

6-1-2014

## The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?

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### Recommended Citation

James R. Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?*, 30 GA. ST. U. L. REV. (2014).  
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## THE FEDERAL RULES AT 75: DISPUTE RESOLUTION, PRIVATE ENFORCEMENT OR DECISIONS ACCORDING TO LAW?

James R. Maxeiner\*

### ABSTRACT

*This essay is a critical response to the 2013 commemorations of the 75th anniversary of the Federal Rules of Civil Procedure.*

*The Federal Rules of Civil Procedure were introduced in 1938 to provide procedure to decide cases on their merits. The Rules were designed to replace decisions under the “sporting theory of justice” with decisions according to law. By 1976, at midlife, it was clear that they were not achieving their goal. America’s proceduralists split into two sides about what to do.*

*One side promotes rules that control and conclude litigation: e.g., plausibility pleading, case management, limited discovery, cost indemnity for discovery, and summary judgment (“dispute resolution”). The other side defends rules that open litigation to investigation of possible rights: e.g., notice pleading, open and free discovery, and limited summary judgment (“private enforcement”).*

*Both sides focus on process. They overlook the essential goal of civil justice the world over: “to apply the applicable substantive law to the established facts in an impartial manner, and pronounce fair and accurate judgments.”<sup>1</sup> They forget decisions according to law.*

*Abroad we can see systems of civil justice that work, if only we would look. Whereas the heroes of American civil justice, David Dudley Field, Jr., Roscoe Pound, Edmund C. Clark, and Edson D. Sunderland, looked abroad for solutions, today’s proceduralists from*

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1. Alan Uzelac, *Goals of Civil Justice and Civil Procedure in the Contemporary World*, 34 IUS GENTIUM 3, 3 (2014).

*the private enforcement side tell us to avert our eyes from foreign systems. Why? Supposedly our system in its goals is exceptional. In fact, it is not. We could and should learn from others.*

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## INTRODUCTION

The Federal Rules of Civil Procedure of 1938 outfitted American civil justice with tools to apply law to facts. They were an attempt to banish overly contentious litigation (the “sporting theory of justice”).<sup>2</sup> Applying law to facts is fundamental to civil justice. Civil lawsuits resolve disputes between parties by determining legal rights and duties. By enforcing law, they make civil life possible in mass society.

The Federal Rules were not, however, a comprehensive reform of civil justice. They were limited to rules of court.<sup>3</sup> Although they bestowed on courts new power and authority to apply law to facts, they left key aspects of civil justice (e.g., court organization, jurisdiction, costs, appeals) unaltered.<sup>4</sup> They created no new institutions, such as a ministry of justice, which might have helped to make reform reality. They brought with them no codification of substantive law, such as David Dudley Field, Jr. sought when he led America’s last major attempt to rationalize procedure.<sup>5</sup> Old ways persisted.

When the Federal Rules went into effect September 16, 1938, judges and lawyers did not change their practices.<sup>6</sup> Although judges had new powers and authority to formulate issues, they did not make much use of them. Although lawyers had new powers and authority to reach together the real issues between the parties, they rarely cooperated to

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2. Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 290 & n.14 (2010).

3. See James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1261–62 (2010); Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 360–61 (1987).

4. Elwood Hutcheson, *The New Federal Rules of Civil Procedure*, 13 WASH. L. REV. & ST. B. J. 198, 198–99 (1938).

5. David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 389–92 (2010).

6. See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1907–08 (1989).

do that. When eventually lawyers did use their new powers and authority, they acted not to streamline trials, but to unearth new causes and to conduct pretrial inquiries.<sup>7</sup> Applying law to fact receded as a goal of the Rules. Parties settled, not because the merits were against them, but because process costs and risks were too great.<sup>8</sup> Trials vanished.

By 1976, serious problems were apparent.<sup>9</sup> Proceduralists fractured into two sides that continue to this day. One side focuses on resolving disputes;<sup>10</sup> the other focuses on social goals through private enforcement of public law.<sup>11</sup> Debates about revisions of the Federal Rules are about process and not about making decisions according to law. The former side restores the spirit of the sporting theory of justice and rewards zealous advocates;<sup>12</sup> the latter emulates the endless equity proceedings that exhausted estates and benefited only solicitors.<sup>13</sup> Neither side adequately accounts for the interests of litigants.

Neither side addresses the essential goal of the Federal Rules, which is the need of the public: routine application of law to facts to determine rights and resolve disputes. Neither side considers comprehensive reform of civil justice which would overhaul the Rules and reach beyond to restructure the whole system. No wonder that there is again popular dissatisfaction with the administration of civil justice.

The public's goal is stated in Federal Rule 1: "to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>14</sup> The founders of the nation stated the same goal already in 1776 when they declared everyone "ought to have justice and right,

7. See Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and its Discontents*, 61 OKLA. L. REV. 275, 286–87 (2008).

8. *Id.* (identifying the goals of federal litigation as evolving from "deciding cases on the merits to merely disposing of cases as expeditiously as possible").

9. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 911–12, 974 (1987) (describing concerns over excessive costs and delays and discovery abuses raised at the 1976 Pound Conference).

10. Jay Tidmarsh, *Resolving Cases "on the Merits"*, 87 DENV. U. L. REV. 407, 408 (2010).

11. Perschbacher & Bassett, *supra* note 7, at 291.

12. See Tidmarsh, *supra* note 10, at 408.

13. See Perschbacher & Bassett, *supra* note 7, at 291.

14. FED. R. CIV. P. 1.

freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.”<sup>15</sup> That declaration forms part of many state constitutions.<sup>16</sup> It is due process in the federal constitution.<sup>17</sup> It is not a utopian goal but an attainable one. If only we would adopt modern legal methods.

A way to that goal is before our eyes, but we do not look. Abroad we can see systems of civil justice that work. But whereas the heroes of American civil justice, David Dudley Field, Jr., Roscoe Pound, Edmund C. Clark, and Edson D. Sunderland, urged us to look abroad for solutions,<sup>18</sup> today’s proceduralists tell us to avert our eyes.<sup>19</sup> Why? They assert that our system is exceptional in its goals.<sup>20</sup> This is that story.

Part I reports dismay at the 75th anniversary commemorations: the Federal Rules do not work to routinely resolve cases justly, quickly, and inexpensively.<sup>21</sup> Part II chronicles where we have been: how the Federal Rules were supposed to turn lawsuits from sporting contests into applications of law to facts to determine rights and how they are turning in a fourth era of civil procedure into dispute resolution.<sup>22</sup> Part III relates the epic story of the attempt to use the Rules for private enforcement of social goals.<sup>23</sup> Finally, Part IV points a way to return

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15. MD. DECL. OF RIGHTS art. 19. Other states adopted similar declarations. *See, e.g.*, MASS. CONST. pt. 1, art. 11 (“Every subject of the commonwealth . . . ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”).

16. CONN. CONST. art. 1, § 10 (“All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”); R.I. CONST. art., 1 § 5 (“Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws.”).

17. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”).

18. Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT’L & COMP. L. REV. 157, 164 (2008).

19. *See infra* note 235.

20. *See, e.g.*, Richard Marcus, “American Exceptionalism” in *Goals for Civil Litigation*, 34 IUS GENTIUM 123, 139–40 (2014) [hereinafter Marcus, *American Exceptionalism*].

21. *See infra* Part I.

22. *See infra* Part II.

23. *See infra* Part III.

to decisions on the merits by stripping away the blinders that keep us from learning from foreign civil systems that work well.<sup>24</sup>

### I. REQUIEM FOR THE FEDERAL RULES AT 75?

[H]ave the Rules in fact achieved the *just, speedy, and inexpensive* determination of *every* action?

Harold Koh (2013)<sup>25</sup>

The Federal Rules of Civil Procedure turned seventy-five in 2013. Judges, lawyers and academics around the country celebrated.<sup>26</sup> Above all, they extolled social uses of the Rules that have made it possible, in their view, for civil litigation to shape America. When the Rules were adopted in 1938, they were intended to govern routine dispute resolution.<sup>27</sup> Today the Rules sometimes are put to work for private enforcement of public law norms, for making public policy, and even for creating new norms.<sup>28</sup> These social uses are said to define the character of the American system of civil litigation.<sup>29</sup>

Americans engaged in civil litigation either love the Federal Rules or hate them, depending mainly upon how they feel about the Rules' social uses. Members of the profession who live by the rules—judges,

24. See *infra* Part IV.

25. Harold H. Koh, *Keynote Address: "The Just, Speedy, and Inexpensive Determination of Every Action?"*, 162 U. PA. L. REV. (forthcoming 2014) (emphasis added); see also *Highlights From "The Federal Rules at 75"*, UNIV. OF PA. LAW SCH. (Nov. 19, 2013), <https://www.law.upenn.edu/live/news/2921-highlights-from-the-federal-rules-at-75#.U6OHJy-7ldl>. I was present for both the keynote address and Professor Miller's address and report these comments from my notes.

26. See, e.g., *Law School Celebrates the 75th Anniversary of the Federal Rules of Civil Procedure*, UNIV. OF CINCINNATI COLL. OF LAW, <http://www.law.uc.edu/news/75th-anniversary-federal-rules-of-civil-procedure> (last visited Apr. 24, 2014); *Renowned Scholar Arthur R. Miller and Distinguished Panel to Give 18th Annual Pedrick Lecture, "Revisiting the Rules: Celebrating 75 years of the Federal Rules of Civil Procedure"*, ARIZ. STATE UNIV. SANDRA DAY O'CONNOR COLL. OF LAW (Feb. 20, 2014), <http://www.law.asu.edu/News/CollegeofLawNews/TabId/803/ArtMID/7835/ArticleID/4642>.

27. FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.")

28. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 667 (2013).

29. STEPHEN N. SUBRIN & MARGARET Y. K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* 37 (2006).

lawyers and law professors—largely love them.<sup>30</sup> Business people, who are subject to them, largely hate them.<sup>31</sup> Both sides presume to speak for the public who are neither legal professionals nor businessmen and who encounter the Rules only sporadically. Because civil litigation in state courts is in the mold of the Federal Rules, judgments of the Federal Rules are judgments of civil procedure generally.<sup>32</sup>

For professionals, the social uses of civil procedure are God’s work: the oppressed at long last have access to justice and to the levers of power.<sup>33</sup> These social uses give meaning to their lives; they let them work to change society for the better. For businessmen, these “social” uses are the Devil’s doing: the clever exasperate the conscientious with frivolous and expensive lawsuits.<sup>34</sup> They confound legitimate commerce.

The two sides demonize each other.<sup>35</sup> One side sees no lawsuit besides those which are frivolous and whose costs are outrageous; it doubts the ethics of anyone who would promote such base behavior.<sup>36</sup> The other side sees no plaintiff’s plea that is other than proper and finds no price that is too high to pay for “justice”; it questions the conscience of anyone who would reject such claims of right and put a dollar value on justice.<sup>37</sup> Both sides can point to thousands of cases that fit their respective views.

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30. See, e.g., Carol Rice Andrews, *Thinking About Civil Discovery in Alabama: Using the Federal Rules of Civil Procedure as a Thinking Tool*, 60 ALA. L. REV. 683, 685 (2009).

31. See, e.g., *About ATRA*, AM. TORT REFORM ASS’N, <http://www.atra.org/about/> (last visited Apr. 24, 2014) (describing the costs of civil litigation and the economic impact to business).

32. Edgar B. Tolman, *Foreword to ALEXANDER HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS*, at iv (1940) (“There is a growing tendency towards the assimilation of state practice to that of the Federal courts.”).

33. See, e.g., James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383, 392–94 (2005) (discussing the fundamental right of individuals to have open access to courts).

34. See *About ATRA*, *supra* note 31.

35. See Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1754 (2013).

36. *Id.* at 1757–59.

37. Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 598–99 (2011); see also *How Our Civil Justice System Protects Consumers*, PUB. CITIZEN (Apr. 29, 2002), [http://www.citizen.org/congress/article\\_redirect.cfm?ID=7545](http://www.citizen.org/congress/article_redirect.cfm?ID=7545).

Neither side, however, addresses the millions of cases that do not fit either viewpoint. These are cases of people who do not vocalize about the Federal Rules. These people are the ninety-nine percent. They have no goal in mind loftier than routine dispute resolution according to law. They are the people who, when they have a claim against a careless contractor or a cash poor customer, think that the legal system should uphold their rights and return to them their claims without deduction. They are the people who, when they are sued, think that they should have a day in court to voice their views. They are the people who, when they are fired by their employers, think that they should have a chance to challenge the grounds for termination. These people are left out of the conversation altogether. Often, they give up without ever taking their cases to court. These people cast a pall on the revelries of the Federal Rules at seventy-five.

At a Pennsylvania conference, keynote speaker, proceduralist, and internationalist, Professor Harold Koh, asked the uncomfortable question: Have the Federal Rules achieved their goals: the *just, speedy* and *inexpensive* determination of *every* action?<sup>38</sup> Koh, the former diplomat and law school dean, was too polite to say no. He answered his question: “only partially.”<sup>39</sup> Others were not so gentle. Professor Arthur R. Miller, who for litigators is practically synonymous with the Federal Rules (as joint author of the treatise on the Federal Rules, “Wright & Miller,” as former rules reporter for the Advisory Committee for Civil Rules, and as premier proponent of social uses of the rules),<sup>40</sup> gave a less than stellar grade: “at best, B minus, and on an inflated grade curve, that’s below the median.”<sup>41</sup>

Other participants at other commemorations were less buoyant. At a University of Michigan celebration of Federal Rules Advisory Committee Reporter Ed Cooper, Paul V. Niemeyer, judge on the

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38. See Koh, *supra* note 25; see also *Highlights From “The Federal Rules at 75”*, *supra* note 25. I was present for both the keynote address and Professor Miller’s address and report these comments from my notes.

39. Koh, *supra* note 25.

40. Arthur R. Miller, *Biography*, N.Y. UNIV. LAW SCH., <https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=biography&personID=20130> (last visited June 11, 2014).

41. *Highlights From “The Federal Rules at 75”*, *supra* note 25. I was present for both the keynote address and Professor Miller’s address and report these comments from my notes.

Fourth Circuit Court of Appeals, and former chairman of the Federal Rules Advisory Committee, despaired: “Unfortunately, any objective evaluation of current federal civil process will inevitably lead to the conclusion that the process is functioning inadequately in its purpose of discharging justice speedily and inexpensively.”<sup>42</sup> Professor Burbank, the host of the Pennsylvania celebration, in a joint paper presented concurrently with his party, painted a depressing picture: “[T]he federal courts [are] unattractive to business and inaccessible to the middle class.”<sup>43</sup> For the poor, there is no “functioning federal civil legal aid system worthy of the name.”<sup>44</sup>

Today Americans doubt whether the Federal Rules can ever achieve the objective of securing “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>45</sup> In 2013, the Federal Rules Advisory Committee proposed that Rule 1 be amended to provide, not just that the rules be “interpreted and administered” to achieve these goals, but that they actually be so “*employed by the court and the parties*.”<sup>46</sup> Already four years before, the American College of Trial Lawyers counseled ratcheting down Rule 1’s goals to seeking “*reasonably prompt, reasonably efficient, reasonably affordable resolution*.”<sup>47</sup>

This is not what the public expects. It is not what it expected in 1938 when the Federal Rules took effect. At the time, Arthur T. Vanderbilt, President of the American Bar Association, reported: “If these new Rules are intelligently and liberally administered by the United States District Judges, with a view to promoting the administration of justice *in the interest of litigants*, there will indeed be a new dawn in the

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42. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673, 673 (2013).

43. Burbank, Farhang & Kritzer, *supra* note 28, at 650.

44. *Id.* at 653.

45. FED. R. CIV. P. 1.

46. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 281 (2013) (emphasis added).

47. PAUL C. SAUNDERS ET AL., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 4 (2009).

judicial history of this country.”<sup>48</sup> Lawyers forgot law and litigants. Dawn has turned to dusk.

## II. CHRONICLES OF THE FEDERAL RULES

The aim is stated in the deathless prose of Rule 1 of the Federal Rules of Civil Procedure as the achievement of “just, speedy, and inexpensive” resolution of civil disputes.

Paul D. Carrington (1995)<sup>49</sup>

### A. Prologue

Most chronicles of the Federal Rules begin in August 1906 when Roscoe Pound, then the Dean of the University of Nebraska College of Law, addressed the annual meeting of the American Bar Association (ABA) on the topic: “The Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>50</sup> It is among the most famous addresses ever given to American lawyers.<sup>51</sup> Pound’s speech resonated because the public *was* dissatisfied with civil justice.<sup>52</sup>

In his 1906 address, Pound diagnosed causes of dissatisfaction. He did not prescribe cures. But he did not limit his diagnosis to civil procedure: he looked at the legal system and its methods generally. Among the chief causes he counted: (1) private prosecution;<sup>53</sup> (2) the

48. Arthur T. Vanderbilt, *Foreword to Reports of the Section of Judicial Administration*, 63 ANNU. REP. A.B.A. 500, 519 (1938).

49. Paul D. Carrington, *In Memoriam: Maurice Rosenberg*, 95 COLUM. L. REV. 1901, 1901 (1995).

50. Roscoe Pound, *The Causes of the Popular Dissatisfaction with the Administration of Justice*, 29 ANNU. REP. A.B.A. 395, 395 (1906).

51. See generally John H. Wigmore, *Roscoe Pound’s St. Paul Address of 1906: The Spark That Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC’Y 176 (1937).

52. See *id.* at 178. For a list of some of the criticisms as they continued through the years, see JAMES R. MAXEINER ET AL., *FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE* 287–99 (2011).

53. Pound, *supra* note 50, at 403 (“Private prosecution has become obsolete.”). Common law methods failed to keep government and public utilities in line. They did not protect employees or consumers. See 3 ROSCOE POUND, *JURISPRUDENCE* 343–44 (1959).

“sporting theory of justice”;<sup>54</sup> (3) judicial supremacy;<sup>55</sup> (4) case law in an era calling for legislation;<sup>56</sup> (5) backward procedure;<sup>57</sup> (6) archaic court organization;<sup>58</sup> and (7) putting courts into politics.<sup>59</sup>

Despite initial opposition, the ABA mounted several programs of reform that responded to Pound’s critiques.<sup>60</sup> The reform that eventually led to the Federal Rules sought transfer of authority for making rules of court in cases at law from Congress to the Supreme Court.<sup>61</sup> As broad as was Pound’s diagnosis, the ABA program was narrow. Its principal goal was not civil justice or even civil procedure reform. It was the creation of uniform rules for suits at law (not even equity) in federal courts to replace use of state procedure in federal courts.<sup>62</sup> The struggle, nevertheless, took more than twenty years.<sup>63</sup> Through these many years, the debate was about enabling the Supreme Court to issue court rules.<sup>64</sup> Most everyone assumed that the rules created would be good ones.

In 1934, Congress finally adopted the Rules Enabling Act.<sup>65</sup> Pursuant to that Act, the Supreme Court chose Charles E. Clark, Dean of Yale Law School, to head up the project.<sup>66</sup> Clark picked Edson R.

54. Pound, *supra* note 50, at 405 (“The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point.”). The question should not be, “[w]hat do substantive law and justice require?,” but here it is, “[h]ave the rules of the game been carried out strictly?” *Id.* at 406.

55. *Id.* at 407. American courts make public policy decisions as incidents of private litigation. *Id.* “[C]ourts are held for what should be the work of the legislature.” *Id.* at 408.

56. *Id.* at 408, 415. Case law, Pound wrote, is inherently uncertain, confusing, incomplete, and bulky. The times called for the development of law through legislation; yet American legislation was crude and unorganized.

57. *Id.* at 408. American courts decide cases on points of practice leading to “[u]ncertainty, delay and expense, and above all . . . injustice.” *Id.*

58. *Id.* at 411–12. Rigid and yet overlapping jurisdictional lines (e.g., diversity) waste judicial resources and delay decisions of cases on their merits. “It ought to be impossible for a cause to fail because brought in the wrong place.” *Id.* at 412. “Even more archaic is our system of concurrent jurisdiction . . . involving diversity of citizenship.” *Id.* at 411.

59. *Id.* at 415 (“Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench.”).

60. See generally Austin W. Scott, *Pound’s Influence on Civil Procedure*, 78 HARV. L. REV. 1568 (1965).

61. *Id.* at 1573.

62. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1054 (1982).

63. *Id.* at 1097.

64. *Id.* at 1078 (describing a debate in the Judiciary Committee where proponents of the Rules defined what powers the Supreme Court would have to make rules regarding practice and procedure).

65. 28 U.S.C § 2072 (2012).

66. Fred Rodell, *For Charles E. Clark: A Brief and Belated but Fond Farewell*, 65 COLUM. L. REV.

Sunderland, professor at the University of Michigan School of Law, as chief assistant.<sup>67</sup> Sunderland was principal draftsman of the pretrial provisions that became the most controversial features of the Federal Rules.<sup>68</sup>

In 1934, on the eve of the adoption of the Enabling Act, and before being picked to draft the Federal Rules, Sunderland set out a prescription for reform. Just as Pound *diagnosed* the whole of civil justice, so Sunderland *prescribed* almost as broadly: “the business of the courts,” “effectiveness of court organization,” and “adequacy of court procedure.”<sup>69</sup> Under adequacy of court procedure, Sunderland included proposals for “ascertaining and defining the dispute” and “trying the dispute.”<sup>70</sup> Both anticipate Sunderland’s work to turn civil procedure toward decisions on the merits and according to law.

*B. Clark and Sunderland’s Goal: Decisions According to Law (1938)*

Dean Clark and Professor Sunderland authored the Federal Rules of Civil Procedure of 1938.<sup>71</sup> The Rules are intended, states Rule 1, “to secure the just, speedy, and inexpensive determination of every action.”<sup>72</sup> They were designed, Clark wrote soon after their adoption, to be a “simple and flexible system of procedural steps wherein the merits of the case are at all times stressed.”<sup>73</sup> “[T]he rules are good or bad,” wrote Sunderland, “in proportion to the contribution which they

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1323, 1323 (1965).

67. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 714 (1998) [hereinafter Subrin, *Fishing Expeditions*].

68. *Id.* (identifying Sunderland as the drafter of the provisions on summary judgment and discovery).

69. Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 60–70 (1933). Systematization of substantive law was the principal omission from Sunderland’s prescription.

70. *Id.* at 73–80. The other two points—only tangentially included in the Federal Rules—were “obtaining jurisdiction over the defendant” and “obtaining a review.” *Id.* at 70–73, 80–82.

71. Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 6 (1959).

72. FED. R. CIV. P. 1.

73. Charles E. Clark, *The Nebraska Rules of Civil Procedure*, 21 NEB. L. REV. 307, 308 (1942); see also Peter Julian, *Charles E. Clark and Simple Pleading: Against a “Formalism of Generality”*, 104 NW. U. L. REV. 1179, 1196 (2010).

make to a speedy and satisfactory decision on the merits.”<sup>74</sup> To decide cases on the merits requires *deciding what to decide*: i.e., what is the applicable law and which facts are material and in dispute. Then can facts be found and law applied.<sup>75</sup> Deciding cases on the merits means making decisions according to law.

### 1. *Pleading: The Old Way of Deciding What to Decide*

To facilitate deciding cases on the merits, the Federal Rules had to overcome failures of two prior eras of American civil procedure, i.e., common law pleading and code pleading, in deciding what to decide. Common law pleading as designed, and code pleading as applied, failed because they forced parties to an issue, in the case of the former, or to multiple issues, in the case of the latter, too soon.<sup>76</sup> At the same time, for certain classes of cases, there existed a parallel system of “equity” pleading. It failed because it never got to issue.<sup>77</sup>

Common law and code pleading expected that parties *by themselves* would come to an issue.<sup>78</sup> Through pleading, parties chose the law to be applied.<sup>79</sup> At trial, parties proved facts that would, in theory, decide rights based on the law agreed and thus would resolve their disputes according to law. In common law pleading, parties were to make a single issue, whether of law, or of fact, determinative.<sup>80</sup> In code pleading, parties had more leeway: they could raise multiple issues of

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74. Edson R. Sunderland, *The Problem of Trying Issues*, 5 TEX. L. REV. 18, 20 (1926) [hereinafter Sunderland, *Trying Issues*]; accord Edson R. Sunderland, *The Machinery of Procedural Reform*, 22 MICH. L. REV. 293, 296 (1924) [hereinafter Sunderland, *Machinery*]; cf. Paul D. Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A. J. 860, 860 (1980) (“[J]udges not only make law, they also decide cases—real cases . . . in conformity with law . . .”).

75. CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 2 (2d ed. 1947) (“Before any dispute can be adjusted or decided it is necessary to ascertain the actual points at issue between the disputants.”); HENRY JOHN STEPHEN, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 1 (1st American ed., 1824, last American ed. 1919, 1867) (“In the course of administering justice between litigating parties, there are two successive objects—to ascertain the subjects for decision, and to decide.”); Maxeiner, *supra* note 3, at 1265 n.26 (“The issues of fact and of law must be framed clearly enough so that the tribunal knows what to decide.”) (quoting FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* § 3.1, at 180 (5th ed. 2001)).

76. See Julian, *supra* note 73, at 1184, 1186.

77. CLARK, *supra* note 75, at 16–17.

78. Julian, *supra* note 73, at 1184, 1186.

79. *Id.*

80. *Id.* at 1184.

law or fact. But they were to raise all issues in pleading.<sup>81</sup> Clark and Sunderland saw that was too soon.

Clark and Sunderland were pleading's critics par excellence. Pleadings, Clark wrote, "are only a mere step in trying to get to the actual merits of the litigation."<sup>82</sup> They serve, Sunderland explained, "only as preliminary forecasts of the real issues."<sup>83</sup> It is a truism of lawsuits that no one can predict with certainty what the process will turn up in the way of facts and legal issues. An issue that may not have been apparent at the outset can become central to decision.

Civil procedure aims at correct application of law to facts. The process starts out with imperfect knowledge of which rules are applicable and of which alleged facts are true. Applying law to facts requires determining rules that are applicable to facts and finding facts that are material to applicable rules.

Determining which rules are applicable and finding which facts are material are *interdependent* inquiries: Until one knows which rules apply, one cannot know which facts are material. Until one knows the facts, one cannot know which rules apply. Settle the applicable rules too soon, and facts may be overlooked that would change the result if other rules applied. Fail to settle the applicable rules soon enough, and the process may detour to find facts that are not material under the rules actually applied and may not even be disputed. "The process of applying law to facts is thus one which requires going back and forth from law to facts and facts to law."<sup>84</sup>

Sunderland identified this back-and-forth process:

[T]he process of developing issues is one which proceeds in stages,—first and most vaguely in the written pleadings; secondly, and much more explicitly, in the opening statements of counsel, and finally and conclusively in the production of the evidence. By the time the case is ready for the decision of the court or the jury,

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81. *See id.* at 1186.

82. Clark, *supra* note 73, at 312.

83. Sunderland, *Trying Issues*, *supra* note 74, at 18.

84. MAXEINER ET AL., *supra* note 52, at 90–91.

the [r]eal points in dispute are fully revealed.<sup>85</sup>

In the end, common law pleading and code pleading shared the same malady: apply pleading requirements strictly, and decisions are made unjustly without the benefit of all the facts; apply pleading requirements too loosely, and trials go off track or parties are “ambushed” by facts and law not previously disclosed that they are not prepared to meet.<sup>86</sup>

## 2. *Pre-trial: The New Way of Deciding What to Decide*

In the Federal Rules of 1938, Clark and Sunderland introduced measures meant to minimize the sporting elements of procedure and to promote deciding cases on their merits.<sup>87</sup> No longer would the parties alone choose the law and designate the material facts; the court would help them identify the legal and factual issues. No longer would the parties identify at the outset the precise facts that they would prove. They would present facts, and courts would decide parties’ rights under law and justice. Through pleading and pretrial discovery, the parties and the court would formulate the issues. Through summary judgment, trial, jury instructions, and justified judgments (special verdicts, findings of fact, and conclusions of law), courts would apply law and validate their applications of law to fact.<sup>88</sup>

The Federal Rules are most controversially known for relaxing pleading and for creating discovery.<sup>89</sup> These measures avoid premature determination of law and facts, but also were to promote expeditious handling of cases by eliminating false issues.<sup>90</sup> They were

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85. Sunderland, *Trying Issues*, *supra* note 74, at 18.

86. Edson R. Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 200 (1933).

87. ALEXANDER HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* 6–7 (1940); Sunderland, *supra* note 86, at 200 (stating that a trial should be “a well-organized presentation of the merits of the case instead of a contest in which each party attempts to overwhelm his opponent by unexpected attacks from ambush”).

88. See MAXEINER ET AL., *supra* note 52, at 200–06.

89. See, e.g., HOLTZOFF, *supra* note 87, at 6–7.

90. Subrin, *Fishing Expeditions*, *supra* note 67, at 716–17.

to see to it that, unencumbered by fictions and technicalities, parties provided courts with facts.

The Federal Rules are less well-known, and are less favorably known among professionals, for their measures for applying law and validating decisions, e.g., summary judgments, jury instructions, special verdicts, directed verdicts and court findings of fact, and conclusions of law. Just as relaxed pleading and discovery were to assure all the facts came out, these measures were to assure that issues were framed, trials were conducted expeditiously and efficiently, and decisions were reached on the merits.<sup>91</sup> These were to assure that courts correctly gave parties their rights.

The enigma of the Federal Rules was, and is, who shall formulate the issues? In common law and code pleading, lawyers did. The Federal Rules of 1938 offered a change: they authorized, but did not require, courts to formulate issues. That has proved to be a fatal flaw. So what were these tools?<sup>92</sup>

*a. Finding and Presenting Material Facts in Dispute*

The Federal Rules created a new system of presenting facts. The Rules were to be ““avenues to justice and not dead-end streets without direction or purpose.””<sup>93</sup> Under the new system, parties were not required to establish in their pleadings the precise legal ground of their claims. Rule 7, in allowing for only one form of pleading for all cases, eliminated the common law requirement that parties had to choose a form of action and therefore legal ground for recovery.<sup>94</sup> Rule 8, by requiring only “a short and plain statement of the claim showing that the pleader is entitled to relief[.]”<sup>95</sup> made it impossible to oblige

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91. See Maxeiner, *Pleading*, *supra* note 3, at 1278–79.

92. To avoid confusion with the Rules as amended, the Rules as adopted in 1938 are spoken of in the past tense, even though often the same language is found in the current Rules. There are a number of editions of the Rules as adopted in 1938. Here, this article addresses the 1939 Federal Rules of Civil Procedure for the District Courts of the United States. FED. R. CIV. P. (1939).

93. HOLTZOFF, *supra* note 87, at 14–15 (quoting *Laverett v. Cont’l Briar Pipe Co.*, 25 F. Supp. 80, 81 (E.D.N.Y. 1938)).

94. FED. R. CIV. P. 7; Julian, *supra* note 73, at 1184–86.

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

plaintiffs to present precise outlines of facts they would prove to establish their rights.<sup>96</sup>

The new system directed parties toward applying law to facts and away from immaterial matters. So Rule 8(d) provided that failure to deny an averment in a pleading requiring a response (e.g., a complaint) has the effect of an admission.<sup>97</sup> This was to focus parties on disputed points of material fact and expedite decisions.<sup>98</sup> Rule 8(e)(1) provided that averments “shall be simple, concise, and direct. No technical forms of pleading or motions are required.”<sup>99</sup> It thus reinforced elimination of the forms of action and abolition of legal fictions that had accompanied them, and worked to produce decisions on the merits.

Rule 8(e)(2) allowed parties to state claims alternatively,<sup>100</sup> thus allowing them to account for the possibility that facts proven might fit different legal claims.<sup>101</sup> Rule 8(f) provided that all pleadings were to be construed so “as to do substantial justice.”<sup>102</sup> Rule 9 relieved parties of pleading and proving matters that normally might be assumed to be true (e.g., (a) capacity of parties, (d) genuineness of official documents, and (e) validity of judgments) and assigned these as matters for opposing parties to challenge.<sup>103</sup> At the same time, however, it required that certain matters, i.e., fraud or mistake, be

96. Clark did not use the term “notice pleading” in the Federal Rules and did not regard Rule 8’s requirement as a mere notice, but as a “more legal requirement.” Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 278 (1942); accord HOLTZOFF, *supra* note 87, at 25 (“It suffices to plead conclusions, whether of fact or of law, provided the complaint is sufficiently definite so as to give fair notice to the opposite party of the precise nature of the claim.”).

97. HOLTZOFF, *supra* note 87, at 26–27 (setting out Rule 8(d) as adopted in 1938); see also FED. R. CIV. P. 8(b)(6) (for the modern version of the Rule).

98. *But see* HOLTZOFF, *supra* note 87, at 32 (“A statement that the defendant is without knowledge or information sufficient to form a belief as to the truth of certain allegations in the complaint has the effect of a denial. This is the case even if the facts are presumably within the pleader’s knowledge.”).

99. *See id.* at 27; see also FED. R. CIV. P. 8(d)(1).

100. HOLTZOFF, *supra* note 87, at 27 (for the Rule as enacted in 1938); see also FED. R. CIV. P. 8(d)(2) (for the modern version of the Rule).

101. HOLTZOFF, *supra* note 87, at 25 (“In view of the fact that the pleader will be awarded that relief to which he is entitled, a pleading may not be dismissed on the ground that a party has misconceived his remedy and his prayer for judgment is not well founded, provided he is entitled to some relief on the facts averred.”). “Inconsistent claims may be joined in the same pleading. . . . The pleader is not required to elect as between such claims.” *Id.* at 26.

102. *Id.* at 27.

103. FED. R. CIV. P. 9(a), (d), (e); see also HOLTZOFF, *supra* note 87, at 27–30.

stated with “particularity” and that special damages (e.g., consequential damages or punitive damages), be stated “specifically.”<sup>104</sup> Rule 9 thus promoted moving the conflict to material matters likely to be in dispute.

Rule 11 followed the precedent of code pleading, which used a requirement of signing pleadings as a way to prevent attorneys from making fictitious claims.<sup>105</sup> It thus authorized judges to strike pleadings that were without good ground or were interposed for delay and permitted them to sanction attorneys for willful violations.<sup>106</sup> Rule 11 would move parties on to matters material and in dispute. Rules 13 and 14 swept away old cramped counterclaim and third-party practice and invited consideration of all issues among all parties.<sup>107</sup>

#### *b. Formulating Issues*

The new system sought to suppress the sporting theory of justice and direct proceedings to issues material under substantive law and in dispute.<sup>108</sup> Rule 12(b) consolidated for early court decision dilatory objections directed to procedural prerequisites, i.e., subject matter jurisdiction, personal jurisdiction, venue, process, service of process, and sufficiency of the complaint.<sup>109</sup> Rule 12(h) required that most of these objections be made immediately or be forever waived.<sup>110</sup> Dispatching these expeditiously from the proceedings permitted the process to move on to decisions on the merits. Rules 12(c) and 12(d) permitted courts to decide cases on the pleadings, where the merits were already clear or failing procedural prerequisites fatal.<sup>111</sup> Rules 12(e) and 12(f) bestowed on courts authority to begin applying law to facts by striking pleadings, defenses, and redundant, immaterial, impertinent, or scandalous matter.<sup>112</sup> To decide cases required party

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104. FED. R. CIV. P. 9(b), (g); *see also* HOLTZOFF, *supra* note 87, at 29–30.

105. FED. R. CIV. P. 11(a), (b); *see also* HOLTZOFF, *supra* note 87, at 31.

106. FED. R. CIV. P. 11(a), (c); *see also* HOLTZOFF, *supra* note 87, at 32.

107. *See* FED. R. CIV. P. 13, 14.

108. *See* Bone, *supra* note 2, at 290 & n.14.

109. FED. R. CIV. P. 12(b).

110. FED. R. CIV. P. 12(h).

111. FED. R. CIV. P. 12(c), (d).

112. FED. R. CIV. P. 12(e), (f).

motion; the court could strike pleadings on its own without party motion.<sup>113</sup>

Rule 15 underscored the tentative nature of pleadings as a preliminary step in getting at the material issues between the parties and in dispute.<sup>114</sup> Even at trial, should a party object that evidence presented was outside the pleadings, Rule 15(b) directed the court to freely allow amendment “when the presentation of the merits of the action will be subserved thereby.”<sup>115</sup> It authorized the court to grant a continuance to enable the other party to meet the evidence.<sup>116</sup>

Rule 16, then titled “Pre-Trial Procedure: Formulating Issues[,]” was the key to making the new system of applying law work.<sup>117</sup> Where common law pleading and code pleading looked to the parties to settle the issues between them, Rule 16 enabled judges to take an active hand.<sup>118</sup>

In the new system, the parties were to use discovery to formulate issues for trial. So George Ragland, who provided the systematic foundation for discovery, wrote:

[Pleading and discovery] effect a division of labor toward a common end, namely, the formulation of the dispute into a justiciable form by disclosing the material controverted facts and eliminating the uncontroverted and unessential facts in each case prior to its final presentation for decision. Discovery procedure and pleading approach the problem from the same basic standpoint: both are equally in harmony with the traditional Anglo-American doctrine of party-formulation of issues.<sup>119</sup>

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113. See FED. R. CIV. P. 12.

114. FED. R. CIV. P. 15.

115. FED. R. CIV. P. 15(b) (1938).

116. *Id.*

117. Harry D. Nims, *The Cost of Justice: A New Approach*, 39 A.B.A. J. 455, 458, 522–23 (1953).

118. *Id.*

119. GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 260 (1932).

*c. Applying Law to Facts*

To facilitate getting process to decide real issues between parties, as well as to expedite process, Rule 56 introduced the nearly new device of summary judgment.<sup>120</sup> Rule 56(c) required courts to render judgment “forthwith” if all materials on file and submitted showed that there was “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>121</sup>

The Rules, as adopted, aimed at trying cases according to substantive law and justice. They included many provisions intended to promote rational determination of law, finding of fact, and applying law to facts. The Rules expected judges to work to help jurors decide according to law. Rule 51 governed judges giving jurors instructions in how to decide.<sup>122</sup> Rule 49 encouraged judges to require juries to explain their verdicts through special verdicts and answers to interrogatories.<sup>123</sup> Rule 48(c) permitted judges to poll jurors to assure their adherence to their verdict.<sup>124</sup> Rule 50 gave judges substantial authority to decide issues or cases as a matter of law, both before and after jury deliberation.<sup>125</sup> Rule 52 required that judges justify their decisions in those cases where juries were not used.<sup>126</sup> Rule 38 provided that juries would be deemed waived if not requested at the outset of proceedings.<sup>127</sup> Perhaps because trials have fallen into disuse, these measures are only occasionally thought of today.

*C. The Federal Rules Come of Age Lagging Justice (1959)*

The Federal Rules came into force September 16, 1938.<sup>128</sup> Theirs was the misfortune that less than a year later, Europe went to war. As a result, the Rules had a stunted childhood. When they turned twenty-

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120. FED. R. CIV. P. 56.

121. FED. R. CIV. P. 56(c) (1938).

122. FED. R. CIV. P. 51.

123. FED. R. CIV. P. 49.

124. FED. R. CIV. P. 48(c).

125. FED. R. CIV. P. 50.

126. FED. R. CIV. P. 52.

127. FED. R. CIV. P. 38.

128. *Current Rules of Practice & Procedure*, U. S. COURTS, <http://www.uscourts.gov/rulesandpolicies/rules/current-rules.aspx> (last visited June 21, 2014).

one, one of their supporters, Judge Alfred P. Murrah, lamented that “wartime controls and limitations on travel brought a decrease in litigation and there was little opportunity for the new procedures to become firmly rooted.”<sup>129</sup> The end of the war did not improve things. “In their struggle to keep pace with [the great tide of postwar litigation], many courts either lacked the time or the interest to delve into what new procedural techniques might be helpful.”<sup>130</sup> Events, the judge concluded, “had suppressed development of widespread knowledge of the Federal Rules and of the use of the pre-trial conference.”<sup>131</sup>

In their teenage years, the Federal Rules suffered from a judgment common to the gifted young: “not performing up to ability.” Already in 1949, addressing civil justice generally, “realist” Judge Jerome Frank let loose his polemic, *Courts on Trial: Myth and Reality in American Justice*.<sup>132</sup> Report cards finding problems with Rules started to appear soon thereafter. Judge Prettyman in 1951 directed his to “non-routine cases.”<sup>133</sup> In 1953, Benjamin Kaplan, later first Reporter of the Federal Rules Advisory Committee, thought the conclusion unremarkable that “legal procedure still falls far short of reasonable and reasonably attainable goals.”<sup>134</sup> By the mid-1950s, bad report cards were common. “Teachers” called conferences to discuss the shortcomings of civil justice. When the Rules were still but seventeen, in 1956, Attorney General Herbert Brownell, Jr. convened the first Attorney General’s Conference on Court Congestion and Delay in Litigation.<sup>135</sup>

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129. Alfred P. Murrah, *Pre-Trial Procedure*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 73 (1960).

130. *Id.*

131. *Id.*

132. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

133. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE REPORT ON PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES, 13 F.R.D. 62, 62–63, in Leon R. Yankwich, “Short Cuts” in *Long Cases*, 13 F.R.D. 41, 62–84 (1953); see also Dennis A. Kendig, *Procedures for Management of Non-Routine Cases*, 3 HOFSTRA L. REV. 701, 701–02 (1975).

134. Benjamin Kaplan & Livingston Hall, *Foreword*, 287 ANNALS AM. ACAD. POL. & SOC. SCI. vii, vii (1953).

135. *Conference on Court Congestion and Delay Executive Committee*, J. AM. JUDICATURE SOC. 91, 91 (1956).

The year that the Federal Rules turned twenty, 1958, it might have seemed that just about everybody was dumping on the civil justice system, if not always on the Rules themselves. In February of 1958, Warren E. Burger, then recently appointed District of Columbia Circuit Judge, who later as Chief Justice would be the Rules' supreme critic, addressed a regional ABA meeting in a talk with a title reminiscent of Judge Frank's polemic, "The Courts on Trial: a Call for Action Against Delay."<sup>136</sup> Chief Justice Warren followed up with a one-two punch of addresses in May at the annual meeting of the American Law Institute (ALI) and in August at the annual meeting of the ABA.<sup>137</sup> At the latter, the nation's Chief Justice told the group: "[I]nterminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States."<sup>138</sup> If that was not stern enough correction, interspersed between the two Chief Justice's critiques at the ALI and ABA meetings, Attorney General Brownell's successor, Attorney General William P. Rogers, held the second Attorney General's Conference on Court Congestion and Delay in Civil Litigation.<sup>139</sup> The ABA, as it had to Pound's Address at the 1906 Annual Meeting, responded to Chief Justice Warren's admonitions by establishing a special committee (on court congestion), which even published its own monthly newsletter, *Court Congestion*.<sup>140</sup>

When the Federal Rules turned twenty-one, the American Academy of Political and Social Science delivered a rhetorical kick in the pants: a symposium titled *Lagging Justice*.<sup>141</sup> The symposium analyzed the

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136. Warren E. Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A. J. 738, 738 (1958).

137. Earl Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1043 (1958).

138. *Id.*

139. Henry P. Chandler, *The Problem of Congestion and Delay in the Federal Courts*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 144, 152 (1960).

140. Milton D. Green, *The Situation in 1959*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 8 (1960).

141. See Glenn R. Winters, *Foreword*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. vii, vii-viii (1960); Harry Kalven, Jr., *The Literature of Judicial Administration: Books*, 43 J. AM. JUDICATURE SOC'Y 210, 210-11 (1960).

long time it took to get to trial after pleadings were closed.<sup>142</sup> Participants identified the causes of lagging justice, less in the Rules themselves, and more in management, personnel, and, above all, in growth in the number of proceedings without adequate additional judicial manpower.<sup>143</sup> Pretrial discovery was not mentioned as a cause of delay, but failure to make full use of the pretrial conference of Rule 16 was.<sup>144</sup> Drafter, then Judge, Clark was invited to speak up for his offspring and did: Clark claimed that criticism was “overdrawn.”<sup>145</sup> The symposium title “Lagging Justice,” he said, was “not apt.”<sup>146</sup> Certainly his Rules had not led to problems: “the general success of the rules has been phenomenal. This is shown not only . . . by the uniform chorus of praise, but also by their adoption in the states.”<sup>147</sup> The Symposium did not consider revision of the Rules or an overhaul of civil justice.<sup>148</sup>

In defending the Rules, Clark held firm to the idea that they worked to decide cases on the merits by facilitating the framing of issues. His new pleading was not some form of notice pleading; it addressed the “very practical need . . . of uncovering the matters really in dispute well in advance of the formal and portentous full-dress trial.”<sup>149</sup> The various pretrial procedures—discovery, summary judgment, and pretrial conferences—were working towards “uncovering the merits at an early stage.”<sup>150</sup> The pre-trial conference was at hand “to settle the

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142. Kalven, *supra* note 141, at 210.

143. See generally Roger A. Johnsen, *Judicial Manpower Problems*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 29 (1960) (exploring various ways to more effectively use the undermanned American judiciary).

144. See Murrah, *supra* note 129, at 70.

145. Charles E. Clark, *Practice and Procedure*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 61 (1960) [hereinafter Clark, *Practice and Procedure*].

146. *Id.*

147. *Id.* at 66.

148. In 1959, Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz published the first edition of their famous study. See HANS ZEISEL, HARRY KALVEN, JR. & BERNARD BUCHHOLZ, *DELAY IN THE COURT: AN ANALYSIS OF THE REMEDIES FOR DELAYED JUSTICE* (1959). In the Lagging Justice Symposium, they presented the study’s results as calling for the most modest of change. Harry Kalven, Jr., *The Bar, The Court, and The Delay*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 44–45 (1960); Hans Zeisel, *The Jury and the Court Delay*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 46, 52 (1960). Yet years later, Professor Carrington termed their study “a monstrous empirical assault on the institution of the civil jury.” Carrington, *In Memoriam*, *supra* note 49, at 1902.

149. Clark, *Practice and Procedure*, *supra* note 145, at 62.

150. *Id.* at 65.

issues and admissions of things not questioned and generally to advance the case for trial only on essentials.”<sup>151</sup> Clark provided the tools, but his optimistic views of how they would be used were not borne out by experiences.

*D. At Middle Age: Popular Dissatisfaction (Again) (1976)*

By the 1970s, it was clear that American civil justice was in trouble. Already in 1971 Maurice Rosenberg, himself a hero of civil procedure, pronounced American civil justice “failing” and lamented that “‘Crisis’ is the word most commonly used to describe the status of our judicial system.”<sup>152</sup> Chief Justice Burger tried to cure the maladies. He called a conference for 1976 to address them.

*1. The National Conference on the Causes of the Popular Dissatisfaction With the Administration of Justice (“The Pound Conference”) (1976)*

In April 1976, just months shy of the 70th anniversary of Pound’s famous address in St. Paul, the chief justices of the supreme courts of the American states under the leadership of Warren E. Burger, Chief Justice of the United States, gathered for a conference that took its name from Pound’s own address: “The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>153</sup> The Chief Justice asked his state counterparts: “[H]ow can we serve the interests of justice with processes more speedy and less expensive?”<sup>154</sup>

The 1976 Pound Conference in St. Paul was Pound’s 1906 address redux—right down to the very venue in the Chamber of the Minnesota House. Except, where Pound had been a doctor diagnosing disease, the Chief Justice was less a doctor prescribing cure than a pathologist

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151. *Id.*

152. Maurice Rosenberg, *Devising Procedures That are Civil to Promote Justice That is Civilized*, 69 MICH. L. REV. 797, 798 (1971).

153. Warren E. Burger, *Preface* to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 5, 6 (A. Leo Levin & Russell R. Wheeler eds., 1979).

154. *Id.*

conducting a post-mortem.<sup>155</sup> Seventy years of law reform had spawned new law reform organizations such as the American Judicature Society, the American Law Institute, and the Federal Judicial Center, but, had not secured the just, speedy, and inexpensive determination of every action.

## 2. *What Went Wrong?*

Clark and Sunderland overestimated the likelihood of the bench and bar moving out of historic character.<sup>156</sup> The Federal Rules were to promote cooperation between bench and bar. Judges were to help bring adversary lawyers to issues, which courts would then try.<sup>157</sup> Instead, however, judges were reluctant to interfere with adversaries' control of process.<sup>158</sup> Lawyers declined to define material issues in dispute.<sup>159</sup>

Where Sunderland saw discovery as a way to eliminate undisputed issues, lawyers used the rules to discover new disputes. They used easy pleading and discovery to further their clients' interests "by all means and expedients, and at all hazards and costs to other persons."<sup>160</sup> Notice pleading was fine and discovery was even better. Why settle for an unpredictable jury result when one could use discovery to drive the opponent into the ground?

From lawyers' perspective the Federal Rules gave them tools for mining gold. Plaintiffs' lawyers, particularly those paid on contingent fees, could use discovery to create uncertainty on claims and recovery and thereby garner bigger recoveries and larger fees.<sup>161</sup> Defendants' lawyers, working by the hour, could make money looking under every stone for evidence and taking every precaution to meet every

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155. *See id.*

156. Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1518–19 (1998).

157. *Id.* at 1519.

158. *Id.*

159. *Id.*

160. The quote is from Lord Brougham's famous description of adversary representation. Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1323 (2006).

161. Subrin, *Fishing Expeditions*, *supra* note 67, at 741.

conceivable attack.<sup>162</sup> It is no coincidence that hourly billing became the norm when discovery became routine.<sup>163</sup>

Cases were not decided by who was right, but by who played the game better. The Federal Rules were used not to decide what to decide—the long elusive common law goal—but to broaden what to decide. The consequence was predictable: cases were never decided. They were settled.<sup>164</sup>

Even had the Federal Rules been used as intended, it seems unlikely that they would have been fully successful in demolishing sporting justice and substituting decisions according to law. They were procedural reform without court reform or law reform.<sup>165</sup> They did not address indemnity for attorneys' fees, jurisdiction, or appellate review. All three of these contribute to contentious litigation in America. The Federal Rules did not reorganize courts or judicial selection. They were not accompanied by systematization of substantive law.

As a result, the Federal Rules did not end gamesmanship: rather they changed the game from swift checkers to slow chess.<sup>166</sup> Worse, they turned contests into wars of attrition.<sup>167</sup>

### E. *The Fourth Era in Civil Procedure*

The newest chronicles of the Federal Rules say that today we are in a new, fourth era in civil procedure.<sup>168</sup> The first was common law

162. *Id.*

163. George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 94–95 (1999) (using an economic model to support the premise that liberal discovery rules under the Federal Rules were a “substantial factor” in encouraging the legal profession to move to hourly billing).

164. See Subrin, *Fishing Expeditions*, *supra* note 67, at 706–07.

165. Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 439 (1910) (“It is not too much, indeed, to say that improvement in these three particulars [court organization, bench, and bar] is a necessary precursor of thoroughgoing reform of procedure.”).

166. Compare William D. Mitchell, *The New Federal Rules of Civil Procedure*, 61 ANN. REP. A.B.A. 423, 430 (1936) (“[A] suit is not a mere game of checkers . . .”), with William S. Bailey, *Successful Pretrial Motions in 10 Moves*, TRIAL, Mar. 2009, at 22 (examining pretrial motions as chess moves).

167. See, e.g., FREDERICK L. WHITMER, LITIGATION IS WAR: STRATEGY & TACTICS FOR THE LITIGATION BATTLEFIELD I (2007); Simon H. Rifkind, *Are We Asking Too Much of Our Courts*, 70 F.R.D. 79, 107 (1976) (“The practice—in many areas of the law—has been to make *discovery* the ‘sporting match’ and an endurance contest.”).

168. SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS? 75–78 (2013); Stephen Subrin & Thomas Main, *The Fourth Era of American Civil*

pleading.<sup>169</sup> The second was code pleading under Field's 1848 code.<sup>170</sup> The third was under the original Federal Rules of 1938.<sup>171</sup> And now, the fourth era is that of the Federal Rules as reformulated since the Pound Conference.<sup>172</sup> Since then, responding to dissatisfaction with the administration of justice, through Rules amendment and extra-rules court precedent, procedures have moved and continue to move to limit discovery, hasten dispute resolution, and turn judges into "case managers."<sup>173</sup> In this fourth era, the Federal Rules are to control parties' access to courts ("plausibility pleading"), limit private investigations (numerical limits on depositions and interrogatories), restrict parties' access to trials (increased use of summary judgments) and leave more cases to judges and fewer to juries (more directed verdicts, special verdicts, and judgments notwithstanding verdicts).<sup>174</sup> The changes focus on controlling private invocation of litigation and its tools of discovery. They show little concern for deciding cases according to law.<sup>175</sup>

Defenders of the Federal Rules of the third era, the proponents of private enforcement, challenge the changes that create the fourth. They argue that the changes work against access to courts and, in the end, justice.<sup>176</sup> They claim that critics exaggerate expenses; they say most are proportionate.<sup>177</sup> Yet, when most litigating lawyers acknowledge cases with amounts in dispute under \$100,000 are not viable, it is hard for defenders of the third era to seriously assert that the Federal Rules achieve their mission of securing the just, inexpensive, and expeditious resolution of every case. Indeed, already thirty years ago Professor

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*Procedure*, 162 U. PA. L. REV. (forthcoming 2014).

169. Arthur. R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 86 N.Y.U. L. REV. 286, 288–90 (2013) [hereinafter Miller, *Simplified Pleading*]; Julian, *supra* note 73, at 1184–85.

170. Julian, *supra* note 73, at 1186–87; Clark, *Practice and Procedure*, *supra* note 145, at 61.

171. See discussion *infra* Part III.A.

172. DODSON, *supra* note 168, at 30–46.

173. See *id.* at 77.

174. *Id.* at 75–81; Miller, *Federal Courthouse Doors*, *supra* note 37, at 59194, 597; Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 17879, 197 (2013).

175. DODSON, *supra* note 168, at 77.

176. Miller, *Federal Courthouse Doors*, *supra* note 37, at 591–94, 597.

177. See *id.* at 598.

Miller himself wondered whether “the adversary system as we know it has become too costly and inefficient a device for resolving civil disputes.”<sup>178</sup>

Defenders have designed a different defense. It is an epic story of how the Federal Rules have taken on an alternative social role of private enforcement of public law.

### III. FEDERAL RULES—THE EPIC

The aim of the movement served by these heroes has been to make judicial institutions more effective and more efficient in performing their assigned mission. In America, that mission has been not merely to resolve disputes, but also to give substance to the Constitution by enforcing the rights of citizens.

Paul D. Carrington (1995)<sup>179</sup>

Today, when American proceduralists celebrate, they fete the heroic years: the 1960s and the early 1970s. Those were years of civil rights lawmaking, of mass tort litigation, and of private enforcement of public norms.<sup>180</sup> It was an era when one could believe in “using the civil litigation system to deliver the promise of the law to those who were otherwise without much power in society.”<sup>181</sup> Proceduralists lament later Supreme Court decisions that have turned those dynamic bright summer days of hope into desultory dark winter days of discontent. They ask, are the courthouse doors closing?<sup>182</sup>

Proceduralists tell an epic story of good versus evil that continues to this day. “[T]hose who oppose civil justice[,]” former reporter

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178. Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 20 (1984).

179. Carrington, *In Memoriam*, *supra* note 49, at 1901 (“Its father could be said to be Jeremy Bentham. Its seldom-sung American heroes include David Dudley Field, Roscoe Pound, Harry Wigmore, Charles Clark, and Maurice Rosenberg.”).

180. D. Michael Risinger, *Wolves and Sheep, Predators and Scavengers, or Why I Left Civil Procedure (Not With a Bang, but a Whimper)*, 60 UCLA L. REV. 1620, 1622–23 (2013).

181. *Id.* See generally James Gordley, *The Meaning of Equal Access to Legal Services*, 10 CORNELL INT’L L.J. 220 (1977).

182. DODSON, *supra* note 168; Miller, *Federal Courthouse Doors*, *supra* note 37, at 587; Weinstein, *supra* note 6, at 1907 (speaking of an “anti-access movement”).

Professor Paul D. Carrington writes, “are numerous, ubiquitous, and persistent . . . . Every victory for the cause is therefore temporary, even evanescent, because each is predestined to evoke a response by the devils within us all. The forces of darkness return.”<sup>183</sup>

Who can better tell that epic with more credibility and eloquence than Professor Carrington and his compatriots Professors Arthur R. Miller and Richard L. Marcus: three of only four living present and former reporters for the Advisory Committee of the Rules of Civil Procedure?<sup>184</sup> Their good will, decency, idealism, and ideals inspire us to achieve justice for all. They are the synoptic writers of the epic that is the Federal Rules: Miller, Marcus, and Paul Carrington.<sup>185</sup> Their epic is informed by important historical work of proceduralists of the last quarter century.

#### A. *Founders’ Era (1938–1959)*

The epic begins a long time ago, a time out of mind, a time that none of us remembers: 1938. It was a time of great depression. Civil justice was debased by “debilitating technicalities and rigidity that characterized the prior English and American procedural systems—that is, the common law forms of action and then the codes.”<sup>186</sup> Disputes were resolved in sporting contests by “tricks or traps or obfuscation.”<sup>187</sup>

A new world dawned September 16, 1938 when the Federal Rules of Civil Procedure took effect.<sup>188</sup> It was the “Golden Age of

183. Carrington, *In Memoriam*, *supra* note 49, at 1901.

184. See ADVISORY COMM. ON CIVIL RULES, APRIL 10–11, 2014 MEETING 7 (2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2014-04.pdf> (listing Richard L. Marcus and Edward H. Cooper as current reporters); *Federal Committee on Rules of Practice and Procedure Opens “Duke Rules Package” for Comment*, DUKE LAW SCH., (Aug. 22, 2013), <http://law.duke.edu/news/federal-committee-rules-practice-and-procedure-opens-duke-rules-package-comment/> (describing Arthur R. Miller and Paul D. Carrington as former reporters).

185. The fourth, Edward H. Cooper, so far as I know, does not disagree with the synoptic epic Miller, Marcus, and Carrington; but he has not told his views in publications known to the author.

186. Miller, *Simplified Pleading*, *supra* note 169, at 288–89.

187. *Id.* at 288; Paul D. Carrington, *A New Confederacy? Disunionsim in the Federal Courts*, 45 DUKE L.J. 929, 932 (1996) (“[N]ineteenth century civil procedure was a sport of chance in which the substantive merits of claims and defenses played a minor role.”).

188. Lately Professor Marcus has doubted whether it was quite so new. See Richard Marcus, *Bomb Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 NW.

Rulemaking” when “giants trod the soil of rulemaking. Drawing from the legacy of Jeremy Bentham, David Dudley Field, and Roscoe Pound, a small band of drafters created the Federal Rules of Civil Procedure in the late 1930s and changed the American procedural landscape.”<sup>189</sup> These giants, “the distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits.”<sup>190</sup> They could do that. 1938 was a simpler time. It was easier to resolve cases on their merits. Litigation was about “relatively simple matters.”<sup>191</sup>

The epic writers gloss over what Chief Justices Warren and then Judge, later Chief Justice, Burger saw already in 1958: the civil justice system was failing to meet the demands increased litigation was placing on it.<sup>192</sup> Instead, they prefer to remember from the first two decades of the Federal Rules how the Supreme Court supercharged the rules governing pleading and discovery. In *Conley v. Gibson*, the Court found almost any allegation might satisfy Rule 8’s requirements for a complaint.<sup>193</sup> In *Hickman v. Taylor*, it approved use of discovery “to obtain the fullest possible knowledge of the issues.”<sup>194</sup>

### B. Rights Revolution (the 1960s)

How things have changed since 1959! “Today’s worlds of civil rights, employment discrimination, environmental, consumer protection, pension, high-tech, and product safety litigation largely did not exist when the Federal Rules were formulated . . . [T]here were not even law school courses on those subjects in the 1950s.”<sup>195</sup> In the 1960s, there were notable increases in employment discrimination

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U. L. REV. 475, 481 (2013).

189. Marcus, *Modes*, *supra* note 18, at 157; accord Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 604 (2010) [hereinafter Carrington, *Politics*] (noting the “eminent lawyers” who were not quite giants).

190. Miller, *Simplified Pleading*, *supra* note 169, at 288; accord Carrington, *supra* note 189, at 604.

191. Miller, *Simplified Pleading*, *supra* note 169, at 290.

192. *Id.* at 360–61.

193. *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

194. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

195. Miller, *Simplified Pleading*, *supra* note 169, at 292.

cases, and in assertions of new rights by consumers, and by those seeking to enforce complex environmental laws.<sup>196</sup>

“[L]awyers, fully armed in 1938 with the tools of discovery, could effectively uncover falsehood and wrongdoing in civil cases.”<sup>197</sup> This was fortuitous drafting by the giants, for private enforcement had not been a guiding goal of their work in 1938. “In retrospect, it seems that the private enforcement orientation grew somewhat organically over the twentieth century.”<sup>198</sup> It was a new development in American history that emerged largely only after World War II.

By the time the rights revolution rolled around, the Federal Rules as interpreted enabled parties to “conduct private investigations of business practices threatening harm to consumers, passengers, tenants, workers, patients, or franchisees.”<sup>199</sup> 1970 saw, by Rules amendment, abolition of the Rule 34(a) requirement that parties needed good cause and a judicial order to obtain discovery of documents.<sup>200</sup> By then judges could “make law and policy to an extent not regarded as permissible in most other nations.”<sup>201</sup>

### C. Corporate Counterrevolution

Not everyone appreciated the super-charged Federal Rules. Against the private enforcement of public policies came, according to the epic, “a backlash that favors corporate and governmental interests against the claims of individual citizens.”<sup>202</sup> The backlash has been hydra-headed—taking many forms—all promoted by a corporate interest-captured Supreme Court: rule reformations, new applications of

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196. Carrington, *Politics*, *supra* note 189, at 601–02.

197. Paul D. Carrington, *Moths to the Light: The Dubious Attractions of American Law*, 46 U. KAN. L. REV. 673, 684 (1998) [hereinafter Carrington, *Moths to the Light*]; Carrington, *Politics*, *supra* note 189, at 605 (“To the extent that the Progressive reformers achieved their aims, private citizens gained the ability to enforce many diverse laws enacted or proclaimed to protect public interests as well as their own.”).

198. Marcus, *American Exceptionalism*, *supra* note 20, at 139.

199. Carrington, *supra* note 189, at 610.

200. ADVISORY COMM. ON CIVIL RULES, PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE DISCOVERY RULES app. B (1969), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV07-1969.pdf>.

201. Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GERMAN L.J. 1413, 1419 (2004) [hereinafter Carrington, *American*].

202. Miller, *Simplified Pleading*, *supra* note 169, at 302.

previously little used rules, “retiring” of precedents that had supercharged rules for private enforcement, and new legislation through “interpretation.”<sup>203</sup>

The epic writers tell how changes in the Federal Rules, both by amendment and by interpretation, threaten the private enforcement goal. “Not surprisingly,” Professor Marcus writes, “those who challenge the private enforcement goal in the U.S. also seem to want to dismantle the procedural apparatus that supports it.”<sup>204</sup> Professor Miller writes of eight steps in “deformation” of procedure in federal courts: (a) reformulation of pretrial conferences; (b) summary judgment; (c) expert evidence; (d) class actions; (e) the Federal Arbitration Act; (f) pleading requirements; (g) personal jurisdiction; and (h) discovery.<sup>205</sup> Professor Carrington says that the Supreme Court “has evidenced a probusiness shift . . . to weaken private enforcement of public laws regulating business.”<sup>206</sup> It has put its thumb on the scale in favor of business. The aspiration of “equal justice under law” has been supplanted, says Professor Miller, by intentions “to impede meaningful citizen access to our justice system or to impair the enforcement of our public policies and constitutional principles by constructing a procedural Great Wall of China or Maginot Line around the courtrooms in our courthouses.”<sup>207</sup>

But the epic has not won over the public or the profession. Dispute resolution leads.

#### IV. THE FUTURE ON THE MERITS?

It is sometimes assumed that the business of courts is merely dispute resolution, by whatever means may be effective to bring repose . . . . I assume that this pre-Enlightenment purpose will not become the norm, and that we will continue to expect courts to

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203. *See id.* at 302–06, 309.

204. Marcus, *American Exceptionalism*, *supra* note 20, at 139.

205. Miller, *Simplified Pleading*, *supra* note 169, at 287.

206. Carrington, *Politics*, *supra* note 189, at 609.

207. Miller, *Simplified Pleading*, *supra* note 169, at 372.

decide cases by applying law to fact.

Paul D. Carrington (1998)<sup>208</sup>

Professor Carrington has it right: courts exist to decide cases by applying law to facts. He quips: Mr. Legality points the way to the “Celestial City.”<sup>209</sup> That’s smart, but no surprise. The essential goal of every modern system of civil justice is the application of law to facts to determine rights and resolve disputes according to law and justice.<sup>210</sup> In this way, legal systems not only do right in individual cases, they make social life possible. They validate a nation’s laws and facilitate its peoples’ compliance with law.

#### A. *Learning From Foreign Systems*

The Federal Rules fail because they do not apply law to fact. That is unfortunate, but it is no good reason to give up on the essential goal of civil justice systems. Other systems show it to be an attainable goal. Learn from others! There’s nothing new in that. It is a mantra of our federal system, that every state is a laboratory for other states.<sup>211</sup> OK. Let’s do it. There’s no good reason to look at the work of only American laboratories. Sunderland himself called for us to see in civil law systems “the most valuable data upon which to base our own experiments in procedural reform.”<sup>212</sup>

One system that we might learn well from is the German. It is among the finest and most admired in the world.<sup>213</sup> The German system takes

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208. Carrington, *supra* note 156, at 1522–23.

209. *See id.* at 1517.

210. Uzelac, *supra* note 1, at 3 (“It would be easy to state the obvious and repeat that in all justice systems of the world the role of civil justice is to apply the applicable substantive law to the established facts in an impartial manner, and pronounce fair and accurate judgments.”). This collection includes twelve papers on the goals of civil justice in an approximately like number of countries. The paper from the United States is by Professor Marcus.

211. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting).

212. Edson R. Sunderland, *Current Legal Literature: Among Recent Books*, 15 A.B.A. J. 35, 36 (1929).

213. It was the only foreign system that Pound named in his 1906 address: “the wonderful mechanism of modern German judicial administration.” Pound, *supra* note 50, at 397. It may be better today. One-hundred eight years later, the World Justice Project, partly funded and led by the American Bar Association, reviewed ninety-nine civil justice systems around the world. THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014 1 (2014). Of the civil justice systems in the thirty wealthiest countries, the

seriously applying law to facts. In a nutshell,<sup>214</sup> the following is why it works well.

Parties present facts to courts; courts find facts and determine rights under law. The idea is captured in the Latin maxim: *da mihi factum, dabo tibi jus!* (Give me the facts, I will give you your right).<sup>215</sup> Process does not exist for its own sake. It exists to facilitate determining rights under law.

German process parallels American process in outline, but differs in details that facilitate decisions on the merits.<sup>216</sup> Plaintiffs file complaints.<sup>217</sup> Courts determine sufficiency of complaints, help parties correct insufficient complaints, and direct parties that have gone to the wrong courts to the right ones.<sup>218</sup> Courts serve complaints and the defendants answer.<sup>219</sup> Pleadings identify key facts and point to evidence parties will rely on.<sup>220</sup>

Early on, courts meet with parties—not just lawyers—to discuss cases.<sup>221</sup> Together they identify applicable law and material facts in dispute.<sup>222</sup> If no material facts are in dispute, courts may summarily decide.<sup>223</sup> If material facts are in dispute, courts invite parties to submit evidence.<sup>224</sup> Parties propose testimony and, if courts agree that the evidence proposed would contribute to resolving a material question in dispute, they order taking proof.<sup>225</sup> Parties have a fully developed right to be heard which is fully enforceable on appeal, so courts are reluctant to reject proffered proof.<sup>226</sup>

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Project rated the German system third, behind only those of Norway and the Netherlands. *Id.* at 95. The project scored the U.S. twenty-five percent lower and ranked it twenty-fifth. *Id.* at 154.

214. For an explanation of this system, see MAXEINER ET AL., *supra* note 52, along with three other books and dozens of articles authored by Maxeiner.

215. Maxeiner, *supra* note 3, at 1283.

216. *Id.* at 1280–88.

217. *Id.* at 1285.

218. *Id.* at 1285–86.

219. *Id.*

220. *Id.*

221. Maxeiner, *supra* note 3, at 1286.

222. *Id.*

223. *Id.*

224. *Id.* at 1287.

225. *Id.*

226. *Id.*

Courts decide nothing finally until they decide the entire case.<sup>227</sup> They may readdress issues that seemed settled.<sup>228</sup> They let parties know which issues they will be deciding and give parties the opportunity to respond.<sup>229</sup> Once courts have clarified all material issues in dispute, they proceed to making final decisions.<sup>230</sup> They explain their decisions in full: they give contentions of both sides and explain why they come to the conclusions they do.<sup>231</sup> If parties believe courts' decisions are wrong, they may appeal them.<sup>232</sup> On first appeal, other courts decide which party is right in law and not whether the first court failed to follow the rules of the game.<sup>233</sup>

German civil justice works because courts decide cases on the merits; they apply law to facts. German judges guide parties from the commencement of suits. Judges have freedom in structuring the order and content of proceedings. Because they control how proceedings go, they do not need to limit access to procedure. They are not gatekeepers, but facilitators. Courts do not decide issues conclusively until they decide the entire case at the end of proceedings.

Of course, the United States cannot simply adopt the German system. Process is not simple. It requires laws, processes, and institutions different from those we presently have. But those laws, processes, and institutions are of a piece with legal methods Americans have for two centuries aspired to as best practices. The United States can learn from the German and other foreign systems if only we would give them a look.

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227. James R. Maxeiner, *Imagining Judges That Apply Law: How They Might Do It*, 114 PENN ST. L. REV. 469, 481 (2009).

228. *See id.*

229. *Id.* at 478.

230. *Id.* at 476–81.

231. James R. Maxeiner, *What America Can Learn From Germany's Justice System*, ATLANTIC (June 7, 2012, 11:00 AM), <http://www.theatlantic.com/national/archive/2012/06/what-america-can-learn-from-germanys-justice-system/258208/>.

232. Maxeiner, *supra* note 3, at 1282.

233. *See* James R. Maxeiner, *Thinking Like A Lawyer Abroad: Putting Justice Into Legal Reasoning*, 11 WASH U. GLOB. STUD. L. REV. 55, 85 (2012).

*B. Sunderland to Miller, Marcus, and Carrington: “Why don’t you take advantage of what has been done by the civil law . . .?”*

Sunderland, in a book review that predated his work on the Federal Rules, raised the question: “Why don’t you take advantage of what has been done by the civil law, that governs at least twice as many people as the common law, is two thousand years older, and embodies a much greater amount of human experience?”<sup>234</sup>

Professors Miller, Marcus, and Carrington are internationally minded men. Yet for them, there are few lessons to be learned abroad. Where Sunderland sought out foreign solutions, his successors avert their eyes. Where Sunderland saw his work as experiments, independent of frontiers, in a universal search for better methods of dealing with fundamental problems of litigation, Miller and Carrington revere Sunderland’s reforms as immovable and immutable building blocks peculiar to American culture.<sup>235</sup>

Not to look at foreign solutions is irresponsible. It is foolish. So said Sunderland.<sup>236</sup> So how do Miller, Marcus, and Carrington answer Sunderland?

*1. American Exceptionalism*

Americans have long known that through comparison of our institutions with those of foreigners, we learn “what is defective or excellent, and therefore of what is to be cherished and upheld, or to be

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234. Sunderland, *supra* note 212, at 35.

235. Carrington, *Moths to the Light*, *supra* note 197, at 686 (“It would require deep cultural change . . .”); see Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 397 (2010) (noting that some changes would be “too deep an assault on the historic role of civil litigation in our country”). See generally Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM J. COMP. L. 277 (2002) (examining the relationships between a society’s culture and dispute resolution methods); see generally Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM J. COMP. L. 709 (2005) (introducing works that examine the dispute resolution methods in other countries). Some American proceduralists are more open to foreign examples. See Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT’L & COMP. L. REV. 1, 21–23 (2011); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 444–45 (2010).

236. See *infra* note 270.

disapproved and abolished in our institutions.”<sup>237</sup> Those, however, who are unwilling to disapprove or even abolish institutions found wanting, maintain the failing institutions and assert that they serve unique American needs.<sup>238</sup> So it is with defenders of the failed Federal Rules.

American civil procedure is exceptional, they say, because its goals are exceptional.<sup>239</sup> Where foreign systems are concerned only with resolving disputes among private parties, the American system relies on private parties to enforce public law. This difference, they claim, defines the American system.<sup>240</sup> Professor Carrington explains:

[D]iscovery is the American alternative to the administrative state. We have by means of Rules 26–37, and by their analogues in state law, privatized a great deal of our law enforcement, especially in such fields as antitrust and trade regulation, consumer protection, securities regulation, civil rights, and intellectual property. Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy.<sup>241</sup>

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237. Caleb Cushing, *On the Study of the Civil Law*, 11 N. AM. REV. 407, 408 (1820).

238. See generally Marcus, *American Exceptionalism*, *supra* note 20 (examining the unique goals of American civil litigation).

239. Marcus, *American Exceptionalism*, *supra* note 20, at 139 (“American procedure is exceptional because American procedural goals are exceptional . . . . The goal of public enforcement largely emerged after World War II, and there has recently been an effort in the U.S. to discredit the goal of private enforcement that seems now to explain so much about American procedure that baffles the rest of the world. Not surprisingly, those who challenge the private enforcement goal in the U.S. also seem to want to dismantle the procedural apparatus that supports it.”).

240. See SUBRIN & WOO, *supra* note 29, at 37 (“The role of civil litigation in America is somewhat different perhaps from its role in other countries, and it defines the character of our legal system. Rather than simply seeking courts to resolve private disputes (the conflict resolution model), Americans have relied on relatively open access to court and private civil litigation to be at the heart of a great deal of the enforcement of our public laws (the behavior modification or social control model). With a mistrust of big government and intrusive states, the American public has (probably more than most other countries) relied on private civil litigation rather than solely on state-controlled litigation or state regulatory agencies to enforce our public values.”).

241. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997); accord Carrington, *American*, *supra* note 201, at 1413; Paul D. Carrington, *Civil Procedure to Enforce Transnational Rights?*, (Mar. 3, 2007), available at [http://scholarship.law.duke.edu/faculty\\_scholarship/1990](http://scholarship.law.duke.edu/faculty_scholarship/1990); see generally J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); Marcus, *supra* note 235.

The story they tell is that because foreign systems do not do these things, they do not need American-style pleading and discovery and, therefore, there is not much to learn from their procedures in “dispute resolution.”<sup>242</sup>

The story of American exceptionalism in civil procedure goals is fantasy. A recent multinational study, *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, edited by Alan Uzelac, under the aegis of the International Association of Procedural Law, explodes the idea of American exceptionalism in goals for civil procedure.<sup>243</sup> Professor Uzelac, in summarizing the results of eleven studies of twelve systems of civil justice, finds in all twelve there to be two main goals of civil justice: dispute resolution and social policy.<sup>244</sup> The definitions and relative emphases given to each, especially the latter, vary.<sup>245</sup> But, there is no escaping the conclusion that the United States is not exceptional and that its use of private enforcement of social policy does not define our system.<sup>246</sup>

## 2. *Foreign Fact Instead of Exceptionalism Fantasy*

The proponents of American exceptionalism do not offer proof for their claims that other states orient civil justice exclusively on dispute resolution to the denigration of social policy. Professor Marcus alone obliquely states where he got the idea: “For most of the rest of the world, *we Americans are informed*, the administrative enforcement model is the favored method of achieving policy enforcement or behavior modification, and conflict resolution is the goal of private

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242. Were these statements true, foreign experiences ought none the less lead Americans to ask: (1) should the United States abandon the “transsubstantive model,” one size fits all, of forms of civil procedure and substitute a two-track approach, where one track is for dispute resolution and the other for social policy?; and (2) is the United States well served by private enforcement through civil justice or are there better ways to achieve policy goals?

243. See Uzelac, *supra* note 1.

244. *Id.* at 6.

245. *Id.*

246. Although the U.S. system is not exceptional in goals, it is exceptional in its methods: it hands over the power of the state to unchecked use by private parties. E. Donald Elliott, Twombly in Context: *Why Federal Rule of Civil Procedure 4(b) is Unconstitutional*, 64 FLA. L. REV. 895, 898 (2012).

civil litigation.”<sup>247</sup> When challenged, he cites his colleagues.<sup>248</sup> We can only speculate where he or they got the idea. My best guess: pre-conceptions about the defunct Soviet system.<sup>249</sup>

Foreign civil justice determines rights. In this way, it resolves conflicts. Foreign civil justice rests on private enforcement of rights.<sup>250</sup> In the case of the German system, it has done this for a century.<sup>251</sup> Private parties more than public officers enforce rights, both those found in traditional private law, and those based on newer public law.

The huge, centralized bureaucracy that American proceduralists imagine is not a feature of Germany. Its Federal Ministry of Labour and Social Affairs, which oversees the enforcement of employment law, social law, the labor courts and the social courts, has about eleven hundred employees.<sup>252</sup> Its Federal Ministry of Justice and Consumer Protection, which oversees enforcement of consumer protection laws and the ordinary civil courts, has about seven hundred employees.<sup>253</sup> To put those numbers in perspective, the Administrative Office of the United States Courts has more than thirty thousand employees.<sup>254</sup> Who, we should ask, has armies of public officials?

To dispel the notion of American exceptionalism it is sufficient to look at some of the areas where exceptionalism is supposedly evidenced.<sup>255</sup>

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247. Marcus, *American Exceptionalism*, *supra* note 20, at 129 (emphasis added).

248. *Id.* at 129–34.

249. Perhaps they read too robustly the words of Mirjan Damaška. See generally MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986). Professor Marcus frequently refers to Professor Damaška’s work. See, e.g., Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World order?*, 7 *TUL. J. INT’L & COMP. L.* 153, 187–88 (1999).

250. Uzelac, *supra* note 1, at 15–16.

251. See MAXEINER ET AL., *supra* note 52, app. at 271.

252. E-mail from Ralf Peters, Fed. Ministry of Labour and Soc. Affairs, to James R. Maxeiner, Assoc. Professor of Law, Univ. of Baltimore Sch. of Law (Feb. 12, 2014) (on file with author).

253. *Aufbau und Organisation*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, [http://www.bmju.de/DE/Ministerium/AufbauOrganisation/\\_node.html](http://www.bmju.de/DE/Ministerium/AufbauOrganisation/_node.html) (last visited June 26, 2014).

254. OFFICE OF PERSONNEL MGMT., DATA, ANALYSIS & DOCUMENTATION FEDERAL EMPLOYMENT REPORTS: EMPLOYMENT AND TRENDS—SEPTEMBER 2012 (2012), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2012/september/table-3/>.

255. Different writers highlight different areas for mention. Employment law and consumer protection are two areas that have not only been mentioned but have received close attention. See Burbank, Farhang & Kritzer, *supra* note 28, at 667. This article was prepared as part of the fourteenth World Congress of

1. **Employment law.** Americans boast that federal courts handle yearly 20,000 cases of employment discrimination, mostly termination cases.<sup>256</sup> Most of these cases in Germany would fall in the jurisdiction of state labor courts. They handle 400,000 cases a year.<sup>257</sup> The great majority of these cases are private suits by employees against employers. The state labor courts are civil courts; their rules of procedure are those of ordinary civil courts.<sup>258</sup>

2. **Consumer protection.** Private litigation in the ordinary courts is the principal locus of enforcement of German laws of consumer protection, be they laws protecting consumers against unfair terms, product liability, misleading advertising, or deceptive sales practices.<sup>259</sup> Most of these laws now find counterparts throughout the European Union (EU) thanks to EU directives compelling their adoption. Under German law, private consumer organizations are authorized to send demand letters with the force of law and, if those do not cause corporate cessation of consumer damaging practices, to bring private suits.<sup>260</sup>

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the International Association of Procedural Law. *Id.* at 637 n.a1. It focuses on two areas of private enforcement: employment law and protecting consumers from unfair and deceptive acts and practices. *Id.* at 643.

256. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1323 n.233 (2009).

257. Until recently, Germany did not have a specific discrimination law. Joachim Wiemann, *Obligation to Contract and the German General Act on Equal Treatment (Allgemeines Gleichbehandlungsgesetz)*, 11 GERMAN L.J. 1131, 1131 (2010). Nevertheless German labor courts have long handled matters that in America would be raised as job discrimination. Since the U.S. has no general employment law, but instead applies a common law “employment at will” doctrine, plaintiffs who would bring unlawful discharge suits in Germany assert discrimination in employment. See Miller, *Simplified Pleading*, *supra* note 169, at 343 n.210.

258. See MANFRED WEISS & MARLENE SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* 149 (4th ed. 2008). For perspectives specifically on German labor courts and proceedings, see generally JÜRGEN ARNOLD, *DIE ARBEITSGERICHTSBARKEIT: FESTSCHRIFT ZUM 100-JÄHRIGEN BESTEHEN DES DEUTSCHEN ARBEITSGERICHTSVERBANDES* (1994); EBERHARD WIESER, *ARBEITSGERICHTSVERFAHREN* (1994); and still valuable and insightful, Ernst Fraenkel, *The Labor Courts in the German Judicial System*, in *GERMAN LABOR COURTS* 3–18 (1946).

259. See BARBARA GRUNEWALD & KARL-NIKOLAU PEIFER, *VERBRAUCHERSCHUTZ IM ZIVILRECHT* 7–10 (2010) (with an introduction and ten chapters each on a different form of consumer protection detailing its implementation); Stefan Lenze, *German Product Liability Law: Between European Directives, American Restatements and Common Sense*, in *PRODUCT LIABILITY IN COMPARATIVE PERSPECTIVE* 100–25 (Duncan Fairgrieve ed., 2005).

260. JAMES R. MAXEINER & PETER SCHOTTHÖFER, *ADVERTISING LAW IN EUROPE AND NORTH AMERICA* 228–32 (2d ed. 1999) (including a chapter on German law by George Jennes & Peter Schotthöfer); James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European*

3. **Competition and antitrust law.** The former relies almost exclusively on private enforcement,<sup>261</sup> while the latter, modeled on American law, includes a significant private enforcement component.<sup>262</sup>

4. **Private rights of action in civil courts under public law.** American proceduralists admire those oft-confusing and sometimes inconsistent precedents that permit private rights of action pursuant to New Deal (1930s) and subsequent legislation. The German Civil Code has anticipated such actions since its adoption in 1896. Section 828(2) provides that a person has a duty to pay damages is “held by a person who commits a breach of a statute that is intended to protect another person.”<sup>263</sup>

By studying these and other areas where private parties enforce public law through civil justice, Americans would learn how the German system has minimized the difficulties encountered here.<sup>264</sup> The German approach is straight-forward. Civil justice is limited to enforcing rights that are already determined in law or determinable based on facts limited to the individuals concerned. Those rights may originate in private or public law. Where, however, law application requires policy decisions, i.e., political decisions for people beyond those immediately concerned, then administrative decision-making, with eventual political responsibility is appropriate and private enforcement through ordinary courts is not. Private challenges are still possible. They go first to the administrative authorities themselves, whose decisions are then are reviewable by administrative courts.<sup>265</sup>

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*Alternatives*, 28 YALE J. INT’L L. 109, 157–59 (2003).

261. See generally LAW AGAINST UNFAIR COMPETITION: TOWARDS A NEW PARADIGM IN EUROPE? (Reto M. Hilty & Frauke Henning-Bodewig eds., 2007) (examining the evolution of competition laws in Europe); THE ENFORCEMENT OF COMPETITION LAW IN EUROPE (Thomas M. J. Möllers & Andreas Heinemann eds., 2007) (analyzing the enforcement mechanisms of unfair competition law and antitrust law).

262. DAVID ALEXANDER JÜNTGEN, DIE PROZESSUALE DURCHSETZUNG PRIVATER ANSPRÜCHE IM KARTELLRECHT *passim* (2007); MAXEINER, *supra* note 259, at 55.

263. See BÉNÉDICTE FAUVARQUE-COSSON & DENIS MAZEAUD, EUROPEAN CONTRACT LAW: MATERIALS FOR A COMMON FRAME OF REFERENCE: TERMINOLOGY, GUIDING PRINCIPLES, MODEL RULES 489 n.175 (2008).

264. Professor Burbank and colleagues set out those difficulties in their recent article on private enforcement. Burbank, Farhang & Kritzer, *supra* note 28, at 667.

265. MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 219–22

## CONCLUSION

Sunderland named two principal reasons why Americans do not learn from foreign civil justice: “ignorance, due to the fact that American lawyers are not usually good linguists,” and “professional prejudice against new ideas, based on natural conservatism and the monopolistic nature of judicial agencies.”<sup>266</sup>

Limited facility with foreign languages remains an impediment,<sup>267</sup> but one of ever declining importance as the English-speaking European Union harmonizes and reforms its laws. One consequence of that harmonizing is an explosion of English language materials by foreign experts.<sup>268</sup> That literature, some scholarly, some practical, offers American scholars a firm basis on which to write. If only one of ten new scholars would put aside the U.S. judicial clerkships for serious foreign law studies abroad—preferably in the local language—we would soon have sufficient institutional knowledge to well utilize foreign law.<sup>269</sup>

Professional prejudice is another matter. It is simply stupid to ignore foreign successes because they are foreign. So thought Sunderland.<sup>270</sup> So said famously the German, Rudolf von Jhering:

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(2d ed. 2001).

266. Sunderland, *supra* note 212, at 35.

267. Ernst C. Stiefel & James R. Maxeiner, *Why are U.S. Lawyers not Learning From Comparative Law?*, in *THE INTERNATIONAL PRACTICE OF LAW* 213–36 (Nedim Peter Vogt et al. eds., 1997).

268. This offers a niche for U.S. law professors who do not know foreign languages. Since these foreign scholars do not know U.S. law, their work needs “translation” into American legal understanding.

269. This would address Professor Clermont’s claim that we cannot use foreign experiences because knowledge of foreign systems is too little diffused. See Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 *WAKE FOREST L. REV.* 1337, 1343 n.36 (2010).

270. See, e.g., Edson R. Sunderland, *Joinder of Actions*, 18 *MICH. L. REV.* 571, 572 (1920) (“There is further striking failure which must be charged to the legal profession in America . . . and that is its ignorance of and indifference to improvements in procedural practice developed in other jurisdictions. It is safe to say that if a new method of treating cancer were discovered and successfully employed in England, every intelligent doctor in the world would almost immediately know about it and attempt to take advantage of it. But it is equally safe to say that if a new and successful method of treating some procedural problem were discovered in England, American lawyers as a class would remain in substantial ignorance of it for at least two generations, and would probably treat it with scornful indifference for a generation or two more. There are no state lines for progressive doctors, dentists, engineers, architects, manufacturers or business men. But not one lawyer in a hundred knows or cares what reforms are being employed by his profession on the other side of the political boundary. The American lawyer is satisfied with things as they are. As long as clients continue to come and the machinery of the law continues to move, he is . . . free from concern over the methods used elsewhere . . .”).

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back yard.<sup>271</sup>

Let us follow Sunderland's invocation and "search[] for new and better methods, overcoming the barriers of language and forgetting the prejudices of nationality and race."<sup>272</sup> Then we may be able to avoid the tragedy that Chief Justice Burger warned of at the 1976 Pound Conference:

It is far easier to do what we lawyers often do—praise our system as the best ever devised and denounce anyone who dares to suggest that we consider, not only periodic adjustment, but major and systemic changes. The inertia of some lawyers, judges, and legislators is such that nothing less than a collapse of the system will bring them to consider change.<sup>273</sup>

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271. RUDOLF VON JHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* 8–9 (Basel, B. Schwabe, 1953), as translated in K. ZWIGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 16 (Tony Weir, trans., 2d ed. 1992).

272. Sunderland, *supra* note 212, at 35.

273. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 79, 89 (1976).

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