THE YALE LAW JOURNAL

JOHN H. LANGBEIN

The Disappearance of Civil Trial in the United States

ABSTRACT. Since the 1930s, the proportion of civil cases concluded at trial has declined from about 20% to below 2% in the federal courts and below 1% in state courts. This Article looks to the history of the civil trial to explain why the trial endured so long and then vanished so rapidly.

For the litigants, a civil procedure system serves two connected functions: investigating the facts and adjudicating the dispute. The better the system investigates and clarifies the facts, the more it promotes settlement and reduces the need to adjudicate. The Anglo-American common law for most of its history paid scant attention to the investigative function. This Article points to the role of the jury system in shaping the procedure and restricting the investigative function. Pleading was the only significant component of pretrial procedure, and the dominant function of pleading was to control the jury by narrowing to a single issue the question that the jury would be asked to decide. This primitive pretrial process left trial as the only occasion at which it was sometimes possible to investigate issues of fact. Over time, the jury-free equity courts developed techniques to enable litigants to obtain testimonial and documentary evidence in advance of adjudication. The fusion of law and equity in the Federal Rules of Civil Procedure of 1938 brought those techniques into the merged procedure, and expanded them notably. The signature reform of the Federal Rules was to shift pretrial procedure from pleading to discovery. A new system of civil procedure emerged, centered on the discovery of documents and the sworn depositions of parties and witnesses. Related innovations, the pretrial conference and summary judgment, reinforced the substitution of discovery for trial. This new procedure system has overcome the investigation deficit that so afflicted common law procedure, enabling almost all cases to be settled or dismissed without trial. Pretrial procedure has become nontrial procedure by making trial obsolete.

AUTHOR. Sterling Professor of Law and Legal History, Yale University. I acknowledge with gratitude suggestions and references from Gerrit Beckhaus, Stephen Burbank, E. Donald Elliott, Owen Fiss, John Gordan, III, Geoffrey C. Hazard, Jr., Richard Helmholz, Samuel Issacharoff, Amalia Kessler, Ron Kilgard, Renée Lerner, David Marcus, Nicholas Parrillo, Judith Resnik, Peter Schuck, Suja Thomas, Michael Weisman, John Witt, and Stephen Yeazell.

ARTICLE CONTENTS

INTRODUCTION: THE VANISHING TRIAL

A striking trend in the administration of civil justice in the United States in recent decades has been the virtual abandonment of the centuries-old institution of trial. As late as 1936, on the eve of the promulgation of the Federal Rules of Civil Procedure, a fifth of all civil cases that were filed in the federal courts were resolved at trial.[1] The rest terminated either in the pleading and motions phase for failure to state a cause of action, or were settled before trial. That one-fifth trial rate was "a minority but a very substantial minority. Civil practice was still in significant measure a trial practice."[2]

By 1940, the proportion of cases tried declined to 15.2%.[3] In 1952, the figure was 12%; in 1972, 9.1%; in 1982, 6.1%; in 1992, 3.5%. By the year 2002, only 1.8% of federal civil filings terminated in trials of any sort, and only 1.2% in jury trials.[4] At the state level, where most civil litigation takes place,[5] trials as a percentage of dispositions declined by half between 1992 and 2005 in the nation's seventy-five most populous counties.[6] Jury trials in 2002 constituted less than one percent (0.6%) of all state court dispositions.[7] Thus, in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become "vanishingly rare."[8] This

1. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 185 n.9 (2001) [hereinafter Yeazell, *Re-Financing*] (citing Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3 [hereinafter Yeazell, *Process*]) (reporting the proportion of cases tried in 1936 as 19% and in 1938 as 19.9%).

2. Yeazell, *Re-Financing*, *supra* note 1, at 185 (citation omitted).

3. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 44 tbl.2 (1983) (citing 1940 ADMIN. OFF. OF THE U.S. COURTS ANN. REP.).

4. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462-63 tbl.1 (2004). Jury trial data appears in ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 12-13 (2001).

5. Galanter reports that 98% of all trials in the United States take place in state courts. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 9.

6. LYNN LANGTON & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1, 9 & tbl.10 (2008).

7. Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004).

8. The term originates with Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 51 (1996). "Our culture portrays trial—especially trial by jury—as the quintessential dramatic instrument of justice. Our judicial system operates on a different premise: Trial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost." *Id.* at 3 (footnote omitted). Marc Galanter's important empirical study has popularized the concept of the vanishing trial. *See* Galanter,

Article explores how and why this movement away from trial occurred.

In functional terms, from the perspective of the litigants, a civil procedure system serves two connected objectives: investigating the facts of the case and adjudicating issues of law or fact that remain in dispute. Of these functions, investigating and resolving questions of fact is by far the more important. Sir William Blackstone, the English jurist who wrote in the 1760s, underscored the centrality of fact issues in an arresting passage: "[E]xperience will abundantly show," he said, "that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of."[9] Was the traffic light red or green? Was the signature forged or genuine? Ascertain the facts in such a dispute, and the law is usually easy—so easy, indeed, that the parties will commonly settle the case, or the court will be able to dismiss it as groundless. Thus, the better a civil procedure system is at investigating and clarifying the facts, the less it will need to take cases to adjudication.

Alas, investigating the facts was for centuries a critical weakness of civil procedure at common law, for reasons connected to the central role of the jury system. Part I of this Article emphasizes that, apart from pleading, the common law provided no means other than trial to probe matters of fact, and that pleading was preoccupied with keeping order among the writs and circumscribing the role of the jury. Common law procedure offered the litigant no means to locate or force production of documentary evidence in the hands of an opponent or a third party, no opportunity other than trial to examine an uncooperative or adverse witness, and no opportunity whatsoever to obtain the sworn testimony of an opposing party. Only in the jury-free equity courts, discussed in Part II, was it possible for a litigant to obtain sworn testimony and documentary evidence in advance of adjudication.

Part III points to the merger of law and equity in the Federal Rules of Civil Procedure in 1938[10] as the precipitating event in the movement from trial to nontrial procedure in the United States. The Federal Rules and state procedure codes patterned on the Federal Rules govern most civil litigation in the United

supra note 4. In assessing the decline of trial in the ordinary courts, it is important to bear in mind the spread of what Herbert Kritzer calls "trial-like events" elsewhere, especially in administrative tribunals. *See* Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials,"* 62 DEPAUL L. REV. (forthcoming 2013), http://ssrn.com/abstract=2089447; *see also* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (discussing the claims resolution process of the Social Security Administration).

9. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 330 (Oxford, Oxford Univ. Press 1765-69) (spelling modernized).

10. *See, e.g.*, FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

States.[11] The drafters of the Federal Rules had two dominant and connected objectives: to consolidate the previously distinct procedures and courts of common law and equity into a single system,[12] and to redirect pretrial procedure away from pleading and toward discovery. Discovery under the Rules became a system of litigant-conducted investigation, derived from equity procedure, featuring the sworn interrogation of parties and witnesses and compulsory disclosure of documents (and now electronic records). Relatedly, the Federal Rules made liberal provision for summary judgment in cases in which discovery showed that there was no material dispute of fact requiring trial. The discovery regime of the Federal Rules and the associated practices of judicial case management, ostensibly directed at enabling the litigants to prepare for trial, have had the effect of displacing trial in most cases, causing ever more cases to be resolved in the pretrial process, either by settlement or by pretrial adjudication. Pretrial civil procedure has become nontrial civil procedure.

I. COMMON LAW CIVIL TRIAL: ORIGINS AND ATTRIBUTES

A. The Shaping Role of the Jury System

The main features of the Anglo-American[13] civil trial developed in the

11. Regarding the absorption of the Federal Rules into the procedural systems of the states, see *infra* text accompanying note 92.

12. As promulgated in 1938, Rule 1 announced that "[t]hese rules govern the procedure . . . in all suits of a civil nature whether cognizable as cases at law or in equity." FED. R. CIV. P. 1 (1938) (amended 1948). This language was deleted in 2007 on the ground that "[t]he merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger." FED. R. CIV. P. 1 advisory committee's note (2007). At the state level, there had been significant progress in consolidating law and equity from the mid-nineteenth century onward, especially as a consequence of the Field Code in New York. *See* JOHN NORTON POMEROY, CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION §§ 6-10, at 8-16 nn.5-16 (Walter Carrington ed., 5th ed. 1929). The Field Code was widely imitated among the states in the period before promulgation of the Federal Rules. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 8, at 23-31 (2d ed. 1947). Under code pleading, fact pleading replaced "the issue pleading of the common law." *Id.* § 7, at 23 (emphasis omitted); *see also id.* § 11, at 56. For more on the Field Code, see *infra* note 88 and accompanying text.

13. English and American civil procedure now differ in many ways, but the two systems have a common origin, and they retain profoundly important structural similarities, many of which are discussed in this Article. It is, therefore, hyperbole to dismiss as "nonsense . . . the glib phrase 'Anglo-American procedure.'" Neil Andrews, *English Civil Justice in the Age of Convergence*, *in* COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 97, 108 (Janet Walker & Oscar G. Chase eds., 2010).

practice of the English common law courts[14] in medieval and early modern times, as a consequence of the jury system, in which panels of lay persons were used to decide cases.[15] Legal professionals—judges and lawyers—operated the initial pleading stage of the procedure, which was meant to identify and to narrow the dispute between the parties. If the dispute turned on a matter of law—that is, on a question such as whether the complaint stated a legally actionable claim, or whether some particular legal rule governed—the professional judges decided the case on the pleadings.[16] If, however, the pleadings established that the case turned on a question of fact, the case was sent for resolution at trial by a jury composed of citizens untrained in the law.[17] So tight was the linkage between trial and jury that there was in fact no such thing as nonjury trial at common law.[18] In any case involving a disputed issue of fact, bench trial (adjudication by the judge sitting without a jury) was unknown until the later nineteenth century.[19]

14. The Courts of Common Pleas, King's Bench, and Exchequer. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 17-20, 37-39 (4th ed. 2002).

15. "[T]he common law trial, as we know it, is a direct result of the use of the jury. Without the common law jury, there would be no common law trial." Stephen Goldstein, *The Anglo-American Jury System as Seen by an Outsider (Who Is a Former Insider)*, *in* 1 THE CLIFFORD CHANCE LECTURES: BRIDGING THE CHANNEL 165, 170 (Basil S. Markesinis ed., 1996). The defining role of the jury in shaping the Anglo-American trial has been a central theme of historical and comparative scholarship since Thayer. *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (Boston, Little, Brown & Co. 1898).

16. For an historical overview of the pleading system, see THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 399-418 (5th ed. 1956).

17. Regarding jury composition in the formative period, see JAMES MASSCHAELE, JURY, STATE, AND SOCIETY IN MEDIEVAL ENGLAND 89-156 (2008).

18. "Until 1854, trial by jury was the only form of trial used in any court of common law." Adrian Zuckerman, *From Formalism to Court Control of Litigation*, *in* 1806-1976-2006: DE LA COMMÉMORATION D'UN CODE À L'AUTRE: 200 ANS DE PROCÉDURE CIVILE EN FRANCE 339, 343 n.14 (Loïc Cadiet & Guy Canivet eds., 2006); *accord* J.A. JOLOWICZ, ON CIVIL PROCEDURE 29 (2000).

In criminal procedure, too, jury trial was the only mode of trial for cases of serious crime. Until modern times, the only way to avoid jury trial in a case of serious crime in England was to plead guilty. Jury-waived bench trial in such cases developed in the United States, mostly in the late nineteenth and early twentieth centuries. *See* Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123 (1982).

19. In England, the Common Law Procedure Act of 1854 first authorized the parties in certain circumstances to waive jury trial. Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, § 1. In American practice, the right of litigants to waive jury trial was recognized slightly earlier than in England. Regarding the "obscure" history of jury-waived trial in American jurisdictions, see ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 260-61 (1952). Millar points to *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819), which held that a litigant may waive the Seventh Amendment

In the early days of the jury system, in the twelfth and thirteenth centuries, jurors were drawn from the close vicinity of the events giving rise to the dispute, in the expectation that the jurors would have knowledge of the events, or if not, that the jurors would be able to investigate the matter on their own in advance of the trial.[20] Medieval jurors came to court mostly to speak rather than to listen—not to hear evidence, but to report a verdict that they had agreed upon in advance.[21] Across the later Middle Ages, the jury ceased to function in this way for complex reasons, including cataclysmic demographic dislocations following the Black Death (the great plague) of the 1340s[22] and the effects of urbanization[23] in producing more impersonal social relations. By early modern times, jurors were no longer expected to come to court knowing the facts. The trial changed character and became an instructional proceeding to inform these lay judges about the matter they were being asked to decide.[24]

This instructional form of trial came to have five distinguishing features, all of which were shaped by the special problems of using jurors, unlearned in the law, as triers of fact.

---

right to jury trial, and to the New York Constitution of 1846, which provided that "a jury trial may be waived by the parties in all civil cases," N.Y. CONST. of 1846, art. I, § 2. Clark and Moore identify federal legislation enacted in 1865 as "[t]he first general act authorizing parties to dispense with a jury, and try the issue of fact before the court." Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 412 (1935) (citing Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501).

20. For discussion of the workings of the self-informing jury, see JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 115-26 (2006) [hereinafter OLDHAM, TRIAL]; and JAMES OLDHAM, THE VARIED LIFE OF THE SELF-INFORMING JURY (2005). The expectation that jurors would form their verdict in advance of trial underlies a statute of 1427 that provided that in certain civil cases the sheriffs were, on demand of a litigant, to furnish the names of the prospective jurors to the litigants at least six days before the convening of the trial court, a step that would enable the litigants "to inform them [the jurors] of their Right and Titles before the Day of the Session." 6 Hen. 6, c. 2 (1427); *see also* THAYER, *supra* note 15, at 92 (alluding to this expectation).

21. It was the duty of the jurors "so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony; they must weigh it and state the net result in a verdict." 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 624-25 (Cambridge, Cambridge Univ. Press 2d ed. 1898).

22. For detail, see JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 224-27 (2009) [hereinafter LANGBEIN, LERNER & SMITH].

23. Dyer reckons "a fivefold rise in the whole urban population between 1086 and 1300 . . . culminating in a total of about a million town dwellers by 1300." Christopher Dyer, *How Urban Was Medieval England?*, HIST. TODAY, Jan. 1997, at 37, 39.

24. Regarding the emergence of the instructional trial, see LANGBEIN, LERNER & SMITH, *supra* note 22, at 238-48.

B. Defining Traits

1. Concentration

In the parlance of comparative law, the Anglo-American trial is said to be concentrated, meaning that it transpires as a single continuous meeting of the court. This proceeding may now adjourn for the evening or the weekend, but it is otherwise uninterrupted. At this continuous proceeding, the court hears all the evidence and all the legal submissions, after which the jurors deliberate and render judgment.

The principle of concentration arose from the challenges of assembling, informing, and controlling a group of twelve lay judges. If you let jurors go home and tell them to return three weeks later, some of them may not show up.[25] Moreover, during any such interval, jurors would be at risk of being tampered with—intimidated, bribed, and so forth. "It is quite impractical, if not completely impossible, to reconvene a jury of laymen for a number of short hearings held over an extended period of time."[26]

In jury-free Continental legal systems, based on the Roman-canon tradition,[27] civil proceedings are discontinuous, taking place across as many hearings as the court, staffed exclusively with professional judges, thinks necessary. At these hearings the court hears testimony and the submissions of the parties' lawyers.[28] The court records evidence and party submissions in an

25. Regarding the burden of jury service and the difficulty of obtaining jurors, see Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 146-48 (2003). Regarding the unpleasantness of jury service in late medieval and early modern times, see David J. Seipp, *Jurors, Evidences and the Tempest of 1499*, *in* "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 75, 86-89 (John W. Cairns & Grant McLeod eds., 2002), which discusses the practice of pressuring jury members to agree by confining them without food or water until they returned a verdict; and LANGBEIN, LERNER & SMITH, *supra* note 22, at 420, which describes the confinement of jurors without heat or light.

26. Goldstein, *supra* note 15, at 171; *accord* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 60 (1997).

27. Regarding the Roman-canon origins of the European tradition, see R.C. van Caenegem, *History of European Civil Procedure*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 16-23 (Mauro Cappelletti ed., 1973); and JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 112-24 (3d ed. 2007).

28. Damaška contrasts the Anglo-American "day-in-court" model with Continental-style "piecemeal trial." MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 51-53, 57, 62 (1986). Goldstein resists that contrast as "misleading" on the ground that "the sporadic oral hearings that may occur in

official file or dossier, which the court will draw upon when writing its judgment if the case does not settle. For efficiency reasons, there has been an effort in modern times in various European systems to encourage the courts to conduct civil proceedings in a single, well-prepared hearing, but this *Konzentrationsmaxime*[29] is at most a managerial aspiration. If the proceedings in a case cannot be so arranged, the case will transpire across as many discontinuous hearings as the circumstances require. In an Anglo-American jury trial, by contrast, the principle of concentration is structural.[30]

2. The Pretrial/Trial Division

The principle of concentration makes the danger of surprise in an Anglo-American trial acute, because a trial once underway cannot be interrupted and adjourned to a further hearing. In a system of concentrated trial, there is no tomorrow. Contrast Continental procedure: If one party raises an issue of law or fact or offers a significant item of evidence that the opposing party has not anticipated, the surprised party simply motions the court to schedule a further hearing, which will allow time to explore the new matter and, if need be, to identify further responsive evidence.[31]

Because the danger of surprise in Anglo-American procedure has been so consequential, the system has had to institute some sort of procedure in advance of trial to identify and to limit what the trial will be about.[32] For most of the history of the common law, this pretrial procedure was largely confined

Continental civil litigation . . . are not 'trials' at all for they lack the fundamental aspect of a trial, exclusivity . . . of the oral hearing as a means of providing information to the adjudicator." Goldstein, *supra* note 15, at 171-72.

29. *See* PETER WILLMANN, DIE KONZENTRATIONSMAXIME: EINE UNTERSUCHUNG HEUTIGEN UND FRÜHEREN RECHTS (2004).

30. Regarding the relationship between the principle of concentration and the law of evidence, see DAMAŠKA, *supra* note 26, at 58-73.

31. "[I]n systems where the trial is not concentrated . . . the problem of surprise at the trial stage can be handled by simply allowing a further appearance before the court at a later date." Arthur Taylor von Mehren, *The Significance for Procedural Practice and Theory of the Concentrated Trial: Comparative Remarks*, *in* 2 EUROPÄISCHES RECHTSDENKEN IN GESCHICHTE UND GEGENWART: FESTSCHRIFT FÜR HELMUT COING 361, 364 (Norbert Horn et al. eds., 1982).

32. The pretrial/trial division is also characteristic of Anglo-American criminal procedure, in which the investigative and charging phases of a case constitute the pretrial. In some Continental systems, the nineteenth-century reforms that instituted public trial for cases of serious crime resulted in a pretrial/trial division. For Germany, see EBERHARD SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE §§ 288-289, at 327-332 (3d ed. 1965).

to pleading—that is, the opening phase of litigation in which the litigants were meant to disclose their respective positions. "Indeed, pleadings were nearly the only device that common law procedure afforded for the pretrial disclosure of the parties' claims and evidence."[33]

Common law pleading had the further function of controlling the jury, by severely narrowing—to a single issue—the question that the jury would be asked to decide.[34]

The common law made no provision for the pretrial examination of opposing parties or nonparty witnesses; nor did the common law provide any means[35] to compel the production of documents. This inattention to evidence-gathering can be traced back to the foundational period of the common law, in which the self-informing jury was expected to know the facts or to investigate on its own. By treating the jurors as already knowing the facts when they arrived in court, the common law happily dispensed with the need for procedures to investigate fact. In later times, when the trial became an instructional proceeding to educate jurors who no longer had knowledge of the matter in dispute, the pretrial remained confined to pleading. Investigation by means of witness testimony occurred only at trial.[36] Moreover, because the parties were disqualified from testifying on account of interest until the middle of the nineteenth century,[37] the common law wholly suppressed party testimony.

33. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 3.1, at 181 (5th ed. 2001).

34. Regarding the single-issue pleading requirement, see *infra* text accompanying note 162. "The logic of medieval pleading was directed to the possible misleading of juries." S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 79 (2d ed. 1981). "Pleading had originated as a means of controlling juries, by narrowing their terms of reference and excluding problems of law from their consideration." BAKER, *supra* note 14, at 88. The need for pleading to serve this role declined after the development of post-verdict review, especially by means of the motion for new trial, which "enabled juries to be controlled after they had pronounced" their verdicts. *Id.*

35. There was an exception of sorts: In the rare circumstance in which the demandant claimed that he or she owned the document in question, he or she could seek the document by bringing a common law action of replevin (to recover wrongfully withheld personal property).

36. Not until the 1563 Elizabethan Statute of Perjury did civil litigants obtain the right of compulsory process, to require the attendance of summoned witnesses at trial. 5 Eliz. 1, c. 9, § 12.

37. Regarding the impact of the disqualification rule on doctrinal development, see Kenneth S. Abraham, *The Common Law Prohibition on Party Testimony and the Development of Tort Liability*, 95 VA. L. REV. 489 (2009); and John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1178-79, 1184-86 (1996).

This impoverishment of the investigative function was perhaps the greatest weakness of common law civil procedure in the age before fusion of law and equity.[38] A litigant was powerless to locate or force production of documentary evidence that was in the hands of an opponent or a third party. There was no opportunity to examine an uncooperative or adverse witness in advance of trial,[39] and no opportunity ever to examine an opposing party. The maneuver called "nonsuit" was one response to the shortcomings of the pretrial process at common law in the age before fusion. Lacking pretrial discovery devices, a plaintiff taking a case to trial would sometimes have only a hazy idea of what the evidence might turn out to be. A plaintiff who learned at trial that his evidence was weak could, by moving for nonsuit, withdraw the case before verdict without suffering preclusion.[40]

In American civil procedure before the Federal Rules, "trial was often the only real way to do discovery, and some of the trials in this earlier era can be seen as in-court efforts to seek information."[41]

Regarding the movement to abolish the rule, see George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 656-62, 709-11 (1997).

38. I have emphasized elsewhere that English criminal procedure exhibited a similar impoverishment of investigative capacity into the nineteenth and twentieth centuries, on account of the resistance to professionalizing police and prosecution. From the late Middle Ages, detective work and prosecuting functions were left to amateur justices of the peace. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 40-47 (2003) [hereinafter LANGBEIN, ORIGINS]; JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 1-125 (1974) [hereinafter LANGBEIN, PROSECUTING].

39. "Witnesses had no role in the traditional pre-trial process." ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE § 19.1, at 697 (2d ed. 2006). Blackstone regarded "[t]he want of a complete discovery by the oath of the parties" and "the want of a compulsive power for the production of books and papers belonging to the parties" as among the "principal defects" of common law procedure. 3 BLACKSTONE, *supra* note 9, at 381-82.

40. "And there is this advantage attending a nonsuit; that the plaintiff, though subject to the payment costs, may afterwards bring another action for the same cause, which he cannot do, after a verdict against him." 2 WILLIAM TIDD, THE PRACTICE OF THE KING'S BENCH IN PERSONAL ACTIONS 797 (London, J. Butterworth 1794). For discussion of nonsuit in Lord Mansfield's cases, see OLDHAM, TRIAL, *supra* note 20, at 11-12 (2006); early American nonsuit practice is reviewed in Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 300-01 (1966).

41. Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 951 (2004).

3. Bifurcation and Jury Control

The jury system resulted in a division of adjudicative responsibility within the first-instance court, expressed clumsily in the slogan that the judge decides questions of law and the jury decides matters of fact.[42] This division of function within the common law court, which is without counterpart in the jury-free Continental tradition, is known in comparative law as the principle of bifurcation.[43]

Bifurcation required a law of jury control, that is, "a body of procedural and evidentiary law to regulate the internal relationships between [the] two parts" of the trial court.[44] In the formative era of the common law, the pleading process carried the main work of jury control, by specifying and limiting to a single issue the question to be put to the jury. In later times, as the instructional trial developed to inform the jurors about the facts and the law, the judges were able to devise far-reaching practices of trial-level jury control, including the exclusionary apparatus of the law of evidence, ever more detailed instructions on the law, judicial comment on the merits of the evidence, quashing of verdicts by ordering a new trial, and the directed verdict.[45] The development of these trial-level controls, by relieving the pleading process of the need to serve the function of jury control, was an important precondition for the redesign of pretrial procedure in the Federal Rules (discussed in Part III of this Article), in which discovery came to be substituted for the disclosure function of pleading.

---

42. "[*A*]*d quaestionem facti non respondent judices*[,] . . . *ad quaestionem juris non respondent juratores*." EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND bk. 2, ch. 12, § 234, at 155b (Francis Hargrave & Charles Butler eds., London, Luke Hansard & Sons, 16th ed. 1809) (1628). Coke's formulation neglects the law-applying role of the jury.

43. For detail, see John H. Langbein, *Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW: FROM ANTIQUITY TO MODERN TIMES 67 (Paul Brand & Joshua Getzler eds., 2012).

44. Mirjan Damaška, *The Common Law/Civil Law Divide: Residual Truth of a Misleading Distinction*, *in* COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES, *supra* note 13, at 3, 7.

45. Regarding the history of the law of jury control in England and the United States from medieval to modern times, see LANGBEIN, LERNER & SMITH, *supra* note 22, at 415-56. The story of how jury control in England led to the suppression of civil jury trial across the later nineteenth and twentieth centuries is told in Conor Hanly, *The Decline of Civil Jury Trial in Nineteenth-Century England*, 26 J. LEGAL HIST. 253 (2005).

4. Orality, Immediacy, and Public Access

The connected set of values known as orality, immediacy, and public access was another defining aspect of the Anglo-American trial.[46] Medieval English jurors were commonly illiterate.[47] The only way to inform people who cannot read is by talking to them. Jury trial had to be oral. When trial became an instructional proceeding to educate the jurors about the dispute, it took the form of having the parties' lawyers and the fact witnesses speak to the jurors at the trial.[48]

Jury trials took place in public;[49] spectators as well as participants could

46. These traits of the English tradition came to be much admired in nineteenth-century German procedural scholarship, especially the work of Carl J.A. Mittermaier, praising *Mündlichkeit* (orality), *Unmittelbarkeit* (immediacy), and *Öffentlichkeit* (publicity, openness). CARL. J.A. MITTERMAIER, DAS ENGLISCHE, SCHOTTISCHE UND NORDAMERIKANISCHE STRAFVERFAHREN (Erlangen, Verlag von Ferdinand Enke 1851); CARL. J.A. MITTERMAIER, DIE MÜNDLICHKEIT, DAS ANKLAGEPRINZIP, DIE ÖFFENTLICHKEIT UND DAS GESCHWORNENGERICHT IN IHRER DURCHFÜHRUNG IN DEN VERSCHIEDENEN GESETZGEBUNGEN DARGESTELLT UND NACH DEN FORDERUNGEN DES RECHTS UND DER ZWECKMÄßIGKEIT MIT RÜCKSICHT AUF DIE ERFAHRUNG DER VERSCHIEDENEN LÄNDER (Stuttgart/Tübingen, J.G. Gottascher Verlag 1845).

47. David Seipp has directed attention to a case in 1390 in which the twelve jurors "were discovered to have a thirteenth fellow among them. When questioned, they said that none of them could read the deeds delivered to them [at the trial], so one of them found a stranger who could read [the deeds] aloud and explain them 'in the mother tongue.'" Seipp, *supra* note 25, at 81 (citation omitted). Illiteracy among jurors persisted into the mid-nineteenth century, according to Henry Avory, Clerk of the Arraigns at the Central Criminal Court (Old Bailey), who gave evidence in 1868 to a parliamentary commission that some London area jurors were "utterly unable to read or write." REPORT FROM THE SELECT COMMITTEE ON SPECIAL AND COMMON JURIES; TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE, MINUTES OF EVIDENCE AND APPENDIX 64 (London 1868). I owe this reference to Conor Hanly.

48. Writing sometime around the year 1470, Sir John Fortescue, who had been chief justice of the Court of King's Bench, described the course of a civil trial: "[E]ach party shall declare in the presence of the court, either by himself or by his counsel, and explain to these jurors all and singular of the matters and evidence which he believes may show them the truth of the issue in question." "[T]hen," Fortescue stated, "either party may produce before the justices and jurors all and singular witnesses whom he desires to produce . . . ." JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE [IN PRAISE OF THE LAWS OF ENGLAND] 61 (S.B. Chrimes ed. & trans., 1942). The rule precluding party testimony, discussed *supra* in the text accompanying note 37, developed in the century after Fortescue wrote. *See* 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 576, at 686-93 (3d ed. 1940).

49. Purpose-built courthouses were uncommon in England before the eighteenth century. *See* CLARE GRAHAM, ORDERING LAW: THE ARCHITECTURAL AND SOCIAL HISTORY OF THE ENGLISH LAW COURT TO 1914, at 66-67 (2003). Under the assize system of sending itinerant

attend, in contrast to the secrecy of evidence gathering both in European civil procedure and in the European-derived procedures of the English equity courts.[50] The public character of trial was thought to deter false testimony,[51] and secrecy would have been impractical to implement in trial courts staffed with dozens of local laymen. Guarantees of openness in trial proceedings are found in many American state constitutions[52] and are no longer particularly associated with jury proceedings. In modern circumstances, commentators regard these measures as serving monitoring and legitimating functions.[53]

Contrast the European systems and the English equity courts, in which the practice was for judges or examiners to question witnesses and to summarize their testimony in writing for the court file.[54] The judge or the court that decided the case based its judgment on reading the file, often not having seen or heard the witnesses. Accordingly, the procedure gave no weight to

trial courts into the shires, trials outside London took place in any one location for only a few days a year. Writing about 1565, Sir Thomas Smith depicted criminal trials as taking place "[i]n the town house [i.e., the town hall], or in some open or common place." THOMAS SMITH, DE REPUBLICA ANGLORUM 111 (Mary Dewar ed., 1982) (spelling modernized).

50. Regarding the rationale for secrecy in Chancery proceedings, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1216-17 (2005).

51. Describing criminal trials of the mid-sixteenth century, Sir Thomas Smith hinted at this point, stating that all was done "openly in the presence of the Judges, . . . the inquest [jury], the prisoner, and so many as will or can come so near as to hear it, and all depositions and witnesses given aloud, that all men may hear from the mouth of the depositors and witnesses what is said." SMITH, *supra* note 49, at 115 (spelling modernized). Writing in the 1760s about civil trials, Blackstone voiced a similar view: "This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination" characteristic of civilian courts. 3 BLACKSTONE, *supra* note 9, at 373. Bentham thought that public trial also deterred judicial misbehavior. He wrote: "Publicity is . . . the surest of all guards against improbity. It keeps the judge himself, while trying [the case], under trial." JEREMY BENTHAM, BENTHAMIANA; OR, SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 115 (John Hill Burton ed., Edinburgh, William Tait 1843), *quoted in* NEIL ANDREWS, PRINCIPLES OF CIVIL PROCEDURE 24 (1994).

52. Judith Resnik cites eighteen state constitutions that require that "all courts shall be open," or use similar language. Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 104 & n.136 (2011).

53. *Id*. at 87-90.

54. Regarding the centrality of this practice in Continental procedure, and its tension with the orality of common law trial, see DAMAŠKA, *supra* note 28, at 50-51, 61.

"demeanor" evidence, or to confrontation of witness and litigant.[55] In the German system of *Aktenversendung* (sending away the court file), it was routine for some distant court (or a university law faculty serving as a court) to render the decision, based on reading the file that had been assembled at the local level.[56] It is in this sense that the unreformed European procedure is said to have lacked immediacy (*Unmittelbarkeit*).[57]

The orality of trial procedure has declined precipitously in modern England, where civil jury trial has been largely suppressed. Since 1985, in a case that goes to trial, witness testimony ("evidence in chief") is submitted by affidavit, but the witness may be called for oral cross-examination.[58]

5. Partisan Investigation and Presentation of Fact; Cross-Examination

In striking contrast to the European tradition of judicially conducted fact gathering, the common law judge took no responsibility for investigating the facts of a case. This concept of the judicial role, which distances the judge from investigating the facts, developed in England in medieval times, when the jurors were expected to come to court already knowing the facts. Later, however, when the jurors ceased to be self-informing, and the trial became an instructional proceeding to educate the jurors about the facts, the judges did not materially alter their role. The judges still took no hand in the work of investigating the facts.[59] That work was left to the litigants, which in practice

55. Writing sometime before 1676, Matthew Hale, the preeminent common law judge of his age, praised the "Excellency" of common law trial, especially the "Opportunity of confronting the adverse Witnesses, . . . [by which] great Opportunities are gained for the true and clear Discovery of the Truth." MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 163-64 (Charles M. Gray ed., 1971) (1713). Hale linked confrontation to cross-examination, which he did not see as distinctively the work of counsel. "[T]here is opportunity for all Persons concerned, *viz.* the Judge, or any of the Jury, or Parties, or their Counsel or Attorneys, to propound occasional Questions, which beats and bolts out the Truth much better than when the Witness only delivers a formal [statement] without being interrogated . . . ." *Id.* at 164 (spelling modernized).

56. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 196-213 (1968). For concern about the trend in American federal practice to delegate factfinding work to magistrates, masters, and other "subjudges," see Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1448-49, 1463 (1983).

57. *See* MERRYMAN & PÉREZ-PERDOMO, *supra* note 27, at 114-15. For a discussion of this and other traits of the English tradition admired by nineteenth-century German scholars, see *supra* note 46.

58. *See* ZUCKERMAN, *supra* note 39, §§ 19.1-.49, at 697-712.

59. *See* DAMAŠKA, *supra* note 26, at 58.

meant their lawyers.[60] Both in pretrial investigation[61] and at trial, the lawyers came to dominate the process of gathering, selecting, and presenting evidence about the facts.[62] As the instructional trial developed, the lawyers took charge of examining and cross-examining witnesses and presenting any documentary evidence, as well as addressing the jurors.[63]

The practice of lawyer-conducted cross-examination of witnesses, which is "unknown to systems of trial other than the common-law system,"[64] took hold in early modern times.[65] By the nineteenth century, cross-examination had come to be seen as the central safeguard in the common law trial. An American commentator writing in 1857 called cross-examination "the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity

60. *Id.*

61. Already in medieval times, hence before the instructional trial, the attorney (forerunner of today's solicitor) investigated facts in order to supply the serjeant (forerunner of today's barrister) with the information that the serjeant needed in order to select the correct writ and plead the case. *See* Paul Brand, *Inside the Courtroom: Lawyers, Litigants and Justices in England in the Later Middle Ages*, *in* THE MORAL WORLD OF THE LAW 91, 101-03 (Peter Coss ed., 2000).

62. The surviving historical sources about the development of trial procedure are better for criminal than for civil justice. Regarding the former, see LANGBEIN, ORIGINS, *supra* note 38, at 180-90; and John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983).

63. Regarding the significance of partisan control over the investigation and presentation of facts in the development of Anglo-American procedure, see Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247 (1937). I have elsewhere pointed to some of the shortcomings of this partisanship. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

64. EDMUND MORRIS MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 113 (1956). For discussion of the responsibility of judges for gathering evidence in the Continental tradition, see Langbein, *supra* note 63, at 827-32, which discusses German practice.

65. The sources for the emergence of the practice and theory of lawyer-conducted cross-examination are slender. Hale's discussion is reproduced *supra*, note 55. Morgan pointed to a case as early as 1668 in which the objection was raised that the testimony of a hearsay declarant escaped cross-examination. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 182 (1948) (citing 2 ROLLE'S ABRIDGMENT 679 (London 1668)). Working from the published law reports and treatise literature, Gallanis found a significant increase in the frequency of hearsay objections in civil litigation in the 1780s and 1790s. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 538-40 & fig.1 (1999). The earliest mention of cross-examination as the basis for excluding hearsay in the criminal trials reported in the *Old Bailey Sessions Papers* (contemporary reports of London trials) appears to have been a case heard in 1789. *See* LANGBEIN, ORIGINS, *supra* note 38, at 245 & n.289.

of mortals."[66] This reliance upon cross-examination as the guarantor of truth is puzzling, because contemporaries knew that cross-examination could also be put to truth-defeating ends.[67]

The movement to nontrial civil procedure in the later twentieth century has necessarily entailed an abandonment of cross-examination, although (as remarked below in connection with discovery practice under the Federal Rules) the pretrial deposition serves a somewhat comparable function, allowing counsel to probe the projected testimony of adverse witnesses.

II. EQUITY: NONTRIAL AND NONJURY CIVIL PROCEDURE

Jury procedure made it awkward for common law courts to administer specific remedies, such as the injunction (cease this) or the decree of specific performance (do that).[68] Specific relief often requires continuing supervision and modification as circumstances change,[69] but a jury dissolves once it has delivered its verdict. Accordingly, the early common law courts largely

66. *Of the Disqualification of Parties as Witnesses*, 5 AM. L. REG. 257, 263-64 (1857), *cited in* Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 96 (1981).

67. Compare Wigmore's panegyric, that cross-examination is "the greatest legal engine ever invented for the discovery of truth," 5 WIGMORE, *supra* note 48, § 1367, at 32, with his admission that cross-examination was "almost equally powerful for the creation of false impressions," 1 WIGMORE, *supra* note 48, § 8, at 237. Trial lawyers pride themselves on their skill in using cross-examination to discredit truthful testimony: "By a carefully planned and executed cross-examination," boasted an American lawyer in 1977, "I can usually raise at least a slight question about the accuracy of [an adverse] witness's story, or question his motives or impartiality." Robert F. Hanley, *Working the Witness Puzzle*, 3 LITIGATION 8, 10 (1977); *accord* DAMAŠKA, *supra* note 26, at 80 ("[A] skillfully executed cross-examination, by raising at least some credibility questions, can decrease the value of almost any testimony . . . .").

68. Even in modern post-fusion practice, concern about the difficulty of supervision remains a justification for refusing to grant specific relief in some cases. *See* RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981). The common law courts did develop the power to issue commands in the form of the prerogative writs (certiorari, habeas corpus, mandamus, prohibition, etc.). The prerogative writs were not civil remedies in the conventional sense, but rather administrative decrees directed to an inferior court or officeholder, ordering that court or officer to take some step incident to a case before the common law court. Regarding the origins of these writs, see S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1951).

69. "Tailoring specific relief requires factual investigation and raises issues of supervision and adjustment of the decree that are beyond the administrative capability of a jury of laypersons convened for a one-time sitting . . . ." LANGBEIN, LERNER & SMITH, *supra* note 22, at 274.

confined themselves to awarding money damages[70] except in cases involving ownership or possession of real property.[71] But no society can long tolerate a legal system that lacks the power to grant specific remedies.

The English solved this dilemma in the later fourteenth and fifteenth centuries by creating a second system of civil justice, which came to be called equity, and which was administered primarily[72] in a new court, the Court of Chancery, which employed nonjury procedures. The judge, called the chancellor, exercised the power to order specific relief,[73] based upon his power to imprison a person who disobeyed his decree.[74] The early chancellors were bishops. Having been keepers of ecclesiastical courts in their dioceses, they were experienced in Roman-canon civil procedure.[75] They patterned Chancery civil procedure on the Roman-canon model, although with many departures.[76]

70. The early common law did experiment with granting specific performance, but ceased doing so by the fourteenth century, in part because of the difficulty of enforcing such relief by distraint, which was the common law mode of process. The chancellor, by contrast, could order a defendant imprisoned for defiance. *See* PLUCKNETT, *supra* note 16, at 678-80. Plucknett thought that "there is no very great reason in the nature of things why common law should confine itself to an action for damages . . . ." *Id*. at 678. As explained in the text, I think this view is mistaken. Juries cannot supervise specific performance.

71. Regarding the recovery of possession under the medieval real actions, see W.S. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 10-16 (1927). In a successful action of *novel disseisin*, "the sheriff would restore the plaintiff to seisin in the presence and 'by view of' the jurors," who "would point out exactly what properties they had awarded to the plaintiff." DONALD W. SUTHERLAND, THE ASSIZE OF NOVEL DISSEISIN 74 (1973) (citation omitted). The ejectment writ was manipulated to displace *novel disseisin* in the fifteenth and sixteenth centuries. MARK WONNACOTT, THE HISTORY OF THE LAW OF LANDLORD AND TENANT IN ENGLAND AND WALES 130-31 (2011).

72. Regarding the so-called "lesser" courts of equity, including the palatinate courts and the Court of Requests, see W.J. JONES, THE ELIZABETHAN COURT OF CHANCERY 348-89 (1967); and LANGBEIN, LERNER & SMITH, *supra* note 22, at 319-20. Regarding Exchequer equity, see W. H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER: ITS JURISDICTION, ADMINISTRATION, PROCEDURES AND RECORDS (1976).

73. For the mature practice, see EDWARD FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS, INCLUDING THOSE OF PUBLIC COMPANIES (London, Butterworths 1861); and WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY (London, W. Maxwell & Son 1867).

74. *See* LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 48 (D.E.C. Yale ed., 1986) [hereinafter NOTTINGHAM].

75. Some of the early chancellors had formal training in canon law. For biographical detail, see Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245, 311-13 (1996).

76. For authority supporting the view that the English "courts of equity [were] fundamentally civilian in their proof procedure and concepts," see MICHAEL R.T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 14 (1999).

In a Chancery case, proceedings were discontinuous rather than concentrated; witness testimony was collected in closed sessions and reduced to writing rather than heard orally.[77] The chancellor based judgment on reading the evidence in the court file rather than hearing live testimony. Chancery developed the ability to handle multiparty and multi-issue litigation,[78] which the common law courts had been largely unable to entertain,[79] both for fear that such cases were too complex for jurors and because such cases did not fit within the bipolar pleading process.

Beyond remedy law, Chancery's other great contribution to English civil procedure was to enable the use of witness testimony and documentary evidence. Because common law civil procedure took shape at a time when the supposition was that a jury from the vicinity of the events already knew the facts, the early common law developed virtually no means for investigating the facts. "The common law made no provision for the interrogation of adverse parties on oath as a means of proof,"[80] nor for the examination of nonparty witnesses, nor for the production of a document not already in the possession of the party seeking it. Chancery, by contrast, drawing on the Roman-canon tradition, developed procedures that enabled a litigant (1) to obtain sworn responses from an opposing litigant;[81] (2) to require nonparty witnesses to answer interrogatories on oath;[82] and (3) to compel the production of relevant documents.[83]

Thus, by early modern times, the English were operating two distinct civil procedure systems: the common law system, rooted in jury trial, and the supplementary system of equity, which employed nonjury and nontrial procedure. The common law courts had jurisdiction over most of the law of

77. On the differences between common law and Chancery procedure, see LANGBEIN, LERNER & SMITH, *supra* note 22, at 289-99, which summarizes the literature.

78. *See* JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS; AND THE INCIDENTS THEREOF; ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA § 72, at 61-62 (Boston, Charles C. Little & James Brown 1838).

79. Multiparty actions are to be distinguished from representative actions, in which a single party pleaded on behalf of an entity or group such as a village or a parish. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

80. MACNAIR, *supra* note 76, at 58.

81. *See* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 148-59 (1960); JONES, *supra* note 72, at 214-15; NOTTINGHAM, *supra* note 74, at 53, 99-100; 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 372-73 (London, V. & R. Stevens, G.S. Norton 1846).

82. JONES, *supra* note 72, at 236 (describing the resulting examinations as "the principal way in which the court could find out the facts").

83. *See* STORY, *supra* note 78, §§ 311-325, at 208-17 (describing bills of discovery).

property and obligations. Even in those fields, however, a common law litigant had to bring a parallel action in Chancery, either to obtain documents needed in a common law trial,[84] or to enforce a common law judgment by means of an injunction or a decree of specific performance. Bringing that second lawsuit was costly: Sequencing the two actions was complex,[85] and because a litigant seeking discovery of documents was required to "describe them with reasonable certainty,"[86] he had to know in advance what he was looking for.

The Americans absorbed this dual system of civil procedure, with jury trial at common law and nonjury proceedings in equity. Some states, such as New York and Delaware, replicated the English system of separate courts of law and equity. In other states, notably Massachusetts and Pennsylvania, and in the federal courts, one court administered both systems with varying degrees of distinctness.[87]

Dissatisfaction with the complexity and expense of running two distinct civil justice systems led, in the nineteenth century, to efforts to merge law and equity, notably the Field Code in New York in 1848,[88] and then to a series of legislative measures in England across the years from 1852 to 1875.[89] The American fusion movement culminated in the twentieth century with the Federal Rules of Civil Procedure.

84. *See* Charles Synge Christopher, Baron Bowen, *Progress in the Administration of Justice During the Victorian Period*, *in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 518 (Ass'n of Am. Law Sch. ed., 1907) ("The common law . . . had no power of compelling litigants to disclose what documents in their possession threw a light upon the dispute, or to answer interrogatories before the trial. In all such cases the suitor was driven into equity to assist him in the prosecution even of a legal claim.").

85. *See* STORY, *supra* note 78, §§ 317-19, at 212-14.

86. *Id.* § 320, at 215.

87. The patterns as developed in colonial times are discussed in Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* LAW IN AMERICAN HISTORY 257, 262-82 (Donald Fleming & Bernard Bailyn eds., 1971).

88. N.Y. CODE PROC. (1848). Regarding the objectives of the Field Code, see Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988). For more on the Field Code, see *supra* note 12.

89. *See* LANGBEIN, LERNER & SMITH, *supra* note 22, at 376-77, 384-85. Regarding the background to the English reforms, see Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery* (pts. 1 & 2), 22 LAW & HIST. REV. 389 (2004), 22 LAW & HIST. REV. 565 (2004).

III. THE FEDERAL RULES: THE PRETRIAL BECOMES THE NONTRIAL

In the 1930s, the Americans began devising what became a new civil procedure system. This system is called pretrial procedure, in the sense of procedures whose purpose is to allow the litigants to prepare for trial, but that term is now a misnomer. The more candid term—in a system that takes only one or two percent of its cases to trial[90]—would be nontrial procedure.

The precipitating event in the creation of this new system was the promulgation in 1938 of the Federal Rules of Civil Procedure.[91] The Federal Rules were devised for use in the federal courts, but most of the American states have chosen to emulate the Federal Rules,[92] with the result that the Federal Rules and state codes patterned on them now govern most civil litigation in the United States.

The Federal Rules sound no clarion call for the suppression of trial. Far from it: Rule 38(a) declares that "[t]he right of trial by jury as declared by the Seventh Amendment" is to be "preserved to the parties inviolate."[93] What the Federal Rules have largely done, however, is to create conditions in which litigants have found it not in their interests to exercise that right.

A. The Flight from Pleading

By the early twentieth century, many observers had come to the view that pleading did not serve its ostensible notice-and-disclosure functions very well, because there were too many ways for an artful pleader to conceal or mislead. Edson Sunderland, a civil procedure scholar at the University of Michigan Law School whose central role in drafting the Federal Rules is discussed below, wrote in 1933: "[A] pleader may allege many things that he knows may not or

90. *See supra* text accompanying note 4.

91. Regarding the origins of the Federal Rules, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010); and Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

92. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); *see also* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2002-2003) (updating the survey). Some proponents of what would become the Rules Enabling Act of 1934 anticipated that the states would emulate the Federal Rules. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 693 & n.13 (1998).

93. FED. R. CIV. P. 38(a).

cannot be proved. . . . The other party has no way of determining from the pleadings what facts will actually become the subjects of proof and what will be merely ignored at the trial."[94] Each pleader strains, Sunderland observed, "to give himself the widest freedom of action at the trial and at the same time convey as little information as possible to his adversary."[95]

Responding to this view that pleading was structurally defective for the task of pretrial clarification, the drafters of the Federal Rules instituted two major and interconnected reforms. The Rules debased the pleading function, providing in Rule 8 for mere notice pleading ("a short and plain statement of the claim"[96]) that ceased to require the pleading of supporting facts.[97] As a functional substitute for pleading,[98] the Rules instituted a regime of broad pretrial discovery, discussed below, which derived to some extent from former equity practice.

Pleading has long had a gatekeeping function, providing the defendant with an early-stage opportunity for dismissal of a case that fails to state a cause of action. Federal Rule 12(b) carried forward that principle. The U.S. Supreme Court has recently shown signs of discomfort with the minimalist pleading regime of Rule 8. In a pair of cases decided in 2007 and 2009, the Court has somewhat heightened the pleading standard by requiring the plaintiff to identify a plausible factual basis for the claim.[99]

---

94. Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 864 (1933). "The same double uncertainty inheres . . . in the denials which the pleader employs." *Id*. In his scholarly writing, Charles Clark, chair of the Rules drafting committee and author of a textbook on pleading, voiced sustained doubts about the utility of pleading. *See* Marcus, *supra* note 91, at 471-84, 488-99. For discussion of Sunderland's role in drafting the Federal Rules, see *infra* text accompanying notes 122-124, 231-238.

95. Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 73-74 (1933).

96. FED. R. CIV. P. 8(a)(2).

97. Regarding the drafters' critique of fact pleading, see Marcus, *supra* note 91, at 490-92, and sources there cited.

98. "In the United States, the pure pleading approach has largely been supplanted by . . . arrangements that permit each party to familiarize himself before trial with the details of all positions that the other party may advance when the controversy is ultimately presented to the adjudicator. This solution requires elaborate pretrial interrogatory and discovery procedures." Von Mehren, *supra* note 31, at 363.

99. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). For discussion and criticism of the Court's direction, see, for example, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); and Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010). It appears that the change has increased the success rate on motions to dismiss. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do*

B. Party-Conducted Discovery: Overcoming the Investigation Deficit

In Part I of this Article, discussing the origins of the pretrial/trial distinction,[100] I have emphasized the impoverishment of the investigative function in the pretrial process of the common law courts. A common law litigant had no means of compelling the production of documents, and no opportunity before trial to examine opposing parties or witnesses.

Equity, by contrast, enabled a litigant to obtain discovery of documents; equitable pleading could be manipulated to obtain what amounted to sworn evidence from an opposing party; and interrogatories requiring sworn responses directed to nonparty witnesses were a staple of equitable procedure.[101] In equitable causes of action, these techniques of investigation were not pretrial procedures; rather, they were modes of investigation and proof for an adjudicative process in which there would be no trial in the common law sense—that is, no public proceeding for the oral examination and cross-examination of witnesses. Equity courts collected witness proofs in the form of written summaries of responses to party-propounded interrogatories. The judge decided a case in equity by examining those summaries and any documentary evidence, but not by hearing witnesses testify and be cross-examined at a concentrated trial. Thus, equity's techniques of investigation had been devised to serve nontrial procedure.

It was long understood, however, that in the hands of a common law litigant, equity's investigative procedures could in some circumstances be made to function in a pretrial dimension, in what came to be known as equity's auxiliary jurisdiction.[102] As previously mentioned, a common law litigant could bring a parallel suit in equity, usually in the form of a bill of discovery,[103] for the purpose of compelling the production of a document important to the common

Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270 (2012). *But see* JOE S. CECIL ET AL., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf (reporting a study of motions to dismiss in federal court between 2006 and 2010, finding that "[i]n general, there was no increase in the rate of grants of motions to dismiss without leave to amend").

100. *See supra* text accompanying notes 31-41.

101. *See supra* text accompanying notes 81-86.

102. In Justice Story's phrase, "the auxiliary or assistant jurisdiction." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA, § 1480, at 699 (Boston, Hilliard, Gray 1836).

103. *See supra* note 83 and accompanying text.

law case. Equity also permitted a common law litigant to obtain a decree permitting the taking and preserving of witness testimony for a common law proceeding, in circumstances in which it was feared that the witness would be unavailable at the time of the trial on account of ill health or distance.[104]

1. The Regime

The drafters of the Federal Rules routinized the practice of using equity-derived investigative techniques as pretrial discovery procedures. The Federal Rules make available three main forms of discovery: documents (now including electronic records), interrogatories, and depositions. A party may demand the production of documents "relevant to any party's claim or defense."[105] A party may propound interrogatories, that is, written questions directed to another party, which that party must answer "fully in writing under oath."[106] And a party may conduct an oral deposition, that is, an out-of-court examination of "any person, including a party,"[107] under oath and stenographically recorded. Whereas some documentary discovery[108] and some use of interrogatories had been known in prior equity practice, the oral deposition was in major respects a creation of the Federal Rules.[109]

104. 2 STORY, *supra* note 102, §§ 1505-1516, at 718-30.

105. FED. R. CIV. P. 26(b)(1).

106. *Id.* R. 33(b)(3).

107. *Id.* R. 30(a)(1). A Supreme Court Justice wrote disapprovingly in 1885 about allowing a litigant "to call a party in advance of the trial at law, and subject him to all the skill of opposing counsel to extract something which [the opposing counsel] may then use or not, as it suits his purpose." *Ex parte* Fisk, 113 U.S. 713, 724 (1885) (Miller, J.).

108. Judith Resnik has observed that the discovery rules were devised "before photocopying and computers were commonplace, [and] did not envision the massive amounts of information that could be generated, stored, or hidden." Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 183 (2003). Prior to the spread of photocopying in the 1960s and thereafter, the practice of discovering documents had been largely limited to inspection and notetaking on site. Regarding the origins and spread of xerography, see DAVID OWEN, COPIES IN SECONDS: HOW A LONE INVENTOR AND AN UNKNOWN COMPANY CREATED THE BIGGEST COMMUNICATION BREAKTHROUGH SINCE GUTENBERG—CHESTER CARLSON AND THE BIRTH OF THE XEROX MACHINE (2004).

109. Writing in 1933, Edson Sunderland, who would become the principal drafter of the discovery regime of the Federal Rules, referred to "oral examination by deposition" as "a new method, unknown to the [historic English] chancery practice," but found by then in one form or another in some American state procedure systems. Sunderland, *supra* note 94, at 874. Regarding practice in the states in which some form of deposition predated the Federal Rules, see GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 62-91 (1932). These

The 1938 discovery regime has been altered on several subsequent occasions. An amendment in 1946 broadened the scope of discovery to include material that would be inadmissible "at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[110] Amendments promulgated in 1970 further expanded the reach of discovery in various respects—making insurance policies discoverable, eliminating the need for advance judicial approval, and allowing follow-up discovery.[111] Further amendments have been made in efforts to restrain discovery abuse[112] and to guide electronic discovery.[113]

In past centuries, the term "deposition" was used to refer to written testimony of all sorts. In modern American usage, the term has lost any meaning other than the counsel-conducted pretrial examination[114]—an indication of how important that device has become. Deposition procedure allows the lawyers for each side to question opposing parties and potential witnesses under oath. No judge is present, but counsel for both sides (all sides in a multiparty case) attend and may examine or cross-examine the deponent.[115] In this way cross-examination, the talismanic safeguard of common law trial procedure, is projected into the pretrial process. A stenographer[116] records the testimony. If the case goes to trial, the stenographic

state practices exhibited restrictions that the Federal Rules would relax or abandon. *See* Subrin, *supra* note 92, at 698-706. "Probably the most important change made by the Federal Rules with respect to federal discovery was to permit parties to take oral depositions of both parties and witnesses as a matter of right . . . ." *Id.* at 703 (observing that such provision was at the time found in only seven states).

110. FED. R. CIV. P. 26(b)(1).

111. *See* Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F.R.D. 487 (1970).

112. For a convenient summary, see John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 561-63, 577-81 (2010).

113. *Id.* at 581-84. Regarding the challenges of electronic discovery, see SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS (2009).

114. *See* Kessler, *supra* note 50, at 1206.

115. FED. R. CIV. P. 30(c)(1) ("The examination and cross-examination of a deponent proceed as they would at trial . . . .").

116. There was a technological dimension to the emergence of the deposition, in the development and widespread use of stenography in legal proceedings. I am not aware of legal historical scholarship regarding this phenomenon. Regarding the deliberations of the Federal Rules drafters about whether or not to require a judge or judge-like officer to preside at depositions, see Ezra Siller, The Origins of the Oral Deposition Under the Federal Rules: Who's in Charge? (May 2012) (unpublished manuscript), http://ssrn.com/abstract=2054928.

transcript is not ordinarily admissible in evidence, but can be used to impeach a witness whose trial testimony varies from what was said at the deposition,[117] or in circumstances in which the witness has died, or is otherwise unavailable for trial.[118]

Having dispensed with the participation of the judge or judge-equivalent officer, the pretrial deposition effectively displaces much of the law of evidence, a body of law that presupposes trial-stage judicial rulings on admissibility or exclusion. Likewise, in the realm of documentary discovery, Rule 26(b)(1) allows a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," and provides that the information sought need not be admissible at trial "if reasonably calculated to lead to the discovery of admissible evidence."[119]

In many relatively simple cases, little or no formal discovery takes place.[120] In some such cases, the facts are evident; in others, no discovery is needed beyond the "initial disclosure" respecting potential witnesses and records that each party is required to make "without awaiting a discovery request."[121] Even in cases in which the discovery regime is not employed, the availability of discovery affects the disposition to settle, because each litigant knows that if the case proceeds, the discovery regime will usually prevent the concealment of evidence helpful to his opponent(s).

In theory, the discovery system of the Federal Rules is a branch of pretrial

117. FED. R. CIV. P. 32(a)(2).

118. *Id.* R. 32(a)(4).

119. *Id.* R. 26(b)(1).

120. A five-state empirical study conducted in the early 1990s by the National Center for State Courts found that no recorded discovery took place in forty-two percent of the cases. *See* Susan Keilitz, Roger A. Hansen & Henry W.K. Daley, *Is Civil Discovery in State Trial Courts out of Control?*, ST. CT. J., Spring 1993, at 8, 9. For other empirical data, see James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 621-23 (1998); and Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 527 (1998).

121. FED. R. CIV. P. 26 (a)(1)(A). The rule requires each party to disclose without demand the names of persons "likely to have discoverable information," and also to disclose documents and electronic records in the party's possession that the party "may use to support its claims or defenses." *Id.* Some jurisdictions require more extensive initial disclosures. The Arizona version of the rule requires parties to identify "the factual basis for each claim or defense"; "[t]he legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities"; and the names and addresses of known potential witnesses and the "information each . . . is believed to possess." ARIZ. R. CIV. P. 26.1(a). I owe this reference to Ron Kilgard.

procedure that is designed to assist a litigant to prepare for trial, both by gathering evidence to support that litigant's case, and by ascertaining the positions and the likely evidence that the opposing party or parties might present were the case to advance to trial. However, precisely because discovery allows such far-reaching disclosure of the strengths and weaknesses of each side's case, discovery often has the effect of facilitating settlement. In such cases, discovery serves to displace rather than to prepare for trial. Indeed, part of the rationale that motivated the drafters of the Federal Rules to prefer discovery over pleading was the expectation that the change would promote settlement. On the eve of the drafting of the Federal Rules, Sunderland, the architect of the discovery regime, wrote that "one of the greatest uses of judicial procedure is to bring parties to a point where they will seriously discuss settlement."[122] Part of what was wrong with the pleading-centeredness of the older law, Sunderland thought, was that "the pleadings seldom disclose a basis upon which a settlement can be reached. It is not what a party asserts, but what he can establish by proof"[123] that shapes settlement. "Many a case would be settled, to the advantage of the parties and to the relief of the court, if the true situation could be disclosed before the trial begins."[124]

2. Paper and Electronic Trails: The Changing Character of Evidence

A background factor of some importance in the decline of trial has been the changing character of the evidence. In earlier times, when the procedures of oral trial took shape, evidence in contested cases was more likely than today to take the form of witness testimony—about what the witness saw or heard or said or did—as opposed to the writings and electronic records[125] characteristic of much modern transactional life. Documentary evidence often "speaks for itself" (as a common phrase has it), and is usually less in need of the probing that occurs at trial. The centrality of documentary discovery in nontrial procedure reflects this change in the character and reliability of evidence. (The growing use of summary judgment, discussed below, also reflects the trend

122. Sunderland, *supra* note 94, at 864.

123. *Id*.

124. *Id*. at 865.

125. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 380-81 (2007) (basing summary judgment on video evidence notwithstanding a contradictory factual account given by the nonmovant plaintiff). For critiques, see Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); and Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of* Scott v. Harris, 91 JUDICATURE 180 (2008).

toward documents and other proofs more reliable than witness testimony.[126])

A main factor underlying the trend toward documentary evidence is the ever greater role of large institutions such as corporations and government agencies in the transactions and activities that give rise to litigation.[127] Record generation and record retention are essential to the work of such organizations. I have had occasion elsewhere, in discussing the growth of corporate trust companies, to point to the way that

> the needs of ordinary business practice incline institutional trustees toward good record keeping. A bank trust department or other institutional fiduciary is an intrinsically bureaucratic entity. Performing trust functions necessarily involves the conduct of many persons deliberating and acting over time—account officers, investment officers, accountants, information technology personnel, supervisors, review committees. Internal coordination requires that transactions, authorizations, and committee decisions be documented. The data processing revolution has reinforced these tendencies by lowering the cost of creating and retaining many kinds of records.[128]

In place of witnesses being asked "to recall conversations lost to memory or recalled only through a prism of self interest,"[129] today's civil lawsuit is ever more likely to turn on well-preserved transactional documentation.

The growing importance of institutional litigants has also influenced the incentives to settle cases short of trial, a subject discussed below.[130] The discovery-based processes of modern litigation have been conducive to the

126. The greater reliability of a particular form of evidence bears on whether that evidence satisfies the summary judgment standard of Rule 56(a), that there be "no genuine dispute as to any material fact." FED. R. CIV. P. 56(a).

127. For empirical study of the shift in lawyers' work across recent decades from personal to institutional clients such as corporations and other business organizations, nonprofits, labor unions, and governments, see Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 718-19 (1998); and Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369 (2006).

128. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 948 (2005). The high level of reliability of records generated in the ordinary course of business has long been recognized in the business records exception to the hearsay rule, now expanded and codified as Rule 803(6) of the Federal Rules of Evidence ("Records of a Regularly Conducted Activity"). The Rule now includes records regularly made and "kept in the course of a regularly conducted activity of a business, organization, occupation, or calling." FED. R. EVID. 803(6)(B).

129. George A. Davidson, *Who Killed the Civil Trial?*, N.Y. L.J. MAG., Sept. 2007, at 1, 3.

130. *See infra* text accompanying notes 219-225.

growth of large law firms and hourly billing.[131] American litigators "prefer to leave no stone unturned, provided, of course, they can charge by the stone."[132]

A similar change in the character of evidence can be observed in criminal justice, in which the movement toward nontrial criminal procedure has been associated with the growing importance of forensic evidence such as DNA and fingerprints.[133] Mirjan Damaška speaks of this trend (and the related growth of expert evidence) as "the scientization of proof."[134] As with civil justice, this change in the character of evidence in criminal cases has been associated with the growth of complex bureaucratic institutions specializing to some extent in generating and preserving evidence—police forces,[135] crime labs,[136] and

131. Subrin points out that the Advisory Committee that drafted the Federal Rules was composed mostly of lawyers "associated with what was then considered large firm practice." Subrin, *supra* note 91, at 971. "The attorneys on the Committee were . . . members of firms that could handle complex litigation; they had clients who could afford to pay for the attorney latitude the new rules would provide." *Id.* at 972.

For the view that the discovery system of the Federal Rules influenced the emergence of large law firms dependent on hourly billing, see Galanter, *supra* note 4, at 502-04; George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91; and Subrin, *supra* note 92, at 741. Writing a few years before the promulgation of the Federal Rules, Ragland reported that in those states that allowed pretrial depositions, "defendants employ the process much more frequently than do plaintiffs," in part because "much of the business of defendants is concentrated in the larger law firms." RAGLAND, *supra* note 109, at 33-34.

132. Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985).

133. Thomas Weigend, *Why Have a Trial When You Can Have a Bargain?*, *in* 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT 207, 210 (Antony Duff et al. eds., 2006). Relatedly, there has been a growing awareness in criminal justice circles of the potential unreliability of witness testimony, especially eyewitness identifications. Regarding the causes of eyewitness error, see BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (3d ed. 1997); and Richard A. Wise, Clifford S. Fishman & Martin A. Safer, *How To Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 454-64 (2009).

134. DAMAŠKA, *supra* note 26, at 147.

135. "Modern police forces in America's older cities date from the middle decades of the [nineteenth] century. New York established a police department in 1845; New Orleans and Cincinnati in 1852; Boston, Philadelphia, and Chicago in 1855; Baltimore and Newark in 1857; and Providence in 1864." STANLEY H. PALMER, POLICE AND PROTEST IN ENGLAND AND IRELAND, 1780-1850, at 20 (1988). For England, see David Philips, *"A New Engine of Power and Authority": The Institutionalization of Law-Enforcement in England 1780-1830*, *in* CRIME AND THE LAW: THE SOCIAL HISTORY OF CRIME IN WESTERN EUROPE SINCE 1500, at 155 (V.A.C. Gatrell et al. eds., 1980).

136. Regarding the range of modern practice, see RICHARD SAFERSTEIN, FORENSIC SCIENCE: FROM THE CRIME SCENE TO THE CRIME LAB (2009).

prosecutorial corps.[137]

3. Displacing Trial

In a procedural system ever more oriented to pretrial resolution, the deposition has in important respects replaced the trial as the primary occasion for probing sworn testimony about matters of fact. In combination with what the litigants learn from discovery of documents and from disclosures in response to interrogatories, deposition testimony provides the litigants a detailed advance view of what the issues and the evidence would be (on both or all sides) were the case to go to trial. In this way the discovery system has transferred into the pretrial process much of the work of eliciting facts and refining legal issues that had formerly been the function of trial. Having seen the dress rehearsal, today's litigants often find that they can dispense with the scheduled performance.

4. The Drawbacks to the Discovery Revolution: Expense and Abuse

There are serious downsides to discovery as practiced in the United States. Discovery is costly, so costly that the prospect of having to bear those costs can dissuade a potential litigant from advancing a meritorious claim or defense.[138] The perverse incentives of the adversary system intensify the problem, because each party's discovery activities are conducted in large part at the expense of the opposing litigant(s).[139] "[I]t is almost invariably cheaper to ask for

137. Systems of public prosecution developed in England and the United States in the nineteenth century, but the history is not yet well understood. For England, see Bruce P. Smith, *The Emergence of Public Prosecution in London, 1790-1850*, 18 YALE J.L. & HUMAN. 29 (2006). The primitive character of public prosecution in mid-nineteenth century Philadelphia is discussed in ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880, at 80-83 (1989).

138. Discovery costs are not the only category of litigation expense that bears on the willingness or ability of a potential litigant to bring or defend a suit. Other costs include the fees of experts and of counsel. Particularly in complex cases, lawyers' fees can become quite large. Gillian Hadfield has argued that the increasing institutionalization of litigation (discussed *supra* in the text accompanying note 130) has led to increases in lawyers' fees. "Legal fees are high precisely because legal resources are, as a result of free market forces, pulled disproportionately into the commercial sphere, and individuals are largely priced out of the market." Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956 (2000).

139. *See* JAMES R. MAXEINER ET AL., FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE 147-50 (2011); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989).

materials than to produce them," which tempts litigants "to seek costly information of marginal relevance."[140] The prospect of bearing these costs pressures "the parties continually to recalculate the comparative advantages of settlement and trial."[141] The greater the investment that either side has made in pretrial investigation, the greater is the incentive to avoid the risk of total loss that can result at trial.[142]

Accordingly, discovery has two inseparable dimensions: investigating the facts and inflicting costs on the other side. A party receiving a discovery demand needs to engage counsel to study and interpret the demand (and sometimes to institute proceedings to resist it). The producing party must locate the documents, and then pay counsel to examine them for relevance and privilege. The trend toward electronic documents has exacerbated the expense, because "the costs of producing electronic documents far exceed those of producing paper documents."[143] When depositions are demanded of parties or witnesses, the complying side is put to the expense and distraction of preparing the deponents for the deposition, usually with the aid of counsel. When a deposition takes place, even in a relatively simple case, "[a]t least two lawyers are normally present, in addition to the witness and the court reporter, and questioning often moves slowly."[144] Thereafter, counsel will study and evaluate the transcripts. When a case entails the use of expert witnesses, they must be paid for preparation and deposition time and for expenses.

The broad scope of permitted discovery, together with the failure of the Federal Rules to institute a "loser pays" cost-shifting regime, invites cost-inflicting abuse.[145] The fear of discovery abuse is what motivates the Supreme

140. Samuel Issacharoff, *Facts, Investigation, and the Role of Discovery*, *in* LITIGATION IN ENGLAND AND GERMANY: LEGAL PROFESSIONAL SERVICES, KEY FEATURES AND FUNDING 39, 44-45 (Peter Gottwald ed., 2010). To discourage discovery demands designed to impose compliance costs on the opposing party, the suggestion has been made that the demandant be required to bear those costs, even in the absence of a broader loser-pays cost system, on analogy to principles of unjust enrichment. *See* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

141. Yeazell, *supra* note 41, at 951.

142. *Id*. at 958-64.

143. Beisner, *supra* note 112, at 565 (observing that electronic records tend to be created in greater number and that such records are commonly more difficult to review for responsiveness and privilege). For a discussion of the cost factors, see *id*. at 565-70.

144. GEOFFREY C. HAZARD, JR., JOHN LEUBSDORF & DEBRA LYN BASSETT, CIVIL PROCEDURE § 8.16, at 357 (6th ed. 2011).

145. Among the practices regarded as abusive are

Court's recent effort to tighten pleading standards in *Bell Atlantic Corp. v. Twombly*, in which the Court spoke of the danger that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases."[146] Although cases of abuse are thought to be infrequent,[147] when they occur, they transform discovery from a truth-serving to a truth-impairing device.

C. Judicial Case Management

1. The Pretrial Conference

In part to compensate for the weakened role of pleading in the Federal Rules,[148] the drafters made provision in Rule 16 for "the court . . . in its discretion [to] direct the attorneys for the parties to [attend] . . . a conference to consider" matters including "simplification of the issues," amending the pleadings, and "obtaining admissions of fact and of documents which will avoid unnecessary proof."[149] This so-called "pretrial conference" can take the

> discovery beyond what the rules require or what is necessary to prove the proponent's case; discovery of information not needed by the proponent but having potential for coercing the respondent to settle because of its confidential or embarrassing nature; discovery taken primarily to impose expense and delay on the respondent rather than to obtain information for the lawsuit; discovery for purposes unrelated to the litigation in which it is sought (such as obtaining access to protected and otherwise unavailable intellectual property); propounding discovery requests to which the costs of responding exceed the anticipated increase in value of the proponent's claim or defense; withholding discoverable information or materials on the basis of groundless boilerplate objections; and unjustifiable or bad faith assertions of privilege.
>
> John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 507 (2000).

146. 550 U.S. 544, 559 (2007).

147. For empirical studies to the effect that such abuse does not occur "in the great bulk of cases," see JAMES ET AL., *supra* note 33, § 5.2, at 288 & n.7 and sources there cited. *See also* Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683, 684-85 (1998) (reviewing empirical studies indicating that no discovery occurs in as many as half of all cases and that abusive discovery is most likely to occur in "complex, high stakes litigation, handled by big firms with corporate clients").

148. Rule 16 was "designed to substitute for formal pleadings the less formal processes of discussion and exchange as ways of narrowing issues for trial and of expediting proof." David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1981 (1989).

149. FED. R. CIV. P. 16(c)(1)-(3) (1938). Sunderland was again the moving figure. *See* Shapiro, *supra* note 148, at 1978. Sunderland pointed to prior Michigan practice as the model. Edson

form of an off-the-record conversation in the judge's chambers or a formal hearing at which the judge, sitting without a jury, hears counsel and resolves pretrial issues.[150]

In the pleading-centered pretrial procedure that prevailed before the Federal Rules, the litigants exchanged written pleadings by filing them with the court, but the judge had little or no contact with the case before the trial commenced.[151] The discovery revolution,[152] by shifting so much activity into the pretrial phase, effectively required that the Rules make provision for judicial determinations before trial—for example, in disputes about the scope of discovery.[153] Granting the lawyers for the parties "unprecedented authority to obtain sworn testimony and to compel the other party to disclose information" required that there be "judicial oversight" to keep order and to prevent abuse and delay.[154]

R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215, 225 (1937).

150. Regarding the range of issues that can be the subject of pretrial conferences, see HAZARD ET AL., *supra* note 144, § 10.3, at 392-94.

151. By contrast, in the formative period of the common law in the thirteenth century, pleading was oral and "tentative"; judges participated in the pleading process, advising the pleaders about the likely consequences of particular pleas. For discussion and illustrative sources, see LANGBEIN, LERNER & SMITH, *supra* note 22, at 147-52; regarding the movement from oral to written pleading in the fifteenth and sixteenth centuries, see *id*. at 253-56 and works there cited.

152. Armistead Dobie, dean of the University of Virginia Law School and a member of the Rules drafting committee, wrote at the time that the discovery provisions were "revolutionary" in their importance. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275 (1939); *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 521 n.119 (1986) (citing Dobie's article).

153. "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . ." FED. R. CIV. P. 26(c)(1). Judith Resnik observed in a landmark article in 1982 that on account of the "[c]reation of the new discovery rights, . . . [l]itigants became entitled to the court's help in obtaining from each other all unprivileged information 'relevant to the subject matter' of the lawsuit. Thus, the domain of trial judges grew." Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 392 (1982) (quoting FED. R. CIV. P. 26(b)). E. Donald Elliott expressed somewhat differently the relationship between the discovery regime of the Federal Rules and the growth of the judge's role in pretrial procedure: "[M]anagerial judging is a response to a fundamental design flaw in the Federal Rules of Civil Procedure: the lack of incentives for litigants to narrow issues for trial." E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308 (1986). "[T]he problem that managerial judging aims to solve is, at base, structural: it results from a fundamental imbalance in the Rules between the techniques available for developing and expanding issues and those for narrowing or resolving them prior to trial." *Id*. at 319.

154. Damaška, *supra* note 44, at 11.

An important change in judicial administration, which took root in the federal courts in the late 1960s and thereafter, facilitated case management. A system of "continuous" or "individual" case assignment was introduced, in which the same judge oversees all proceedings in a case, both pretrial and trial.[155]

As judicial involvement in the pretrial process increased, Rule 16 was amended in 1983 to expand the range of matters that the judge was empowered to resolve in such hearings. The amended rule invites the judge to "establish[] early and continuing control so that the case will not be protracted because of lack of management."[156] Among the topics that the revised rule identifies as appropriate for resolution at such hearings are the sequencing of discovery[157] and of pretrial motions;[158] and the adoption of "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[159]

2. Managerial Judging and Complex Cases

The special sensitivity toward the managerial problems of complex cases voiced in the 1983 revision of Rule 16 underscores that the trend toward greater judicial management in the pretrial process ("managerial judging,"[160] to use Judith Resnik's apt term) had causes beyond the weakening of pleading and the profusion of discovery. The Federal Rules brought over from equity and expanded not only liberal discovery but also liberal joinder of parties and claims.[161] The pleading rules at common law, especially the single-issue

155. Regarding the ways that continuous case assignment promotes judicial case management, see Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 674-76 (2010); and Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 939-43 (2000).

156. FED. R. CIV. P. 16(a)(2).

157. *Id.* R. 16(b)(3).

158. *Id.* R. 16(b)(2).

159. *Id.* R. 16(c)(2)(L).

160. *See* Resnik, *supra* note 153. Resnik understood the term to embrace not only the growing involvement of judges in the pretrial process, but also the expanded judicial role in fashioning remedial decrees in post-trial proceedings, notably in complex public law litigation concerning prison conditions and racial desegregation of schools. *Id*. at 393-94.

161. FED. R. CIV. P. 18-25. Among the features of the Federal Rules that Charles Clark advertised at the outset "as among the most important" were the provisions promoting "free joinder of parties, of claims, and of counterclaims, free amendment, and extensive impleader of new parties." Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448 (1936). I owe this reference to David Marcus.

requirement,[162] greatly restricted multiparty and multi-issue litigation.[163] "Single-issue pleading allowed only one contested issue of fact to reach the jury for decision, no matter how complex the facts of the case. Single-issue pleading was a way to restrict and simplify the jury's task, but often at the heavy cost of oversimplifying and distorting the case."[164] The nonjury equity courts, freed from the need to package cases for decision by lay triers, had been able to entertain multiparty and multi-issue cases, which is why substantive fields characterized by multiparty relations such as account,[165] business associations,[166] and estate administration[167] developed in equity rather than at common law.[168]

Amendments to the Federal Rules in 1966 further promoted large-scale litigation by facilitating class actions.[169] In the 1980s, the *Agent Orange* case

162. "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." Subrin, *supra* note 91, at 916.

163. "Pleading to a single issue meant no joinder of claims or defenses, extraordinarily limited joinder of parties, and no pleading in the alternative. Equity took the opposite position—that all interested parties should be joined so that complete justice could be done in every case." Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 65 (1993).

164. Langbein, *supra* note 43, at 71. Speaking of eighteenth-century England, Holdsworth remarked: "[T]he common law system of procedure, pleading, and evidence fitted it to deal only with single issues defined by the pleading of the parties, and made it quite unable to deal with those questions of the personal conduct of the parties upon which the decisions of the Chancellors were based." 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 599 (1938).

165. *See* Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 MICH. L. REV. 1571, 1623-33 (1983); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 65-72 (1980).

166. Regarding equity's effective capture of jurisdiction over partnership matters, see 1 STORY, *supra* note 102, §§ 659-683, at 654-79.

167. 1 SPENCE, *supra* note 81, at 578-86.

168. A study of all reported English civil cases for the years 1789 to 1791 found that cases of any complexity or large value were prevailingly allocated to and resolved by equity courts rather than by jury trial in common law courts. *See* Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 590-608 (1984).

169. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pts. 1 & 2), 81 HARV. L. REV. 356 (1967), 81 HARV. L. REV. 591 (1968). For the practice as it has developed, see generally AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION (2010).

became a celebrated example,[170] "consolidating more than 600 separate actions" that sought damages for toxic harm on behalf of a purported plaintiff class of 2.4 million persons.[171]

The absorption and expansion of equity's multiparty and multi-issue practice in the Federal Rules coincided with and encouraged the development of fields of substantive law that depended upon such procedures—notably antitrust,[172] securities regulation,[173] international trade law,[174] products liability and other mass torts,[175] and various public law causes of action.[176]

The proliferation of complex cases led to the development across the 1950s and 1960s of consensus case management techniques, which the organized federal judiciary endorsed in a handbook,[177] subsequently revised several times

170. Recounted in detail in PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1987) [hereinafter SCHUCK, AGENT ORANGE]; for citation to the various published opinions in the litigation, see Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 337-38 n.6 (1986) [hereinafter Schuck, *Judges*].

171. Schuck, *Judges*, *supra* note 170, at 341. The class members were "some 2.4 million American [military] veterans exposed to [a chemical known as] Agent Orange during the war in Vietnam, the wives and children (born and unborn) of those veterans, and exposed Vietnam veterans from Australia and New Zealand." *Id.* at 342. The seven defendant chemical companies had been "pared down from an original twenty-four." *Id.*

172. "Complex litigation became a catalytic force with the electrical equipment antitrust cases in the 1950s . . . ." Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 224 (1997). Regarding those cases, see Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

173. *E.g.*, *In re* U.S. Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (reversing the district court's finding that the case, which consolidated eighteen cases and five certified classes, was too complex for jurors to understand).

174. *E.g.*, *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980). The case alleged antitrust and tariff violations and was projected to require a year of trial time, following nine years of discovery that had "produced millions of documents and over 100,000 pages of depositions." *Id.* at 1073.

175. Regarding the "steady evolution toward a more collectivist, functional, and managerial tort law," see SCHUCK, AGENT ORANGE, *supra* note 170, at 12.

176. For an overview of the expansion of federal regulatory activity from the late nineteenth century into the 1970s, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986). *See also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing the regulatory features of public law litigation).

177. Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960).

and now known as the *Manual for Complex Litigation*.[178] In a case involving dozens[179] or indeed thousands of parties, leaving each party free to conduct discovery and make pretrial and trial motions according to that party's convenience and strategic advantage would result in duplication, delay, avoidable expense, and, in some circumstances, chaos. Accordingly, the *Manual* provides for extensive use of pretrial conferences to identify and refine issues, as well as to plan (and limit) discovery and the use of experts.[180] Another initiative in this vein was the legislation dealing with multidistrict litigation, enacted in 1968,[181] which provides a process for consolidating in a single federal district court all the discovery and other pretrial activity arising from cases that involve "common questions of fact,"[182] for example, product liability suits concerning the same product.

As the complexity of legal regulation has grown, predicting the outcome of adjudication in such cases has become more difficult.[183] Law has become "more indeterminate," in the sense that litigants and judges "have less faith that legal doctrine provides a single right answer."[184] In this way, the experience with

178. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, FOURTH (2004) [hereinafter MANUAL, FOURTH].

179. A notable example: A case went to trial in San Francisco in 1985, in which five manufacturers of asbestos products sued seventy-five insurance companies that were alleged to have shared the manufacturers' liability for tort claims. No courtroom was large enough to accommodate the personnel from the ninety-six law firms who appeared in the case. The trial had to be moved from the courthouse to the auditorium of a concert hall, which was somewhat rebuilt for the purpose. *See* Saul Rubin, *Case To Determine Which Insurers Are Liable for Damages: Stage Set for Huge Asbestos Trial*, L.A. TIMES, Mar. 5, 1985, http://articles.latimes.com/1985-03-05/business/fi-12575_1_asbestos-trial. For the final resolution on appeal a decade later, see *Armstrong World Indus., Inc. v. Aetna Casualty & Surety Co.*, 52 Cal. Rptr. 2d 690 (Ct. App. 1996).

180. MANUAL, FOURTH, *supra* note 178, §§ 11.11-.13, at 32-34, §§ 11.2-.23, at 36-42, § 11.33, at 44-46.

181. Pub. L. No. 90-296, 82 Stat. 109 (codified as amended at 28 U.S.C. § 1407 (2006)) (creating the Judicial Panel on Multidistrict Litigation).

182. *Id.* at 109 (codified at 28 U.S.C. § 1407(a)). Regarding the work of the panel, see DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2011).

183. Reflecting in 1947 on the difficulty of deciding cases arising from the Internal Revenue Code, Judge Learned Hand wrote that "[m]uch of the law is now as difficult to fathom, and more and more of it is likely to be so . . . [in] a period of increasingly detailed regulation." Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947). I owe this reference to Nicholas Parrillo.

184. Mark Galanter, "*. . . A Settlement Judge, Not a Trial Judge": Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 14 (1985). Regarding the theme that there has been a decline of "faith" in adjudication, see Resnik, *supra* note 152, at 505-07. Legal sources can result in

complex cases under the Federal Rules has come to echo the rule skepticism of the legal realist movement.[185]

3. Promoting Settlement

The *Manual* emphasizes the responsibility of the judge to whom a case is assigned to promote settlement,[186] a theme that the 1983 revision of Rule 16 governing pretrial conferences endorsed for all cases. The revision made "facilitating settlement" of the case[187] an express objective of pretrial conferences. Managerial judging thus expanded "from a set of techniques for narrowing issues to a set of techniques for settling cases."[188]

Judicial involvement in promoting settlement has resulted in part from the judicial role in other case management activities, such as scheduling the phases of the pretrial; those activities necessarily expose the judge to the emerging merits of the case. From this vantage point, according to the *Manual*, the judge may be able to spot circumstances in which "resistance to settlement arises from unreasonable or unrealistic attitudes of parties and counsel"; and in such circumstances, "the judge can help them reexamine their premises and assess their case[] realistically."[189] Geoffrey Hazard has remarked that, by acquainting a neutral observer with the evidence, judicial case management can function as "mediation by another name."[190]

The danger, however, is that the judge may know less than he or she thinks; the judge may have only "a generalized understanding"[191] of the case. Pressing for settlement in such circumstances risks denying adequate opportunity for a party to develop his or her case. In *Agent Orange*, Judge

indeterminacy both when too vague and when so multitudinous that compliance becomes impractical. Regarding the latter dynamic as evidenced in some spheres of American regulatory law, see John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation*, 4 SOC. & LEGAL STUD. 307, 319-20 (1995).

185. Regarding the influence of the realists on the drafters of the Federal Rules, see Marcus, *supra* note 91.

186. MANUAL, FOURTH, *supra* note 178, §§ 13.1-.24, at 167-82.

187. FED. R. CIV. P. 16(a)(5); *accord id*. R. 16(c)(1), 16(c)(2)(I).

188. Elliott, *supra* note 153, at 323; *see also* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 613 (2005) (viewing the 1983 amendments as a "triumph of those judges who sought to gain authority to press for settlement").

189. MANUAL, FOURTH, *supra* note 178, § 13.11, at 167.

190. E-mail from Geoffrey C. Hazard, Jr., Thomas E. Miller Distinguished Professor of Law, U.C. Hastings Coll. of the Law, to author (Nov. 22, 2011) (on file with author).

191. Schuck, *Judges*, *supra* note 170, at 349-50.

Weinstein promoted settlement by a variety of means, some of which remain highly controversial, including imposing severe time limits on pretrial investigation and disclosing to the parties "how he intended to rule on a number of important and complex legal issues."[192]

Caseload pressures incline judges toward settlement, even though empirical study indicates that, at least in the federal system, judicial resources have largely kept pace with caseloads across the past half century.[193] Judge Weinstein has spoken of the link between caseload pressures and settlement pressures. "Federal judges tend to be biased toward settlement. We are the kitchen help in litigation. We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers."[194] Judge Weinstein's theme is that in processing any one case, the judge must take into account the rest of the court's caseload. This concern with cross-caseload efficiency has become particularly prominent in England, where the Woolf Reforms of the 1990s[195] established the policy of using aggressive judicial case management to diminish the incidence of trials.[196]

192. *Id.* at 344. Judge Weinstein also employed mediators and special masters to further negotiations, *id.* at 344-45, and he persuaded the defendants to allow him to arbitrate what was "perhaps the most difficult question facing the defendants—how to allocate liability among themselves." *Id.* at 345. Weinstein "harbored genuine doubts about the [plaintiffs'] evidence on causation," but he "deeply sympathized with their plight." *Id.* at 343. Promoting settlement spared Weinstein not only a trial that was projected to last a year, but also "[t]he prospect of having either to direct a verdict for the chemical companies or to reverse a jury verdict in favor of the [plaintiffs]." *Id.* But if the chemical companies were entitled to win on causation, it was abusive for the judge to pressure them to settle a claim that he knew he would have resolved in their favor.

193. *See* Galanter, *supra* note 4, at 500-04.

194. Jack B. Weinstein, *Comments on Owen M. Fiss,* Against Settlement *(1984)*, 78 FORDHAM L. REV. 1265, 1265 (2009).

195. An official study conducted in the mid-1990s by Lord Harry Woolf resulted in a new civil procedure code, called the Civil Procedure Rules (CPR). *See* CIVIL PROCEDURE RULES (2012) [hereinafter CPR]. For the originally promulgated version, see THE CIVIL PROCEDURE RULES (1998), http://www.legislation.gov.uk/uksi/1998/3132/contents/made (last visited Sept. 3, 2012). The recommendations leading to the CPR appear in LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996); and LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995).

196. Case management powers are scheduled in CPR § 1.4(2); for discussion, see Neil Andrews, *A New Civil Procedural Code for England: Party-Control "Going, Going, Gone,"* 19 CIV. JUST. Q. 1 (2000). The CPR empowers the court to "control the evidence by giving directions as to—(a) the issues on which [the court] requires evidence; (b) the nature of the evidence which [the court] requires to decide those issues; and (c) the way in which the evidence is to be placed before the court." CPR § 32.1(1) (1998). Hazel Genn reads the "message" of the Woolf reforms to be that "diversion and settlement is the goal, [and] that courts exist only

The disposition to promote settlement found in the 1983 revision of Federal Rule 16 is also evidenced in federal legislation enacted in 1998, requiring each federal district court to devise and implement a program "to encourage and promote the use of alternative dispute resolution."[197] Congressional findings accompanying the legislation declare that "alternative dispute resolution . . . in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements."[198] So-called "court-connected" mediation programs, in which litigants are required to attempt settlement with the assistance of a neutral mediator, have become widespread.[199] Alternative dispute resolution programs of various sorts, notably arbitration and mediation, also operate apart from the civil courts.[200]

Settlement of a civil dispute has material advantages over adjudication. Settlement is usually cheaper and faster; the court is spared the labor of adjudication; each party is spared the risk of a less favorable outcome; and neither party is stigmatized as the loser. Thus, so long as adjudication is preserved as a viable alternative, the litigants' choice to settle a case is voluntary, and facilitating settlement is sound public policy.[201]

a. The Danger of Coercion

The trend to recast the judicial role to include the objective of encouraging

as a last resort and, perhaps, as a symbol of failure." HAZEL GENN, JUDGING CIVIL JUSTICE 53 (2010).

197. Alternative Dispute Resolution Act of 1998, Pub. L. 105–315, § 3, 112 Stat. 2993, 2993 (codified as amended at 28 U.S.C. § 651(b) (2006)).

198. *Id.* § 2.

199. For a discussion of the varieties, see Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271 (2011).

200. These programs differ from the present subject, because they displace the whole of civil jurisdiction, not just the trial function. Regarding mandatory arbitration programs arising from consumer sales and contracts of employment, see Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1134-39 (2006); regarding the trend of major federal administrative agency proceedings to displace civil jurisdiction, see *id*. at 1130-31.

201. *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78, 1085 (1984) (observing that settlement may be unfair when the parties have unequal resources to conduct litigation and that it prevents the generation of precedent). For the view that subsequent changes in the plaintiffs' bar have rendered resources more equal in many categories of cases, see Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1179-84 (2009); and Yeazell, *Re-Financing*, *supra* note 1.

settlement was contrary to the design of the original drafters of the Federal Rules, several of whom had opposed it.[202] Charles Clark, chair of the drafting committee, thought that "[c]ompelled settlement negotiations" were "dangerous," because they induce doubt about "the impartiality of the tribunal."[203] Later commentators have emphasized this concern. Albert Alschuler has referred to pretrial conferences as "Cajolery Conferences,"[204] and he has cautioned that "a judge who has gained familiarity with the facts of a case during his pretrial activities is unlikely to relish the prospect of hearing the evidence again at trial."[205] Judith Resnik has pointed to the danger that, in a judicially supervised settlement negotiation, "litigants who incur a judge's displeasure may suffer judicial hostility or even vengeance with little hope of relief."[206] Owen Fiss has described the settlement of civil suits in circumstances of coercion as "the civil analogue of plea bargaining."[207] Fiss has worried that in civil cases "[c]onsent is often coerced,"[208] but he has not developed the claim. He also expressed concern that "disparities in resources between the parties" could disadvantage "the poorer party" in various ways,[209] but he conceded that such "imbalances of power can distort" trial outcomes as well.[210]

b. The Contrast with Nontrial Criminal Procedure

The analogy to plea bargaining reminds us that a parallel movement from trial to nontrial procedure has taken place in criminal procedure. In 2002, in the state courts that process most criminal cases, only 1.3% of those cases were resolved at jury trial;[211] in the federal system, the figure for 2004 was 4%.[212]

202. Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1577-78 (2008).

203. Shapiro, *supra* note 148, at 1980 (quoting Charles E. Clark, *To an Understanding Use of Pre-Trial*, *in* Proceedings of the Seminar on Procedures for Effective Judicial Administration, 29 F.R.D. 454, 456 (1962)).

204. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1828 (1986).

205. *Id*. at 1835.

206. Resnik, *supra* note 153, at 425. Regarding the difficulty of obtaining appellate review of judicial determinations made in the pretrial process, see Yeazell, *Process*, *supra* note 1, at 651-53.

207. Fiss, *supra* note 201, at 1075.

208. *Id.*

209. *Id*. at 1076.

210. *Id*. at 1077.

211. Galanter, *supra* note 5, at 10.

Most of the rest were "settled" by means of plea bargaining, the practice by which the criminal defendant waives trial and agrees to plead guilty in exchange for the prosecutor's undertaking to charge a less serious offense or to recommend a lesser sentence. The analogy between the settlement of civil cases and plea bargaining is worrisome, because plea bargaining is unmistakably coercive. The defendant who insists on trial is threatened with a materially harsher sentence if convicted. The greater the disparity between the sentence for pleading guilty and that for conviction at trial, the greater the pressure on the defendant to waive trial, even when the defendant has tenable defenses.[213] Unlike the settlement dynamics in a civil case, which turn principally on the parties' efforts to discount the likelihood of success at trial in the light of what has been learned in the pretrial about the facts and the law, the main determinant of plea bargaining is the severity of the threatened sentence if the defendant insists on trial. This contest pits a prosecutor who commands the resources of the state, and whose incentives are sometimes self-serving,[214] against a defendant who is commonly indigent and poorly represented.

Dispensing with criminal trial in this way undermines the purpose of

212. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 59 (2006). This count of cases resolved by guilty pleas contains a few that are purely concessionary, that is, cases in which the plea was not bargained. Cases processed by means of conditional nonprosecution agreements are bargained without plea. In 2006, 94% of state felony convictions resulted from guilty pleas, 4% from jury trials, and 2% from bench trials. 2010 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 242, http://www.uscourts.gov/uscourts/statistics/judicialbusiness/2010/judicialbusinespdfversion.pdf. In federal court in fiscal year 2010, excluding dismissals, 2.6% of all criminal defendants went to jury trial and 0.4% to bench trials, while 97.4% of convictions were resolved by guilty plea. Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006-Statistical Table*, U.S. DEP'T OF JUSTICE 25 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssco6st.pdf.

213. A recent example, featured in a *New York Times* story, was the case of a defendant prosecuted in Florida following fisticuffs with his troubled former romantic partner. Because her credibility was weak, the defendant had a heightened chance of acquittal. The prosecutor threatened the defendant with charges that would entail a mandatory fifty-year prison sentence upon conviction unless the defendant agreed to plead guilty to charges carrying a two-year prison term. Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html.

214. For an analysis of a recent notable case, see STUART TAYLOR, JR. & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007). *See also* Andrew Dyke, *Electoral Cycles in the Administration of Criminal Justice*, 133 PUB. CHOICE 417 (2007) (reporting an empirical study finding that elected prosecutors in North Carolina were more likely in election years to prosecute cases that would be dismissed in other years, especially in electoral districts in which there was more competition).

criminal justice, which "depends upon an objective determination of whether the . . . [criminal] penalty is deserved."[215] By contrast, the parties to a civil suit appropriately seek private advantage, and can be expected to "bargain in the shadow"[216] of what they know about the facts, the law, and the litigation costs. In law and economics terms, the parties' decision to settle a civil case in the pretrial process is in most cases an informed Coasean[217] determination to contract around the costs and risks of trial. Thus, civil settlement is far less likely to be coercive than the plea bargaining process in criminal procedure, in which the prosecutor has such broad powers, unrelated to the merits of the particular case, to induce the defendant to waive trial.

D. Settlement Dynamics

The increasing importance of institutional litigants, noticed above in connection with the changing character of the proofs,[218] has interacted with the discovery revolution to affect settlement rates. As Marc Galanter observed in a celebrated article,[219] institutional litigants are commonly "repeat players," familiar with the recurrent categories of claims against them. Such litigants are experienced in estimating the merits of such cases—estimating, that is, the probability that a claim will succeed at trial, and the amount of damages and litigation costs that would result. On the defense side, the discovery-based processes of modern litigation have been conducive to the growth of large law firms.[220] In the tort bar, plaintiffs' lawyers have been able to replicate some of the advantages of repeat-player defendants by specializing in particular types of claims and by developing litigation consortia that share costs and information.[221] Examining tort litigation patterns over the past century, Samuel

215. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 705 (1981).

216. The celebrated term coined in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

217. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

218. *See supra* text accompanying notes 126-137.

219. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98-101 (1974). For empirical support, see Gross & Syverud, *supra* note 8, at 26, emphasizing that the pervasiveness of liability insurance means that even litigants that "do not have ample resources of their own" are often "financed (and perhaps controlled) by substantial players with long-term positions in the game of litigation." *Id*.

220. *See supra* note 131.

221. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1622-24 (2004). The American Association for Justice (formerly the American Trial Lawyers Association), an

Issacharoff and John Witt found that when torts "develop repetitive fact patterns and repeat-play constituencies," what results "are essentially bureaucratized, aggregate settlement structures."[222]

"The standard models for explaining why most cases settle and why some cases actually go to trial hinge largely on the availability of information about likely litigated outcomes."[223] The discovery revolution, by enhancing the information available to litigants and their counsel, fuels this settlement dynamic. "[A]s patterns of liability and damages stabilize, trials seem to become increasingly exceptional as claims are handled through routinized negotiations between established representatives."[224]

Cases that resist settlement are typically those in which there is material uncertainty about the relevant legal rules, or in which the facts remain doubtful despite discovery.[225] Even in such cases, the career incentives of the litigant decisionmakers contribute to the penchant for settlement. A law firm that encourages a client to take a case to trial risks losing the client as well as the case if the outcome is adverse. Likewise, corporate or other institutional managers who settle a case on advice of counsel for materially less than could be lost at trial are taking what is for them a course of action less risky than trial. Pursuing discovery-informed settlement allows these risk-averse actors to

organization of plaintiffs' lawyers, sponsors dozens of "Litigation Groups" in categories such as "Bicycle," "Burn Injury," and "Chinese Drywall." *See Litigation Groups*, AM. ASS'N FOR JUST., http://www.justice.org/cps/rde/justice/hs.xsl/1150.htm (last visited Sept. 15, 2012). The view that changes in the organization and capitalization of the plaintiffs' bar have inclined plaintiff-side law firms toward settling rather than trying cases is developed in Yeazell, *supra* note 41, at 954-64.

222. Issacharoff & Witt, *supra* note 221, at 1573; *see also* Edward A. Purcell, Jr., *The Action Was Outside the Courts: Consumer Injuries and the Uses of Contract in the United States, 1875-1945*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES 505 (Willibald Steinmetz ed., 2000) (canvassing "organized release-seeking practices" of claims agents, lawyers, and others, engaged to settle personal injury claims arising from workplace, medical, and roadway accidents). Regarding settlement practices in low-value tort cases that are processed to insurers without filing suit or conducting discovery, see Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011).

223. Issacharoff & Witt, *supra* note 221, at 1600 (discussing Mnookin & Kornhauser, *supra* note 216; and George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984)). For the foundational law and economics account of the incentives for settlement, see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-29 (1973); and Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63-69 (1982).

224. Issacharoff & Witt, *supra* note 221, at 1618.

225. *See* Priest & Klein, *supra* note 223, at 9-15.

position themselves at the point on the litigation risk-return curve that is for them more advantageous, even when it might be in the interest of the client firm to be less risk averse.

E. Summary Judgment

For cases in which pretrial proceedings do not result in consensual resolution, the Federal Rules make provision for adjudication without trial in two distinct ways. One is ancient: the motion to dismiss the opponent's case at the pleading stage, on the ground that the pleaded allegations do not state an actionable claim.[226] The other mode of involuntary termination without trial is the motion for summary judgment. Under Rule 56(a), the court must grant judgment "as a matter of law" in circumstances in which "there is no genuine dispute as to any material fact."[227] Summary judgment is "the primary procedure used to avoid unnecessary civil trials."[228]

Summary judgment entered mainstream Anglo-American civil procedure remarkably late, in an English statute enacted in 1855.[229] That Act provided a creditor's remedy for collecting liquidated debts arising from bills of exchange or promissory notes. Further legislation in the 1870s extended the procedure to a few other types of cases.[230] Writing in 1925, Sunderland, who would become the main architect of the summary judgment provision of the Federal Rules,[231] observed that summary judgment in England was "in essence . . . nothing but a

226. FED. R. CIV. P. 12(b)(6).

227. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." *Id.* R. 56(a).

228. EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1.1, at 1 (3d ed. 2006).

229. Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67. This law, also known as Keating's Act, is named after Sir Henry Keating, the Member of Parliament (later judge of Common Pleas) who sponsored the bill. *See* John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act*, 31 IND. L.J. 329, 337-38 (1956). For earlier impulses toward summary judgment in some American state legislation, see Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193 (1928).

230. For practice under the English legislation, see Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 424-35 (1929).

231. Regarding Sunderland's role, see Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 596-603 (2004); and Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 7, 10 (1959).

process for the prompt collection of debts."[232] The English legislation, which was limited to plaintiffs, was the apparent model for most of the summary judgment provisions found in those American states (about twenty)[233] that had any such procedure before the promulgation of the Federal Rules.[234] Federal Rule 56(a), drafted by Sunderland and somewhat based on an earlier Michigan statute that Sunderland had championed, constituted a drastic expansion, because it made summary judgment available in any type of case, and to any party. Under the Federal Rules, summary judgment lies if the moving party can show that "there is no genuine dispute as to any material fact."[235] The Supreme Court liberalized the interpretation of this standard in three prominent cases ("the trilogy") decided in 1986,[236] but whether that development has affected summary judgment rates is disputed.[237]

There is an intimate connection between the discovery revolution and

232. Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 111 (1925); *see also* Burbank, *supra* note 231, at 598 (discussing Sunderland's article).

233. *See* Clark & Samenow, *supra* note 230, at 423, 440-71.

234. Bauman, *supra* note 229, at 343. Before the Federal Rules, summary judgment, where it existed, was "a collection of very different tools of very different (and usually very limited) scope: as to the types of cases in which they could properly be invoked, the parties who could invoke them, and the purposes for which they could be used." Burbank, *supra* note 231, at 595. It has been argued that, because the origins of Rule 56 appear to trace prevailingly to an innovation in English law of the 1850s, Rule 56 violates the right to jury trial under the Seventh Amendment, which is treated as preserving the jury entitlement that existed under English law as of 1791. *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007). *But see* Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625 (2008); Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919 (2010).

235. FED. R. CIV. P. 56(a).

236. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). For discussion of the trilogy, see BRUNET & REDISH, *supra* note 228, at §§ 5.6-.9, at 100-19, § 9.6, at 322-35, § 9.9, at 347-51; and Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990).

237. For the view that the trilogy has materially increased grants of summary judgment, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1048-57 (2003), which reviews empirical studies and judicial opinions. *See also* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) (attributing "a large part of the dramatic reduction in federal trials" to the trilogy). For the contrary view, see Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, *in* EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008, at 1, 1 (Kuo-Chang Huan ed., 2009), an empirical study finding no statistically significant increase in summary judgment in post-trilogy cases.

summary judgment.[238] Litigants who seek summary judgment commonly do so after discovery has taken place. Rule 56(c) contemplates that, in deciding whether there is genuine dispute regarding a material fact, the court may rely upon elements of the discovery product, "including depositions, documents, . . . [and] interrogatory answers."[239] Many litigators "believe that discovery's primary use is to develop evidence for summary judgment, not to prepare for trial."[240]

Reliable empirical evidence regarding the percentage of cases resolved on summary judgment has proven difficult to obtain.[241] Stephen Burbank's study published in 2004 concluded that summary judgment accounted for about 7.7% of terminations in 2000, up from 1.8% in 1960.[242] Much larger termination rates appear in other studies.[243] Judge Patricia Wald, writing in 1998, reported a 22% rate of termination by summary judgment for each of the two previous years in the District Court for the District of Columbia.[244] The termination rate varies greatly among types of cases. "Recent data suggests that

238. Edson Sunderland, the principal drafter of the discovery and summary judgment provisions of the Federal Rules, remarked on the linkage between the two a few years before drafting of the Rules began. "An effective general system of discovery would greatly increase the effectiveness of the summary judgment." Sunderland, *supra* note 95, at 74.

239. FED. R. CIV. P. 56(c). For discussion of the evidentiary materials used in summary judgment proceedings, see BRUNET & REDISH, *supra* note 228, §§ 8.1-.12, at 205-79.

240. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 245 (2010) (reporting this as the view of 50% of surveyed plaintiffs' lawyers and 47% of defense lawyers). Judge Wood cites D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 274 (2010). Hornby cites *Member Survey on Civil Practice: Detailed Report*, ABA SEC. OF LITIG. 71 tbl.6.11 (Dec. 11, 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf.

241. "Unfortunately, the federal courts do not keep statistics on dispositions via summary judgment." Milton I. Shadur, *Trial or Tribulations (Rule 56 Style)?*, LITIG., Winter 2003, at 5, 5. Regarding the inconsistent handling of disposition data in the Federal Judicial Center database, see Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004). Regarding the shortcomings of prior empirical studies of summary judgment termination rates, see Burbank, *supra* note 231, at 604-18.

242. Burbank, *supra* note 231, at 591, 592, 617-18. Theodore Rave computes materially higher success rates based on Burbank's data. D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 900 n.142 (2006).

243. Burbank, *supra* note 231, at 604-18; Rave, *supra* note 242, at 900-01 & nn.142-43. Hadfield, making a variety of "heroic" assumptions to correct for shortcomings of the data, finds it plausible that "nontrial adjudication" has been more important than settlement in the decline of trial in recent decades. Hadfield, *supra* note 241, at 731-33.

244. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1915 (1998).

70% of summary judgment motions in civil rights cases and 73% of summary judgment motions in employment discrimination cases are granted—the highest of any type of federal civil case."[245]

In many cases in which a motion for summary judgment is denied, the denial exercises a shaping influence on settlement. In such a case, the judge who has "review[ed] a substantial factual record . . . send[s] a signal that the judge thinks the claim has some merit."[246] Such cases commonly lead to settlement.[247]

Summary judgment has preserved adjudication on issues that ostensibly present no material fact dispute, but transferred that adjudication into the pretrial. In consequence, as Judge Wald has written, "[f]ederal jurisprudence is largely the product of summary judgment in civil cases."[248]

CONCLUSION: WHY CIVIL TRIAL VANISHED

The Federal Rules preserve the right to civil trial,[249] but across the second half of the twentieth century, civil trial all but disappeared in the United States. I have emphasized a functional account of how this great transformation occurred. Build a better mousetrap, said Emerson, and the world will beat a path to your door.[250] The Federal Rules built a better mousetrap: a civil procedure centered in pretrial discovery. Litigants no longer go to trial because they no longer need to.

The core function of civil trial is to facilitate the investigation and resolution of disputes. As in Blackstone's day,[251] most civil disputes concern matters of fact—what happened in the past. In the early decades of the twentieth century, a consensus emerged that the inherited system for investigating and resolving such disputes at common law was deeply deficient. That inherited system consisted of a pretrial process largely limited to pleading, and a trial procedure reliant on lawyer-conducted selection, preparation, examination, and cross-examination of witness testimony.

245. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 549 & n.150 (2010) (reporting the Federal Judicial Center data).

246. Rave, *supra* note 242, at 894.

247. Schneider, *supra* note 245, at 540.

248. Wald, *supra* note 244, at 1897.

249. *See supra* note 93.

250. OXFORD DICTIONARY OF QUOTATIONS 201 (2d ed. 1955).

251. *See supra* text accompanying note 9.

In the 1930s, the drafters of the Federal Rules devised a system of discovery that was meant largely to substitute for pleading. They did not foresee that the package of discovery techniques that they devised—interrogatories, documentary discovery, and sworn depositions—would constitute a truth-revealing process so powerful that it would ultimately displace not only the older pleading-based pretrial, but also the trial. By so enhancing the information available to litigants about the evidence likely to be presented were trial to occur, discovery promoted settlement in place of trial. Clarification promoted pacification.

The other innovations of the Federal Rules that have contributed to the demise of trial are importantly connected to the discovery revolution. The driving force behind the pretrial conference and the associated growth of judicial case management was the need to manage discovery—that is, to sequence discovery and the discovery-based pretrial motions, and to resolve disputes concerning the permitted scope of discovery. The discovery revolution also underlies the displacement of trial in cases resolved by means of summary judgment, because the showing that a party seeking summary judgment needs to make—that "there is no genuine dispute as to any material fact"[252]—is routinely based on discovery product.[253]

The substitution of nontrial for trial procedure to which the Federal Rules gave rise took place gradually, across the last two-thirds of the twentieth century, as evidenced in the statistics on declining trial rates canvassed above.[254] The discovery rules underwent important changes in 1946[255] and in the 1970s.[256] The continuous case assignment system of judicial administration did not develop until the 1960s.[257] The modern class action rules were put in place in 1966 and thereafter.[258] The procedure for consolidating multidistrict cases dates from 1968.[259] Only in 1983 was Rule 16 revised to reconceptualize

252. FED. R. CIV. P. 56(a).

253. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, . . . interrogatory answers, or other materials . . . ." *Id.* R. 56(c)(1).

254. *See supra* text accompanying notes 1-8.

255. *See supra* text accompanying note 110.

256. *See supra* text accompanying note 111.

257. *See supra* text accompanying note 155.

258. *See supra* text accompanying note 169.

259. *See supra* text accompanying note 181.

the pretrial conference as a forum for encouraging settlement.[260] Congress made it federal policy to promote alternative dispute resolution, including court-connected mediation, in legislation enacted in 1998.[261]

Although the central dynamic in the disappearance of trial has been the substitution of discovery-induced settlements and dismissals, other factors have also been at work. I have emphasized how the interaction of changes in the character of evidence with the growing presence of institutional litigants[262] has increased the disposition to settle cases short of trial. Associated with these changes, and with the growth of the regulatory state, has been the growth in size and complexity of some modern lawsuits—the phenomenon sometimes called the "Big Case."[263] Big Cases have bred "Big Law," that is, the litigation departments of large law firms. Large law firms that bill by the hour have thrived on the discovery-based processes of modern litigation.[264] In the field of tort law, large defense-side law firms have provoked plaintiff-side adaptations such as litigation consortia that share expertise and in some cases discovery product and discovery costs.[265] With sophisticated counsel on both sides, the paradigm of modern tort litigation consists of discovery to establish the facts, followed by settlement.

Judges have welcomed the case management role, which has enhanced judicial authority both in promoting settlement[266] and in pretrial (nontrial) adjudication.[267] Nontrial procedure has transformed the judicial role from courtroom umpire to office-bound caseload manager.[268]

The movement to nontrial procedure has inevitably undermined the civil

260. *See supra* text accompanying note 187.

261. *See supra* text accompanying note 197.

262. *See supra* text accompanying notes 126-137.

263. *See supra* text accompanying notes 170-182.

264. *See supra* text accompanying note 131.

265. *See supra* text accompanying note 221.

266. *See supra* text accompanying notes 186-198.

267. A trial judge dealing with a discovery dispute "enjoys enormous discretionary power to shape what may be the only significant stage of litigation. The broad language of most of the key discovery rules gives the judge wide latitude." Yeazell, *Process*, *supra* note 1, at 651. In addition, the abuse-of-discretion standard of review renders "the trial judge, when acting on a discovery dispute, . . . in most cases virtually immune to appellate supervision . . . ." *Id*.

268. Federal District Judge Hornby describes himself spending his days "using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or video conference) in individual cases to set dates or limits"; and researching and writing judgments on pretrial motions. D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 462 (2007).

jury, because the civil jury has always been a trial-phase institution. Discovery and its associated techniques of case management, which derive from the jury-free procedures of equity, can be seen as an "implicit attack on the jury."[269] The civil jury has indeed been a casualty, but more in the nature of collateral damage than as target. The right to civil jury trial remains protected in the federal and state constitutions,[270] and in the Federal Rules.[271] Only when discovery and related pretrial motions reveal a case to be meritless do the Federal Rules preclude jury trial (by means of summary judgment) in circumstances in which pre-Rules procedure would have allowed jury trial. Apart from such cases, the main reason that the jury is disappearing is that litigants who are entitled to demand trial decide to settle, either because they no longer need trial, or because they cannot afford it.

American civil procedure is unique among the major Western legal systems in failing to have some form of loser-pays regime for the allocation of litigation costs, both pretrial and trial.[272] This so-called "American rule" long predates the discovery revolution,[273] but the interaction of discovery with the American rule has become a main shortcoming of our new discovery-based civil procedure.

Common law trial was never a particularly good way of resolving fact disputes, because the common law was never able to overcome the mistake that hobbled it from the outset in the Middle Ages, the failure to devise suitable means of investigating the facts. The discovery revolution of the Federal Rules, by overcoming that investigation deficit, set in motion changes that have made trial obsolete.

269. Subrin, *supra* note 91, at 1000. The jury did indeed have its detractors in elite legal and judicial circles. Speaking to the Federal Bar Association in New York in 1928, Charles Evans Hughes advised the organization as a matter of policy to "[g]et rid of jury trials as much as possible . . . . The ideal of justice is incarnated in the judge." *Fewer Jury Trials Urged by Hughes: More Power for the Federal Judges Would Improve the System, He Says*, N.Y. TIMES, Dec. 7, 1928, at 3. I owe this reference to Daniel Ernst.

270. U.S. CONST. amend. VII. "[N]early every state constitution contains a similar guaranty." HAZARD ET AL., *supra* note 144, § 12.1, at 529.

271. FED. R. CIV. P. 38(a).

272. "In almost all other countries, except Japan and China, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs." AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 7 & n.8 (2006).

273. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).