in equity

> no doubt, was due to a defect which equity never cured—the theory that Chancery was a one-man court, which soon came to mean that a single Chancellor was unable to keep up with the business of the court. Not until 1913 do we find the appointment of a Vice-Chancellor.

T. PLUCKNETT, *supra* note 24, at 689 (footnote omitted). For complaints about equity in America, see *infra* notes 90-106 and accompanying text.

[67] Equity also became associated with monarchy and nondemocratic principles, because of its inherent discretion, rejection of the lay jury, and clashes with Parliament and the law courts. *See* F. JAMES & G. HAZARD (3d), *supra* note 31, at 14-16. *See generally* Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. 127 (1941) (exploring the power struggle between the courts of common law and equity in the 17th century).

C. *The Equity-Dominated Federal Rules of Civil Procedure*

In the twentieth century, Federal Rules proponents emphasized that they were not suggesting new procedures. They rather insisted that they were just combining the best and most enlightened rules adopted elsewhere.[68] For the most part the proponents were right, but their argument ignores the implications of their choices regarding what the "best" rules were. The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.[69] The expansive and flexible aspects of equity are all implicit in the Federal Rules. Before the Rules, equity procedure and jurisprudence historically had applied to only a small percentage of the totality of litigation.[70] Thus the drafters made an enormous change: in effect the tail of historic adjudication was now wagging the dog. Moreover, the Federal Rules went beyond equity's flexibility and permissiveness in pleading, joinder, and discovery.[71]

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[68] *See, e.g.*, AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE (E. Hammond ed. 1939) (proceedings of the Institute on the Federal Rules of Civil Procedure and the Symposium on the Federal Rules of Civil Procedure). For a description of the sources of various rules, *see Hearings on the Rules of Civil Procedure for the District Courts of the United States: Hearings Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 4 (1938) [hereinafter *1938 House Hearings*] (statement of Homer Cummings, U.S. Attorney General); AMERICAN BAR ASSOCIATION, *supra*, at 28, 32 (statement of Edgar B. Tolman, member of the drafting committees); *id.* at 45, 51, 54-55, 57, 59, 66 (statement of Charles E. Clark, Dean of Yale Law School).

[69] *See 1938 House Hearings*, *supra* note 68, at 73 (statement of Edgar B. Tolman); P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 19, 20 (2d ed. 1977); 4 C. WRIGHT & A. MILLER, *supra* note 1, § 1008; Clark & Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 434-35 (1935) [hereinafter Clark & Moore I]; Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1058 (1955).

[70] *See* Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-38 (1982).

[71] *Compare* Rule 25 (Bill of Complaint—Contents) of the Federal Equity Rules of 1912 in J. HOPKINS, THE NEW FEDERAL EQUITY RULES (1913) [hereinafter FED. EQ. R.] (requiring, inter alia, "ultimate facts") *with* FED. R. CIV. P. 8(a)(2) (General Rules of Pleading: Claims for Relief); *compare* FED. EQ. R. 26 (Joinder of Causes of Action) (requiring that joined causes of action be "cognizable in equity," and that "when there is more than one plaintiff, the causes of action joined must be joint . . . .") *with* FED. R. CIV. P. 18(a) (Joinder of Claims and Remedies: Joinder of Claims) and 20(a) (Permissive Joinder of Parties: Permissive Joinder); *compare* FED. EQ. R. 47 (Depositions—To Be Taken in Exceptional Instances) (permitting oral depositions only "upon application of either party, when allowed by statute, or for good and exceptional cause . . . .") *with* FED. R. CIV. P. 30(a) (Depositions Upon Oral Examination: When Depositions May be Taken); and *compare* FED. EQ. R. 58 (Discovery--Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (limiting interrogatories to "facts and documents material to the support or defense of the cause") *with* FED. R. CIV. P. 26(b)(1) (General Provisions Governing Discovery: Discovery Scope and Limits in General).

The purpose of this Article is not to show the derivation of each Federal Rule. The drafters of the Rules, treatises, and articles have already done this.[72] This Article, however, will establish how different people and various historical currents ultimately joined together in a historic surge in the direction of an equity mentality. The result is played out in the Federal Rules in a number of different but interrelated ways: ease of pleading;[73] broad joinder;[74] expansive discovery;[75] greater judicial power and discretion;[76] flexible remedies;[77] latitude for

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[72] They show the extensive borrowings from equity, particularly from the Federal Equity Rules of 1912, *supra* note 71. *See, e.g.,* ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES app. at 83, 84 table 1 (March 1938) (showing "Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure"); C. WRIGHT & A. MILLER, *supra* note 1 (providing a rule by rule discussion); Holtzoff, *supra* note 69, at 1058.

[73] *See, e.g.,* FED. R. CIV. P. 2 (One Form of Action), 8(a), (c), (e) (General Rules of Pleading: Claims for Relief, Affirmative Defenses, Pleading to be Concise and Direct; Consistency), 11 (Signing of Pleadings, Motions, and Other Papers; Sanctions), 15 (Amended and Supplemental Pleadings). For a comparison to previous American procedure, see *infra* text accompanying notes 93-97, 143-49. For a criticism of the leniency in pleading, see McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades,* 38 A.B.A. J. 123, 124-25 (1952) [hereinafter McCaskill, *Philosophy of Pleading*].

[74] *See, e.g.,* FED. R. CIV. P. 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 15 (Amended and Supplemental Pleadings), 18 (Joinder of Claims and Remedies), 19 (Joinder of Persons Needed for Just Adjudication), 20 (Permissive Joinder of Parties), 22 (Interpleader), 23 (Class Actions), 24 (Intervention), 25 (Substitution of Parties), 42 (Consolidation; Separate Trials). For comparative code provisions, see *infra* text accompanying notes 150-51.

[75] *See* FED. R. CIV. P. 26-37 (Depositions and Discovery). For contemporary discovery problems, see *supra* note 7. For comparative code provisions, see *infra* text accompanying notes 152-57.

[76] One lawyer complains: "It has become increasingly clear that if one can but find him, there is a federal judge anywhere who will order nearly anything." Publius, *Let's Kill All the Lawyers,* WASHINGTONIAN, Mar. 1981, at 67. For comments on the enlarged, amorphous, and multi-issued nature of lawsuits and the vast amount of law available to lawyers and judges, see discussions in THE POUND CONFERENCE, *supra* note 6. Examples of Federal Rules of Civil Procedure that lend themselves to, or specifically provide for, judicial discretion include: 1, 8(a), (e), 11, 12(e), 13, 14, 15, 16, 19(b), 20, 23, 26(b)(1), (c), (d), 35(a), 37(a)(4), (b)(2), 39(b), 41(a)(2), 42(a), (b), 49, 50(a), (b), 53(b), 54(b), 54(c), 55(c), 56(c), 59(a)(1), 50(b)(1), 60(b)(6), 61, 62(b), 65(c). I have used current numbers, but for the most part, they are identical or similar to the 1938 rules. The case law rarely has provided more predictability or better defined standards than the rules, as is demonstrated by looking up the aforementioned rules in J. MOORE, MOORE'S FEDERAL PRACTICE (2nd ed. 1984), or C. WRIGHT & A. MILLER, *supra* note 1. One usually finds in these treatises a wide range of cases offering a baffling array of interpretations that usually provide no more certainty than the vague rule itself. On case management, see *supra* note 17.

[77] *See* Chayes, *supra* note 20, at 1292-96; Oakes, *"A Plague of Lawyers?": Law and the Public Interest,* 2 VT. L. REV. 7, 12-15 (1977).

lawyers;[78] control over juries;[79] reliance on professional experts;[80] reliance on documentation;[81] and disengagement of substance, procedure, and remedy.[82] This combination of procedural factors contributes to a procedural system and view of the law that markedly differs from ei-

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[78] "'Americans increasingly define as legal problems many forms of hurts and distresses they once would have accepted as endemic to an imperfect world or at all events as the responsibility of institutions other than courts.'" Goldstein, *A Dramatic Rise in Lawsuits and Costs Concerns Bar*, N.Y. Times, May 18, 1977, at A1, col. 3, B9, col. 1 (quoting Professor Maurice Rosenberg, a Columbia University law professor); *see also* J. LIEBERMAN, THE LITIGIOUS SOCIETY 18 (1981) (noting the role of attorneys in fostering litigation); Carpenter, *The Pampered Poodle and Other Trivia*, 6 LITIGATION 3 (Summer 1980) (discussing the enormous magnitude of trivial litigation); Taylor, *supra* note 12 (stating that lawyers find ways to keep each other busy based on their training to find potential conflicts in the simplest of relationships). At least one commentator, however, has cautioned about claims of litigiousness. *See* Galanter, *supra* note 12, at 36-69.

[79] Litigants must now claim the right to a jury trial at an earlier stage of the litigation than had been the norm. *See* FED. R. CIV. P. 38(b) (Jury Trial of Right; Demand). For the more jury-protective provision of the Field Code, see 1848 N.Y. Laws, ch. 379, § 221 [hereinafter 1848 CODE]; *see also* FED. R. CIV. P. 50(a), (b) (Motion for a Direct Verdict and Judgment Notwithstanding the Verdict), 56 (Summary Judgment). On previous constitutional doubts as to directed verdict and judgment n.o.v., see Galloway v. United States, 319 U.S. 372, 396-411 (1943) (Black, J., dissenting); Slocum v. New York Life Ins. Co., 228 U.S. 364, 376-400 (1913). Cases such as *Galloway*, which stated that the practice of granting a directed verdict was approved explicitly in the Federal Rules of Civil Procedure, *see* 319 U.S. at 389, were considered by some as making inroads on the quality of the right to a jury trial, notwithstanding the language in the Enabling Act (currently codified at 28 U.S.C. § 2072 (1982)) that the rules should not "abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

It is true that some cases under the Federal Rules are jury-protective. *See, e.g.*, Ross v. Bernhard, 396 U.S. 531 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc., v. Westover, 359 U.S. 500 (1959). These cases do not alter the essential point, however, that the major thrust of the Federal rules is pro-judge rather than anti-jury. *See infra* text accompanying notes 512-13.

[80] For example, under the Enabling Act of 1934, the Supreme Court and the Advisory Committee, rather than Congress or state legislatures, formulated the procedural rules. Those rules empowered judges at the expense of juries. The rules facilitated the role of courts to deal with larger societal problems, perhaps making it easier for other branches to refrain from resolving those issues. *See, e.g.*, Chayes, *supra* note 20, at 1288-1302; Oakes, *supra* note 77, at 8-10. Public policy cases, as well as personal injury and commercial cases, in turn increasingly relied on experts to aid the court, both because lawyers prepared and presented the cases, and because experts were widely utilized as witnesses.

[81] *See* Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION 28, 28-29 (Spring 1981); Sherman & Kinnard, *supra* note 7, at 246; *Those #*X/!!! Lawyers*, TIME, April 10, 1978, at 58-59. Again borrowing from equity, there has been a decrease on the importance of oral testimony in open court and of the trial itself, with profound influence on the quality and meaning of dispute resolution, and on the nature of trial advocacy. *See* Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A. J. 860 (July 1980); Stanley, *President's Page*, 62 A.B.A. J. 1375, 1375 (1976); *infra* text accompanying notes 445-48.

[82] *See infra* text accompanying notes 110-21, 214-15, 381-82.

ther a combined common law and equity system or the nineteenth century procedural code system.[83] The norms and attitudes borrowed from equity define our current legal landscape: expansion of legal theories, law suits, and, consequently, litigation departments; enormous litigation costs; enlarged judicial discretion; and decreased jury power.

Before discussing how the shift to an equity-type jurisprudence came about, it is important to issue four warnings. First, I am not arguing that before the Federal Rules there had been no movement toward equity. To the contrary, the Field Code of 1848 took some steps in that direction, and there were subsequent experiments in liberalized pleading, joinder and discovery.[84] What I *am* saying is that the Federal Rules were revolutionary in their approach and impact because they borrowed so much from equity and rejected so many of the restraining and narrowing features of historic common law procedure. It was the synergistic effect of consistently and repeatedly choosing the most wide-open solutions that was so critical for the evolution to what exists today.

Second, I am not saying that the Federal Rules are solely responsible for shaping the contours of modern civil litigation. Factors such as citizen awareness of rights, size and scope of government, and individual and societal expectations for the good and protected life should also be considered.[85] Causes and effects here, as with other historical questions, are virtually impossible to disentangle. So far as I can determine, the Federal Rules and the Enabling Act are simultaneously an effect, cause, reflection, and symbol of our legal system, which is in turn an effect, cause, reflection, and symbol of the country's social-economic-political structure. It cannot be denied, however, that the Federal Rules facilitated other factors that pushed in the same expansive, unbounded direction.[86]

Third, to criticize a system in which equity procedure has swallowed the law is not to criticize historic equity or those attributes of modern practice that utilize equity procedure. This is not an attack on

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[83] *See* Schaefer, *Is the Adversary System Working in Optimal Fashion?*, in THE POUND CONFERENCE, *supra* note 6, at 171, 186 ("The 1906 lawyer would not recognize civil procedure as it exists today, with relaxed pleading standards, liberal joinder of parties and causes of action, alternative pleadings, discovery, and summary and declaratory judgments.").

[84] *See* G. RAGLAND, JR., DISCOVERY BEFORE TRIAL 17-18 (1932); *infra* text accompanying notes 132-38.

[85] One should also consider the growth in legislation and regulation, transactions and their complexity, photocopying and data processing, nontangible property, and the size of law firms. *See supra* text accompanying note 18.

[86] *See infra* notes 355-58 and accompanying text (describing the impact of the New Deal on the development of the Federal Rules).

those aspects of *Brown v. Board of Education*[87] or other structural cases that attempt to re-interpret constitutional rights in light of experience and evolving norms of what is humanitarian. I *do* criticize, however, the availability of equity practice for all cases, the failure to integrate substance and process, and the failure to define, categorize, and make rules after new rights are created. In other words, I question the view of equity as the dominant or sole mode instead of as a companion to a more defined system.

Fourth, I am not suggesting that we should return to common law pleading or to the Field Code. Nonetheless, there are aspects of common law thought, pre-Federal Rules procedure, and legal formalism that may continue to make sense and should inform our debate about appropriate American civil procedure.[88]

TRADITIONAL EQUITY AND CONTEMPORARY PROCEDURE (Wash. L. Rev. Vol. 78) 2003

Thomas O. Main*

III. THE PROCEDURAL MERGER OF LAW AND EQUITY

Beginning in the middle of the nineteenth century, a reform effort to simplify legal procedure originated in the State of New York.[213] The reformers were frustrated with the practical and theoretical complexities of parallel systems of law and equity.[214] Enticed by the rhetoric of uniformity,[215] these reformers sought to unify law and equity into a single system of codes.[216] Such codes offered a simple set of uniform rules better suited for the practical task of procedure to efficiently process the more important issues of substantive law.[217] One commentator described the technicalities of common law pleading as "needless distinctions, scholastic subtleties and dead forms which have disfigured and encumbered our jurisprudence."[218] The reform effort was successful, as Section 62 of the new New York Code of Civil Procedure declared for New York state courts:

> The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs, which shall be denominated a civil action.[219]

The Field Code abolished the common law forms and merged law and equity in a greatly simplified procedure.[220] Code reformers took great pains to emphasize that the new codes reorganized only the procedure of law and equity.[221] Accepting Blackstone's view that substance and procedure were conceptually distinct,[222] the Field Code took the additional step of recognizing the divisibility in fact of substance and procedure: "The legislative mandate of the Commissioners was reform in procedure—not alteration of the substantive rules of equity or the common law."[223]

The merged procedure of the codes borrowed heavily from equity practice.[224] Much like the old bills in equity, the Field Code provided that the pleadings should state the facts;[225] thus the codes, like equity, de-emphasized the importance of framing an issue.[226] The Code adopted for all actions numerous equity practices and processes, including latitude in the joinder of claims and parties.[227] Further, echoing King James I's

resolution of the dispute between Bacon and Coke three centuries prior.[228] any conflict between the substantive doctrines of law and equity was to be resolved in favor of equity.[229]

The innovative codes proved popular elsewhere and were adopted in most states. The system inaugurated by the New York Code of 1848 was adopted promptly by Missouri and Massachusetts in 1849 and 1850, respectively.[230] In 1851, California adopted a version of the Field Code, and prior to the outbreak of the Civil War, Iowa, Minnesota, Indiana, Ohio, the Washington Territory, Nebraska, Wisconsin and Kansas likewise enacted similar procedural codes.[231] Within twenty-five years, procedural codes had been adopted in a majority of the states and territories.[232] Additionally, the Field Code had at least some influence in all states, as all states departed somewhat from the common law system of pleading in response to the proliferation of the codes.[233] For example, some of the states that did not model the codes nevertheless modified their pleading rules by statutes, allowing the assertion of equitable defenses in actions at law.[234]

Nevertheless, the reform effort that was remarkably successful in the state courts initially drew only skepticism from the federal courts. Although law and equity were administered on different "sides" of the same federal courts.[235] a commitment to the formal separation of law and equity was venerated and, arguably, constitutionally grounded. Justice Grier emphasized the significance of the separation in an 1858 opinion of the Court:

> This [dual] system, matured by the wisdom of ages, founded upon principles of truth and sound reason, has been ruthlessly abolished in many of our States, who have rashly substituted in its place the suggestions of sociologists, who invest new codes and systems of pleading to order. But this attempt to abolish all species, and establish a single genus, is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common law courts.[236]

Bolstered by constitutional references to systems of law and of equity,[237] commentators long sustained the argument that "the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States."[238]

However, the resolve for separate systems weakened as popular confusion and dissent mushroomed. A primary source of the confusion and dissent was federal procedure, which, both prior and subsequent to state adoption of the procedural codes, followed state procedure in law

cases and a uniform federal procedure in equity cases.[239] Thus, there was a uniform simplified procedure in equity for the federal courts throughout the country. Yet in law cases the various federal courts were applying the procedure of the corresponding state court.

Federal equity practice was a model of simplicity and uniformity. Somewhat paradoxically, federal procedure in equity cases was actually a product of a certain hostility toward equity among the early colonists.[240] Conformity to state practice seems to have been demanded, but it became necessary to follow the English equity procedure because a number of the states adopted no equity procedure to which conformity could be had.[241] The first set of Federal Equity Rules, promulgated by the Supreme Court in 1822, contained thirty-three very concise rules of practice and procedure.[242] A few of the rules were mandatory,[243] but most generously accorded federal judges with broad discretionary authority.[244] Moreover, after the extension of the doctrine of *Swift v. Tyson*,[245] to equity cases in 1851, the federal courts enunciated their own views of the principles of equity jurisprudence, without restriction by the decisions of state courts.[246] The Federal Equity Rules proved quite durable and were substantially revised only twice in the succeeding century—in 1842 and in 1912.[247] The latter revision was a comprehensive reform that modeled many of the provisions of the Field Code, especially those dealing with the joinder of parties.[248]

Meanwhile, the procedure in law cases was controlled by congressional legislation requiring the federal courts to follow state procedure "as near as may be."[249] The Conformity Act was unpopular and true conformity seemed largely unobtainable.[250] Noting the success of equity procedure,[251] the American Bar Association blamed legislative control of federal practice for the problem and proposed that the power to promulgate federal rules of procedure for law cases be turned over to the United States Supreme Court.[252] After years of debate and struggle,[253] Congress passed a bill providing:

> [T]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.[254]

The legislation further provided that "[t]he court may at any time unite the general rules prescribed by it for cases in equity with more in actions at law as to secure one form of civil action and procedure for both . . . ."[255] However, the Court did not rush to the task; an advisory

committee was appointed the following year.[256] Two years thereafter, a set of uniform rules was promulgated, eliminating the distinction between procedures for cases in equity and in law.[257] "Under the new rules the hideous Conformity Act [wa]s relegated to the limbo of 'old unhappy, far off things.'"[258] In his address to the American Law Institute Chief Justice Hughes stated the objective of the new rules:

> It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity.[259]

Carrying the torch lit by Blackstone 150 years earlier, the reformers argued that procedure had a tendency to be obtrusive, and that it should be restricted to its proper and subordinate role.[260] The Chief Justice transmitted the Rules to Congress over the dissent of Justice Brandeis, and in 1938 the new uniform Federal Rules of Civil Procedure went into effect.[261]

The philosophy and procedures of equity heavily influenced the tenor of the new Federal Rules.[262] One general and generous sentence applicable to all types of cases established a fluid standard of pleading.[263] Parties could plead alternative theories.[264] Plaintiffs were able to pursue novel theories of relief.[265] Related and unrelated claims could be joined in a single action.[266] Judges could hear the counterclaims and cross-claims of parties already joined in the filed action.[267] As in equity, there were numerous specialized devices through which judges could allow the lawsuit to expand further in order to develop a more efficient litigation unit—e.g., impleaders,[268] interpleaders,[269] interventions,[270] and class actions.[271] Complementing the new pleading regime were new liberal rules of discovery,[272] and judges were vested with the authority to "manage" the case through pretrial conferences[273] and special masters.[274]

The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.[275] Indeed, Rule 1 articulated this

very purpose: "[The Federal Rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[279] Commenting generally on the philosophy and durability of discretionary rules, Professor Carrington mellifluously recites: "Tight will tear. Wide will wear."[280]

Like the Field Code, the reforms were directed exclusively to the procedural problem: the 1934 enabling legislation provided that "said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant."[281] The Supreme Court later confirmed that "[t]he Rules have not abrogated the distinction between equitable and legal remedies. Only the procedural distinctions have been abolished."[282] The fundamental substantive characteristics that distinguished the regimes of law and equity remained intact.[283] Again, in the event of any substantive conflict between law and equity, the latter was to prevail.[284]

Many states, in turn, modeled the federal rules for their state court procedures. In 1960, in the first comprehensive survey of state adoption of the Federal Rules, Professor Charles Alan Wright concluded that, after twenty years of operating under the Federal Rules, state procedural systems were approximately evenly divided among procedural systems modeled on the Federal Rules, the common law and the Field Code.[285] Decades later, Professor John Oakley detailed "the pervasive influence of the Federal Rules on at least some part of every state's civil procedure."[286]

The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law

Lumen N. Mulligan
Glen Staszewski

UCLA L. Rev v. 59 (2012)

The rulemaking era began when Congress empowered the Court to promulgate the Rules of Civil Procedure in 1934 with the passage of the Rules Enabling Act.[41] Although the 1934 Act did not specify the use of committees, in 1935 the Court appointed a fourteen-person Advisory Committee—which did not adhere to the notice-and-comment procedures currently required of the Advisory Committee[42]—to do the research and drafting work for the creation of the original Federal Rules of Civil Procedure.[43] Under this first incarnation of the rulemaking process, the Court directly reviewed the work of the Advisory Committee and, if satisfied, reported the promulgated Rules to Congress,[44] which could overrule any of the rules by exercising the legislative veto built into the 1934 Act during the specified "report-and-wait period."[45] Although the Court often deferred to the Advisory Committee's proposals during this early period,[46] it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress.[47] At least once, the Court exercised its rulemaking authority directly in amending a Rule of Criminal Procedure, bypassing the Advisory Committee entirely.[48]

The rulemaking process become more reticulated in 1958 when Congress created the Judicial Conference of the United States, which took over the direct supervision of the Advisory Committee from the Court.[49] This new structure resulted in decreased input into the rulemaking process by the Justices.[50] Indeed, during this period, the Court unfailingly promulgated Rules recommended to it by the Judicial Conference, leading Justices and commentators to describe the Court's role in rulemaking as one of being a "'mere conduit' for the work of others."[51]

By the late 1970s, observers of the rulemaking process, including Chief Justice Burger,[52] leveled charges at every step in the process. They argued that Congress's review of the Rules was flawed.[53] They similarly argued that the Court was not an appropriate entity to promulgate Rules.[54] Commentators chastised the committee structure as acting beyond the bounds of the Rules Enabling Act[55] and for being unrepresentative and closed to public input.[56] The judiciary sought to correct many of these faults without new legislation by commissioning a Federal Judicial Center study, which, upon completion, suggested several amendments to the rulemaking process.[57]

These changes, however, did not satisfy Congress, which passed significant rulemaking reforms in 1988.[58] While retaining the Judicial Conference's role in the rulemaking process, the 1988 Act codified the role of the rulemaking committees for the first time. It mandated the existence of the Standing Committee on Rules of Practice and Procedure, which the Judicial Conference had previously established at its discretion, and charged the Standing Committee with reviewing the proposals of other duly appointed committees and making recommendations to the Judicial Conference.[59] The 1988 Act also formalized the Judicial Conference's practice of deploying area-specific advisory committees.[60] Hence, the Court can only promulgate Rules that have been vetted by the area-specific advisory committees, the Standing Committee, and the Judicial Conference.

The 1988 Act also increased representation and public participation in the rulemaking process. The Act mandates that the various advisory committees include practitioners, trial judges, and appellate judges.[61] Congress also mandated greater transparency and public input. The Act thus requires the Judicial Conference to publish its procedures for amendment and adoption of rules.[62] It further re-

quires that the Advisory and Standing Committees conduct open and publicly noticed meetings, record the minutes, and make those minutes publicly available.[65] Additionally, the 1988 Act codified the longstanding practice of the Advisory Committee to attach official drafters' notes to Rule proposals.[66] Finally, the 1988 Act increased the length of the report-and-wait period to Congress. The period now stands at a minimum of seven months.[67]

Thus, the current rulemaking process comprises seven steps.[68] First, the Administrative Office of the United States Courts collects recommendations for new Rules or amendments from the public, practitioners, and judges.[69] These suggestions are forwarded to the appropriate Advisory Committee's reporter[70] (a law professor assigned to each advisory committee to set the agenda and do the initial drafting of rule revisions and explanatory notes[71]), who makes an initial recommendation for action to the Advisory Committee. Second, to go forward with a Rules revision, the Advisory Committee must submit the proposed revision and explanatory note, and any dissenting views, to the Standing Committee in order to obtain permission to advance to the publication and comment period.[72] Third, the Advisory Committee publishes the proposed revision widely, receives public comment, and holds public hearings.[73] At the conclusion of the notice-and-comment period, the Advisory Committee's reporter summarizes the results of the public input and presents them to the Advisory Committee.[74] If the Advisory Committee finds that no substantial changes to the revision are called for, it transmits the revision and accompanying notes and reports to the Standing Committee.[75] If the Advisory Committee makes substantial changes to the proposed revision, it must go through another public notice-and-comment period.[76] Fourth, the Standing Committee reviews the proposed revision.[77] If it makes substantial changes to the proposed revision, the Standing Committee returns the proposed revision to the Advisory Committee.[78] If the Standing Committee does not make substantial changes, it sends the proposed revision to the Judicial Conference.[79] Fifth, the Judicial Conference considers proposed revisions each September, sending approved revisions to the Court or rejected proposals back to the Standing Committee.[80] Sixth, the Court takes the proposed revisions under advisement from September to May 1 of the following year, at which time it must transmit to Congress those Rules it seeks to promulgate.[81] Seventh, under the current law, Congress's report-and-wait period runs another seven months from May 1 to December 1, at which time unaltered revisions to the Rules become law.[82]

ONE PERCENT PROCEDURE

Brooke D. Coleman
William C. Oltman Professor of Teaching Excellence, and
Associate Professor of Law

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1. Federal Civil Rulemaking

The federal civil rulemaking process, which is chiefly carried out by the Civil Rules Committee, has evolved over time. Specifically, the committee's composition and its members' roles in the rulemaking process have changed. The first committee, appointed by the Court in 1934, consisted of only practitioners and academics.[45] The Rules Enabling Act of 1934 had just been passed, and the only process in place was the one that the members of the newly-formed committee envisioned for themselves. Thus, once appointed, the committee set to drafting the new Federal Rules of Civil Procedure.[46] It circulated its drafts to members of the Bar, but there was nothing official about its process—it was mostly ad hoc.[47]

The process has since changed. Currently, because of various modifications to both the Rules Enabling Act and the related processes that guide the committee's work, there is a standard committee structure and practice.[48] The Standing Committee on the Federal Rules of Practice

45. *See* Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 274 (2009).

46. *Id.* at 275. They modeled their process off of the American Law Institute's approach to considering proposals.

47. *Id.*

48. *Id.* at 277.

and Procedure sits above five advisory committees, one of which is the Civil Rules Committee.[49] That committee consists of fifteen members, all appointed by the Chief Justice of the Supreme Court for terms of up to six years.[50] In addition, the rulemaking process itself now has multiple steps, including review by the Standing Committee, the Judicial Conference of the Courts, and the Supreme Court.[51] Moreover, the Civil Rules Committee publishes its proposals for public comment, a process that involves written comments and, when appropriate, oral testimony.[52] The process, however multi-layered it may be, still relies greatly on the members of the committee itself. After all, these are the individuals who decide which rules will be pushed forward—these are the individuals who set the agenda for how the Federal Rules of Civil Procedure will develop.

a. Committee Composition

In the early years, the Civil Rules Committee was made up of lawyers and academics, but that composition has gone through two shifts—one of slight change from the late 1950s to the early 1970s and one of major change from the early 1970s to present day.[53] The committee was discharged in 1956, but was reconstituted in accordance with new legislation in 1958, adding Judicial Conference oversight and giving rise to the current committee structure.[54] When the new committee started its work in the late 1950s, it still consisted of mostly practicing lawyers and academics, but it added three judges.[55] Starting in the late 1960s, the

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49. *Id.*

50. *Id.*; *see also Committee Membership Selection*, U.S. CTS., http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection [https://perma.cc/82PY-MF47].

51. Coleman, *supra* note 45, at 277–78.

52. *Id.* at 278–79.

53. Burbank & Farhang, *supra* note 9, at 1563–69.

54. *See* Order Discharging the Advisory Committee, 352 U.S. 803 (1956), Pub. L. No. 85-313, 72 Stat. 356 (1958); REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6–7 (Sept. 17–19, 1958).

55. *See* Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 774 (1961). In 1961, the Committee consisted of eight attorneys, four professors, and three judges. *Id.* Maris noted that the members of the Committees "constitute[d] a nationally known group of experienced judges, lawyers and law teachers" who "were carefully selected by the Chief Justice so as to be widely representative of the Bench, the Bar and the law teachers." *Id.* He wrote that the group included "representative lawyers engaged in the various types of practice, in the legal specialties, and those active in the bar associations." *Id.* They were "widely distributed geographically" and appointed to overlapping four-year appointments, renewable only once "thus assuring the infusion of new blood and new ideas into the program as the years pass." *Id.*

Chief Justice began appointing an even greater number of judges to the committee, a trend that has continued to this day.[56] Professors Stephen Burbank and Sean Farhang have closely studied the committee's composition and determined that during the period from 1958 to 1971—before the second shift in composition began—"there were never less than seven . . . practitioners," "never more than three . . . judges," and "never less than three academics" on the committee.[57]

The committee has profoundly changed between 1971 and the present day, with judges taking up more seats than practitioners and academics combined.[58] Today, the committee is made up of nine judges—seven federal district court judges, one federal appellate court judge, and one state judge—four practitioners, one representative from the Department of Justice, and one academic.[59] Two professors serve as reporters to the committee, but they do not exercise any voting power.[60]

Thus, more judges, fewer academics, and a somewhat static number of practitioners now serve on the committee. This shift in composition, on its own, is worth investigating. But, there is an additional shift in composition: who the practitioners on the committee represent in their professional practice and who—a Democrat or Republican president—appointed the judge members of the committee to their Article III judgeships.

The practitioners on the committee are now disproportionately corporate defense lawyers, and the handful of plaintiffs' lawyers tend to specialize in complex litigation. For example, from 1960 to 1971, a total of twelve practitioners served on the committee at one time or another.[61] Of those, eight practiced law in firms that represented both plaintiffs and defendants, three were in firms that primarily represented plaintiffs, and one was in a firm that primarily represented defendants.[62] The

56. Coleman, *supra* note 45, at 290.

57. Burbank & Farhang, *supra* note 9, at 1566; *see also* Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1144–52 (2015) (reviewing the current membership of the Civil Rules Committee). For an article discussing the connections between large law firms and the Committee, *see generally* Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in Our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L. J. 1293 (2015).

58. Burbank & Farhang, *supra* note 9, at 1568.

59. *Committee Membership Selection*, *supra* note 50

60. *Id.*

61. Burbank & Farhang, *supra* note 9, at 1566–67.

62. *Id.* As the authors note, the classification system employed—categorizing a lawyer as "defendant" or "plaintiff" or "individual" or "business" only if he represented more than 75% of

practitioner committee members of today bear little resemblance to this picture. The defense bar is much more dominant in its committee membership: according to Burbank and Farhang's study, there has been "a substantial shift [away from plaintiff and] toward defense practitioners" on the committee.[63] In addition, the practitioner profile has shifted from lawyers with a mix of clients to lawyers that specialize in representing businesses or individuals, but rarely both.[64] Plaintiffs' lawyers on the early committee represented both individual and business interests, but the plaintiffs' lawyers on the modern committee represent individuals or classes almost exclusively.[65] On the other side, the defense lawyers on the committee represent solely business interests.[66]

The changes in judicial composition are also pronounced. During the 1960s, four judges served on the committee.[67] Two were appointed by a Democratic president and two were appointed by a Republican president.[68] According to Burbank and Farhang's study, this parity no longer exists. Comparing the overall number of Democratic and Republican appointed judges to the number of such judges sitting on the committees from 1970 to 2013, the authors found that, adjusting for the population of judges overall, Republican appointees served on the Civil Rules Committee at a 161% greater rate than Democratic appointees.[69] In other words, "[b]eing appointed by a Democratic president is significantly associated with a lower probability of serving on the Committee."[70] Judges who were appointed by a Republican president have a 2.3 times greater chance of being appointed to the committee than their Democratic-appointee counterparts.[71]

that type of client—meant that most of the practitioners on the early committees could not be categorized. *Id.* at 1569–70. Instead, many were categorized as "both." This is in stark contrast to modern practitioners who are one category or the other. *Id.*

63. *Id.* at 1569.

64. *Id.* at 1570.

65. *Id.*

66. *Id.* As Burbank and Farhang note, this trend may be due to changes in the broader legal market, rather than the Chief Justice's preferences. *Id.* Nonetheless, the information is significant and worth noting because—no matter why the change has happened—it will have an impact on how the committee functions.

67. *Id.* at 1566.

68. *Id.*

69. *Id.* at 1573.

70. *Id.* at 1574.

71. *Id.* The data on judicial appointments is not limited to party affiliation, however. Burbank and Farhang's study also found a predisposition for the appointment of white men. *Id.* A white federal judge had a 5.1 times greater chance of being appointed to a committee than a non-white judge. *Id.* These statistics, like the party affiliation stats, are adjusted for overall population. In other words,

In sum, the committee membership is a fairly homogeneous group—a group that arguably has a conservative ideological bent and which also has a practice experience that is grounded in defending corporations.[72] However, even arguably non-conservative practitioner members of the committee share homogeneity with the rest of the committee members. Though they represent plaintiffs, as one commentator has put it, they "operate in the rarified world of complex litigation."[73] As will be discussed later in this Article, the composition of the committee appears to deeply influence how the committee functions and what kinds of changes it makes.

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the authors found that non-white judges accounted for 11% of the "judge years" that they looked at, but only accounted for 2% of the committee service years that they observed. *Id.* This is in contrast to gender as an indicator, which seems to be insignificant to probability of committee service in this case. *Id.* at 1575.

72. *See Meeting Minutes*, U.S. CTS., http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes [https://perma.cc/NF6A-UKL5] (providing links to meeting minutes for the Judicial Conference Committee on Rules and Practice and Procedure. The author reviewed the minutes to identify the names of committee members and the durations of their terms.). A final "type" of member is the academic appointment to the committee. While the number of academic appointments is down to only one, the composition of that sole member is of interest. Since 1985, there have been seven voting academic members of the committee: Professor Maurice Rosenberg (Columbia Law School, 1985–87); Professor Mark Nordenberg (University of Pittsburgh, 1988–93); Professor Thomas Rowe (Duke Law School, 1994–99); Professor John Jeffries (University of Virginia, 1999–2005); Professor Myles Lynk (Arizona State University, 1998–2004); Professor Stephen Gensler (University of Oklahoma, 2005–11); and Professor Robert Klonoff (Lewis & Clark, 2011–present). All seven are men and six out of the seven are white. The most recent appointment, Bob Klonoff, appears to have the most litigation experience, having served as the Assistant to the Solicitor General during the Reagan Administration and as a law partner at Jones Day. *See Law Faculty: Robert Klonoff*, LEWIS & CLARK L. SCHOOL, https://law.lclark.edu/live/profiles/310-robert-klonoff [https://perma.cc/HM5J-3BLG]. Others have substantial practice experience as well. Professor Myles Lynk, who worked as an associate at various law firms, became a partner at Dewey Ballantine and also served as Special Assistant to the Secretary of Health, Education, and Welfare. *See Myles V. Lynk Curriculum Vitae*, ARIZ. ST. UNIV., https://apps.law.asu.edu/files/faculty/cvs/lynkmyles.pdf [https://perma.cc/9C9N-3JSM]. Professor Maurice Rosenberg practiced law at Cravath, Swain and Moore and also served as the Assistant Attorney General during the Carter Administration. *See Legal Scholar Rosenberg is Dead at 75*, 21 COLUM. UNIV. REC. (Sept. 8, 1995), http://www.columbia.edu/cu/record/archives/vol21/vol21_iss1/record2101.34.html [https://perma.cc/4B3Y-4AJU].

73. *See also* Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 762 (2016) (stating that Duke Law School's Judicial Center Advisory Council "held an invitation-only conference in November 2014 (under Chatham House rules), whose ultimate goal is to develop a 'best practices document, which will provide authoritative guidance on implementing the proportionality standard.'") (citing *Implementing Discovery Proportionality Standard Conference (Invitation Only)*, DUKE L., https://law.duke.edu/judicialstudies/conferences/november2014 [https://perma.cc/PN7C-KCJW]).