

## Wolves and Sheep, Predators and Scavengers, or Why I Left Civil Procedure (Not With a Bang, but a Whimper)



D. Michael Risinger

### ABSTRACT

This is a piece written on the retirement of Professor Stephen Yeazell, whose distinguished career is almost contemporaneous with my own time in law teaching. I started teaching Civil Procedure in the fall of 1973 fresh from a federal district court clerkship. I was attracted to the possibilities of using the civil litigation system to provide justice to those who were otherwise without much power in society. The Federal Rules of Civil Procedure as then interpreted, and as I had seen them work during my clerkship, seemed well designed for such a role. Not long after I began teaching, the first effective shots of the civil procedure counterrevolution were fired at the 1976 Pound Conference, sponsored by the American Bar Association at the behest of Chief Justice Warren Burger. This paper chronicles my view of the counterrevolution from that point through the decision of the summary judgment trilogy in 1986, and into the early 1990s. The trilogy and its aftermath, and related developments in regard to other topics such as class actions, finally led me to abandon civil procedure as a subject of interest, and to turn my sole attention to other fronts. It is good that others such as Professor Yeazell stayed to fight the rear guard action, or to document the lost battles, or to make the best of a bad situation, but given what has happened to Civil Procedure since I left it, I am generally glad I moved on to new pastures in Evidence and Proof, and in the innocence movement.

### AUTHOR

D. Michael Risinger is the John J. Gibbons Professor of Law at Seton Hall University School of Law. The hat-tips usually found in the asterisk footnote are instead to be found in the last footnote (footnote 82), except for this one: I must thank my wife, Lesley C. Risinger, for her peerless editorial skills, without which this project might have derailed.



I am happy to have the chance to participate in this symposium in honor of Stephen Yeazell, a man who stayed the course when I didn't.

I was hired into my first faculty job in 1973 fresh from a two-year federal district court clerkship, with the understanding that I would be teaching Evidence and Civil Procedure.<sup>1</sup> My interests then were generally the same as now—examining how the promise of the law<sup>2</sup> was kept (or not) in individual cases by procedural systems that deliver results assertedly based on that promise. My interest had a global (you might say jurisprudential) aspect, and a specific (you might say political) aspect.

The global aspect involved an interest in how legal procedures (arranged into systems) work and how they can be arranged to work as promised (more or less), rather than deliver results that violate the supposed goals espoused for them. This interest applied to any system of legal decision in individual cases whatsoever, and thus it encompassed both nonlitigation procedures, such as administrative and alternative dispute resolution procedures, as well as historical and comparative approaches to such procedural arrangements in Anglo-American and other legal systems and traditions.

The specific (political) aspect of my interests inevitably took me to the American system of criminal and civil litigation, which is where I thought the action was in using the law to deliver on the promises I was most interested in. That was because, as someone who came of age as a lawyer in the late 1960s, I was most interested in ensuring the promise of proof beyond reasonable doubt in criminal cases<sup>3</sup> and in using the civil litigation system to deliver the promise of the

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1. And there I have stayed. I am in my fortieth year at Seton Hall.

2. By the promise of the law, I am generally referring to the substantive law, but I also take certain substantively-based rules that are undoubtedly analytically procedural, such as standards of proof, to be within the promise of the law that is my focus. On why such substantively-based procedural rules are procedural, see D. Michael Risinger, "Substance" and "Procedure" Revisited: With Some Aftershoots on the Constitutional Problems of "Irrebuttable Presumptions," 30 UCLA L. REV. 189, 203–11 (1982).

3. My first article (written with my Harvard classmate Bob Ashford) focused on this. See Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969). (Incidentally, Bob's nickname from childhood was "Bob" even though neither of his given names was "Robert," so he finally changed his name officially to avoid confusion, and he is the same Robert Ashford of socioeconomic fame who now teaches at the Syracuse College of Law).

I have returned to this concern over wrongful convictions as an explicit theme in the last decade. See, e.g., D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007); D. Michael

law to those who were otherwise without much power in society. I was, in short, a child of what Professor Yeazell has called the “silent litigation revolution.”<sup>4</sup> Evidence (theoretically the applied epistemology of the law), with its transsubstantive applications in nearly every context, was a natural focus, and Civil Procedure even more so. My interest in the history of Anglo-American civil procedure had been stoked by James Chadbourn, whose course emphasized historical development, and the district court clerkship had given me two years of intimate acquaintance with federal civil procedure in action.

It appeared to be a good time to be a budding commenter on the civil procedure scene. Although there were giants in the field, the population of the field was relatively sparse. Civil Procedure had become a unified subject matter fairly recently, replacing the older curriculum division between courses in “pleading and practice” on the one hand, and “jurisdiction and judgments” on the other, only in the preceding quarter century.<sup>5</sup> It will come as a surprise to some

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Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004) [hereinafter Risinger, *Unsafe Verdicts*]; D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence Into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869 (2011–2012).

4. Professor Yeazell has captured perfectly my attitude, and the attitude of many of us coming to litigation at that time:

*Brown* and the civil rights litigation movement helped create a renewed belief, not just in the law, but more specifically in litigation as a noble calling and as an avenue for social change . . . .

. . . .

Because *Brown* culminated what was for its time an imaginative and unusual use of litigation, it challenged existing conceptions of legal practice. Some of the challenges were cultural: the movement represented in *Brown* allowed lawyers to see themselves and their profession as potential actors in a broad drama of social transformation.

Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1976, 2003 (2004).

5. Before the promulgation of the Federal Rules of Civil Procedure in 1938, there were very few published casebooks or teaching materials specified for “Civil Procedure” as a unitary course. An examination of all the titles in English in the Library of Congress catalogue containing the phrase “civil procedure” published before 1950 reveals only four titles. The first was published by Professor Austin W. Scott of Harvard in 1915, and was limited to actions at law. In his introduction, Professor Scott says, “About five years ago, when the editor began his work as a teacher of law in the Harvard Law School, he decided to enlarge the course on Pleading in that school into a course on Civil Procedure.” AUSTIN WAKEMAN SCOTT, A SELECTION OF CASES AND OTHER AUTHORITIES ON CIVIL PROCEDURE IN ACTIONS AT LAW iii (1915). It does not appear that this book (published by the Harvard University Press), or its approach, was widely adopted. (It is interesting to note, though, that Professor Scott returned to the business of civil procedure materials thirty-five years later with Little Brown’s publication of AUSTIN WAKEMAN SCOTT & SIDNEY POST SIMPSON, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE (1950). Around 1916 Bobbs-Merrill put out WILLIAM H. LOYD, CASES ON CIVIL PROCEDURE, SELECTED AND ANNOTATED (the book is apparently undated, with the LOC

readers, but there was not even a Civil Procedure section of the Association of American Law Schools when I started. It was established a year later, in 1974.<sup>6</sup>

My first scholarly project after joining the academy involved an issue I had encountered during my clerkship that seemed both underappreciated and undertheorized: counsel's duty of honesty at the pleading stage as well as at the discovery and pretrial stages of a civil action, both pursuant to Federal Rule of Civil Procedure 11 as it then was and as I believed it ought to be.<sup>7</sup> I want to emphasize, as I made clear in the resulting article, that I believed from my own experience, limited though it perhaps was, that the most common violations of that duty (though perhaps not the most important in the individual cases in which such violations occurred) were committed by defense counsel, usually by filing various forms of denial both in pleadings and in discovery when their actual state of knowledge demanded more forthcoming admissions.<sup>8</sup> I also made it clear that I thought any inquiry into a violation of either the duty to investigate, or the duty of honesty more generally, ought to await a merits disposition of the underlying issue that would not invite conflation of the two issues.<sup>9</sup> I point these things out because the resulting article was intended to be evenhanded in regard to the control of such violations on both the plaintiff side and the defense side, and

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giving the copyright date as 1916). Again, this book apparently had little effect. In 1927, West Publishing Co. (West) published ROSWELL MAGILL, *CASES ON CIVIL PROCEDURE*, and in 1933, West followed that with JAMES P. MCBAIN, *CASES ON CIVIL PROCEDURE*. But it was the promulgation of the Federal Rules of Civil Procedure (and the decisions in cases like *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)) that precipitated the consolidation of Civil Procedure as both a curriculum core course and as a delimited area of scholarly attention, a development that would have to await the end of World War II to reach full fruition. Although there were some locally published Civil Procedure materials before and during the war by George James and Paul R. Hays, the real emergence of modern Civil Procedure occurred with the publication by Foundation Press of THOMAS E. ATKINSON & JAMES H. CHADBOURN, *CASES AND OTHER MATERIALS ON CIVIL PROCEDURE* (1948) (later to become Chadbourn and Levin in 1962), and most significantly, the 1950 publication by Foundation of RICHARD H. FIELD & BENJAMIN KAPLAN, *MATERIALS FOR AN ELEMENTARY COURSE IN CIVIL PROCEDURE*, the casebook that more than any other defined Civil Procedure as a subject and paved the way for a spate of quality competitors in the 1960s such as Rosenberg & Weinstein, Carrington, Cound, Freidenthal & Miller, and others.

6. See 1975 ANNUAL MEETING PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 46. The organizing force and first chair was Professor Sherman Cohn of Georgetown, and by virtue of showing up when Sherman put out the initial call, I signed the petition to form the section and became a founding member. And by making myself useful about the place I became the third chair, in 1977.
7. See D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems With Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).
8. *Id.* at 2 n.4, 56 n.183.
9. *Id.* at 61–62.

to provide more nuanced remedies than resort to the drastic remedy of striking the pleading. Subsequent developments precipitated by the article, at least in part, proved much less symmetrical than I was happy with, to say the least. That too is a small part of the larger story of why I left civil procedure, but we will come to that in due time.

In writing that piece, I attempted to do a substantial amount of research on the history of the honesty requirement and the procedural arrangements in which it had originated and with which it evolved as those arrangements changed. As a result of that research, coupled with my previous experiences and predilections, by the mid-1970s I had evolved a view of federal civil procedure, its history and goals, strengths and weaknesses, that might or might not have been something of a just-so story, might or might not have been completely accurate in the details of historical development it reflected or assumed, but which worked for me in accounting for my approach to the subject. I never wrote it down and of course never considered publishing it. And I will grant from the outset that my story foregrounded the problems of only a slice of the kinds of cases that made it into federal court, and that my own views of the system might have been skewed by that emphasis. This story captured my own focus, however, and I will set it out now in some detail, because it too is part of the story of why I left civil procedure. So this is the story I told myself. I call it, as the title to this piece reflects, "Wolves and Sheep, Predators and Scavengers."

As I saw it then, the substantive law provided notional remedies for a range of civil wrongs done by individuals or corporations to other individuals or corporations, but historically the procedural law provided the practical prospect of a remedy for such wrongs only to a limited number of the victims. The common law system had two dominant aspects which ensured that, in general, only wealthy victims would be able to hold to account those who wronged them civilly, and only a small proportion of wealthy victims at that. The first was the extreme expense associated with the cumbersome machinery of the common law. The second was the practical requirement that admissible proof of the facts establishing the legal wrong had to be available and in hand through private investigation at the start of the case, since there was generally no mechanism for officially aided discovery to allow those with reasonable suspicions that they had been harmed in a legally cognizable way to obtain such information.<sup>10</sup> The Benthamite reforms reflected in the Field Code and its

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10. "Under the common law each party was expected to seek out and produce his proof without aid from his adversary." WILLIAM WIRT BLUME, *AMERICAN CIVIL PROCEDURE* 117 (1955). The

progeny, both in the United States and abroad, rationalized and simplified the procedural system, reducing the expense somewhat, but did little to address the problem of how to obtain needed information, and in fact instantiated an approach to the pleading stage that emphasized the requirement of information in hand.<sup>11</sup>

The situation did not go unnoticed during the Progressive Era. Various discovery reforms were incorporated piecemeal into some state systems,<sup>12</sup> but such reforms were neither systematic nor adopted widely enough to make a great deal of difference nationwide. In addition, the requirements of fact pleading still stood athwart, at least in theory, the path leading to such reforms as were undertaken.

Then came the Federal Rules of Civil Procedure.

You can hear the portentous chords of the soundtrack here, I'm sure. Even with a full knowledge of the experiments and debates leading up to the promulgation of the Federal Rules, however, it is hard to overstate the change that they wrought in making the civil action a potential vehicle for the kind of civil litigation I was interested in seeing. Prior to the Federal Rules, in vir-

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equitable bill of discovery in aid of an action at law existed, but given its technicality, restriction, and expense, it almost might as well not have existed, at least in regard to the kinds of cases and individuals with which I was most concerned.

11. As is well known, New York's 1848 Field Code of Civil Procedure abolished the distinction between law and equity, created a single form of action, and provided for pleading the "facts constituting a cause of action." N.Y. CODE PROC. (1848). In addition, to ensure that proper reason to plead such facts was in hand, the Code required every pleading to be verified by oath. This was unsurprising, given David Dudley Field's own commitment to the extreme rugged individualism reflected in the theories of political economy of his time. See generally Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).
12. The obligatory starting point for examining the state of discovery in American jurisdictions immediately before the Federal Rules is GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL (1932). Ragland's survey of the discovery practices in each state, plus England, Ontario, and other foreign English-speaking jurisdictions, showed a large variety of approaches to pretrial discovery. Jurisdictions tended to allow either interrogatories or depositions directed toward parties, but not both. Many jurisdictions that allowed depositions of parties restricted their scope. In thirty of the forty-eight American States, plus the Federal courts, discovery was heavily restricted. Depositions, when allowed, could only be had from parties. In four more (California, Colorado, North Carolina, and Texas), rules were somewhat more liberal, but with idiosyncratic twists. Five states (Idaho, Indiana, South Dakota, Utah, and Wisconsin) allowed depositions of parties of right, and of nonparties by application to the court. In seven states (Maryland, Missouri, Nebraska, North Dakota, New Hampshire, North Dakota, South Carolina, and West Virginia) interrogatories were not provided for, but depositions of both party and nonparty witnesses could be taken as a matter of course. Two states (Kentucky and Virginia) allowed both interrogatories and depositions of parties and non-parties, and Ohio allowed all that, and in addition allowed pre-filing discovery so that pleadings could be framed (thus anticipating functionally the structure of federal notice pleading, discovery, and pretrial order, at least on one interpretation of the proper functions of those mechanisms). All information given here is derived from Ragland's state-by-state summary, *id.* at 267-391.

tually every place in America, predatory wolves who managed to attack their victims without publicly revealing their identity, their illegal methods of attack, or both, could hide among the sheep flock made up of other apparently similar but law-abiding individuals or entities, leaving no way for their victims to obtain the information necessary to strip them of their sheep's clothing and expose their wolfish nature.<sup>13</sup> After the promulgation of the Federal Rules, the generally reduced pleading hurdles<sup>14</sup> gave access to enhanced discovery that could solve this problem.<sup>15</sup> In addition, the aggregation potentials of the newly expanded

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13. The image of a wolf disguised as a sheep has antecedents in both Aesop, *AESOP'S FABLES* (George Fyler Townsend trans., 1867) ("Once upon a time a Wolf resolved to disguise his appearance in order to secure food more easily. Encased in the skin of a sheep, he pastured with the flock deceiving the shepherd by his costume."), and the Bible, *Matthew* 7:15 (King James Version) ("Beware of false prophets, which come to you in sheep's clothing, but inwardly they are ravening wolves."). This image has a dual aspect. A "wolf in sheep's clothing" can escape detection by the shepherd guarding the flock both before and after its depredations by appearing to be a sheep, and a wolf disguised as a sheep can more easily prey on the lambs of the flock. The application of one or both aspects to the behavior of sellers of watered stock, entities that might charge customers a small hidden fee not allowed by the preexisting contractual relationship, and so forth, seems obvious. Whether the drafters of the Federal Rules of Civil Procedure had attack on such wolf-and-sheep relationships specifically in mind is subject to debate. See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998). However, after the "litigation revolution" documented by Professor Yeazell, see *supra* note 4, which shaped my attitudes, the utility of the Federal Rules in hunting wolves in the territories of consumer fraud, securities fraud, antitrust and civil rights, became their primary virtue to some (like me) and anathema to others. I might point out that the desire to bring justice to such wolves is ancient. Things turned out poorly for the wolf in Aesop's fable.

14. The story of Federal Rule of Civil Procedure 8 and what came to be known as "notice pleading" is too well known to require much repetition here. I had my own view of the minimum function of a federal pleading, and notice was part of it. This included, first, episode notice, so that the defendant is alerted in general to the episode that gave rise to the lawsuit, to the end that the defendant might start his own investigation of the details of that episode from his end, and second, notice of the general family of legal claims being made, also to the same end. But specificity of facts that would correspond to particular elements of particular claims was to abide the results of discovery, where such specificity could then be fairly expected and required at the pretrial conference stage. There is nothing here inconsistent with what I still take to be the intent of the drafters. See Clark's observations in his 1947 revision of his *Handbook of the Law of Code Pleading*:

The abolition of the demurrer, the limitation on objections to the pleadings, and the development of summary motions noted in this chapter indicate the growing realization of the inadequacy of pleadings in the disclosure of facts or formulation of the issues. Discovery devices have been adopted to meet the need for actual knowledge on the part of the litigants of the real facts and issues in controversy.

Extensive discussion of discovery devices is outside the scope of this book, and the Federal Rules are taken merely as exemplary of liberal modern provisions.

CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 567-68 (2d ed. 1947) (footnote omitted).

15. Although there were some liberal jurisdictions, see *supra* note 12, the federal system was among the most restrictive in the United States prior to the promulgation of the Federal



class action device could provide a vehicle to make litigation, even against wolves whose predatory scheme relied on tearing small amounts of flesh from large numbers of victims, cost effective—cost effective for the lawyers involved, that is, who in such circumstances had to operate in essence as independent entrepreneurs in regard to each such case that they brought. These potentials were made particularly clear after the 1966 amendments to Rule 23.<sup>16</sup>

The clients in such class actions may be the real parties in interest, but it was always clear to me that it was the lawyers who were the really interested parties, and I was fine with that.<sup>17</sup> One could regard such lawyers either as top predators who could only eat if they bagged a wolf, or as a form of scavenger whose job was to clean up the garbage of the system. But either way, it seemed to me, they did a valuable service, and I didn't mind their getting paid handsomely for it. It was a service that (one could argue) might be better done by a public agency of some sort, but since no political process was ever likely to establish any such

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Rules, when it became by far the most liberal, fully justifying Professor Wright's evaluation: "The broad and flexible provisions in Rules 26 to 37 for discovery were the most significant innovation in civil procedure when the rules were adopted in 1938." CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 540 (4th ed. 1983).

16. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375–400 (1967) (explaining evolution and intent of the 1966 amendments to Rule 23). "The Advisory Committee forecast that cases of fraudulent misrepresentations or antitrust violations affecting numerous persons would be likely, although not by any means sure candidates for class treatment under subdivision (b)(3)." *Id.* at 393. Just how radically these potentials departed from and expanded what had gone before was the theme of Professor Yeazell's wonderful first article, Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977). This article is a masterpiece of historical scholarship, which establishes both one of the dominant themes and one of the recurring subjects of Professor Yeazell's subsequent scholarship. The dominant theme is the need to look for the real meaning of rules in their specific social context. This theme runs through almost all of his scholarship. The recurring subject is the class action, which Professor Yeazell shows in a series of articles to be a different animal in the context of modern disputes from what it had been historically. See Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43; Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980); Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980); Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687 (1997). (I see a particular connection between Professor Yeazell's 1977 class action article and my Rule 11 article in the amount of historical digging each of us felt driven to undertake.)
17. Not everyone was. "The unseemly picture of the lawyer frequently as the real party in interest, representing vast numbers of plaintiffs no one of whom has substantial interest in the recovery, has been a cause of concern. The size of counsel fees in such litigation led one panelist at Saint Paul to characterize litigation as a new 'growth industry.'" AM. BAR ASS'N, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (1976), reprinted in 74 F.R.D. 159, 195 (1976) (footnote omitted).

agency in a way that could actually make a dent in the wolf problem, privatization of this function seemed to me the best alternative.

Of course it took some time for the possibilities of the new system to be fully appreciated and developed in practice. But virtually all of the developments and adjustments that occurred by amendment or otherwise prior to 1973 (or 1980, for that matter) were in service of the dominant stated aims of the reforms that the FRCP accomplished.<sup>18</sup>

And my years as a federal law clerk at the trial level had not disabused me. Certainly the judge I clerked for, Clarence Newcomer, a Republican, a former prosecutor, and a Nixon appointee, could hardly have been called “pro-plaintiff” by kneejerk inclination, and in the case that originally led me to think about Rule 11, *Kinee v. Abraham Lincoln Savings and Loan Ass’n*,<sup>19</sup> he imposed sanctions on a wolf-hunting plaintiff’s attorney who had gone too far by failing to investigate at all which banks were and which were not engaged in the wolfish behavior complained of.<sup>20</sup> But Judge Newcomer was a thoroughly decent human being

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18. There were significant sets of amendments to the rules in 1946, 1961, 1963, 1966, and 1970, all of which were generally intended to clarify the rules consistent with and in furtherance of their original vision. On the 1970 amendments, see *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J.L. & SOC. PROBS. 623, 624–28 (1972). On the 1966 amendments, see Kaplan, *supra* note 16. On the 1961 and 1963 amendments, see Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961–1963 (I)*, 77 HARV. L. REV. 601 (1964), and Benjamin Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961–1963 (II)*, 77 HARV. L. REV. 801 (1964), particularly Part I at 601, where Professor Kaplan refers to the amendments as “strengthening amendments.” On the 1946 amendments, see Gustavus Ohlinger, *Amendments to the Federal Rules of Civil Procedure*, 9 OHIO ST. L.J. 187 (1948). Starting in 1980, the amendments were often of a different sort entirely. See *infra* text accompanying notes 50–57.

Even *Hickman v. Taylor*, which invented the work-product exception to the reach of discovery, spoke glowingly about the main aims of the new discovery rules. 329 U.S. 495, 501–02, 509 (1947). (The subsequent tortured history of the work product doctrine is beyond the scope of this Article.)

19. 365 F. Supp. 975 (E.D. Pa. 1973).

20. I summarized the case in that article as follows:

In *Kinee*, a group of mortgage borrowers sued some 177 banks. The plaintiffs had been forced by the terms of their mortgage agreement to put up money to cover potential tax liabilities on the property subject to the mortgage. These monies were held by the mortgagee in non-interest bearing escrow. The main thrust of the complaint was that there had been a conspiracy among mortgage-lending institutions to eliminate interest bearing escrow accounts as point of competition in violation of the anti-trust laws. Before any significant pretrial actions were taken, the plaintiffs voluntarily dismissed 46 defendants from the action. The remaining defendants moved, among other things, to strike the complaint for violation of Rule 11. In the course of considering this motion the court (Judge Clarence Newcomer) discovered that there had indeed been a Rule 11 violation, but that the remaining defendants had not been affected by it. The court found that the

with a well-developed sense of both fairness and justice, and he managed to handle a Philadelphia docket with the whole range of civil cases, with all their associated discovery issues, in ways that moved the cases along to trial or settlement with both expedition and full disclosure, or as close as the system was likely to be able to accomplish. So I was unimpressed by the grumbling I was beginning to hear and read with increasing frequency, generally from persons who conceived of themselves as “target defendants,” and the lawyers who represented them.<sup>21</sup> I should have paid more attention.

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plaintiffs and their attorneys had sufficient ground to plead the alleged conspiracy, but that the attorneys, rather than investigating who the potential members of the conspiracy were—mortgage lenders who did not offer interest bearing tax escrow accounts—had taken the shortcut of suing everyone listed under “mortgages” in the Philadelphia phone book. Then they simply waited for those persons who had nothing to do with the subject matter of the complaint, such as mortgage finding agents, to identify themselves, whereupon the attorneys voluntarily released them from the dragnet and dismissed them from the case. The court recognized that striking the complaint for the violation would not be appropriate. The court also realized, however, that a number of parties had been unfairly subjected to inconvenience and expense because of the violation. The court did the most logical thing. It made the responsible persons, the plaintiffs’ attorneys, personally pay the expenses incurred by the voluntarily-dismissed defendants.

Risinger, *supra* note 7, at 42–43 (footnote omitted).

21. Prior to the mid-1970s, there was a small amount of literature reflecting such positions. *See, e.g.*, F. Hastings Griffin, Jr., *Discovery: A Criticism of the Practice*, FORUM, July 1966, at 11; Robert F. Kane, *The Work-Product Doctrine—Cornerstone of the Adversary System*, 31 INS. COUNS. J. 130 (1964); William E. Knepper, *Some Suggestions for Limiting Discovery*, 34 INS. COUNS. J. 398 (1967). But generally the legal literature was well characterized by Charles Alan Wright in the 1970 edition of his *Handbook* thus: “[T]he conclusion that ‘the present federal discovery rules enjoy the predominant support of the Bar’ seems entirely justified.” CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 355 (2d ed. 1970) (quoting WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 225 (1968)). Glaser’s book had a preface by Earl Warren. GLASER, *supra*, at vii. In a short time, a new chief justice would promote a different view of discovery.

Incidentally, all three of the short critical essays cited above (Kane, Griffin, and Knepper) are pretty colorful. Mr. Knepper wrote last, and for his part was generally content to quote the rhetorical flourishes of Mr. Kane and Mr. Griffin. *See* Knepper, *supra*, at 404. Mr. Kane asserted that “[t]he avalanche of discovery tools, e.g., interrogatories, requests for admissions, motions to produce and inspect, have, in the hands of indiscriminate and short-sighted counsel, plagued the insurance defense bar and lawyers truly dedicated to the adversary system,” Kane, *supra*, at 130, and further that “[t]he malignancy of unrestricted discovery presents a tremendous threat to our adversary system,” *id.* at 134. The Griffin piece, by a partner at the Philadelphia firm of Dechert, Price and Rhoads, is surely a must-read for students of rhetorical excess. Mr. Griffin apparently did personal injury defense in the federal courts. Suffice it to say that when I clerked in the same federal court that must have been his primary venue, I did not see extensive evidence of the injustice effects he describes in such overwrought language. Discovery was not an “albatross around the neck of the trial bar,” about to “strangle not only the lawyer, struggling under its load, but also the system of justice it was sent out to save.” Griffin, *supra*, at 13. It was generally, at worst, an

And as the wolf-hunting potentials of the Federal Rules began to be developed, especially after the 1966 amendments to Rule 23 made class actions more attractive,<sup>22</sup> by powerful and aggressive members of the burgeoning group of wolf hunters, such as David Berger and Harold Kohn of Philadelphia, Abe Pomerantz of New York, and David Shapiro of Washington D.C.,<sup>23</sup> it was only to be expected that not everyone would appreciate the resulting litigation, by any means. Every civil action seeking to explore the nature of a wolf candidate ran the risk of imposing some costs on an innocent sheep if the wolf examination did not pan out. And since all wolves always claimed to be sheep, the pushback generally took the form of the claim that the new system hassled too many sheep at too great a cost and thus was counterproductive from both a moral and an economic perspective.<sup>24</sup> This pushback developed steam in the 1970s, along with other linked complaints about various substantive policies comprising the main arsenal of the wolf hunters of the time, namely both federal and state law doctrines of antitrust law, securities law, stockholder rights law, civil rights law, and state law doctrines of products liability law, medical malpractice, and other aspects of tort law, all of which might find their way into federal courts on occasion on diversity grounds.<sup>25</sup>

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irritation, not a lethal weapon, as far as both lawyer and judge (and law clerk) expenditure of time was concerned. Or so it seemed to me. (And that was before much of the work was offloaded to magistrate judges.) For an article that captures much of my own attitude on the subject (and has to be the funniest article ever published in the Columbia Law Review), see Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996).

22. See *supra* note 15 and accompanying text.

23. See Douglas Martin, *David Berger, Lawyer and Class-Action Hero, Dies at 94*, N.Y. TIMES, Feb. 24, 2007, <http://www.nytimes.com/2007/02/24/obituaries/24berger.html>. The obituary also makes reference to Kohn, Pomerantz, and Shapiro. *Id.*

24. “[L]itigation is the new growth industry, adding billions of dollars to the cost of producing consumer goods and services.” Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 204 (1976) (address given to the Pound Conference). Mr. Kirkham was one of the deans of the antitrust defense bar and served as General Counsel to Standard Oil of California (now Chevron) from 1960 to 1970 before returning to private practice. For his obituary, see *Death: Francis R. Kirkham*, DESERET NEWS (Oct. 27, 1996, 12:00 AM), <http://www.deseretnews.com/article/521561/DEATH—FRANCIS-R-KIRKHAM.html>.

25. Of course I had (and have) my own opinions and investments about the various alterations in regard to these substantive doctrines (whether legislative or judge made) that have been referred to as “reform” in the last three or four decades. In addition, I was actively involved in a few wolf hunts myself, mostly involving civil rights violations by law enforcement or other agents of governmental bodies. But my main academic focus in the 1970s and into the 1980s was on the procedural system, and its ability to deliver whatever substantive promise was represented by the legal doctrines in these areas at any given point in time.

Looking back, I see myself as fairly naïve in a number of ways. I still think the “wolves and sheep” image is an appropriate starting point, but I failed to take into account a few important details of the psychology involved. First, wolves not only pass themselves off as sheep, they actually have a large capacity to convince themselves that in fact they *are* sheep. This changes the dynamic of their resistance considerably, and allows them to put up a unified front, charged with the moral fervor of wronged sheep (in alliance with the actual sheep who have been or have come to fear being wrongly accused and hassled). Also, I failed to see how these themes fit in with other strong traditions of the American establishment running back as far as the Revolutionary period, most particularly the right of the prosperous (many of whom in the Revolutionary period were in fact smugglers and tax-avoiders under the applicable laws) to be outraged when their inferiors tramp through their business under the banner of legal authority. The following, from a recent book on the Fourth Amendment by Professor Taslitz, may illustrate my thrust:

[I]ndignation at the arbitrariness of general searches was supplemented by class prejudices, which subtly melded into condescension toward the role of being a customs officer or king’s messenger. Officers were generally of low social status, especially relative to the high status and wealth of magistrates. Framing-era sentiments have recently been described by legal scholar Thomas Davies as expressing “outright disdain for the character and judgment of ordinary officers.” “It was disagreeable enough,” says Davies, “for an elite or middle-class householder to have to open his house to a search in response to a command from a high status magistrate acting under a judicial commission.” It was, however, a “gross insult to the householder’s status as a ‘free man’ to be bossed about by an ordinary officer who was likely drawn from an inferior class.” The widely publicized remarks of the Boston town meeting of 1772 made the point vividly:

Thus our houses and even our bed chambers, are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants; whenever they are pleased to say they suspect there are in the house wares . . . for which duties have not been paid.<sup>26</sup>

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26. ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 37–38 (2006) (second alteration in original) (quoting Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) and 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 206 (1971)).

Increasingly in the 1970s American establishment, business and governmental interests (and by extension the lawyers who represented them) viewed these supposed do-gooders as lowlifes with dirty boots, who were empowered by notice pleading and broad discovery to sign their own general warrants.<sup>27</sup>

There were clear signals of dissatisfaction with the activities of wolf hunters from people in high places by the mid-1970s, most importantly, members of the U.S. Supreme Court. The appointment of Justice Rehnquist in 1972 solidified the emerging conservative bent of the court under the relatively new leadership of Chief Justice Burger (appointed by Nixon in 1970). Three of the most obvious decisions that were beginning to undermine the utility of the Federal Rules for the kind of cases I was most interested in were decided soon

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27. In this regard, consider the following quotation from Kane:

[T]he foundation of a healthy, truth-ascertaining adversary system requires a strong adherence to the policy of protection of the “lawyer’s work-product.”

Long ago the U.S. Supreme Court declared its adherence to such a policy in *Boyd v. United States* [, 116 U.S. 616 (1886)]. There a statute provided that in actions under the revenue laws—other than criminal—the prosecution, upon information and belief that the defendant had a paper which would “tend to prove any allegation” made by the plaintiff, could make a motion for inspection. If the defendant failed to comply with the order, the allegation was deemed to be admitted. The court, in striking down the statute, reached back to Lord Camden’s opinion in *Entick v. Carrington*, described it as a “monument to English Freedom” and held that

Compelling the production of (a party’s) private books and papers, to convict him of a crime, *or to forfeit his property*, is contrary to the principles of free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the *instincts* of an American.

It is even more abhorrent, I suggest, to the instincts and to the principles of any American trial advocate.

This instinct has often been evident in those decisions confining discovery within sensible boundaries and, at the same time, preventing the would-be discoverer from embarking upon a “fishing expedition.”

Kane, *supra* note 21, at 130 (footnote omitted).

Or consider the following, from Simon Rifkind’s written version of his address to the Pound Conference in 1976:

I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment.

Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976). One would never guess from either Kane’s or Rifkind’s remarks that what was generally at stake were corporate records. I guess this was part of the movement toward “corporations are people too” even for interests that seem applicable only to real humans.

after I joined the faculty at Seton Hall: *Zahn v. International Paper Co.*,<sup>28</sup> *Eisen v. Carlisle & Jacquelin*,<sup>29</sup> and *Alyeska Pipeline Service Co. v. Wilderness Society*.<sup>30</sup>

*Zahn* held that in regard to a class action under Rule 26(b)(3), every member of a plaintiff class (and not just the class as a whole) had to individually satisfy the amount in controversy required for federal jurisdiction. *Eisen* held that “individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort,”<sup>31</sup> and further, that the cost of such notice must be borne by the party seeking class certification.<sup>32</sup> Together, these two cases virtually killed the viability of national class actions based on state law in federal court and undermined the practicality of the (b)(3) class action device, even for federal claims, for all but the most well-heeled wolf hunters.

*Eisen* raised costs. *Alyeska Pipeline* diminished the prospect of reward by limiting equitable authority to grant attorney’s fees to successful plaintiffs based on either a “private attorney general” or a “common benefit” rationale, absent an explicit statute. But I remained hopeful that these opinions reflected only a suspicion of class actions and a desire to move state law-based class actions off the plates of federal courts and onto those of state courts.<sup>33</sup> With the Pollyanna outlook of youth, I naively failed to read into these opinions the general hostility that was to ultimately drive events of the 1980s and beyond in regard to procedure doctrines. And as the 1970s progressed, I was so heartened by positive

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28. 414 U.S. 291 (1973).

29. 417 U.S. 156 (1974).

30. 421 U.S. 240 (1975).

31. *Eisen*, 417 U.S. at 173.

32. *Id.* at 173–75.

33. Professor Jonathan M. Landers took the position that, while he himself thought a federal class mechanism for handling things like state law-based consumer class actions would be desirable, it could and should be accomplished only through actual federal legislation, not rulemaking. Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974). Professor Denbeaux, however, came up with a brilliant solution to the problems created by these cases, using disgorgement of unjust enrichment to skirt the need both for notification and for worrying about binding absent members of a class. It was based on the well-recognized right of a single plaintiff to disgorge the entire amount of unjust enrichment. Mark P. Denbeaux, *Restitution and Mass Actions: A Solution to the Problems of Class Actions*, 10 SETON HALL L. REV. 273 (1979). I can only attribute the failure of the litigating bar to push this approach to the modest placement of the article and the nonexistence of databases like Westlaw or Lexis.

The subsequent ironic return of such class actions to what was arguably then in many ways a different federal court regime is noted below. See *infra* text accompanying notes 72–77.

turns in civil rights doctrines, particularly the 1978 decision of *Monell v. Department of Social Services*,<sup>34</sup> that I failed to take the gathering tide of attacks on the FRCP and their original vision as seriously as I should have.

These attacks were moving from the fringe to the establishment and, though they had many targets, their main one centered on the claim that the federal system of discovery unjustifiably drove up the costs of litigation. Now, the way I saw it, there clearly was discovery abuse, and like dishonesty in pleadings and other papers, it could be committed by plaintiffs or defendants. But the likelihood of substantial abuse was not symmetrical. I knew that the wealthier party who paid hourly could in some cases hammer the poorer party who paid hourly with burdensome discovery that would potentially affect the settlement value of the case, but that wasn't the kind of case I was most interested in. Nor did I think that it was the kind of case that drove the complaints, or the controversy. It was the charges of discovery abuse directed against self-financing plaintiffs' lawyers that were central to these controversies. That made little systematic sense to me. There was a big difference in motivation and resources between lawyers whose clients paid by the hour and plaintiffs' lawyers who had to finance the litigation out of expected recovery, whether they were operating on a contingency or in expectation of an attorney's fee upon successful conclusion (based on statute or common benefit). They were generally taking on defendants with better resources.<sup>35</sup> If anyone could get ground down by discovery abuse, it would seem to be them. It was true that they represented clients who often had little relevant information to give, so that responding to discovery was likely to be less burdensome for them. But this asymmetry of burden was the direct product of the initial asymmetry of information, which the discovery system was there to correct for, so it seemed to me a bit disingenuous for defendants to argue that they were being put to unreasonable expense in assembling and disclosing the information that only they had. Again, my perception was that the defendants (and the lawyers who represented them) were complaining that they were in fact sheep not wolves, and that therefore it was not right of society to have the kind of investigatory mechanism that was being used against them at all.

I don't want the reader to think that I was so naïve as to see all wolf-hunting lawyers as pure of heart and faultless in practice. Far from it. While some of them worked for organizations that would never make them rich, most were in it

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34. 436 U.S. 658 (1978).

35. Consider this statement by David Berger from a 1985 Associated Press interview, quoted in his *New York Times* obituary: "In all these cases, we were always up against the toughest, best and richest lawyers in the country. . . . It was a forced-march, scorched-earth battle all the way." Martin, *supra* note 23.



largely for the money. I think most of them, at least at the time we are speaking of, viewed themselves as “doing well by doing good.” Of course, the adversary nature of the litigation system, and the human tendency toward greed and self-justification, would suggest that many such wolf-hunting lawyers would abuse the system as much as they could get away with if it helped their cause and their purse (not necessarily in that order). After all, the plaintiffs’ lawyers in *Kinee* had done just that, on a relatively minor scale. The incentives, however, did not line up in such a way as to encourage the bringing of frivolous cases. Considering the amount of time and money they were putting at risk in every case, and the superior resources of most of their opponents, I expected great care to be exercised in selecting only cases with a significant likelihood of winning. Even if such cases ultimately lost, that significant likelihood rendered them nonfrivolous. One should never equate a losing case with a frivolous case.

Which brings us to the claim that, especially in the class action context, a predatory plaintiffs’ lawyer would be able to make money by bringing frivolous claims in order to precipitate nuisance-value settlement offers. Once again, this didn’t make sense to me, or it made sense only under limited conditions, which seemed to be hard to establish and relatively rare.<sup>36</sup> First, given the relative disparity in resources between such plaintiffs’ lawyers and their usual adversaries, the threat to boost expenses to an unaffordable amount seemed unlikely.<sup>37</sup> Second, while it was theoretically possible that the amount involved in defending a suit was higher than the plaintiff would take in settlement, this too seemed to

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36. It is important to note that even elegant law and economics analyses modeling the theoretic conditions under which such nuisance-value settlements would occur are forced to admit that there is little empirical evidence establishing that they do occur. Consider Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004), which recommends a mandatory merits review by the court as a general solution to the problems of nuisance-value settlements, but admits at 1851–52 n.3, “Despite the general consensus that a problem exists, there is a paucity of empirical research substantiating its extent.” Perhaps the article should have been titled “*Solving the Nuisance-Value Settlement Problem if It Exists.*” The article does usefully show, among other things, that even in theory, class action status does not automatically give more power to plaintiffs than the defendant possesses. *Id.* at 1879–81.

To my mind, the worst problem besetting class action settlements is not the nuisance-value settlement, but the sweetheart deal, in which the class action is settled at a discount to the defendant in return for quick payment of attorneys’ fees. I don’t mind most of the benefit going to the attorneys, but I do mind their not insisting on full disgorgement, because the wolf regards the payment as just a cost of doing business. No lessons are learned. Neither is justice done. But such settlements might be “efficient.”

37. And there is at least some empirical evidence that defendants tend to fight what they perceive as pure nuisance suits. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 358–59 (1991); Yablon, *supra* note 21, at 1624 n.17.

me to be rare, especially given the amounts involved in the settlements that I saw reported, which generally seemed to me to be well over the amount that would be required to defend a meritless suit. And to the extent that they reflected an amount above defense costs based on the possibility of a finding of liability, then that meant that the underlying actions were not really frivolous, didn't it? Again, my perception of these cases was that the defendants (and the lawyers who represented them) were complaining that they ought to be regarded as sheep, not wolves, and that the legal doctrines that attempted to regulate their ways of doing business (and the juries that might misinterpret their socially useful behavior as wolfish under those inappropriate substantive doctrines) were simply wrongheaded. It followed from this that such doctrines ought to be changed, along with the parts of the procedural system that aided those who sought to apply such doctrines. What I thought I perceived was a growing nostalgia for the way business was done before the promulgation of the FRCP, a desire to roll back many of the novel mechanisms introduced in those rules and their amendments through 1966, and the desire for a counterrevolution to restore the good old days.

The movement to push such a counterrevolution can be traced to the Pound Conference in 1976. The Pound Conference, formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, was the brainchild of Chief Justice Burger, who told the American Bar Association (ABA) that such a meeting to commemorate the seventieth anniversary of Roscoe Pound's famous 1906 speech to the ABA on the same topic would be a good idea and would provide a forum to begin planning for the needs of the legal system in the year 2000.<sup>38</sup> The conference, a meeting of some 200 judges, legal scholars, and leaders of the bar, who had gathered to examine concerns about the efficiency and fairness of court systems and their administration, took place in April 1976 in St. Paul, Minnesota.<sup>39</sup> I wasn't invited.

If I had been invited, I might not have seen the point to discussions on the civil side of things. I knew that there was "popular dissatisfaction" with the changes in criminal procedure precipitated by the Warren Court's "rights revolution" of the 1960s (as did anyone who had ever seen an "impeach Earl Warren" bumper sticker), but I did not personally perceive any widespread "popular" dissatisfaction on the civil side, beyond what is inevitably always with

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38. Warren E. Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A. J. 443, 445-46 (1976).

39. See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice*, 70 F.R.D. 79 (1976).

us.<sup>40</sup> It became clear from the content of the speeches at the Pound Conference, however, that among those selected to participate, there was dissatisfaction with the underlying vision of the Federal Rules. Whether this represented “popular” dissatisfaction is subject to dispute, but dissatisfaction it certainly was, voiced by powerful people in a forum blessed by the Chief Justice of the United States.

To be fair to Chief Justice Burger, it was not apparent from anything he said in touting the conference that it was to be directed toward changing the moving spirit of the FRCP.<sup>41</sup> He viewed the conference, at least publicly, as an opportunity to discuss what the legal system should look like in the year 2000,<sup>42</sup> and it covered topics of criminal as well as civil law and procedure.<sup>43</sup> On the civil side, however, the people who were invited to attend and who were invited to speak took the opportunity to air their complaints about “abuses” of the civil rules, particularly in regard to discovery, although low pleading standards, frivolous claims, class action abuse, and other such perceived issues also made their appearance, including some substantive ones like medical malpractice.<sup>44</sup> Rereading the written product of the conference, it seemed to function somewhere between

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40. This inevitable background dissatisfaction was recognized by Pound himself. See Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. REP. 395 (1906), reprinted in 35 F.R.D. 273, 273–79 (1964).

41. See Burger, *supra* note 38, at 445–46 (explaining genesis and purposes of Pound Conference to be held that April).

42. One of the main subjects of discussion at the Pound Conference was alternative dispute resolution (ADR), see Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976), and indeed some view the Pound Conference as the defining event that shaped and framed what was to come for ADR. See L. Camille Hébert, *Introduction—The Impact of Mediation: 25 Years After the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 527, 527 (2002). I will not treat of this here, however, because it formed no part of my decision to abandon civil procedure. Had I stayed, however, some developments in the period since my departure might have helped drive me out had I been around to see them. See *infra* text accompanying notes 71–80.

43. His opening remarks are relatively bland until the very end, when he throws some punches at environmental litigation and medical malpractice, and then says:

Now, however, after more than 35 years' experience with pretrial procedures [under the FRCP], we hear widespread complaints that they are being misused and overused. Increasingly, in the past 20 years, responsible lawyers have pointed to abuses of pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that “the case must be tried twice.” The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands.

Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95–96 (1976).

44. See Lawrence E. Walsh, *Improvements in the Judicial System: A Summary and Overview*, 70 F.R.D. 223, 223–31 (1976) (summarizing various points made by various participants in the conference).

a brainstorming exercise and a group therapy session.<sup>45</sup> Almost immediately, it became de rigueur to believe that “discovery abuse” was both widespread and a serious problem, based on almost no data at all.<sup>46</sup> In fact, over the five years between the Pound Conference and the promulgation of the 1980 FRCP amendments addressing discovery, almost everybody appeared to agree that discovery abuse was a bad problem, but nobody could agree on what comprised the problem, why it happened, or what to do about it. A Follow-up Task Force was appointed by ABA President Lawrence Walsh to “assure that the ideas presented at the Pound Conference would be carefully considered by those organizations or agencies best able to evaluate and implement them.”<sup>47</sup> The Task Force filed a report in August 1976 emphasizing (and assuming) “abuse of discovery on a widespread scale,” further emphasizing the use of sanctions, and singling out class actions as another particular concern.<sup>48</sup> It recommended that the ABA Section on Litigation “accord a high priority to the problem of abuses in the use of pretrial procedures and report its findings and recommendations with a view to appropriate action by state and federal courts.”<sup>49</sup>

Immediately thereafter in 1976, the ABA Section on Litigation formed a Special Committee for the Study of Discovery Abuse (Special Committee) in direct response to the Pound Conference Follow-up Task Force Report, and in 1977 the Special Committee issued a short report with a set of proposed amendments to the FRCP. The most radical proposal was to change the language of Rule 26 with the intent to narrow the scope of discovery (and perhaps indirectly

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45. The written product of the Pound Conference was published in Federal Rules Decisions, 70 F.R.D. 79, 79–246 (1976). The main written attacks on the then-current practice under the Federal Rules were by Francis Kirkham and Simon Rifkind. I have already quoted from Kirkham, *supra* note 24, and Rifkind, *supra* note 27. Suffice it to say that both are almost as extreme as Kane, *supra* note 21 and Griffin, *supra* note 21. The only cautionary note was sounded by Judge A. Leon Higginbotham, in a powerful article emphasizing what the past was like for the dispossessed under previous systems of litigation in America, and the need for continued liberal procedures for the powerless. A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, 70 F.R.D. 134 (1976). This was a particularly hard hitting speech which was later pretty much ignored, but it still rewards reading today. Judge Higginbotham was one of my personal heroes. For those readers who don't know who Judge Higginbotham was, see *A. Leon Higginbotham, Jr.*, WIKIPEDIA, [http://en.wikipedia.org/wiki/A.\\_Leon\\_Higginbotham,\\_Jr.](http://en.wikipedia.org/wiki/A._Leon_Higginbotham,_Jr) (last visited June 19, 2013).

46. This was even pointed out at the Pound Conference itself. See Walsh, *supra* note 44, at 230 (summarizing excoriating remarks of “Dr. Nader,” who was very likely Laura Nader, Ralph Nader's sister and a well-known anthropologist specializing in studies of conflict and harmony).

47. AM. BAR ASS'N, *supra* note 17, at 165.

48. *Id.* at 191–97. This section seems clearly to have been based on the positions taken by Mr. Kirkham in his speech to the Pound Conference, which was cited repeatedly. Mr. Kirkham was a member of the Follow-up Task Force.

49. *Id.* at 192.

raise the amount of detail required of pleadings). The recommendations also included provisions for a mandatory discovery conference, a limitation on the number of interrogatories that could be served as a matter of right to thirty, and a requirement that documents be produced “as kept in the usual course of business,” as well as beefed-up sanction provisions. These proposals were published and transmitted to the Advisory Committee on Civil Rules (Advisory Committee) for consideration. The ensuing couple of years precipitated a great deal of controversy and discussion in the profession. In 1979 the Advisory Committee transmitted its recommended rule changes to the Court.<sup>50</sup> After initially accepting the Special Committee’s recommendations, then dealing with the resulting storm of controversy during the public comment period, the Advisory Committee ultimately rejected both the narrowing of the scope of discovery and the limitation on interrogatories, finding that discovery abuse was “not so pervasive as to require fundamental changes in discovery in all cases,”<sup>51</sup> and made various other adjustments to the Special Committee’s recommendations.<sup>52</sup> These proposed rules

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50. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521 (1980).

51. *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979). Events were to make the Committee eat this finding, but the finding was probably right, and the outcry over discovery abuse more than a tad overheated. Most of the early studies that were done were surveys of lawyers and judges, not examinations of actual cases, much less subcategories of cases, to see where abuse, if any, was concentrated, and may have reflected no more than a certain conventional wisdom. The same was true in regard to the incidence of fraudulent and frivolous litigation. Later research told a different story. See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1167–68 & nn.56, 60 (1993), and authorities there cited, and Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 313 & n.63 (2002) [hereinafter Subrin, *Discovery in Global Perspective*] and authorities there cited. On the importance of subcategories in approaching discovery issues, see Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).

52. Here is a footnote borrowed from Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 779 n.54 (1985), summing up the fraught process that the Advisory Committee went through:

The Advisory Committee originally had issued a preliminary draft of proposed amendments which reflected the ABA Special Committee’s recommendations for significant changes in the rules. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 77 F.R.D. 613 (1978). However, after circulation for public comment, a revised draft that recommended fewer sweeping changes was issued. See *Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 80 F.R.D. 323 (1979). It is particularly noteworthy that the Advisory Committee, in its final draft, rejected the ABA Special Committee’s recommendation that the scope of discovery be limited to “any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party.” The final draft of the Advisory Committee was promulgated by the United States Supreme

were promulgated to be effective in 1980 over dissents by Justices Powell, Stewart, and Rehnquist, who objected that the rules had not gone far enough and that the Special Committee recommendations should have been adopted at the very least.

Looking back on that period from this vantage, in those fights over discovery I think I can see a tripartite collision in the various committees among those who defended the original vision of the Federal Rules, those who wanted to retain the main functions but fix whatever problems there were with a dose of judicial management, and those who wanted to obliterate the original vision to the extent possible. As time went on, the “original vision” people lost to the combined voices of the judicial management people and those who wanted to go further and reduce the reach of discovery (and of the litigation process generally) to the extent possible if they couldn’t obliterate it completely.<sup>53</sup> These behind-the-scenes struggles were always dressed up in public with the standard kind of committee rhetoric proclaiming only good intentions, but they should have been clear enough to those who paid attention. This did not include me, although I recall

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Court and became effective on August 1, 1980. See Amendments to Federal Rules of Civil Procedure, 446 U.S. 995 (1980).

53. Another influential article in this period by an author writing soon after joining the legal academy was Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978). Professor Brazil shows himself to be an adversary skeptic in regard to discovery, and in favor both of enhanced ethical standards of responsibility to system values rather than the client at the pretrial stage, and of a more managerial approach by judges, *id.* at 1348–61, but he is quite skeptical also of the more extreme proposals of the ABA Special Committee concerning scope of discovery, *id.* at 1332–48. Thus he positions himself as against obliterating the original vision of the discovery rules. I can identify with his desire for more control of adversariness in discovery, since I am also something of an adversary skeptic in some regards myself. See, e.g., Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 21–23 (2003); Risinger, *Unsafe Verdicts*, *supra* note 3, at 1288, 1295–96. But Professor Brazil makes a nice distinction between the justifications for adversariness in trial preparation and presentation, and those in regard to gathering of information. Brazil, *supra*, at 1349. I found this interesting because my wife and I have lately been pushing a similar position (in a slightly more radical form, perhaps) in regard to judicial control of investigation and discovery in criminal cases. See Risinger & Risinger, *supra* note 3, at 890–93. Professor Brazil conducted some of the early survey research on judge and lawyer opinions about discovery abuse. See, e.g., Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787. His work was cited to support positions that went further than he probably would have liked (a position I can definitely identify with), judging from the Vanderbilt article. See, e.g., Frank F. Flegal & Steven M. Umin, *Curbing Discovery Abuse in Civil Litigation: We’re Not There Yet*, 1981 B.Y.U. L. REV. 597, 600–01. For his sins, he was made a magistrate judge and spent two-and-a-half decades administering the discovery rules (and I am sure he did a great job of it). He has since retired and returned to academia as a professor of practice at Berkeley. *Wayne Brazil*, BERKELEY L., <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=13847> (last visited June 19, 2013).

being aware that there were forces afoot that were trying to make wolf hunting harder.

I should have paid more attention. I was too busy with other things, however, including a class action against the city of Philadelphia in which I was cocounsel for the plaintiffs in my copious spare time,<sup>54</sup> and, somewhat later, another substantial civil rights action involving the unjustified shooting of a black jogger by members of the Philadelphia police and the subsequent charges that were brought against him in order to cover up the circumstance of the shooting.<sup>55</sup> But something I did notice over these years was that I was getting contacted about the Rule 11 article<sup>56</sup> by people whom I would not have expected to be so excited about it—that is, various establishment figures who (I should have seen) perceived in the article the blueprint for a potential tool with which to defeat wolf hunts. The law of unintended consequences was getting set to rear its ugly head. But I still didn't quite get it. I was too flattered by the attention.

Almost immediately after the promulgation of the 1980 amendments, spurred on by the dissenting trio of Stewart, Rehnquist, and Powell, who had protested that those amendments had not gone far enough, the ABA Special Committee came back swinging with new proposals, most notably a renewed call to narrow the scope of discovery. The Advisory Committee went back to work, and apparently the alignments had changed, because the proposed changes they then put forth that ultimately became the 1983 amendments included many fundamental changes of the kind the ABA committee had sought.

I was still too small a fish to actually be involved in the rule revision process. I knew that the Advisory Committee was looking hard at various rule change

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54. *Ludwig v. Moak* (No. 2819, Aug. Term 1974, C.P. Phila.). This state class action involved the practice of the city of Philadelphia of towing cars, providing no hearing concerning the propriety of the tow until the adjudication of the underlying ticket, requiring a payment of forty dollars to retrieve the towed car in advance of such a hearing, and then refusing to refund the tow fee in the case of a discharge or acquittal of the underlying traffic offense that supposedly justified the tow. It wended its stately way through the court for over eight years before it settled, with the city agreeing to change its procedures to comport with constitutional requirements and to refund the towing fee to every class member who filled out a claim form. I must say that, looking back over my files from that period, I am surprised at the number of cases I was involved in as cocounsel, mostly civil rights cases, but others also. Publication pressures were less in that era and it seemed that continuing practical experience was an appropriate thing for an academic concerned with how things actually worked.

55. My colleague and friend Mark Denbeaux and I handled this case from very soon after the December 1979 shooting of William Bragton, through his acquittal in what might have been the longest attempted burglary trial in the history of the Philadelphia Court of Common Pleas, see Mike Leary & Michael A. Hobbs, *A Shot, a Tape and Justice: Man Accused of Burglary Is Freed*, PHILA. INQUIRER, June 4, 1980, at 1-A, through to the ultimate settlement of his civil rights action against the police and the city in 1984.

56. See Risinger, *supra* note 7; see also *supra* text accompanying notes 7–9.

recommendations that sprang from the ABA Committee, and also at an amendment to Rule 11, which the ABA Committee had not put forth. And I was now on the mailing list for drafts, and I was growing more concerned for one particular, perhaps idiosyncratic, reason. The initial draft of amended Rule 11 was accompanied by a note emphasizing that generally, assertions of a Rule 11 violation should not be addressed until disposition on the merits of the underlying pleading. Then that note disappeared. The final note indicated that prior decisions “have tended to confuse the issue of attorney honesty with the merits of the action” but then failed to indicate that ordinarily, the merits should be determined before honesty is addressed. That, coupled with the mandatory language concerning sanctions, gave me a bad feeling about how things were going to work in practice. Then, when they were finally promulgated, the new requirement that discovery not be “excessive” given the stakes of the case worried me. In early 1983, I was just beginning my representation of another person wrongly shot by the police, this time in Essex County, New Jersey, and I was a bit afraid that the defendants would say that he wasn’t hurt badly enough to justify all the dozen-and-a-half depositions I thought I needed. In the event, no such objection was forthcoming, but the signal given by the 1983 amendments and the process of their promulgation worried me. I feared that the signal sent was not evenhanded or symmetrical. To put it bluntly, I feared it was intended to be antiplaintiff, and particularly anti-wolf hunt, and that it would be so construed by the courts. And to me this was particularly concerning as more Reagan nominees came onto the bench, for reasons that ought to be sufficiently obvious by now.

The next five years went by in a blur. I was away visiting at the National University of Singapore for one of them, and my one major article in the period was about, of all things, just compensation under the Takings Clause of the U.S. Constitution.<sup>57</sup> And my involvement in another case (the Mayflower Madam case<sup>58</sup>) drew my attention to the weaknesses of handwriting identification and

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57. D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 SETON HALL L. REV. 483 (1985). This was another article growing out of a case, one which I undertook when I did not like the way the owners of the franchise at the gasoline station to which I went got trampled into the dirt when their premises were condemned. Professor Gideon Kanner keeps it alive in the literature singlehandedly, and I am grateful to him for that. See Gideon Kanner, “Fairness and Equity,” or *Judicial Bait-and-Switch? It’s Time to Reform the Law of “Just” Compensation*, 4 ALB. GOV’T L. REV. 38, 47 (2011).

58. The 1984 prosecution of Sydney Biddle Barrows (whose Biddle connection garnered her the sobriquet “the Mayflower Madam”) was a high profile case in New York. It was the subject of both a book, SYDNEY BARROWS WITH WILLIAM NOVAK, MAYFLOWER MADAM: THE SECRET LIFE OF SYDNEY BIDDLE BARROWS (1986), and a TV movie starring Candice Bergen, MAYFLOWER MADAM (USA Network television broadcast Nov. 15,



other traditional forensic identification sciences (and there were plenty of such weaknesses). And nothing that happened in those five years on the civil procedure front heartened me or renewed my waning interest. All my fears about Rule 11 (for which I felt some responsibility) seemed to be borne out.<sup>59</sup> And at best, the 1983 amendments and the new “get tough” managerial stance they represented solved few discovery problems but merely added a new layer of finger-pointing satellite litigation on top of them. And an increasing number of courts seemed intent on imposing pleading requirements that were clearly not authorized by the Federal Rules on civil rights and other cases that I favored but that were apparently increasingly disfavored by the courts.<sup>60</sup>

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1987). My involvement in the Mayflower Madam case (and how it led to my subsequent focus on handwriting identification and forensic science in general) is told in another memoir of sorts, in D. Michael Risinger, *Goodbye to All That, or a Fool's Errand, by One of the Fools: How I Stopped Worrying About Court Responses to Handwriting Identification (and "Forensic Science" in General) and Learned to Love Misinterpretations of Kumho Tire v. Carmichael*, 43 TULSA L. REV. 447, 449–52 (2007).

59. Many, myself included, saw the operation of the new Rule 11 as a blunt instrument that solved few problems and was often wielded against plaintiffs, particularly civil rights plaintiffs, early in the litigation before appropriate discovery could be had, with devastating effect. The satellite litigation that it fostered, sometimes involving dueling Rule 11 motions, seemed to be more of a problem than a solution. There was a burgeoning literature about the effects of new Rule 11, virtually all of it depressing. *See, e.g.*, STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 101–03 (1989). This study is the best empirical research on the effects of the 1983 version of Rule 11. It documents that (in the Third Circuit, at any rate) Rule 11 was invoked against plaintiffs twice as often as against defendants (66.7 percent of motions) and that plaintiffs' counsel were sanctioned at more than three times the rate of defense counsel (77.8 percent of sanctions levied were against plaintiffs' counsel). *Id.* at xiv. In addition, the rates for civil rights plaintiffs and their attorneys were much higher still. *Id.* While the final conclusions of the report found that “Rule 11 has had effects on pre-filing conduct of many attorneys [based on their self-reports] of the sort hoped for by the rule makers and has yielded other benefits,” and that the costs “do not appear to be clearly incommensurate with the probable benefits,” *id.* at 95, it conceded that the record with respect to civil rights actions was troubling and said that more attention should be given “to the possibility that the amended rule has a disproportionately adverse impact upon the poor,” *id.* at 100 (citation omitted). So the numbers told the depressing story I suspected, whatever other gloss was put on self-reported “positive” effects, which were objectively unquantifiable. Rule 11 was ultimately amended yet again in 1993 to remove the mandatory requirement of sanctions on any finding of violation and to soften the standards applicable to fact-based assertions when there was good reason to believe that discovery would yield support, a common circumstance in civil rights litigation, for instance. *See* FED. R. CIV. P. 11 advisory committee's note, available at [http://www.law.cornell.edu/rules/frcp/rule\\_11](http://www.law.cornell.edu/rules/frcp/rule_11). But by then I was gone.
60. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986). They were clearly not authorized until the Supreme Court did the same thing in *Twombly* and *Iqbal*, but that is another story. *See infra* note 80 and accompanying text.

I can't say for sure why the summary judgment trilogy upset me more than many other things that were happening in civil litigation. Perhaps it was because I viewed it as creating the ultimate in asymmetrical doctrines favoring civil defendants and because I thought I saw an even broader signaling of such an attitude by the Supreme Court just below the surface of the opinions.<sup>61</sup> At any rate, I generated a short article in the white heat of the moment, and it was published as part of a minisymposium volume of the *Brooklyn Law Review* on the fiftieth anniversary of the Federal Rules. Its title conveys its content: *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*.<sup>62</sup>

But for present purposes, the important piece in this minisymposium was not mine, but Judge Weinstein's. In writing about the effects of the Federal Rules since their promulgation, he captured more eloquently than I could exactly how I was feeling:

We have a right to a thrilling moment of self-congratulation as we contemplate the fact that in our federal courts we have come closer to making a reality of the right to equality before the law. Of course, many other factors besides the Rules were at work in making the courts more accessible to litigants: for example, a powerful civil rights movement, the expansion of the contingency fee, a huge growth in the power of the bar, and a genuine sense of devotion by most members of the legal profession to the principle that all Americans have the right to vindication of what the substantive law in theory affords. Law students, lawyers, judges and legislators have been celebrating this right to the freedom of the courts'

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61. See Bryan J. Holzberg, *High Court Encourages Summary Judgments*, LITIG. NEWS, Feb. 1988, at 1 (article about *Liberty Lobby*, *Celotex* and *Matsushita*). This problem of judges (and others) perceiving implied signals they take from Supreme Court cases is a fascinating one. I first broached this in the article referred to in the text:

I have heard one federal judge say in open court during the argument on a motion for summary judgment that "the Supreme Court has told us to make wider use of summary judgment to eliminate cases." That signal seems to have been widely read into the summary judgment trilogy, regardless of the legal unclarity of the opinions and the practical unclarity of the shifting majorities and dissents that these opinions represent.

D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 42 (1988) [hereinafter Risinger, *Another Step in the Counter-Revolution*].

This perceived signaling has been a particular problem, for example, in regard to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* is on its face transsubstantive, but the lower courts seem to have read into it only a concern for civil cases. See D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000).

62. Risinger, *Another Step in the Counter-Revolution*, *supra* note 61.

processes since shortly after the end of World War II. And we could easily afford the fiscal costs of this openness in our rich and ever more affluent society. Is this remarkable era of open courthouses and near equality before the law coming to a close? I do not know the answer to that intriguing question.

Some would say that in recent years the Rules have become less generous, and efforts and tendencies are now to leave the courthouse door in a less open position. Some might argue that the Rules should become stingier—that is, more law and less equity oriented—than they were at the outset. It is charged that like Dickens's Ebenezer Scrooge, the Rules are increasingly employed to hoard court access instead of sharing it, to exclude the poor instead of caring for them, and to punish the overzealous instead of educating them. If this is indeed what the future holds, I fear we will only return to a less egalitarian and less democratic time. The history of the struggle for our present Rules reflects our choices.

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The Federal Rules swung the courthouse door wide open. Their political implications are now obvious, though Taft, the conservative, might possibly have been disappointed in their secondary results. They struck the balance in favor of those who petitioned for redress of grievances, and somewhat shifted the burden onto those complained against to come into court and make a case. Class action and joinder rules made it economically feasible to prosecute small claims, though financing problems were not fully solved. The use of masters and magistrates enhanced the ability of the district judges to decide large complex cases of national importance. Plaintiffs flocked in as the substantive law, both state and federal, simultaneously expanded the set of claims upon which a case could be built.

Together with the continuing statutory limitations (only slightly eroded by case law) on intermediate appeals, which are a critical part of the federal practice, the Rules provided an immense shift towards increasing plaintiffs' capacity to enforce substantive rights and ultimately helped lead to an expansion of litigation in the federal courts. That growth in the main seems in retrospect highly desirable as it provided the basis for an enormous effort, almost a quantum jump, toward equality in fact.

In the post-World War II period, for a considerable number of years we were dedicated to and moving toward an egalitarian society, a society in which we thought the dream of equality before the law and

equal opportunity to enforce substantive rights was capable of conversion to real life. The huge expansion of productive capacity multiplied over and over again our country's enormous assets. The ability to expand the real income of our people each year led us to largely ignore the relatively small costs of resulting litigation.

In more recent years the slackened growth in our productivity and the relative weakening of our economic power vis-à-vis that of other nations has lent weight to the increasing pressure of conservatives to reduce access to our courts with the argument that the transactional costs are too heavy to bear. Increasing disparity of income has coincided with greater reluctance to continue the struggle for equality in the courthouse. The slowed growth in the economy coupled with the increasing amount of litigation has caused problems since the early 1970s, and one remedy for these problems has been to restrict access to the courts.<sup>63</sup>

Judge Weinstein ended on an upbeat note, celebrating what he saw as our legal system's "optimistic confidence that the people will use their political institutions for what is right and decent."<sup>64</sup> I was perhaps more pessimistic than Judge Weinstein, and the income inequality he identified as both driver and effect of the constricting changes in the Federal Rules is now much greater than it was when he wrote in 1988, so maybe I was on to something. For me, it appeared that the forces of counterrevolution were gaining ground and that ultimately the federal courts would become nothing more than venues where contending wealthy entities represented by counsel charging high hourly rates would fight over how to divide large sums of money. That is a respectable thing to be involved in, I suppose, but it didn't interest me. I was more and more drawn back (back because it was where I started in 1969) to the epistemic problems of our criminal justice practices, particularly, in the beginning (as a side effect of the *Mayflower Madam* case),<sup>65</sup> the weaknesses of prosecution-proffered claimed expertise and its impact on the accuracy of convictions. I was three-quarters of the way out the door as far as civil procedure was concerned, and a few years later I quit teaching the course, and I was completely gone, to fight on other fronts. As I have just indicated, I hung around in a somewhat desultory way through the early 1990s. The last dustup I remember paying any attention to was the surprising chorus of woe to the proposed obligatory automatic disclosure requirements in

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63. Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 3, 24-26 (1988) (footnotes omitted).

64. *Id.* at 29-30.

65. See Risinger, *supra* note 58.

the 1993 amendments to Rule 26. Somehow lawyers of all stripes seemed to perceive in this a threat to the adversary system itself, even though the information compelled would be asked for by any opponent of the least competence whatsoever. The silly season seemed to have arrived, and it was time to go.<sup>66</sup>

What were the main contending schools at my departure? I have already said that I should have seen three distinct positions, and I will stick with that. There were those, such as Judge Weinstein, who wanted to protect the original vision of the Federal Rules. There were those, such as Wayne Brazil, who believed that there were problems that ought to be solved by less adversariness and more management. And there were those who were looking to do away with the original vision. But as I was going out the door, there were more lenses that had been ground for viewing the perceived problems of civil litigation than fit comfortably into those three main themes. To name a few that particularly appeal to me, Steve Subrin argued persuasively that even the original vision represented the triumph of equity values over common law values and contained the seeds of destruction for what was of most value in the common law procedure tradition, specifically the jury trial.<sup>67</sup> Steve Burbank pushed back on Judge Weinstein's embrace of the original vision, saying in essence that the FRCP's original bestowal on federal judges of chancery power in all cases created a system that was only as good as the judges, which worked well with humane judges in the grand tradition, but as political selection generated different kinds of judges, could end up being driven by the kick of "the Chancellor's boot."<sup>68</sup> (I actually think that the proper image for the risks of the newly generated managerial structure was something more like "the bureaucrat's boot," but perhaps that is a quibble.) Rick Marcus reminded us all, in an elegant piece, to take a Rawlsian approach to rules changes, not an approach driven by personal or group interests in winning or losing, and as his title says, not to throw the baby out with the bath water.<sup>69</sup> And Professor Yeazell reminded us of the interconnectedness of

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66. The story of this odd and overheated debate is well told in Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13 (1994), and Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"*, 46 HASTINGS L.J. 679 (1995).

67. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). See also Rick Marcus's expansions on this theme, Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989) and his later similar observations on the effects of class actions, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995).

68. Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 31 (1988).

69. Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993). Professor Marcus has recently published his own walk down

procedural systems and, insisting as always on proper contextualization, suggested that the shift from pleadings to discovery as the center of civil actions had been the main factor in the rise of a settlement culture and the near disappearance of the jury trial.<sup>70</sup> From about that point, for me things fade to black.

So what has happened between then and now? What have I learned, through this exercise of looking back, about what I have missed? It has given me a chance to catch up on some of the writings of some of the friends and colleagues I left behind. I have enjoyed many of these a great deal and learned a lot. For instance, I was heartened to learn from Steve Subrin that even after the 1998 amendments, things adjusted in such a way that the dominant features of the American approach to discovery remained largely intact in practice.<sup>71</sup> But nothing I have read really tempts me to return. Things have in many ways gotten worse, as I feared they would. The Supreme Court's holding in *Exxon Mobil Corp. v. Allapattah Services, Inc.*<sup>72</sup> construing the effect of the Supplemental Jurisdiction Act,<sup>73</sup> coupled with the subsequent passage of the Class Action Fairness Act of 2005,<sup>74</sup> largely overruled *Zahn*<sup>75</sup> and made federal courts available for many Rule 26(b)(3) class actions once more,<sup>76</sup> but only because it was assumed, by the Class Action Fairness Act's sponsors at any rate,<sup>77</sup> that a federal forum was now better for defendants' interests than the alternative state fora that had developed for class actions in decades since *Zahn*. Worse yet, the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*<sup>78</sup> made it virtually impossible ever to touch a wolf who rips small amounts from large numbers in any court or other venue, state or

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roughly the same memory lane as that trodden in this article. See Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637 (2013).

70. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631. I do seem to like the work of a lot of Steves in this area.
71. See Subrin, *Discovery in Global Perspective*, *supra* note 51.
72. 545 U.S. 546 (2005).
73. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified at 28 U.S.C. § 1367 (2006)).
74. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d), 1453, 1711-15 (2006 & Supp. V 2011)).
75. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973); see *supra* text accompanying notes 28-32.
76. *Exxon Mobil Corp.* construed the Supplemental Jurisdiction Act to allow joinder of below-limit claims against a defendant as long as the claim of a single named plaintiff met the amount-in-controversy requirement. 545 U.S. at 558-59. The Class Action Fairness Act allowed aggregation of claims as long as the total amount in controversy was in excess of five million dollars. 28 U.S.C. § 1332(d)(2). Of course, this combination still excluded the possibility of a federal forum when no individual claim met the amount in controversy and the total damages were less than five million dollars.
77. This was George W. Bush's first major piece of legislation, fulfilling a campaign promise to business groups and supporters of "tort reform." See *Class Action Fairness Act of 2005*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Class\\_Action\\_Fairness\\_Act\\_of\\_2005](http://en.wikipedia.org/wiki/Class_Action_Fairness_Act_of_2005) (last visited June 19, 2013).
78. 131 S. Ct. 1740 (2011).

federal, as long as the wolf has imposed a combined arbitration clause and anti-class action clause in the fine print of its adhesion form.<sup>79</sup> And then there are *Twombly*, *Iqbal*, and crew.<sup>80</sup> And yet. And yet.

And yet some good work still gets done, some wolves in some places still get brought to book in federal court.<sup>81</sup> I know this is true, but I'm not sure why. Now you have to understand, everything I know about civil procedure in the couple of decades that I didn't read in the last month, or in the *New York Times*, I get from my colleagues, and I am blessed with a superior bunch of them.<sup>82</sup> It was Adam Steinman who suggested that the reason for such occasional continued successes in the kinds of cases that most interest me is that there is still enough discretion at the district court level that judges who are inclined to allow such can do it, and there still are a significant group of them that do.<sup>83</sup> Good on 'em, I say. Bless them. Long may they wave.

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79. This is because *Concepcion* is a construction of the Federal Arbitration Act, which is applicable under the Supremacy Clause of the Constitution even to state courts. *Id.* at 1747. Arbitration clauses are one reason for the virtual disappearance of the jury trial in consumer actions, an area where a role both for the jury and for public knowledge through open proceedings can be viewed as a positive good. I am told that people in what used to be called "alternative dispute resolution" no longer favor that name as applied to some areas, as it is no longer "alternative," but the norm. It is the jury trial that has become "alternative dispute resolution," when it can be resorted to at all.
80. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The obligatory readings on the return to fact pleading include Edward A. Hartnett, *Taming Twombly: An Update after Matrixx*, 75 LAW & CONTEMP. PROBS. 37 (2012), Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010), Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010), and Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010).
81. One interesting unintended consequence of the Class Actions Fairness Act (which was primarily aimed at authorizing removal to federal courts by defendants) appears to be that more plaintiffs' lawyers have taken advantage of filing in federal court than was anticipated. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 12-13 (2008) ("The post-CAFA increase in diversity class actions has not been driven primarily by removals."). So some plaintiffs' lawyers continue to perceive a federal venue as a good venue.
82. I will point out only four, Timothy Glynn, Edward Hartnett, Denis McLaughlin, and Adam Steinman, not only because they are distinguished but because they agreed to help make sure I didn't make a fool of myself about the last twenty years. (I also have received similar service from Charlie Sullivan, who doesn't teach civil procedure very often, but keeps up with it better than I do in the course of staying preeminent in the area of employment discrimination.)
83. The Supreme Court's recent and tragic decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), upholding contract-of-adhesion arbitration clauses that prescribe any kind of aggregation even when the effect is to render any attempt to challenge and remedy the unjust enrichment resulting from the complained-of predatory actions economically nonviable, has made the job of these fine folks much harder, but I trust that they will continue to find ways to do justice even in the face of such difficult precedents.