

University of Pennsylvania Carey Law School

## Penn Carey Law: Legal Scholarship Repository

---

All Faculty Scholarship

Faculty Works

---

4-1987

### The Costs of Complexity

Stephen B. Burbank

*University of Pennsylvania Carey Law School*

Author ORCID Identifier:

 Stephen Burbank 0000-0001-9024-0195

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Civil Procedure Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Studies Commons](#), [Litigation Commons](#), and the [Philosophy Commons](#)

---

#### Repository Citation

Burbank, Stephen B., "The Costs of Complexity" (1987). *All Faculty Scholarship*. 1222.  
[https://scholarship.law.upenn.edu/faculty\\_scholarship/1222](https://scholarship.law.upenn.edu/faculty_scholarship/1222)

This Book Review is brought to you for free and open access by the Faculty Works at Penn Carey Law: Legal Scholarship Repository. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Penn Carey Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# THE COSTS OF COMPLEXITY†

*Stephen B. Burbank\**

COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE. By *Richard L. Marcus* and *Edward F. Sherman*. St. Paul: West Publishing Co. 1985. Pp. xxxvii, 846. \$32.95.

“Complex litigation” means different things to different people; the term captures a multitude of sins. Not even those charged with responsibility to devise procedures for complex cases in the federal courts have essayed a definition worthy of the name.<sup>1</sup> Law professors need not be lexicographers in putting together materials for course study, although providing definition to an area of law represents perhaps the highest form of that enterprise as scholarship. When law professors do not pursue this daunting task, and few do,<sup>2</sup> the enterprise is most worthwhile if its product permits others to begin to impose intellectual discipline on the area, or field, that the authors have marked as worthy of discrete attention.

It is no criticism of *Complex Litigation* that the authors have neither posited a definition of the problems their materials document nor imposed an intellectual framework within which to consider those materials. The book breaks new ground, and the attempt would have been premature. It is enough that the authors have conducted a thorough survey, identified faults in the terrain, and by mapping those faults, provided a sound basis for development. Litigation is intensely practical business, and the authors’ choice of identifying practical problems and recurrent patterns of response may be the best way to approach — and is certainly necessary to discipline — theories of complex litigation. Moreover, the authors are also concerned about the practical needs of lawyers,<sup>3</sup> and in course materials designed to

---

† Copyright © 1987 by Stephen B. Burbank.

\* Professor of Law, University of Pennsylvania. A.B. 1968, J.D. 1973, Harvard University. — Ed.

1. Indeed, nobody has devised a litmus test by which one may decide whether a given case is properly labelled complex. The Manual for Complex Litigation itself does not even attempt to define complex litigation. Instead, in section 0.22 it simply describes types of “potentially complex cases,” focusing on either the type of claim made . . . or the procedural characteristics of the case.

P. 2.

2. *But see, e.g.*, A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* (1965).

3. *See, e.g.*, p. 1. *See also* R. MARCUS & E. SHERMAN, *TEACHERS MANUAL FOR COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 1* (1985) [hereinafter *TEACHERS MANUAL*]. This manual is extraordinarily well done. For one hesitant to embark on a new course, particularly a course treating difficult material, it can serve as both a road map and

meet those needs, the prematurity of a theory of complex litigation would probably have been a small point at which to stick. Of course, an unremittingly practical perspective would not be interesting to many law professors and law students, and it would ill equip either to change the status quo. But that is not a problem here;<sup>4</sup> *Complex Litigation* is a rich repository of material for discussion and debate about procedure, courts, and law.<sup>5</sup>

A great advantage in a course on complex litigation is precisely that the phenomenon as presently conceived is so various that it permits unusual freedom in the choice of materials for study. In addition, many of the practical procedural problems of current interest emerged in, or may be identified primarily with, litigation that for one reason or another is deemed complex.<sup>6</sup> If, therefore, the authors of a casebook on complex litigation have done their job well, at the end of the course students should have a good sense of where the action is in American civil procedure today.

The perception of practical problems and the proposals to solve them have prompted reconsideration of the premises of modern American civil procedure.<sup>7</sup> Reconsideration has just begun, and it is a particularly difficult business. So long as the Federal Rules of Civil Procedure seemed to work well in the federal courts and attracted emulation in the states, there was little attention devoted to their basic premises.<sup>8</sup> More generally, academics interested in theory have tended to neglect litigation procedure.<sup>9</sup> Indeed, as those who have suffered a diet of personal jurisdiction and federalism in a basic course in civil procedure know too well, many teachers have not been interested in the Federal Rules and in the phases of a lawsuit they address. We have been teaching what we were taught. If the authors of a casebook on complex litigation have done their job well, neither teacher nor student should be able to escape consideration of the premises of modern procedure.

---

a security blanket. Some of the material in the manual, however, should be in the book. See note 119 *infra*.

4. See p. xv (A course in advanced civil procedure presents "challenging theoretical issues at the cutting edge of modern procedural innovation.").

5. I argue below that, notwithstanding its strengths, the book would be improved by greater attention to modes of dispute resolution other than litigation. See text accompanying notes 114-15 *infra*.

6. See, e.g., text following note 30 *infra* (discovery).

7. See, e.g., Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

8. See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1186 (1982).

9. See G. HAZARD, JR., *RESEARCH IN CIVIL PROCEDURE* 63 (1963) ("With but few exceptions, the product of procedural scholarship in the last 25 years is conspicuously bare of any serious attention to what might be called the philosophy of procedure."). See also Graham, *The Persistence of Progressive Proceduralism* (Book Review), 61 TEXAS L. REV. 929, 946-48 (1983). Happily, in recent years there has been more interest in theories of procedure. See, e.g., text accompanying notes 17-21 *infra*.

A course in complex litigation thus has significant potential. There are, however, risks. One is a result of the traditional first-year curriculum, as described above. The authors of materials on complex litigation must assume that students have basic grounding in many of the areas that are covered, and that assumption will often prove false. As to some matters, such as class actions (pp. 233-498), any problem is likely to be minor, because those matters are central to the study of complex litigation, with the result that one might as well start from scratch. As to other topics, such as subject matter jurisdiction and discovery, there may be a more serious problem, and teachers may have to take remedial action.<sup>10</sup>

A course in complex litigation is an imperfect vehicle for considering procedural reform. Recent amendments to the Federal Rules of Civil Procedure have been the subject of criticism on the ground that they provided responses to problems arising chiefly or exclusively in complex cases.<sup>11</sup> But if there has been distortion, complex litigation may not be the culprit. Rather, the problem may be that today's reformers remain transfixed by the vision of uniform, trans-substantive procedure that animated the Federal Rules of Civil Procedure.<sup>12</sup> Whatever the cause, the fact that complex litigation has brought to light serious problems may make us less critical than we ought to be about the effects of proposed reforms in other types of cases.

Although definitional agnosticism is understandable, a risk in taking the shotgun approach to complex litigation, whether in a course or in a law reform effort, is that by focusing on particular problems thought to be characteristic of complex litigation one may neglect relationships among the problems discretely identified. Worse, in seeking solutions for a problem in focus, one may inadvertently exacerbate other problems.<sup>13</sup>

The authors of *Complex Litigation* have done their job well, enabling teachers to realize the advantages of a course on complex litigation with due attention to its risks. In this essay I will explore some of the themes that I have chosen to pursue with the authors' help, indi-

---

10. On subject matter jurisdiction, see, e.g., pp. 63-79 ("Incidental Jurisdiction for Joinder of Necessary Parties"), pp. 88-108 (incidental jurisdiction and sovereign immunity), and pp. 121-31 (incidental jurisdiction and intervention). On discovery, see pp. 499-592. Because of the authors' understandable desire to cast their net wide, students who have not taken a course in federal courts may feel uneasy. See, e.g., pp. 79-108 ("Joinder Problems Involving Governmental Entities"), pp. 108-20 ("Justiciability Issues in Joinder of Parties"), and pp. 150-67 (abstention).

11. See, e.g., Sherman, *Restructuring the Trial Process in the Age of Complex Litigation* (Book Review), 63 TEXAS L. REV. 721, 744-45 (1984); Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 813 (1981); text following note 30 *infra*.

12. See text accompanying notes 58-71 *infra*. As indicated there, the model of trans-substantive procedure may be more illusion than reality as the Federal Rules become charters for ad hoc decisionmaking.

13. See text accompanying notes 103-13 *infra*.

cating a few matters of interpretation or emphasis on which I disagree with them, and literature that I have found useful in supplementation of their work. Other teachers will have different interests and accordingly will perceive different strengths and weaknesses.<sup>14</sup> A great strength of *Complex Litigation* is that it accommodates a broad range of pedagogical agendas.

## I. PROCEDURAL PREMISES AND PROCESS VALUES

One cannot usefully evaluate a procedural system, let alone usefully participate in debate about procedural reform, without some notion of the values that the system serves or that it ought to serve. When the subject is litigation procedure, it may be possible for students to derive such values from a study of cases. But, if it is true that little attention has been paid to procedural premises, that is a treacherous strategy.<sup>15</sup> The authors of *Complex Litigation* evidently recognized the problem; indeed, they apologize for the theoretical cast of their opening chapter.<sup>16</sup> If an apology is in order, it is that the introductory materials are incomplete and potentially misleading.

The introductory materials address the question of process values only indirectly. For one who regards that question as important in a course on complex litigation, it may be useful to provide additional background reading. For that purpose, I assign selections from a valuable collection of readings put together some years ago by the late Robert Cover and Owen Fiss.<sup>17</sup> Those readings force students to confront values that compete, or that should compete, with efficient administration in the lawmaking calculus.<sup>18</sup> The advantage of the readings lies precisely in their abstraction, their tendency to encourage critical analysis of both reform proposals and the rules we now have.

14. See, e.g., Abrams, *The New Civil Procedure* (Book Review), 32 WAYNE L. REV. 1269 (1986).

15. See, e.g., G. HAZARD, JR., *supra* note 9, at 63-64.

It is only when the nature or adequacy of a particular procedural structure is itself brought into issue that one finds a court addressing questions normally taken for granted: What do we wish procedure to do in this kind of case? What sort of procedural system will accomplish that set of aims? What will it cost in money, and in values not readily monetized? How would such a system feed back upon norms and institutions already functioning in this and related areas?

R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* 2 (1979).

The suggested strategy is also treacherous because litigated cases may give a skewed view of process values in a system dominated by pre-trial dispositions. Moreover, exclusive attention to values informing, or that should inform, litigation procedure may hinder the effort to decide what disputes belong in court in the first place. See text accompanying notes 114-37 *infra*.

16. See *TEACHERS MANUAL*, *supra* note 3, at 1.

17. See R. COVER & O. FISS, *supra* note 15, at ch. 1 ("Valuing Process"). See also, e.g., Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Summers, *Evaluating and Improving Legal Processes — A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974).

18. See R. COVER & O. FISS, *supra* note 15, at 7; Bush, *supra* note 17, at 929-30.



To the extent that the readings consider process values in the context of the constitutional norm of due process,<sup>19</sup> they have an additional attraction. Students may begin to see a link between changing conceptions of the constitutional norm and the importance we attach to various process values.<sup>20</sup> More generally, consideration of process values may shed light on the movement toward alternative dispute resolution by calling into question premises reflected in the very name of that movement.<sup>21</sup>

A major theme of the authors' first chapter is that complex litigation is part of a "metamorphosis in litigation," as a result of which the courts are in crisis (pp. 1-13). The authors attribute these changes in litigation to procedural reforms, technological advances, and the proliferation of substantive law.<sup>22</sup> But they also speak of an "avalanche of cases" (p. 1), of "the litigation boom" (p. 2), and of "a growing public inclination to litigate virtually any issue" (p. 2). Moreover, they include an excerpt from an article<sup>23</sup> in which the author refers to an "explosion" in civil litigation, arguing that "judicial services are a scarce resource" that is being overtaxed (p. 5).

Both the authors' introductory material and this excerpt exhibit the tendency, so well documented by Professor Galanter, to blur distinctions between types of cases (including complex litigation and other litigation), between litigation in the federal and state courts, between cases filed and cases tried, and between use and over-use of the courts.<sup>24</sup> The result is a picture of the dispute landscape sadly lacking

19. See Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part I*, 1973 DUKE L.J. 1153, excerpted in R. COVER & O. FISS, *supra* note 15, at 3-6; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976), excerpted in R. COVER & O. FISS, *supra* note 15, at 18-26.

20. See *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962); Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1008-10 (1983).

21. See text accompanying notes 125-27 *infra*.

22. See p. 1. Professor Bator vividly describes the last of these phenomena in speaking of "the promiscuity with which Congress and the courts have vied, in the past 25 years, to make our federal courts into dynamic litigation-attracting engines for the creation and expansion of rights and the redistribution of powers and entitlements in our society." Bator, *The Judicial Universe of Judge Richard Posner* (Book Review), 52 U. CHI. L. REV. 1146, 1148 (1985).

23. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497 (1979), excerpted at pp. 3-5.

24. See, e.g., Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) [hereinafter Galanter, *Litigation Explosion*]; Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter, *Landscape*]. This is not to suggest that there are no problems. See, e.g., R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59-129 (1985); Saks, *If There Be a Crisis, How Shall We Know It?*, 46 MD. L. REV. 63 (1986); Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1817-20 (1986); Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 276-88 (1986); Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219 (1985).

in perspective, and the problem is not simply empirical. The rhetorical tendency of the "litigation explosion" story is to deflect attention from values other than efficient administration in the effort to end the "crisis," dam the "flood," or stem the "avalanche." The authors do ask whether the "tendency toward efficiency, which makes lawsuits resemble administrative proceedings, [is] a desirable development."<sup>25</sup> But their own rhetoric may suggest that the answer to that question is irrelevant.

The two readings provided as counterweights to the "litigation explosion" and "crisis in the adversary system" (pp. 13-22) stories seem, at least as edited and in light of intervening developments, shortsighted. To be sure, one of them subjects the language of procedural reform to a microscope and decries the motivational pathology thus discovered.<sup>26</sup> But in that respect the piece is an invitation to be cynical rather than critical.<sup>27</sup> More important, both selections celebrate the existing system. The result may be a skewed view of reform alternatives, as well as a weak defense against the rhetoric of crisis.

Professor Chayes' influential article, *The Role of the Judge in Public Law Litigation*,<sup>28</sup> posited a shift in the nature of litigation that the author attributed to a basic reorientation in the way we think about litigation (p. 11). It encouraged us to regard the phenomenon as the norm.<sup>29</sup> Indeed, Professor Chayes suggested that the changes he perceived were the result of the purposive design of procedural reformers, rather than the unintended effects of their efforts.<sup>30</sup>

Professor Friedenthal's defense of the existing discovery system against comprehensive reform recognized the danger of using complex litigation as a norm for trans-substantive amendments (p. 20). He saw in the reform effort an attempt to redress the unintended substantive

25. P. 9. See also p. 13 ("Is the administrative mode a necessary response by the courts to the demands of litigation?")

26. See Friedenthal, *supra* note 11, at 813-14, excerpted at p. 18.

27. See Rosenberg, *Foreword*, 69 CALIF. L. REV. 647, 648 (1981).

28. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), excerpted at pp. 9-13.

29. See p. 10. In a subsequent section of his article not excerpted in *Complex Litigation*, Professor Chayes hedged on any quantitative claim. See Chayes, *supra* note 28, at 1303-04. Cf. Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 325 n.77 (1986) ("Rather than argue about which oversimplification is more inaccurate, we should recognize that modern litigation involves a broad spectrum of different kinds of disputes, and therefore that we need a variety of different processes.").

30. The history is much more complicated than Professor Chayes suggests. See Subrin, *supra* note 7. Professor Subrin's work reveals, however, that for Dean Clark (the Reporter of the original Federal Rules of Civil Procedure) at least, a procedural system based on equity had as one of its attractions the capacity to accommodate public law litigation. See *id.* at 961-73.

In this respect, Professor Chayes is closer to the mark than those who have attributed to the original rulemakers the paradigm of "the relatively simple diversity case." Compare Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986), with Subrin, *supra* note 7, at 972-73 & n.375.

impact of the discovery rules (pp. 20-21). Acknowledging the existence of discovery abuse, he remitted litigants to the discretion of the trial judge or to changes in the substantive law (p. 20).

Both Professor Chayes and Professor Friedenthal were anxious to defend the social gains made possible by the procedural system initiated by the Federal Rules, which, it should constantly be borne in mind, have been considerable. They did not, however, seriously engage its costs or question its premises. In the case of Professor Chayes, however, it is important to note that the effort was "preliminary" and "impressionistic."<sup>31</sup> Moreover, he stressed the need for additional research and identified a number of potential costs of his model. Today, his questions can no longer be ignored:

Can the disinterestedness of the judge be sustained, for example, when he is more visibly a part of the political process? Will the consciously negotiated character of the relief ultimately erode the sense that what is being applied is law?<sup>32</sup>

\* \* \*

A critical question for research is whether this potential is or can be exploited to produce a party structure that is adequately representative in light of the consequences of public law litigation without introducing so much complexity that the procedure falls of its own weight.<sup>33</sup>

Professor Chayes correctly perceived that equity has triumphed in the remedial phase of litigation.<sup>34</sup> What he did not fully grasp is that equity triumphed throughout the Federal Rules.<sup>35</sup> That perception, recently and ably documented by Professor Subrin,<sup>36</sup> should provide additional focus to an inquiry into process values. Thus, to what extent did equity attach relatively greater importance to the values of participation and deterrence than to the values of dignity and effectuation?<sup>37</sup> From a law reform perspective, focusing on equity suggests

---

31. Chayes, *supra* note 28, at 1281.

32. *Id.* at 1309.

33. *Id.* at 1312.

34. See pp. 12-13; Chayes, *supra* note 28, at 1292-96.

35. For recognition by Professor Chayes of borrowing from equity, see Chayes, *supra* note 28, at 1303. See also note 30 *supra*.

36. See Subrin, *supra* note 7. See also G. HAZARD, JR., *supra* note 9, at 118 ("At the turn of this century, Maitland said that the common law forms of action rule us from their graves. I think it can be said that the formulae of equity likewise rule us today. They will do so until they are met and mastered.") (footnote omitted); Burbank, *supra* note 8, at 1168 n.657.

37. *Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

R. COVER & O. FISS, *supra* note 15, at 4 (excerpting Michelman, *supra* note 19 (footnote omitted)). Cf. Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 36 (1982) ("[T]o permit strict enforcement through the small claims class action is to elevate



that those who, with Professor Friedenthal, seek to preserve the gains made possible by the existing system without reexamining its premises are likely to lose. Those responsible for procedural reform know that discretion is an instrument of power.<sup>38</sup> They know that what the Chancellor gives, the Chancellor can take away.<sup>39</sup> It may be that the rulemakers should not concentrate on "turning back the clock"<sup>40</sup> their predecessors built. But so long as discretion dominates procedure, procedure will dominate substantive law.

Having said this, it is important to note that *Complex Litigation* permits teachers and students who are so inclined to pursue process values and hence some of the costs of complexity. Certainly, the materials on compulsory party joinder (pp. 51-79), intervention (pp. 120-47), and class actions (pp. 233-498) are good vehicles for exploring such questions, in particular the extent to which efficient administration has assumed a dominant position in the calculus.<sup>41</sup> My

deterrent and punitive objectives over compensatory ones.") (footnote omitted). This article is excerpted at pp. 116-18. For caution about exclusive attention to adjudicatory procedure, see note 15 *supra*; notes 114-37 *infra* and accompanying text.

38. "Discretion is, of course, an instrument of power. Those who would embrace it are well advised to consider where ultimate power lies and to be alert to the risks of its exercise." Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 309 (1982). "For Progressive proceduralists, the power of the state is embodied in the judge, and it is his authority that must be expanded if justice is to be done." Graham, *supra* note 9, at 943.

39. Professor Chayes surely knows this too. *Cf.* Chayes, *supra* note 37, at 46 ("Control of remedial discretion is therefore an insistent problem in a public law system."). His defense against doctrinal manipulation may, however, be wishful thinking:

[T]he public law trend does not simply reflect the political or ideological coloration of a generation of federal judges. The development is rooted in much more pervasive changes in the contemporary "legal consciousness" — our ways of thinking about law and the legal system — that are in turn related to changes in the larger social, political, and cultural environment. If this claim is valid, it implies that the development in question can be affected only marginally even by sustained resistance in the Supreme Court.

*Id.* at 8 (footnote omitted). See Bush, *supra* note 17, at 943 ("The advocate of the disfavored 'higher' or 'superior' goal would do better in practice to argue his case on the common ground of concrete social impact, since otherwise he may lose that ground by default, while maintaining the high ground of principle or ideology to little avail.").

40. See Chayes, *supra* note 28, at 1313. In a similar vein, Professor Friedenthal asserts that "[f]rom a theoretical point of view, the current practice of allowing general pleadings and extensive discovery cannot seriously be challenged." Friedenthal, *supra* note 11, at 816-17. *But cf.* Rosenberg, *supra* note 27, at 651 (questioning whether "the 'hope of discovering a claim' [is] a proper purpose of discovery, as Professor Friedenthal forthrightly argues").

41. *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972), excerpted at pp. 135-45, provides a marvelous vehicle for considering a number of process values in the context of intervention. Moreover, although the court accorded great weight to the value of participation, it is evident from the constraints placed on the intervenors, see p. 145, that what one hand gives, the other may take away. See also Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 779-80 (1985) (exploring "the inescapable tension between the interest of individual litigants in preserving individual control of claims and procedural fairness . . . and the interest of the judicial system in the efficient joinder of related claims.").

As a constituent element of the effect of current approaches to complex litigation on individual control, a calculation of the costs of complexity should consider their effect on the lawyer-client relationship. See, e.g., pp. 476-98 (judicial control of class action settlements); pp. 643-53 (lead and liaison counsel).

comments reflect one teacher's conviction that the perspective is sufficiently important to warrant more extensive and self-conscious attention at the outset of a course in complex litigation. Moreover, they reflect my concern that because we are educating the next generation of law reformers, it is important at least to set a framework for the consideration of reform, even in a course with an avowedly practical orientation.

## II. PROCEDURE AS AN INSTRUMENT OF POWER

The excerpt from Professor Friedenthal's article discussed above<sup>42</sup> introduces the reader of *Complex Litigation* to an important theme recurring throughout the book: the influence of "procedural" rules on the substantive law. The authors invite students to consider the problem of tailoring procedure to the substantive law and the extent to which procedure makes possible, or drives, changes in the substantive law. Here again, I have found it useful to supplement the material in the casebook with readings from *The Structure of Procedure*.<sup>43</sup> But here, the materials ably speak for themselves.

The issues suggested by the theme of procedure as an instrument of power are not unique to complex litigation, but *Complex Litigation* permits, indeed encourages, consideration of them. In the materials on party joinder and consolidation, students are repeatedly exposed to the substantive implications of joinder<sup>44</sup> and led to consider the extent to which efficiency concerns cause courts to bend the requirements of procedural rules,<sup>45</sup> to pursue dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable,<sup>46</sup> and, alternatively, to pursue dubious substantive strategies that enable packaging.<sup>47</sup> A recurring question raised by the authors' materials is which — joinder or change in the substantive law — is the chicken and which the egg. That question is particularly insistent in mass tort cases, which receive due attention from the authors.<sup>48</sup> It is

---

42. See text following note 30, and text accompanying notes 38-40 *supra*.

43. See R. COVER & O. FISS, *supra* note 15, ch. 2 ("The Independence of Procedure?").

44. See, e.g., pp. 28-32, 38-51, 191-206.

45. See, e.g., pp. 51-58 (compulsory party joinder). It is particularly instructive to compare *Whyham v. Piper Aircraft Corp.*, pp. 51-57, with *Field v. Volkswagenwerk AG*, pp. 71-77.

46. See pp. 194-203 (pre-trial consolidation including consolidated complaint).

47. See pp. 38-51 (permissive party joinder without resolving choice-of-law question).

48. See, e.g., pp. 319-33 & 340-53 (class actions). One's answer to the question whether a DES plaintiff proceeding under a theory of market-share liability should be required to demonstrate "due diligence" in seeking to identify the manufacturer of the drug taken by her mother may depend on one's choice of a procedural or substantive perspective. If one regards cases such as *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980), *discussed at* pp. 48-50, as providing procedural solutions to problems of proof — in effect establishing a presumption — a requirement of due diligence approaches a logical imperative. That is, one of the basic facts is that plaintiff, through no fault of her own, has been unable to identify the manufacturer. If, on the other hand, one regards market share

perhaps most sharply put in the materials on class actions, where we see a court use a presumption to reallocate burdens, thereby overcoming a major obstacle to class certification, and respond to a charge of overreaching by announcing that the presumption is available in individual actions.<sup>49</sup> It could also have been pursued with profit in the context of settlement, because that context vividly illustrates both the instrumental use of provisional substantive strategies<sup>50</sup> and the proposition that alternative dispute resolution represents the ultimate triumph of equity (and defeat of law).<sup>51</sup>

The premise implicit in the above, that complex litigation may exact a cost when the procedural system designed to accommodate it effects changes in the substantive law, requires refinement. Professor Graham has speculated that academics embrace what he calls “the Progressive drive for procedural uniformity”<sup>52</sup> because of their

unconscious understanding that lack of uniformity is a threat to the claim that procedure is a value-free science. If there is more than one scientifically valid way to litigate, then the choice of one or the other procedural system must be based on values; in other words, the selection of one mode of proceeding over another is a political choice.<sup>53</sup>

It is true that procedural rules are never neutral in their effects, if not their purposes.<sup>54</sup> It is also likely that there has been more systematic misrepresentation about the value-free nature of procedural rules than about any other category in the traditional lexicon. But what does it mean to say that procedural choices are “political”? To some it may mean either that procedural choices are driven by an individual’s own substantive values or that they should be. One holding that view

liability as a theory of substantive law disembodied from the procedural setting that brought it forth, due diligence is irrelevant. *See generally* Note, *The Application of a Due Diligence Requirement to Market Share Theory in DES Litigation*, 19 U. MICH. J.L. REF. 771 (1986).

49. *See Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975), *excerpted at* pp. 265-75. The court’s treatment of damages in the context of adequacy of representation is amenable to a similar analysis. *See* pp. 272-75. *See generally* Scott, *The Impact of Class Actions on Rule 10b-5*, 38 U. CHI. L. REV. 337 (1971), *excerpted in* R. COVER & O. FISS, *supra* note 15, at 86-94. Of course, as Professor Scott points out, the quest for efficient administration is not the only value — indeed, it may not plausibly be deemed important — in leading courts to creative solutions in the class action context. *See id.* at 93-94. *See also* pp. 7-9, 319-33 (rule 23(b)(1) class actions).

50. *See* Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 351-53 (1986); Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 65-66 (1986). *See also* pp. 86-87.

51. *See* text accompanying notes 114-36 *infra*.

52. Graham, *supra* note 9, at 945.

53. *Id.*

54. Consider a rule requiring that an answer to a complaint be filed within twenty days of service. *See* FED. R. CIV. P. 12(a). The purpose of the rule is evidently to ensure that once a lawsuit is commenced it proceeds. The rule is inherently arbitrary in the sense that within a certain range it is hard to argue persuasively for one period over another. But the rule is not neutral. Some people will have greater difficulty than others complying with the rule, whether because of lack of legal sophistication or lack of access to a lawyer. Thus, even the most neutral-appearing rule can have differential impact. *See e.g.*, Elliott, *supra* note 29, at 325-26.

may be suspicious of the purposes of every judge or law reformer who has a choice in the application or formulation of doctrine. There is, however, a difference between purposes and effects. Neither judges nor procedural reformers have a general charter to reform society, and broad-scale social reform would be necessary to eradicate the non-neutral effects of many, and perhaps most, procedural rules.

If procedural rules are not neutral and judges and reformers should not use procedural rules to advance their own substantive values, we encounter a paradox: neutral transmission of the substantive law, if possible, would itself be a political act because it would reinforce the status quo. The paradox disappears to the extent that one can distinguish individuals' values from the values that inform the rules of substantive law.<sup>55</sup> The reminder that there is no bright line between procedure and substantive law has been a refuge of procedural reformers for fifty years. But the existence of "underdeterminacy" is no reason to wipe the slate clean.<sup>56</sup>

According to this view, the perception that procedural rules are not neutral makes it important to try to identify the impact of procedural rules and to be candid in describing that impact. The perception also makes it important to be candid in describing the purposes of procedural rules. Because avowedly procedural rules may have either substantive purposes or substantive effects, consideration should be given to the political legitimacy of the process by which they are formulated or applied and of the actors who are formulating or applying them. Rather than giving up on the procedure/substance dichotomy, we should craft it with attention to its ultimately political ramifications.<sup>57</sup>

There is today increasing movement towards, and interest in, departures from the norm of trans-substantive procedure.<sup>58</sup> In consider-

55. Even when the values that inform the rules of substantive law are indeterminate, it is not true (although it is today often said) that a judge's decision not to intervene to change something is "as much" a decision as a decision to change it. The latter entails, the former does not, an (additional) coercive intervention, which enforces the judge's opinion on how things should be. It should not be indulged in unless the relevant authoritative texts strongly support it.

Bator, *supra* note 22, at 1165.

56. See, e.g., Burbank, *supra* note 8, at 1133-35 n.530, 1187-89. Cf. Galanter, *Landscape*, *supra* note 24, at 71:

If interpretation is inevitable, how can one be superior to another? This shouldn't be much of a puzzle for lawyers. We are in the business of assessing competing interpretations. We know that just because *something* can be said for one reading of a matter, it is not automatically a toss-up between that and some other view.

See also Bator, *supra* note 22, at 1163 ("The fact that interpretation does not admit to some mechanical procedure of validation is not a fatal objection to the concept of interpretation."). For the concept of "underdeterminacy," see Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987).

57. See, e.g., Burbank, *Proposals to Amend Rule 68 — Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425 (1986).

58. See, e.g., T. WILLGING, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCE-



ing the alternatives, it is important to distinguish between procedure that is tailored to the case, in the sense that it is ad hoc, and procedure crafted in advance for a type of case. Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense. The trend may be toward rules conferring greater discretion on the trial judge.<sup>59</sup> I have already suggested that discretion will not preserve the substantive law.<sup>60</sup> The issue of trans-substantiveness is linked with the issue of formalism.<sup>61</sup>

The general charters that today masquerade as rules<sup>62</sup> present no necessary logical obstacle to the historic procedural goal of delivering substantive rights.<sup>63</sup> Both my own analyses under the Enabling Act and Professor Cover's more speculative work suggest that nonformal rules, whether embodied in Federal Rules or in case law, need not

DURES 15-24, 31-35 (1985); Subrin, *supra* note 7, at 977, 985, 991, 995-96; Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243 (1984).

59. See, e.g., FED. R. CIV. P. 16. The recent amendments dealing with sanctions may only be an apparent exception to this trend. See FED. R. CIV. P. 11, 16(f), 26(g); Burbank, *supra* note 20, at 1008-10.

60. See text accompanying notes 34-40 *supra*.

61. Cf. Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 126, 129 (1977) ("a procedure is formal insofar as its . . . purpose is to vindicate legal entitlement, to secure to an individual that which is rightfully his").

62. Surely it is the function of law, or at least one of its functions, to put certain questions beyond dispute or present re-examination. By this I do not mean scientific dispute or re-examination, nor do I mean that the rules themselves ought not to be re-examined, as when a statute is amended or a case overruled. What I do mean is that a rule, to have cognitive and normative significance as such, must have an important degree of determinative content to the group to whom it is addressed. To the extent that the rule says only that the adjudicator is to "use his sound discretion," the rule as a rule says nothing about the disposition of the controversy, except to designate who is to make the disposition. To adopt a rule that has determinative content is of course to forego in some measure the quest for "justice" in particular cases that has been such a strong motivation in the recent past. Yet it seems clear that the quest for "justice," carried to its extremes, is every bit as futile and therefore every bit as destructive of a legal order as the quest for "certainty" proved to be when carried to its extremes. . . .

The construction of satisfactory legal generalizations ought to be the special province of legal scholarship, for legal scholars are most free of the pressures of time and interest that impair careful and circumspect analysis. Yet there seems relatively little productive effort along these lines. Perhaps this is because the impact of legal realism has induced a shyness or even embarrassment about attempting generalization.

G. HAZARD, JR., *supra* note 9, at 9-11.

63. Our infatuation with equity has helped us to forget the historic purpose of adjudication. Courts exist not only to resolve disputes, but to resolve them in a way that takes law seriously by trying to apply legal principles to the events that brought the parties to court. The total victory of equity process has caused us to forget the essence of civil adjudication: enabling citizens to have their legitimate expectancies and rights fulfilled. We are good at using equity process and thought to create new general rights. We have, however, largely failed at defining rights and providing methods for their efficient vindication. The effort to defeat formalism so that society could move forward toward new ideas of social justice neglected the benefits of formalism once new rights had been created.

Subrin, *supra* note 7, at 1001. Cf. Bator, *supra* note 22, at 1148 (suggesting a "connection between rising caseloads and the instability, unpredictability, and vagueness of our constitutional, statutory, and judge-made law").



raise allocation of power issues.<sup>64</sup> The concern, however, is that substantive policy choices will be buried, a concern that implicates both democratic values and the values of Justice Harlan's vision of law.<sup>65</sup>

Consideration of democratic values suggests that whatever one thinks of the goal of trans-substantive Federal Rules it may be folly to have as a goal their adoption by the states.<sup>66</sup> State courts historically have had much greater freedom to fashion common law than have the federal courts.<sup>67</sup> If state courts' substantive policy choices are buried in the application of "adjective law," the issue may only be one of accountability in the weak sense — of a court publicly taking responsibility for decisions that it is empowered to make (and thus risking legislative override).

Federal courts, on the other hand, are thought to be significantly more constrained in their lawmaking powers, particularly in state-law cases.<sup>68</sup> Their buried substantive policy choices therefore are more likely to raise the issue of accountability in both the weak sense just described and in the strong sense of allocation of power.<sup>69</sup>

These observations suggest another way to view the occasion of the effectiveness of the Federal Rules, of the *Erie* decision,<sup>70</sup> and of the "new federal common law,"<sup>71</sup> in the same year. As rules of equity procedure, the Federal Rules permitted the federal courts to retain

64. See Burbank, *supra* note 8, at 1193; Burbank, *supra* note 20, at 1008; Burbank, *supra* note 57, at 430, 433-34; Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 722-40 (1975), excerpted in R. COVER & O. FISS, *supra* note 15, at 75-85.

65. Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible. . . . Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

Boddie v. Connecticut, 401 U.S. 371, 374 (1970), quoted in Subrin, *supra* note 7, at 988. See also Summers, *supra* note 17, at 21-22 (process legitimacy), 25-26 (procedural legality). But see Chayes, *supra* note 28, at 1313-16 (legitimacy).

66. For a recent attempt to assess the extent of state borrowing, see Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

67. See, e.g., Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985). Cf. Bator, *supra* note 22, at 1164-65 (distinguishing between federal and state courts in discussing reasons for judicial self-restraint and deference).

68. See, e.g., Jay, *supra* note 67; Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 70 CORNELL L. REV. 733, 753-62, 778-97 (1986).

69. See, e.g., *Rosales v. Honda Motor Co.*, 726 F.2d 259 (5th Cir. 1984) (FED. R. CIV. P. 42); Burbank, *supra* note 8, at 1193 & n.763. Cf. *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3d Cir. 1986) (federal standing decision submerging question whether injured party can seek reformation of insurance contract under state law).

70. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

71. See Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

some of their historic power, even in state-law cases, without appearing to do so.

### III. CREATING COMPLEXITY

*Complex Litigation* provides many opportunities to explore the costs and benefits of using the Federal Rules to create litigation that is complex by reason of its structure (parties or issues). The chapter on judicial control of litigation (pp. 593-737) sharpens that perspective. Moreover, this material and the authors' chapter on duplicative or related litigation (pp. 148-232) prompt the questions whether we are on the road to even more complex litigation and why.

The chapter on judicial control of litigation revisits issues that from the perspective of law reform are among the most important in the field of procedure. How those issues are resolved will influence the procedural systems of the twenty-first century.

The recent reforms in the system we inherited from 1938 have been in the nature of adjustments, often inspired by informal measures previously adopted. Those responsible for both have articulated as their dominant concerns abuses of the existing system and the need to tailor existing mechanisms to the demands of modern litigation. Judges and law reformers have returned again and again to the state of the courts' dockets (pp. 593-606). But it is surely simplistic to see in what they say only a desire for more efficient administration. As Professor Galanter has observed, reform rhetoric about case overload is now attended by rhetoric about over-use,<sup>72</sup> a different type of abuse; moreover, judicial control implicates judicial power.

There is nothing wrong with a strategy of reform that looks to make adjustments in the existing system, so long as that system is basically sound. To determine whether the system is sound, it would help to have some historical perspective on the system, its underlying goals and assumptions. As I have previously suggested, procedural reformers characteristically neglect such matters.<sup>73</sup>

A historical perspective on judicial control of litigation would involve inquiry as to the place of judicial management in the system initiated by the Federal Rules. Both the published work and unpublished papers of Edson Sunderland, the chief architect of the rules on discovery, pre-trial conference, and summary judgment, suggest that he thought those mechanisms would measurably assist in separating the wheat from the chaff.<sup>74</sup> Thus, the recent amendments to rule 16

72. See Galanter, *Landscape*, *supra* note 24, at 5-11, 61-71. Cf. text accompanying notes 116-17 *infra* ("warm" and "cool" themes in discussion of settlement).

73. See text accompanying notes 8-9 & 15 *supra*.

74. See, e.g., Letter from Edson R. Sunderland to Harry D. Nims (Nov. 1, 1935) (Edson R. Sunderland Papers, Michigan Historical Collections, Bentley Historical Library, University of Michigan, box 4, folder N) [hereinafter Sunderland Papers]; Letter from Edson R. Sunderland to

(pp. 602-04) and the current effort to revise rule 56<sup>75</sup> can be rationalized and justified as an attempt to make the Federal Rules work as they were intended to work. In other respects, recent amendments can be seen as corrections of the original draftsmen's mistakes. Thus, amended rule 11 (p. 606) and the provision in amended rule 16 authorizing the "participants" at a pre-trial conference to "consider and take action with respect to . . . the formulation and simplification of issues, including the elimination of frivolous claims or defenses"<sup>76</sup> represent a return to techniques of control that, as Professor Subrin has demonstrated, were considered and rejected during the drafting of the original Federal Rules.<sup>77</sup>

---

Harry D. Nims (Sept. 11, 1937) (*id.*); E. Sunderland, *The Principles Underlying the New Federal Rules of Civil Procedure* 13-23 (undated) (Sunderland Papers, box 18). See also Subrin, *supra* note 7, at 979; Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937) [hereinafter Sunderland, *Theory and Practice*]; Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737 (1939) [hereinafter Sunderland, *Discovery Before Trial*]; Sunderland, *Trends in Procedural Law*, 1 LA. L. REV. 477, 486-88, 494-98 (1939).

For Sunderland's role in drafting these rules, see Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959). Clark recalled that "Mr. Mitchell [chairman of the Advisory Committee] himself had a major hand in the final rewording of rule 16," but he observed that "its original conception, as well as the several rules for discovery and summary judgment, was and now remains a tribute to Edson's genius." *Id.*

According to Professor Elliott, "as the framers envisioned their new system, the issue-narrowing function was to be performed not by pleading, but by discovery and summary judgment." Elliott, *supra* note 29, at 319. Although convenient to Elliott's evolutionary thesis, see also Alschuler, *supra* note 24, at 1832, this account neglects the importance that Sunderland in particular attached to the pretrial conference, which he sometimes discussed as a form of *judicial* discovery:

It is clear that the court, as well as the parties, has a direct interest in eliminating fictitious and non-substantial issues before trial, so as to avoid the waste of time that inevitably occurs under our traditional procedure. In other words, the court itself ought to be interested in a type of discovery designed to determine what are the real issues to be tried. This discovery would supplement the discovery instituted by the parties, and might very well come after the parties have made such use as they care to of the discovery methods available to themselves. At that stage the parties would be in a position to give the court a very definite idea of their real attitude toward the various apparent issues appearing on the record, if the court should undertake, by means of a conference with attorneys representing both parties, to probe into the question of the possibilities of proof.

This type of discovery, instituted by the court at its own instance and in its own interest, is provided by rule 16. Under this rule the court in its discretion in any case, or by general rule, may hold a pre-trial hearing to consider: (1) Simplifying the issues; (2) Amendments; (3) Admission of facts or documents; (4) Limiting the number of expert witnesses; (5) References; (6) Other matters likely to aid in the disposition of the matter.

Sunderland, *Discovery Before Trial*, *supra*, at 753.

It is true, however, that the Advisory Committee had rejected a proposal that would have bestowed greater power on trial judges to formulate the issues to be tried. See Subrin, *supra* note 7, at 978-79; text accompanying notes 76-77 *infra*. Moreover, not even Professor Sunderland seems to have contemplated judicial conduct, as opposed to judicial control, of fact gathering. For a proposal to that end, see Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 825 (1985).

75. See note 78 *infra*. Dean Carrington, the reporter for the Civil Rules Advisory Committee, has been working on revisions of rule 56. See Letter from Paul D. Carrington to Stephen B. Burbank (Aug. 4, 1986) (copy on file with the *Michigan Law Review*).

76. FED. R. CIV. P. 16.

77. See Subrin, *supra* note 7, at 977-79 (verification of complaint and order formulating issues to be tried). See note 74 *supra*.

On another view, however, both the recent amendments to the Federal Rules and the rulemakers' agenda for future reforms relating to judicial control of litigation<sup>78</sup> should cause us to question the premises of the system we inherited before adjusting it. Loosening the standards for summary judgment will further empower federal judges at the expense of juries.<sup>79</sup> The same is true of recent amendments to rule 16 on pre-trial procedure.<sup>80</sup> Everyone admits that there has been abuse of the litigation process in federal courts, but in a formless system, abuse may be in the eye of the beholder. Perhaps more important, the recent emphasis on punishing lawyers and their clients<sup>81</sup> tends to deflect attention — a tried and true technique of procedural reform<sup>82</sup> — in this case, from the abuses of federal judges and from their responsibility to resist easy solutions, including prominently those that empower them.<sup>83</sup>

If it turns out, as I expect it will turn out, that adjustments to the received system are not enough to make it work in the way in which the demands of the next century will require, a historical perspective will also be useful in designing an alternative system. For this purpose, the central perception may be that the Federal Rules, merging

78. Gignoux [the chairman of the Judicial Conference's Standing Committee on Rules of Practice and Procedure] informed one and all that his standing committee's Advisory Committee on Civil Rules . . . was "initiating a comprehensive review of the structure of the rules," with special attention to rule 56, the prosecution of class actions under rule 23, and the use of sanctions under rule 11.

In an interview, Gignoux characterized the review of those rules as "the first step" toward a broader re-evaluation of the Federal Rules. He explained "the general thought" is that instead of simply "reacting" individually to problems with the rules, federal judges should "look back at what's happened after 50 years and see whether the rules need basic restructuring and improvement."

Graham, *ADR Conference Airs Hopes — And Some Doubts*, Legal Times, Oct. 14, 1985, at 2, col. 1.

79. See Subrin, *supra* note 7, at 968-69, 972-73, 998-1000. This process has already begun. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

80. See Sherman, *supra* note 11, at 745-46.

81. See pp. 606-27; Burbank, *supra* note 20.

82. See Burbank, *supra* note 57, at 426-27; Graham, *supra* note 9, at 942-43.

83. See *Strandell v. Jackson County, Ill.*, 115 F.R.D. 333 (S.D. Ill. 1987) (criminal contempt sanction imposed on attorney for refusing to participate in summary jury trial); 55 U.S.L.W. 2120 (Aug. 26, 1986) ("Based on his observations, [Judge] Feikens reported that the judges who impose the most sanctions have the longest dockets in that district court."). See also Sarokin, *Justice Rushed is Justice Denied*, 38 RUTGERS L. REV. 431 (1986).

In an interesting essay, Professor Fiss discusses the dangers of some of the methods that federal judges have devised for dealing with complex litigation, to wit, the use of judicial surrogates such as magistrates and special masters. See Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983). See also R. POSNER, *supra* note 24, at 102-19 (law clerks and staff attorneys). Fiss correctly argues that a "Weberian emphasis on rigidity" or a charge of "excessive rule-bound behavior," Fiss, *supra*, at 1451 (emphasis in original), cannot properly be imputed to the federal judiciary. But he fails to see that in this respect more bureaucracy may prove a cure rather than a disease. See Elliott, *supra* note 29, at 317; note 90 *infra*. For reference to a magistrate, see pp. 627-43.



law and equity, gave us equity rather than law,<sup>84</sup> and that the 1966 amendments made the triumph complete.<sup>85</sup> Of what use was it to talk about the evils of common law or code procedure without also identifying the evils of equity procedure and how your system would avoid them?<sup>86</sup> Today, we should not be talking about the decline of adjudicatory procedure, except perhaps as one would at a wake.<sup>87</sup> Long ago, Professor Sunderland rejected on grounds of “economic extravagance” the theory of procedure according to which the “parties themselves framed their own controversies, and laid them before the court for decision” and the “judges never sought to protect themselves or the parties from the useless trial of issues based upon allegations or denials which had no colorable existence in fact.”<sup>88</sup> That does not mean that the critics are wrong. It means, rather, that history has passed them by. If present trends are to be reversed, we may indeed need to “turn back the clock,”<sup>89</sup> to see whether it is possible to merge law and equity, adversariness and judicial control, without submerging one or the other. The enterprise will reveal substantial — perhaps unacceptable — costs, but the relevant comparison is not just the costs of the equity-based procedure initiated in 1938.<sup>90</sup> As *Complex Litigation* shows, federal judges are moving further beyond equity, in some cases returning to practices previously rejected, even at the trial stage.

So long as efficient administration and judicial control (power) are considered the *summa bona* of procedure, a requirement that “the direct testimony of witnesses under the control of a party be presented in the form of narrative written statements”<sup>91</sup> makes eminent sense. It

84. See Subrin, *supra* note 7; note 63 *supra* and accompanying text.

85. The 1966 amendments included revisions of the rules governing compulsory joinder (rule 19), intervention (rule 24), and class actions (rule 23). See generally Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pts. 1 & 2), 81 HARV. L. REV. 356, 591 (1967-68).

86. See text accompanying notes 38-40 *supra*. In fact, as Professor Subrin has noted, proponents of Supreme Court rulemaking and of the Federal Rules “repeatedly cited the case of *Jarndyce v. Jarndyce* in Dickens’ *Bleakhouse* as representative of the type of technicality they were trying to avoid,” forgetting “that a major point of the novel was the perpetual fog surrounding Chancery.” Subrin, *supra* note 7, at 982 (footnote omitted).

87. See notes 30 & 74 *supra*.

88. Sunderland, *Theory and Practice*, *supra* note 74, at 215. See also Sunderland, *Discovery Before Trial*, *supra* note 74, at 737.

89. See text accompanying note 40 *supra*.

90. “The attempt to escape the necessity of making *explicit* cost-benefit judgments about procedure merely leads to evasive techniques like managerial judging that invite judges to narrow issues in an ad hoc fashion without safeguards.” Elliott, *supra* note 29, at 321 (emphasis in original). Elsewhere, however, Professor Elliott suggests that recent amendments to rule 26 may be sufficient for this purpose in the context of discovery. See *id.* at 322. Although the amended rule provides standards for decisionmaking, there remains cause for concern about the breadth of discretion afforded, see text accompanying notes 38-40 *supra*, as well as about the efficiency of a procedural system that must rely on ad hoc decisions.

91. W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* § 7-3(A) (1982), *reprinted at* p. 613. See Sherman, *supra* note 11, at 746.



recalls the days when suits in equity were determined largely on the paper record created by the parties.<sup>92</sup> But the Supreme Court changed that system in its Equity Rules of 1912, and it perpetuated the requirement that the “testimony of witnesses . . . be taken orally in open court” in the Federal Rules of Civil Procedure.<sup>93</sup> Ironically, efficient administration was also a goal in 1912,<sup>94</sup> but neither then nor in 1937 (when the Court promulgated the Federal Rules) was it the only value served by requiring live testimony.<sup>95</sup>

Some law reformers, including some federal judges, do not like juries.<sup>96</sup> Jury trials, particularly in complex cases, appear inefficient, and they undoubtedly derogate from the power of trial judges. It is no surprise that, here again, calls for reform include allegations of incompetence.<sup>97</sup> Happily, here as elsewhere, Professor Galanter’s work may help to shed some empirical light on the reform debate.<sup>98</sup> Moreover, careful scholarship has thwarted attempts to find historical support for an exception to the constitutional right to jury trial in complex cases.<sup>99</sup> But some have not been deterred. Thus, the Court of Appeals for the Third Circuit has ruled that permitting a case to be tried to a jury may in some circumstances violate due process.<sup>100</sup>

When a case’s complexity results wholly or in part from the joinder of parties and claims permitted or required by procedural rules, there is something odd about reasoning that uses the costs of complexity as the excuse for denying trial by jury. We are confronted by the spectacle of the government denying an explicit constitutional right in

92. Professor Sherman asks whether an “offer of proof” procedure portends a “move away from the traditional Anglo-American notion that oral testimony elicited through direct and cross examination of a witness observed by the factfinder is the preferred form of evidence.” Sherman, *supra* note 11, at 746. That was not the tradition in equity. See Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 278, 291-92 (1922).

93. FED. R. CIV. P. 43(a). Equity Rule 46 provided in pertinent part that “[i]n all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules.” 226 U.S. 661 (1912).

94. See *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706-07 (1927).

95. See *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 36 A.B.A. REP. 448, 456-59 (1911); 3 J. MOORE & J. FRIEDMAN, MOORE’S FEDERAL PRACTICE § 43.02 (1938); Subrin, *supra* note 7, at 979, 986.

96. This is a long tradition. See Subrin, *supra* note 7, at 968-69. For a relatively recent manifestation, see Remarks of Chief Justice Warren E. Burger, Meeting of the Conference of Chief Judges, Flagstaff, Ariz. (Aug. 7, 1979) (copy on file with the *Michigan Law Review*).

97. See Burger, *supra* note 96. See also M. Galanter, *Jury Shadows: Reflections on the Civil Jury and the “Litigation Explosion”* 1-3 (rev. ed. Nov. 1986) (unpublished manuscript) (copy on file with the *Michigan Law Review*).

98. See M. Galanter, *supra* note 97.

99. See Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980).

100. *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980), *excerpted at* pp. 679-80.

order to remedy a supposed constitutional problem for which the government itself is at least partially responsible.<sup>101</sup> This is the case when complexity results from enforced joinder, including by operation of preclusion rules,<sup>102</sup> or from joinder initiated by a party who seeks to avoid a jury trial. Even when the party seeking a jury trial is responsible, one might suppose that before denying the constitutional right the court would explore the option of breaking the lawsuit into smaller, less complex packages, and thus unraveling complexity the government has helped to create.<sup>103</sup>

In this light, one may be less sanguine about what I have called definitional agnosticism or the shotgun approach to complex litigation. In the introduction to their chapter on the disposition of duplicative or related litigation, the authors of *Complex Litigation* tell us:

Litigation may be called complex because of the joinder of multiple parties, the difficulty of the issues involved, or the volume of discovery and evidence necessitating substantial court administration. Sometimes, however, cases take on complexities by virtue of their relationship to other cases. Although filed separately, cases can be so clearly related that they should be looked at as part of the same piece of litigation. If such cases are tried separately without considering their relationship to other pending litigation, the objective of just and efficient resolution of disputes may be frustrated. Allowing separate cases between the same parties on the same or similar issues to proceed independently is not only wasteful, but encourages parties to forum shop and to try to obtain an advantage by multiple litigation of the same matters. Even when separate cases have only some of the same parties or issues, separate litigation can be wasteful and can result in inconsistent or conflicting determinations, leading to uncertainty as to what has been decided and as to the impact of judgments in other suits. [p. 148]

It is common ground that courts require the tools necessary to prevent or discourage parties from conducting duplicative litigation, whether the tool of choice be an injunction or a preclusion rule. There has been some pressure on preclusion law to open up the category of persons who may be bound by prior litigation.<sup>104</sup> Proposals to that end are useful for present purposes because they illustrate that a cost of taking an expansive view of complex litigation for reform purposes may be to undermine values traditionally associated with due pro-

---

101. Cf. p. 683 (“Don’t many of the complexities of litigation now result from joinder and other procedural mechanisms that did not exist [in 1791]?”).

102. “[A]s the rules of procedure have expanded the scope of the initial opportunity to litigate, they have invited a corresponding expansion of the extent to which that opportunity forecloses a subsequent opportunity. . . . [T]his is the clear tendency of the modern law of res judicata.” F. JAMES & G. HAZARD, JR., *CIVIL PROCEDURE* § 11.2, at 589 (3d ed. 1985).

103. Cf. p. 683 (“Can other procedural mechanisms such as bifurcation be used to ameliorate the difficulties posed by these procedural innovations?”).

104. See, e.g., pp. 739-59, 783-92; George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 *STAN. L. REV.* 655 (1980); McCoid, *A Single Package for Multiparty Disputes*, 28 *STAN. L. REV.* 707, 709-10, 714-18 (1976).

cess.<sup>105</sup> But preclusion law is not where reform proposals are likely to center. Their focus is likely to be on mechanisms for packaging related litigation.

In an interesting recent article, Professor Rowe and Mr. Sibley have proposed a federal statute that would exploit the jurisdictional potential of federal courts to deal with related litigation.<sup>106</sup> Others have been concerned about the implications of a recent Supreme Court decision for class actions, state and federal.<sup>107</sup> These are worthwhile areas of inquiry. Those considering reform proposals should remember, however, that in dealing with dispersed litigation regarded as complex because it is related, they run the risk of creating litigation packages that are complex because of their structure.<sup>108</sup> If, as I have argued, we have not yet adequately addressed the costs of current arrangements for litigation in the federal (or state) courts,<sup>109</sup> it would be hard to justify reforms that exacerbate those costs. Yes, we can redefine fairness,<sup>110</sup> but let us be precise about both the values we seek to further in our procedural systems and those that are protected by the Constitution.<sup>111</sup> Efficient administration is one such value, although

105. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). See also text accompanying notes 110-13 *infra*; *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2980 (1985) (“[A state] may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a ‘common question of law.’”).

106. See Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986). The problem the authors address is “the unavailability of any single forum in which to consolidate scattered, related litigation — a difficulty that is becoming more and more common given the increasing number of complex tort actions. . . .” *Id.* at 9 (footnote omitted). They note that “[t]he American Law Institute (ALI) has undertaken a preliminary study of possible reforms in the statutes and rules governing complex litigation; the project’s purview includes consideration of changes in federal subject matter jurisdiction, removal, venue, consolidation, process, and choice of law.” *Id.* at 10 (footnotes omitted). See *Proposal for Preliminary Study of Revision of Statutes and Procedural Rules Governing Complex Civil Litigation*, 7 A.L.I. REP., July 1985, at 11-12.

107. See Miller & Crump, *supra* note 50 (discussing *Shutts*). The authors include sections entitled “Procedural Tools for Judicial Management of Multistate Class Actions,” *id.* at 67-74, and “Legislative Solutions to the Questions Raised by *Shutts*,” *id.* at 74-80. In the latter section, the authors note that the ALI Study Project on Complex Litigation, see note 106 *supra*, includes consideration of federal jurisdiction in multiparty, multistate disputes. See *id.* at 75, 76 & n.522, 79 & n.538.

108. Rowe and Sibley are aware of this risk. See Rowe & Sibley, *supra* note 106, at 17. See also Miller & Crump, *supra* note 50, at 79-80. But see note 109 *infra*.

109. Rowe and Sibley count as possible costs of their proposals the creation of litigation that is unwieldy and the sacrifice of “important interests in individual control of actions and fair treatment of individual claims.” Rowe & Sibley, *supra* note 106, at 17. See also Trangsrud, *supra* note 41. This is by no means a complete catalogue of the costs of complexity. See, e.g., note 41 *supra*; text accompanying notes 53-71 & 101-103 *supra*; text accompanying notes 114-37 *infra*. For that reason, I am not sanguine that “tools of court management [will] minimize the dangers of consolidation.” Rowe & Sibley, *supra* note 106, at 17.

110. See Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985).

111. The chief advantage of the cost-minimization approach is that it helps to assure consideration of the various different goals of the system and their interrelationship. However,

in other contexts we have been told that we must live with constitutional arrangements that are inefficient.<sup>112</sup> Individual dignity, effectuation, and participation compete with efficient administration at every turn.<sup>113</sup> They also compete with judicial power.

IV. THE FLIGHT FROM LAW

The ultimate cost of complexity is surrender of the ideal of justice under law. At a time when so few civil cases are resolved by trial<sup>114</sup> and when there is growing interest in diverting cases from the courts, it is a pity that *Complex Litigation* treats alternative dispute resolution as an add-on (pp. 814-40). The material on encouraging settlement (pp. 683-91) does not redress the balance, both because it is so abbreviated and because its location in the book hinders a coherent view of the flight from law.<sup>115</sup>

In a recent article, Professor Galanter identified “two recurrent themes that impel and justify involvement in the settlement pro-

---

the approach is of little help if the definition of costs is itself incomplete or vague. The specific interrelationships of goals are wholly obscured if all non-administrative goals are lumped together as one.

Bush, *supra* note 17, at 930.

112. See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

[I]t is not clear that the utilitarian balancing analysis asks the constitutionally relevant questions. The due process clause is one of those Bill of Rights protections meant to insure individual liberty in the face of contrary collective action. Therefore, a collective legislative or administrative decision about procedure, one arguably reflecting the intensity of the contending social values and representing an optimum position from the contemporary social perspective, cannot answer the constitutional question of whether due process has been accorded.

Mashaw, *supra* note 19, at 48-49, excerpted in R. COVER & O. FISS, *supra* note 15, at 21.

113. See note 37 *supra* and accompanying text.

114. The rate of settlements remains high. The great majority of civil cases are settled. The portion of cases that run the whole course of possible contest has continued a long historical decline. In the federal courts, cases reaching trial have fallen from 15.2% of terminations in 1940 to 5.0% of terminations in 1985. In state courts, too, a smaller portion of cases is decided by full contest than in the past.

Galanter, *Litigation Explosion*, *supra* note 24, at 8 (footnotes omitted).

For caution about equating terminations or dispositions with settlement, see Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986).

115. Reforming procedural incentives to promote just settlements requires a fundamental change in the way that we view civil procedure. Before such changes can be made, we will have to stop thinking of the “pretrial” process as a prelude to trial, and start thinking of it as the “main event” — as the matrix of incentives within which the overwhelming majority of cases are going to be settled by two party-appointed arbitrators (the opposing lawyers). The most pervasive “ADR” system in the United States today is probably pretrial procedure under the Federal Rules of Civil Procedure. . . .

Elliott, *supra* note 29, at 335-36.

Before taking Professor Elliott’s advice, however, one should decide whether, as a normative matter, procedure should be crafted so as to encourage settlement — in all cases or in some subset of cases. See text accompanying notes 116-27 *infra*. Moreover, that question should be addressed in the context of considering a variety of dispute resolution processes. See Bush, *supra* note 17, at 905-07; Rhode, *supra* note 24, at 286-88; text accompanying notes 125-30 *infra*. Finally, amendments to the Federal Rules of Civil Procedure designed to “encourage” settlement may raise questions of political legitimacy. See text accompanying notes 64-71 *supra*; Burbank, *supra* note 57.



cess,"<sup>116</sup> which he called the "warm" theme and the "cool" theme. He defined them as follows:

The "warm" theme refers to the impulse to replace adversary conflict by a process of conciliation to bring the parties into a mutual accord that expresses and produces community among them. The "cool" theme emphasizes not a more admirable process but efficient institutional management: clearing dockets, reducing delay, eliminating expense, unburdening the courts.<sup>117</sup>

The authors of *Complex Litigation* include in their materials on settlement an excerpt from a speech by Judge Tone that plays both themes.<sup>118</sup> To Tone, settlement is in most cases more likely to lead to optimal justice than adjudication, and aggressive participation by the judge is necessary "in order to manage a burgeoning caseload" (p. 684). Unfortunately, the authors do not force students to confront an opposing view.<sup>119</sup> Certainly, the federal statistics on cases that actually come to trial suggest that if a substantial portion of filed cases were not settled the system would collapse.<sup>120</sup> In that respect the settlement of civil cases is like plea bargaining in criminal cases. Professor Fiss has argued that the analogy carries further:

Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.<sup>121</sup>

It may be that advocates of settlement like Judge Tone and opponents like Professor Fiss are talking past each other. Tone speaks of cases in which the amount of money is small in relation to the anticipated cost of litigation or in which nonmonetary relief is the plaintiff's central objective and it is less painful for the defendant to give that relief than to bear the expense of additional litigation (p. 685). Fiss is concerned mainly with structural public law litigation.<sup>122</sup> But even if they are talking past each other, that very perception should cause one to question whether a trans-substantive solution makes sense.<sup>123</sup>

116. Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 257 (1986).

117. *Id.* For a recent example of the "warm" theme, see McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985). *But see* Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985).

118. Tone, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 57, 58-60, 61-66 (1975), *excerpted at* pp. 683-87.

119. The authors do, however, alert teachers to such a view. *See* TEACHERS MANUAL, *supra* note 3, at 208-09. This material should be in the book.

120. *See* note 114 *supra*.

121. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). *But see* Alschuler, *supra* note 24, at 1820-31 (arguing that settlement can be problematic, but for different reasons).

122. *See* Fiss, *supra* note 121, *passim*.

123. *See* Burbank, *supra* note 57. The 1984 proposed amendment to rule 68 exempted only class and derivative actions. *Id.* at 429 n.20.



Moreover, Tone's second category surely includes some of the cases that are Fiss' special concern, and the problems that Fiss and others identify are by no means confined to such cases.<sup>124</sup>

In any event, the debate about settlement should be placed in the context of a more general debate about modes of dispute resolution. A central question in that debate should be whether courts exist primarily or exclusively to resolve disputes or whether, in addition, they exist to perform functions one or more of which would, in certain cases, be put at risk by settlement, arbitration, mediation, mini-trials, rent-a-judge, or some other alternative to litigation.<sup>125</sup> To what extent are proposals to reform the adjudicatory process (or to divert cases from the courts) likely to rob that process of its distinctive attributes? Professor Fiss puts it this way:

Many of the factors that lead a society to bring social relationships that otherwise seem wholly private (e.g., marriage) within the jurisdiction of a court, such as imbalances of power or the interests of third parties, are also likely to make settlement problematic. Settlement is a poor substitute for judgment; it is an even poorer substitute for the withdrawal of jurisdiction.

.....

... Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.<sup>126</sup>

There is a good deal of force in this argument, but it misses an important point. To the extent that equity has gobbled up law, the pressure on parties to settle cases may correspondingly increase.<sup>127</sup> Moreover, in such a world, the attractiveness of Professor Fiss' ideal may depend on the confidence one reposes in judges. And with all the talk about judicial power in this essay, one might well ask why key

124. In fact, it is argued, because of their frequency, consumer disputes (and perhaps other types of small claims) involve large potentials for activity costs in the aggregate; therefore despite the small amounts at stake in individual cases, an adjudicatory process is called for — rule-oriented, and resource-allocation-based — to minimize these very significant costs. Bush, *supra* note 17, at 967-68. See also Fiss, *supra* note 121, at 1087-89.

125. See note 63 *supra*. See also Sarokin, *supra* note 83, at 433, 437-38.

126. Fiss, *supra* note 121, at 1088-89. See also Galanter, *Litigation Explosion*, *supra* note 24, at 38-39; Alschuler, *supra* note 24, at 1816-17; Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. REV. 1359.

127. For the role of uncertainty in the settlement of the Agent Orange litigation, see Schuck, *supra* note 50, at 346, 352-53. As indicated there, the proposition in the text is contrary to that suggested by certain economic models. See also Alschuler, *supra* note 24, at 1825-28 & n.85.

Professor Bush has noted that "adjudication is only theoretically rule-oriented or precedential; in operation, it is often impossible to predict decisions or awards based on previous cases." Bush, *supra* note 17, at 943. Moreover, in connection with the view that the availability of adjudication affects settlement, see Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979), Professor Bush observed: "For this to occur, however, the 'shadow of the law,' i.e., the possibility of moving into rule-based adjudication, must be real and not fictional." Bush, *supra* note 17, at 979 n.173. See also Subrin, *supra* note 7, at 989 ("bargaining . . . in the shadow of a shadow"); Alschuler, *supra* note 24, at 1823 n.64.

members of the federal judiciary have jumped on the ADR bandwagon.<sup>128</sup> In doing so, are they not repudiating power?

As Professor Subrin has suggested, the alternatives in current fashion represent a logical terminus in the progression from law in the sense that Justice Harlan described it, through equity, to dispute resolution *simpliciter*.<sup>129</sup> It is also true — and perhaps an explanation sufficient in itself — that judges are not lacking for business; indeed, they are tormented by statisticians interested only in case dispositions.<sup>130</sup> Federal judges may recognize, in other words, that power is a feeble instrument if there is no time to exercise it. When *we* recognize, however, that pre-trial and not trial is the scene of the action in federal courts, a somewhat different explanation is suggested, one that may shed additional light on recently proposed amendments to rule 68.<sup>131</sup>

Professor Galanter has suggested that the federal judiciary's view of the role of pre-trial procedure in effecting settlement has changed over time.<sup>132</sup> Professor Resnik has suggested that the current view is problematic at least in terms of a historical/ideal model of adjudication.<sup>133</sup> For present purposes, the important point is that with few civil cases being tried in federal court, ADR is fertile ground for the exercise of power: power to "influence" settlement,<sup>134</sup> to establish the rules and procedures for court-annexed arbitration and other alternatives to adjudication,<sup>135</sup> and indeed, conceivably, to structure a dispute resolution system of the sort described by Professor Sander.<sup>136</sup> At the least, this perspective gives added bite to a distinction between ADR

128. See, e.g., Chief Justice Warren E. Burger, 1984 Year-End Report on the Judiciary 15-16 (copy on file with the *Michigan Law Review*). Cf. Rhode, *supra* note 24, at 283-84 ("What is, however, distinctive about the current climate is the intensity of support for alternative dispute resolution within powerful public, private, and professional constituencies.")

129. See Subrin, *supra* note 7, at 987-91. But see Bush, *supra* note 17, at 973-87 (arguing that the comparative advantage of adjudication over other modes of dispute resolution in terms of formal values is not as great as is usually assumed).

130. See, e.g., Enslin, *Should Judges Manage Their Own Caseloads?*, 70 JUDICATURE 200, 201 (1987).

131. See generally Burbank, *supra* note 57.

132. See Galanter, *supra* note 116. See also Galanter, ". . . A Settlement Judge, not a Trial Judge," *Judicial Mediation in the United States*, 12 J.L. & SOC'Y. 1 (1985).

133. See Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 388-90, 401-02, 406, 425-31 (1982). See also Alschuler, *supra* note 24, at 1835-36; text accompanying note 87 *supra*. But see Flanders, *Blind Umpires — A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 510-14 (1984).

134. See text accompanying note 50 *supra*; Sarokin, *supra* note 83, at 434-36. Cf. Galanter, *supra* note 116, at 262 (active judicial participation in settlement may "be a response to a shift in the character of common law adjudication").

135. See generally Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985). But see Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 544-45 (1985).

136. See Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65 (A.L. Levin & R. Wheeler eds. 1979).

modes that are court-annexed and those that take place outside the courts. Perhaps now we can explain procedural reformers' seemingly schizophrenic reaction to arbitration.<sup>137</sup>

\* \* \*

Professors Marcus and Sherman have rendered a service to the profession. *Complex Litigation* is not only an excellent course book; it is a highly useful reference work. The book has appeared at a time when it is most needed. The federal rulemakers are considering a comprehensive reexamination of the Federal Rules.<sup>138</sup> The American Law Institute is pursuing three inquiries that will necessarily include consideration of problems of complex litigation.<sup>139</sup> Legislative reform proposals have been introduced,<sup>140</sup> and more are sure to follow.

In the past, the nature of procedural study and scholarship was such that few lawyers or scholars would have been equipped to contribute to the reform debate that is now brewing.<sup>141</sup> From that perspective, *Complex Litigation* represents a major contribution to knowledge. The challenge for the law reformer is not to get carried away: not to let one set of practical problems characteristic of complex litigation preclude attention to others,<sup>142</sup> not to let images of complex litigation preclude attention to litigation that is not complex,<sup>143</sup> not to let practical problems preclude attention to process values other than efficient administration,<sup>144</sup> and not to consider process values in the vacuum of trial or pre-trial procedure.<sup>145</sup>

---

137. See Burbank, *supra* note 57, at 427. See also Bush, *supra* note 17, at 1001-02 (discussing process biases that may arise from self-interest and professional socialization); Merry, *Disputing Without Culture* (Book Review), 100 HARV. L. REV. 2057, 2069-71 (1987) (criticizing the ADR movement for presuming an "indifferent state"). Cf. Rhode, *supra* note 24, at 276 ("Much reformist rhetoric has a curiously schizophrenic tone."); Trubek, *Turning Away from Law?* (Book Review), 82 MICH. L. REV. 824, 827 (1984) (exploring "current paradoxes in elite rhetoric").

138. See note 78 *supra*.

139. For the Institute's Study Project on Complex Litigation, see notes 106-07 *supra*. The Institute is also conducting a "Project on Compensation and Liability for Product and Process Injuries," which includes consideration of "various alternative procedures for resolving claims and controversies, including jury and court trials, administrative rulemaking and adjudication, optional or mandatory arbitration, and other systems of dispute resolution." AM. LAW. INST., 1986 ANNUAL REPORT 15, 17. Finally, the Institute has embarked on a study of the litigation process. See *New Restatement Projects and Study of Litigation Process Planned*, 8 A.L.I. REP., July 1986, at 1.

140. See, e.g., H.R. 4315, 99th Cong., 2d Sess. § 3 (1986); H.R. 3690, 98th Cong., 1st Sess. § 4 (1983); Rowe & Sibley, *supra* note 106, at 9-10.

141. See text accompanying notes 8-9 *supra*.

142. See text accompanying notes 13 & 103-09 *supra*.

143. See text accompanying notes 11-12, and text following note 30 *supra*.

144. See text accompanying notes 15-41 & 110-13 *supra*.

145. See note 15 *supra*; text accompanying notes 114-37 *supra*.