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THE INTEGRATION OF LAW AND FACT
IN AN UNCHARTED PARALLEL
PROCEDURAL UNIVERSE

*Stephen N. Subrin**
Thomas O. Main†

PREFACE¹

I heard about David Shapiro a very long time ago. My older brother, Bert, and David were classmates at Harvard College and Harvard Law School. Somewhere along the way I heard that David was an outstanding student in both of Bert's classes; I later heard—and observed—that David was among the most accomplished and thoughtful professors at Harvard Law School. When David, as a Deputy Solicitor General, later argued one of my brother's cases before the Supreme Court of the United States,² I discovered, as did so many others, that David ranks as one of the great appellate advocates in our

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† Associate Professor of Law, University of the Pacific McGeorge School of Law. Thom thanks Craig Carnes, Ben Palmer, and Annie Smith for their excellent research assistance.

We also thank Steve Burbank and Bert Subrin for their helpful comments on an earlier draft of this Article. And we are grateful to the many lawyers we interviewed, several of whom are thanked separately at *infra* notes 12–13. Mistakes, of course, should be credited only to us.

1 Written by Steve Subrin.

2 My brother had been head of the Office of Representation Appeals at the National Labor Relations Board. He utilized a section of the National Labor Relations Act that gives the Board rulemaking authority. The Board's rule with respect to unit determinations for acute care hospitals was unanimously upheld in a case David argued before the Supreme Court. *See American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619–20 (1991). One seeking to learn how best to make appellate arguments might wish to read David's argument in this case, and then note how frequently the Supreme Court opinion tracks his persuasive arguments and answers to questions.

country. That he could talk a majority of the Court into the *Finley*³ decision still astonishes me.

What an honor to be asked by Jay Tidmarsh to contribute to a volume dedicated to David. Of course, I instantly agreed. But, as a younger brother, I learned early on to seek help when necessary. I thought that by asking Thom Main, my former student, to write the Article with me, I could accomplish two goals at once: first, I would receive the assistance I needed, and second, I could, in some small measure, try to carry on David's tradition of participating in the careers of younger scholars.

Some younger brothers also learn not to confront their elders on their strongest ground. By no means would we dare to confront David with the type of article he would write. David is apt to narrow his topic so that he can thoroughly explore it, and back up his conclusions with extensive evidence, carefully constructed arguments, refuted counterpropositions, and meticulously culled citations. In his article about Rule 16, he explained that his "inclination, when confronted with a cosmic question, is to try to particularize it by looking at an important instance of the problem—to see whether light from one corner can help illuminate the whole room."⁴ Thom and I have wanted to write about a topic that has recently perplexed us, but about which there is very little exploration, or even recognition, in the legal literature, whether statutes and rules, judicial opinions, law review articles, or empirical studies. We find ourselves suspecting that something important has developed. And, in stark contrast to David's approach, we gaze into a dark room, with only a dim flashlight, and try to infer the presence of an elephant, or at least a squirrel.

Few law professors have been as able as David Shapiro to combine the conceptual and practical aspects of the world of law. He will, we hope, appreciate our effort to discern what lawyers are actually doing in the world of civil procedure, which he has so effectively studied and taught. Moreover, David's generosity of spirit is likely to be as bemused and forgiving as critical. And perhaps we will have provided him with a slightly different procedural world to explore in the fifth decade of his notable journey as one of the truly remarkable American lawyers and law professors.

3 *Finley v. United States*, 490 U.S. 545 (1989); see also 28 U.S.C. § 1367 (2000) (overruling the principal holding of *Finley*). See generally David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211 (1998) (attempting to explain the remarkable result in *Finley* and recounting the unexpected results of the Court's decision). But I remain astonished.

4 David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).

INTRODUCTION

In this Article we suggest that there are two distinct yet related systems that simultaneously process civil litigation. One of these is the formal system of procedural rules and doctrine that govern pleadings and motion practice in state or federal courts. The other system has no procedural rulebook, is largely ignored in law schools, and is seldom mentioned by judges. Yet it is a methodical and logical system that civil litigators are aware of and, increasingly, rely upon as a necessary complement to the formal system. This dichotomy poses an interesting challenge for federal practice and procedure in the new century.

Our focus is on the universe of correspondence and other materials that flow between adversaries but seldom appear in the pleadings, motions, or other papers contemplated, ordered or even received by any formal procedural system. We have observed that many civil litigators, particularly those representing plaintiffs, seem to find it both desirable and necessary (in order to achieve optimum results for their clients) to prepare various written documents, notebooks, and even videos containing narratives that integrate the law and facts of their cases in ways that may persuade their relevant audiences—the opposing lawyer, the opposing lawyer’s client, their own client, insurance companies, and mediators. These advocacy materials appear in myriad forms, including demand letters,⁵ other settlement correspondence,⁶ notebooks,⁷ mediation statements,⁸ edifying brochures,⁹ and documentary videos.¹⁰ Depending on the context, we refer to this genre at various times as “advocacy materials,” “integrated advocacy statements,” and “integrated law/fact documents.” Although we rec-

5 We are not referring to pro forma demand letters that might be issued pursuant to negotiable instruments, demands for arbitration, or demands by shareholders for an accounting. See *infra* notes 97–103, 107 and accompanying text.

6 We understand that attorneys will often send a second—and more evolved—demand letter at a later stage in the case. This category of other (settlement) correspondence may also include a defendant’s written response to a demand letter. See *infra* text accompanying note 105.

7 We are referring here to binder(s) of several documents, such as an integrated law/fact narrative, proof of damage information, expert reports, potential exhibits, and the like. See *infra* notes 107, 112–13 and accompanying text.

8 See *infra* notes 116–17 and accompanying text.

9 See *infra* note 100 and accompanying text.

10 See *infra* notes 101–03 and accompanying text. These would also include the day-in-the-life videos that are more often associated with trial testimony. Such videos “show a plaintiff’s struggle with daily activities, such as dressing, bathing, eating, and therapy.” VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 178 (2d ed. 1999).

ognize that pleadings, motions and other papers filed with courts may occasionally contain integrated narratives of law and fact, we were intrigued because the procedural rules of the formal system seldom require it. And although we recognize that lawyers have long used demand letters, trial notebooks shared with opposing counsel, and other such devices, we were impressed by the increasing complexity, diversity, popularity and significance of these advocacy materials in contemporary practice.

What evidence do we have this phenomenon is happening? We have drawn upon our own experience.¹¹ We have formally interviewed over a dozen litigators.¹² We have also drawn considerably upon the knowledge of our friends and former students who are practicing lawyers.¹³ We have picked up a few clues in the literature—particularly in articles and books that are targeted to the practicing bar.¹⁴ We have also concluded that our observation is consistent with what one might expect to find upon consideration of current procedural rules when compared with previous procedural regimes.¹⁵

This Article is both descriptive and normative. We describe what we have learned about the parallel procedural universe; we also suggest that if this phenomenon of lawyer utilization of non-rule prescribed advocacy materials is in fact taking place and growing, as we surmise, it is a positive development in civil litigation. In Part I, we examine the integration of law and fact in the context of formal procedural systems. In Part II, we offer examples of integrated advocacy statements from the parallel procedural universe, and explore why and how we think that universe is developing. And finally, in Part III, we ponder some of the implications and repercussions of this expanding parallel universe.

11 Steve was a trial lawyer and partner at Burns & Levinson in Boston. Thom practiced in the trial department at Hill & Barlow, also in Boston. Both of us have consulted on various litigation matters since joining academia.

12 In particular, we wish to thank California attorneys Louis Anapolsky, Holly Harman, Thomas Knox, Hayne Moyer, Michele Riemer, Mark Storm, Charles Tweedy, and in Massachusetts, Ed Barshak (and many others in the firm of Sugarman, Rogers, Barshak & Cohen), Lori Jodoin, Natasha Lisman, Burt Nadler, Jeff Petrucelly, and Jeff Stern. These lawyers and other attorneys in their respective firms offered thoughtful insights and contributions to this Article.

13 For example, Steve spoke at length with his former partner, Erik Lund, at Posternak, Blankstein & Lund, Boston, and his former student, Matt Belanger of Faraci & Lange, Rochester, N.Y. Thom spoke with his former colleague, Bruce Falby, at Piper Rudnick, Boston, and his former student, Darrin Marx, of Hughes Hubbard, Los Angeles.

14 See *infra* notes 99–103 and accompanying text.

15 See *infra* notes 23–73 and accompanying text.

I. THE FORMAL PROCEDURAL UNIVERSE

For centuries in England and the United States, the process of civil litigation has assumed four principal functions. These have taken many forms over time and have worn many labels but, in honor of David, we identify them as: diagnosis, declaration, discovery, and disposition. The last three of these four are likely obvious: parties to formal litigation typically must *declare* some law and facts to initiate or to defend a lawsuit; the litigation process typically includes some form of *discovery* of information whether by investigation, informal exchange of information, or more formal means; and the *disposition* of cases may be effected upon agreement of the parties or as part of a formal proceeding before the court. The *diagnosis* function, however, is more subtle.

Central to our thesis here is the question when and how, in civil litigation, lawyers apply the law to the facts and how they communicate their application to their opponents. A foundational principle of virtually any legal system is to provide substantive rules that, with varying degrees of definiteness, prescribe the legal consequence of certain conduct.¹⁶ Facts trigger legal consequences: if *B* intentionally strikes *A*, absent consent, the law declares it a battery; if proven, *A* can recover damages. At some point or other in the litigation process, a *diagnostic* exercise must occur whereby the law and the facts are meaningfully integrated into a provable narrative.

As demonstrated in legal as well as other contexts, humans attempt to understand reality by identifying some of the many variables in a given situation and then weaving them into a comprehensible story.¹⁷ The eminent psychologist, educator, and researcher Jerome Bruner suggests that the narrative “gives shape to things in the real

16 See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971):

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a “legal system,” social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.

17 Law school exam answers offer an interesting example of this exercise. Students are graded on their ability to reassemble the facts without distorting or destroying them, and then distinguish or analogize the law in order to make an intelligent integration. See generally Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69 (2003) (advocating the teaching, studying, and critiquing of law school exam writing).

world and often bestows on them a title to reality.”¹⁸ James Boyd White, a father of the American Law and Literature Movement, differentiates between “discordant modes of thought and expression, these incompatible, uncommunicating sides of oneself”—“the mind that tells a story” and “the mind that gives reasons.”¹⁹ White proposes that it is central to the lawyer’s craft to master “both sorts of discourse (both narrative and analysis) and put them to work, at the same time and despite their inconsistencies, in the service of a larger enterprise.”²⁰

David Berg, a trial lawyer, puts it more directly in telling about advocacy before juries: “As plaintiffs, we tell a story. As defendants, we destroy that story and, if possible, tell a more plausible one of our own. . . . Our job is to persuade. Simplifying the story, telling it with absolute clarity of thought, is the key to convincing jurors of anything.”²¹

Still more succinct: “The best story wins.” Such was the guidance attributed to John Quincy Adams in a line in the movie, *Amistad*.²²

For most lawyers the diagnostic exercise occurs instinctively as they hear their client’s story. Internal memoranda and conversations and correspondence with the client reflect this mindset from the outset of a case. Indeed, in the competitive market for legal services, an integrated narrative of the case is often prepared for the benefit of a putative client as part of the effort to obtain the client’s business. And, of course, diagnosis is important to lawyers when drafting pleadings, conducting discovery, arguing motions and, ultimately, trying

18 JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 8 (2002); see also MERLIN DONALD, ORIGINS OF THE MODERN MIND: THREE STAGES IN THE EVOLUTION OF CULTURE AND COGNITION 256–58 (1991) (describing the evolution of human cognition as a transition from pre-linguistic ritualistic cultures to mythic cultures involving stories and symbols to finally the modern use of reading, writing, and external memory such as computer technology); VICTOR TURNER, FROM RITUAL TO THEATER: THE HUMAN SERIOUSNESS OF PLAY 18 (1982) (discussing the role of drama as a means for the “inter-cultural transmission of painfully achieved modalities of experience”).

19 JAMES BOYD WHITE, THE LEGAL IMAGINATION 859 (1973), cited in Shulamit Almog, *From Sterne to Borges to Lost Storytellers: Cyberspace, Narrative, and Law*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 5 (2002).

20 *Id.* at 859.

21 David Berg, *The Trial Lawyer*, LITIGATION, Spring 2000, at 6, 7.

22 AMISTAD (Universal Studios 1997) (“In the courtroom, whoever tells the best story wins.”), quoted in Clark D. Cunningham, *But What is Their Story?*, 52 EMORY L.J. 1147, 1151 (2003); see also Lee L. Bennett, *Defense Community Issues: New Liabilities and How to Respond to the Plaintiffs’ Bar*, 69 DEF. COUNS. J. 273, 280 (2002) (“One of the basic rules of litigation is: ‘Whoever tells the best story wins.’ And the ability to simplify a mass of evidence and weave it into a coherent storyline cannot be underestimated.”).

cases. Yet the documents exchanged and filed in our formal litigation system do not necessarily contain a meaningful diagnosis; rare is the pleading, motion, or other paper with a fully integrated narrative of law and fact about the case. This anomaly is a relatively recent phenomenon.

We review these four functions of process, first, within the context of the historical foundations of the common law. In the early English system, writs declared the underlying essential facts. The name of the writ identified the type of story, the legal consequence, and the procedure to be followed.²³ Discovery, in the early years, occurred informally, by asking the clients and neighbors what happened; indeed, so far as we can tell, neighbors with information were also jurors deciding the case.²⁴ Disposition occurred at the pleading stage by plea or demurrer, by a trial verdict, or through settlement.²⁵ But our primary focus is on the diagnostic aspect of procedure, especially as each party's integration of law and fact is communicated to opposing counsel.

The common law system almost automatically accomplished the diagnosis: the formal procedures integrated law and fact. From the very initiation of the action, the writ system itself forced plaintiff's counsel to place, if not torture, his situation into a writ cubbyhole.²⁶ Extremely limited joinder and the search for a single issue further circumscribed the dispute, and forced the application of law to fact.²⁷ With a dispute that was necessarily focused by the underlying procedural schema, we surmise that settlement discussion was frequently com-

23 See generally JAMES FOSDICK BALDWIN, *THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES* 62 (1913) (referring to the common law's "formulaic procedure"); F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 4 (A.H. Chaytor & W.J. Whittaker eds., 1936) ("'[A] form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment.").

24 See JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 953, 955 (8th ed. 2001); FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 3.2, at 182 (5th ed. 2001).

25 See R. ROSS PERRY, *COMMON-LAW PLEADING: ITS HISTORY & PRINCIPLES* 231-94 (Boston, Little, Brown & Co. 1897) (explaining the rules and mechanics of issue pleading).

26 See Sherman Steele, *The Origin and Nature of Equity Jurisprudence*, 6 AM. L. SCH. REV. 10, 10-11 (1926):

In accordance with its technical mode of procedure, every species of legal wrong was supposed to fit into some one of a limited number of classes; for each class an appropriate remedy was provided, obtainable only by the use of some one of a limited number of "forms of action."

27 See JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* § 292, at 532 (1969) ("The reduction of the controversy to Issues is the great Object of Pleading.").

mon and straightforward. For indeed, the practicing bar was small, and thus the barristers were well known to each other;²⁸ there are no empirical studies to confirm that all of this happened as neatly and tidily as we have described it, but neither is there evidence to the contrary.²⁹

As a dominant procedure integrated law and fact in the law courts, a broad substantive mandate integrated law and fact in equity.³⁰ In the earlier stages of equity, there were no technical procedural requirements;³¹ petitions declared a story of facts and perceived unfairness justifying some formal intervention or relief.³² Limited discovery could occur.³³ And chancery disposed of the petition as equity and good conscience demanded.³⁴ We know that the proliferation of parties and issues could make resolution more complicated, less pre-

28 See PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* 70–85 (1992) (describing the development of the legal profession in the twelfth through fourteenth centuries); J.H. Baker, *Counsellors and Barristers: An Historical Study*, 27 *CAMBRIDGE L.J.* 205 (1969) (discussing the historical relationship between barristers and other branches of the legal profession).

29 See J.H. BAKER, *THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY* (2001) (arguing that lawyers' law comes from outside the formal sources such as statutes and reported cases).

30 See generally Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 *WASH. L. REV.* 429, 454–59 (2003) (describing the integration of substance and procedure in English common law courts prior to Blackstone).

31 See Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 *HARV. L. REV.* 834, 854 (1918) ("Less exactness of pleading was required than by the law, and even if a bill were 'misconceived' the complainant was not out of court."); Roger L. Severns, *Nineteenth Century Equity: A Study in Law Reform*, 12 *CHI.-KENT L. REV.* 81, 89 (1934) ("No form was necessary and no strict procedure had to be followed."). Over time, however, equity procedure became more complicated. See generally CHARLES A. KEIGWIN, *CASES IN EQUITY PLEADING* (2d ed. 1933) (describing the evolution of equity pleading through an analysis of cases); 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* § 13, at 13–14 (Boston, Little, Brown & Co. 1857) (describing the vast discretionary powers held by the courts); Melvin M. Johnson, Jr., *The Spirit of Equity*, 16 *B.U. L. REV.* 345, 350 (1936) ("Equity became handcuffed by a rigorous body of rules and concepts.").

32 See William F. Walsh, *Equity Prior to the Chancellor's Court*, 17 *GEO. L.J.* 97, 106 (1929) ("The bill [in equity] was generally in simple form, without formality, and free from the technical rules which applied to writs.").

33 Included as part of the bill in equity, for example, could be a series of interrogatories intended to obtain discovery in aid of the plaintiff's case. See JOHN ADAMS, *THE DOCTRINE OF EQUITY* 306 (Robert Ralston ed., Philadelphia, T. & J. W. Johnson & Co. 1890).

34 See 1 JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 385, at 524 (San Francisco, Bancroft-Whitney Co. 2d ed. 1892) ("[I]t is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based

dictable, and in some instances, unlikely or impossible.³⁵ (Think *Bleak House*.³⁶) But throughout the stages of declaration, discovery, and disposition, the broad substantive mandate of Equity focused the court on an integrated story of law and fact in a manner that demonstrated that the story was not remediable by the law courts.³⁷

We know that the early American legal systems adopted modified versions of the complementary systems of law and equity.³⁸ The law courts featured writs, single-issue pleading, and juries.³⁹ Hence the procedural rules forced some integration of law and fact. And suits in equity were decided in accordance with the principles and practice of equity jurisdiction as established in the High Court of Chancery in England.⁴⁰ Practicing within these systems was a relatively small prac-

upon conscience and good faith.”); Main, *supra* note 30, at 440–59 (discussing the differences in form between common law courts and equity/chancery courts).

35 See HENRY L. MCCLINTOCK, *HANDBOOK OF EQUITY* § 12, at 15 (1936) (“Because of the numerous parties and intermingled issues, a jury trial in many suits in equity would be a practicable impossibility . . .”).

36 See CHARLES DICKENS, *BLEAK HOUSE* (Morton Dauwen Zabel ed., Houghton Mifflin Co. 1956) (1853). Some scholars have suggested that Dickens’s negative depiction of equity is exaggerated. See generally WILLIAM S. HOLDSWORTH, *CHARLES DICKENS AS A LEGAL HISTORIAN* (1929) (examining the underlying legal themes abundant in Charles Dickens’s works).

37 See ADAMS, *supra* note 33, at 302–03 (“It must state the case in direct terms and with reasonable certainty; not necessarily with the same technical precision as at law, but with sufficient precision to show that there is a definite equity.”). That equity required the petitioner to show that there was “no adequate remedy at law” also encouraged an early integration of law and fact in order to meet this requirement. See ELIAS MERWIN, *THE PRINCIPLES OF EQUITY AND EQUITY PLEADING* § 60, at 29 (Cambridge, Riverside Press 1895) (“[E]quity will not take jurisdiction whenever there is a plain, adequate, and complete remedy at common law.”); Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 29 (1919) (“It was not . . . until the law courts began to administer justice in a more fixed and certain manner that the equity courts adopted the rule that they would not take jurisdiction where there is a complete, adequate and plain remedy at law.”).

38 See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 39–42 (1952) (discussing the adoption and later modification of the English legal system by American colonies); WILLIAM F. WALSH, *OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW* 68–77 (1923) (describing the feudal origins of the various types of English courts); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 926–29 (1987) (examining the pre-twentieth century mentality concerning civil procedure in America).

39 Subrin, *supra* note 38, at 914–18.

40 Law and equity were administered on different “sides” of the federal court. See Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 287 (1927). For the early history of equity in the colonies and in the state courts, see Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, in 2 SELECT ESSAYS IN

ting bar and, thus, again, the integration of law and fact was a natural occurrence.⁴¹ Indeed, the biographies of nineteenth century lawyers leave one with the impression that the settlement of cases was not burdened by an inability of opposing lawyers (who knew one another well) to talk intelligently about their cases in a way that integrated law and fact.⁴² Moreover, because many cases were tried, the integration of law and fact would often also have occurred in open court.⁴³

The story of code reform in the mid-nineteenth century is now fairly well known.⁴⁴ Much like the writ system, the codes narrowed the

ANGLO-AMERICAN LEGAL HISTORY 779 (Ass'n of American Law Schools ed., 1908); Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 21-24 (1923).

41 See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 309 (2d ed. 1985) ("Since many lawyers had no settled relations with definite clients, and since so much of practice was litigation, their lives were spent in close contact with other lawyers, as colleagues, friends, and friendly enemies.").

42 See, e.g., JOHN T. RICHARDS, *ABRAHAM LINCOLN: THE LAWYER-STATESMAN* 16, 17 (photo. reprint 1999) (1916) (recounting the familiarity and congeniality of lawyers, judges, and clients with each other in Lincoln's time when the Circuit Court in any county was on session). For a similar theme, see HENRY C. WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN*, 39-71 (photo. reprint 2001) (1892) (detailing Lincoln's life as an attorney on the Eighth Circuit). Most trial lawyers must have known each other in any given community in the mid-nineteenth century. For example, in 1840 there were only a total of 215 lawyers in Suffolk County, Massachusetts (which includes Boston) and eighty-two lawyers in Middlesex County, Massachusetts (which includes Cambridge). Barnstable County, which includes Cape Cod, had a total of eight lawyers. Gerald W. Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, reprinted in *ESSAYS IN NINETEENTH-CENTURY AMERICAN LEGAL HISTORY* 622, 627 (Wythe Holt ed., 1976). Similarly, the *Sacramento City Directory for the Year 1851* identifies fifty-four lawyers. J. HORACE CULVER, *SACRAMENTO CITY DIRECTORY FOR THE YEAR 1851*, at 46 (photo. reprint 2000) (1851).

43 Some studies suggest very high trial rates for American courts in the nineteenth century. Indeed one study suggests that as many as half of certain types of cases were resolved at trial. See Wayne McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 *LAW & SOC'Y REV.* 823, 838-46 (1980-1981) (describing the changes in case disposition in civil law cases from 1820-1970); see also Clinton W. Francis, *Practice, Strategy and Institution: Debt Collection in the English Common-Law Courts, 1740-1840*, 80 *NW. U. L. REV.* 807, 872 (1986) (comparing English and American trial rates).

44 See CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 15-22 (1928) (offering a brief history of the development of code pleading); Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 *CORNELL L.Q.* 238 (1942) (providing a chronological enumeration of the New York Code of Procedure Commissions); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 *LAW & HIST. REV.* 311 (1988) (using the history of the Field Codes to dispel misconceptions about modern rules of civil procedure).

scope of cases and thereby limited the quantum of law and fact to be integrated. For example, although the Field Code permitted some joinder of claims and parties,⁴⁵ judges often forced a single theory upon plaintiffs.⁴⁶ Moreover, the codes required plaintiffs to state "the facts constituting the cause of action."⁴⁷ Plaintiffs were required to plead facts supporting each element of their cause(s) of action.⁴⁸ The standard narrowed the dispute because causes of action for which there was no factual support at the pleading stage could be disposed of as early as the pleading stage. And for cases that survived the pleading stage, the parties and the court had the benefit of a complaint that stated, or at least was supposed to state, the facts in support of each element of a single cause of action; this might provide some effective integration of law and fact. Of course, it is not entirely clear whether what we have called "diagnosis" actually occurred in practice. Indeed, Professor Steve Burbank tells us that Edson Sunderland, a Michigan Law School professor who was instrumental in drafting the Federal Rules of Civil Procedure and was an astute observer of pre-Federal Rule procedure and practice,

was firmly of the view that existing procedural systems for actions at law in this country conduced to the needless and prolonged consumption of resources, including judicial resources at trial—"economic extravagance"—as a result of the absence of tools by which the parties and the judge could determine the factual basis for a pleader's allegations and denials and the issues actually in controversy prior to trial (or for purposes of settlement).⁴⁹

45 Under the Field Code, plaintiffs could be joined if they had "an interest in the subject of the action, and in obtaining the relief demanded," and defendants if they had "an interest in the controversy, adverse to the plaintiff." 1848 N.Y. Laws 379 §§ 97-98. Several identified causes of action could be joined if the "causes of action . . . equally affect[ed] all the parties to the action." *Id.* § 143.

46 See Subrin, *supra* note 38, at 940.

47 1848 N.Y. Laws 379 § 120(2) (reorganized as 1849 N.Y. Laws 438 § 142); see also 1851 N.Y. Laws 479 § 142 (requiring a "plain and concise statement of the facts constituting a cause of action").

48 Naturally there were arguments over what was a fact, an ultimate fact, evidence, or conclusion of law. See Subrin, *supra* note 38, at 941. There was very little pretrial discovery. Subrin, *supra* note 44, at 332-33.

49 Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah?*, 3 J. EMP. LEGAL STUD. (forthcoming 2004) (prepared for the Symposium on the Vanishing Trial, San Francisco, California, Dec. 12-14, 2003) (citing Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 872-73 (1933)).

The dawning of the twentieth century brought a wave of reform to American procedure.⁵⁰ Advocates for a less onerous civil procedure urged the adoption of rules that would impose few or no technical requirements,⁵¹ give judges broad discretion to administer cases,⁵² and subordinate procedure to substance.⁵³ For example, with regard to pleading obligations, reformers thought that litigants should be permitted to tell their stories largely as they saw fit.⁵⁴ This system looked to equity for a model of relaxed narrative (or hardly a narrative at all if one examines the forms attached to the Federal Rules⁵⁵), liberal joinder of claims and parties, and some form of discovery.⁵⁶ Charles Clark, the major draftsman of the Federal Rules of Civil Procedure, outlined the evolution in pleading in the second edition of his treatise on code pleading, published in 1947:

Under the common-law system the pleadings were expected to formulate the issue to be tried. The original ideal was that the plead-

50 See Subrin, *supra* note 38, at 943–75 (focusing on the contributions of predominant equity proponents in the early twentieth century).

51 See *id.*

52 See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1323 (1935):

In fact if the vital provisions for a completely united procedure with clear specifications as to jury trials and waiver thereof are adopted, and if flexible rules as to pleadings and parties, leaving much to the discretion of the trial court, are drafted, we shall feel that the reform is assured of success, whatever the detailed provisions may be.

Id.; Roscoe Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 388, 402 (1910) (“It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and such discretion should be reviewable only for abuse.”).

53 See Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 438 (1910).

[A]fter a period of rigidity in practice, in which substance has been sacrificed to form and end has been subordinated to means, we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machinery of justice shall be restrained by and made strictly to serve the end for which it exists.

Id. See generally Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) (noting a trend in procedural rules toward undue rigidity at odds with developing substantive law).

54 See generally Subrin, *supra* note 38, at 943–75 (focusing on the contributions of the predominant equity proponents of the early twentieth century).

55 See, e.g., FED. R. CIV. P. app. of forms, form 9.

56 See generally Subrin, *supra* note 38, at 943–75 (describing how and why proponents of uniform federal procedural rules looked to equity procedure and thought for their model).

ings should disclose the material facts of the case. The modern view is that the pleadings should give fair notice of the pleader's case to the opposing party and to the court.

Simplified pleading is not alone sufficient to provide the basis for complete, as well as effective, adjudication of disputes; it should be employed in an action made broadly inclusive of all issues between the immediate parties, as well as allied issues involving other parties who may be brought before the court.⁵⁷

So, when, in this brave new procedural world, would the diagnostic function of civil procedure take place? Or, put another way, when would the parties integrate law and fact to advocate and persuade? The demurrer had become the "12(b)(6) motion to dismiss,"⁵⁸ and the *Dioguardi v. Durning* and *Conley v. Gibson* decisions confirmed the dubious utility of this motion.⁵⁹ In *Conley*, for example, the Court held "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁶⁰ Consistent with the liberal regime of notice pleading, the motion to dismiss presented but a minimal threshold for specificity in pleading—requiring nothing resembling a meaningful integration of law and fact.⁶¹

In these pre-*Celotex*⁶² days, the motion for summary judgment was discouraged. The Supreme Court in *Adickes* provided what appeared

57 CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING 54 (2d ed. 1947).

58 See also FED. R. CIV. P. 7(c) ("Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.").

59 See *Conley v. Gibson*, 355 U.S. 41, 45–48 (1957); *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

60 *Conley*, 355 U.S. at 45–46.

61 See Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 948 (1990). Blaze's article describes that, under the original scheme of the Federal Rules, pleading plays a relatively unimportant and limited role in the litigation process. The complaint operates only to initiate the process and to identify the nature of the dispute. The rules are crafted to insulate the pleading phase of litigation from any involvement in substantive resolution of the merits, except in limited and narrowly defined circumstances.

Id.; see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 75 (2d ed. 1990) (remarking that "a sixteen year-old boy could plead under these rules") (quoting AM. BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220 (1938)).

62 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). One study concluded that, prior to *Celotex*, approximately 1.5% of all federal cases were disposed of by summary judg-

to most as an extremely rigorous test for achieving summary judgment.⁶³ Some appellate courts basically advised the lower courts not to grant them.⁶⁴ As a sign in a courtroom in New Orleans said, "No spitting. No summary judgments."⁶⁵ Accordingly lawyers found themselves, in some cases, with many claims, myriad issues, extensive discovery, undigested facts, and no formal law/fact analysis. Indeed, prior to the days of the mandatory pretrial conference, it may not have been customary practice even to provide a trial memorandum to the court or the other side.⁶⁶

ment. See William P. McLaughlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427, 449-57 (1977) (detailing a study based on cases filed in United States District Court for the Northern District of Illinois, Eastern Division, for the fiscal year ending June 30, 1970). Professor Stephen Burbank concludes, in a forthcoming article, that the empirical evidence shows that summary judgment began to take a more prominent role at least a decade prior to *Celotex* and the "trilogy" of Supreme Court summary judgment opinions. See Burbank, *supra* note 49.

63 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970) (requiring movant to proffer affirmative evidence to conclusively negate an element of the plaintiff's cause of action in order to obtain summary judgment); see Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612, 614 (1971):

[C]ourts seldom rely on summary judgment to decide cases involving complicated or voluminous evidence, especially when the legal question is novel or significant. As a result, it has been recognized that although Rule 56 is available in all types of litigation, there are certain types of cases that by the nature of the issues involved do not lend themselves to summary adjudication.

64 See *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487-88 (2d Cir. 1952) (stressing the importance of oral testimony in equity actions); Gerard L. Goettel, *From the Bench: Appellate Factfinding—and Other Atrocities*, 13 LITIGATION 7, 7 (1986) ("[T]he appellate courts have made summary judgment impotent."); see also Glenn S. Koppel, *The California Supreme Court Speaks Out on Summary Judgment in its Own "Trilogy" of Decisions: Has the Celotex Era Arrived?*, 42 SANTA CLARA L. REV. 483, 485 (2002) (referring to "summary judgment's traditional status as a procedural pariah"); Lawrence W. Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOK. L. REV. 279, 279 (1987) ("When a prominent litigator was asked to discuss the topic of summary judgment at the 1977 Second Circuit Judicial Conference, he quipped 'There is none in this Circuit . . . it takes a touch of Pollyanna for any of us to even consider the motion any longer.'").

65 See Steven Alan Childress, *Standards of Review in Federal Civil Appeals: Fifth Circuit Illustration and Analysis*, 29 LOY. L. REV. 851, 854 (1983); see also Jividen v. Law, 461 S.E.2d 451, 459 n.11 (W. Va. 1995) ("The same sign might just as recently have appeared in one of the many county courthouses in West Virginia.").

66 Cf. William M. Byrne, Remarks at the Judicial Conference of the U.S. Court of Appeals for the Ninth Circuit: Seminar on Procedures Prior to Trial (June 25, 1957), in 20 F.R.D. 485, 496-97 (1957):

I see that Clerk Paul O'Brien of the Court of Appeals is handing each of you a copy of our pre-trial rule. You will observe that we require the filing of a

As early as 1925, O.L. McCaskill criticized Clark's view of procedure in a manner that has proved prescient. He had expressed the concern that

flexibility may be carried to such an extreme that our procedural machine will have no stability. . . . Leaving to the trial judge the fixation of the scope of the cause of action does not make for administrative convenience. It ignores one of the most useful purposes of the cause of action as a procedural unit in the action. It ignores the function of a pleading as an instrument of preparation for the trial.⁶⁷

With the effectiveness of 12(b)(6) motions and summary judgments neutralized by the liberal vision of procedure, and with the increase of other relevant variables (such as the size of the bar, the amount of civil litigation, the proliferation of statutes and new causes of action, and the utilization of discovery) problems associated with delays, expense, and invasions of privacy have proliferated—especially in cases where the stakes warranted increased attention by lawyers.⁶⁸ In short, as McCaskill suggested, the failure of the Federal Rules to focus litigation on what is essential for each party's case, when combined with other variables, results in a certain murkiness and a lack of definition, containment, and restraint in the civil litigation process. It should hardly surprise, then, that many of the procedural reform efforts of

memorandum of contentions of fact and law. This memorandum must contain a concise statement of the material facts involved as claimed by each party, including where negligence or contributory negligence is in issue, the party alleging it shall, unless the doctrine of *res ipsa loquitur* is invoked, specify each claimed act or omission relied upon to establish negligence or contributory negligence, and where damage to personal property is in issue, the precise nature and extent of the injury and damage shall be specified. We also require a brief statement of the points of law and citation of authority for each point upon which such party relies.

67 O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 620 (1925).

68 See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 871–73 (explaining how, as the opportunities and incentives for discovery abuse increase, the ability of the courts to adequately control discovery abuse is strained and diminished); see also Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, Keynote Address Before the National Conference on Causes of Popular Dissatisfaction with the Administration of Justice (April 7, 1976), in 70 F.R.D. 79, 83–95 (1976) (asking whether the tools of procedure and methods of judicial process are suited for a complex modern society); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7, 1976), in 70 F.R.D. 79, 199–211 (1976) (discussing overuse of discovery and litigation as growth industry in context of complex litigation).

the past several decades could be described as attempts to more effectively and efficiently integrate law and fact: requiring heightened pleading,⁶⁹ imposing sanctions for the lack of reasonable pretrial investigation of law or fact,⁷⁰ remodeling discovery,⁷¹ resurrecting summary judgment practice,⁷² and promoting the managerial role of judges.⁷³

69 See generally Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (comparing the heightened pleading requirements in the civil rights context with that of securities fraud actions); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) (reflecting on the broader implications of recent reforms in pleading for civil rights and securities fraud litigation).

70 See William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 181 (1985) (reporting that “[w]idespread concern over frivolous litigation and abusive practices of attorneys led to the amendment in 1983 of Rule 11”); see also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1953–54 (1989) (noting the “inescapable connection between the factual and legal components of the Rule 11 certification”).

71 See generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) (chronicling the recent history of discovery reform); Jeffrey W. Stempel, *Politics and Sociology in Federal Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001) (assessing proposals for narrowing the scope of discovery); Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229 (1999) (arguing that the 1998 discovery proposals were unwise); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433 (1999) (discussing the ironies replete in the mandatory automatic disclosure requirement); Gregory S. Weber, *Potential Innovations in Civil Discovery: Lessons for California From the State and Federal Courts*, 32 MCGEORGE L. REV. 1051 (2001) (identifying and discussing innovative discovery devices from the several state and federal courts).

72 See generally Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987) (describing the factual basis for legal summary judgment); Gary T. Foremaster, *The Movant’s Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731 (1987) (discussing the implications of the Court’s decision in *Celotex Corp. v. Catrett*); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988) (discussing the theoretical problems and policy considerations that have stood in the way of the widespread use of summary judgment).

73 See generally E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (defining and assessing the role of managerial judging in civil procedure reform); Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (evaluating the effectiveness of settlement promotion by judges); Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789 (1989) (evaluating judges’ role as case manager and settlement facilitator); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 19–22, 24–29 (1984) (calling for increased judicial activity in an effort to decrease the adversarial nature of litigation); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 377 (1982) (explaining how “managerial judges” are “shaping litigation and influencing

Yet let us consider more methodically what documents, in the formal process of litigation, in fact, require an integrated narrative of law and fact to be filed with the court or shared with the other side.⁷⁴ The pleading rules surely do not require a very expansive or sophisticated integration of law and fact.⁷⁵ Plaintiffs still enjoy a liberal standard of notice pleading, as efforts by judges to impose heightened pleading requirements have been soundly rejected by the Supreme Court.⁷⁶ Today Rule 8(a) remains in its original form, and only through legislative reform in limited contexts has the liberal standard of notice pleading been altered.⁷⁷ Nor are defendants required by rule or even permitted to offer a narrative by way of defense.⁷⁸ Sanctions have been perceived as a mechanism to deter dilatory behavior and to streamline

results"); Shapiro, *supra* note 4, at 1969 (discussing the objectives of Rule 16, its history, and application).

74 We realize that litigation lawyers may at even early stages of a litigation create in their heads or files a narrative of what they happened to put into the applicable legal framework. Some trial lawyers say that at the very beginning of the case they think about what their closing argument to a jury would sound like, thus producing a narrative of law and facts in which to consider their future action in the case, such as discovery they will need.

75 With regard to the availability of facts at the pleading stage, Federal Rule 8(a)(2) was drafted deliberately to avoid usage of the terms "fact" and "cause of action" and the confusion they caused. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."). Although we focus primarily on federal court procedure, we note that most states have adopted the federal pleading standard. See generally Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311 (2001) (suggesting conformity with the federal standard even in code states); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (reviewing formal adoption of the Federal Rules). The Oakley and Coon survey is brought up to date in John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2002/2003).

76 See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (holding, in a unanimous opinion, that Rule 8(a) "meant what it said"). "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Id.* (quoting *Conley*, 355 U.S. at 47); see also *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512–15 (2002) (describing a heightened pleading standard conflicting with Rule 8(2)(2)).

77 The Private Securities Litigation Reform Act imposes heightened pleading requirements in Exchange Act claims for securities fraud actions. See 15 U.S.C. § 78u-4(b) (2000). Further, the Y2K Act imposed heightened pleading with regard to issues of damages, defects, and state of mind. See 15 U.S.C. § 6607.

78 Defendants must, in "short and plain terms" state their affirmative defenses, assert counterclaims (pursuant to the pleading mandate of Rule 8(a)), and "admit or deny the averments upon which the adverse party relies." FED. R. CIV. P. 8(b).

litigation at the pleading stage.⁷⁹ Rule 11 presently requires a pre-filing inquiry into the law and facts, but this is not a pleading rule and does not trigger the production and exchange of an integrated narrative of law and fact.⁸⁰

But just as code pleading may not have, in the real world of lawyers and their work, provided as much diagnosis and integration as the rules intended, lawyers today may be doing more integration of law and fact in their pleadings than one would surmise from just reading the relevant Federal Rules. A recent article entitled *The Myth of Notice Pleading* suggests, for example, that in a wide variety of case types, ranging from antitrust and copyright to defamation and negligence, the courts are requiring more articulation of facts than prescribed by the language of the relevant rules.⁸¹ Moreover, for a variety of reasons, such as trying to demonstrate compliance with Federal Rule 11 or trying to precipitate a favorable settlement, lawyers might be integrating law and fact in more detail in their complaints than required by rule. Judge Posner suggests, with some regret, that more prolix complaints are the norm in federal court:

The idea of "a plain and short statement of the claim" has not caught on. Few complaints follow the models in the Appendix of Forms. Plaintiffs' lawyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to "educate" (that is to say, influence) the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove.⁸²

It is important to note, however, that mere detail in a complaint does not necessarily create an integrated narrative. Averments are made in numbered paragraphs and the content of each paragraph "shall be limited as far as practicable to a statement of a single set of circumstances."⁸³ The paragraphs, in turn, are then often grouped into myriad counts without any signal to the reader of the relative strength or importance of the theories pursued. Such presentation can lead to a syncopated rhythm that does not resemble a coherent

79 See Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 500 (1986) (citing *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir. 1986)).

80 See FED. R. CIV. P. 11(b)(2) (certifying that "the claims, defenses, and other legal contentions therein are warranted by existing law").

81 See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-59 (2003).

82 *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723-24 (1986).

83 FED. R. CIV. P. 10(b).

narrative. Indeed, the primary audience for a complaint is often, if not usually the judge, while advocacy documents, such as demand letters, are primarily drafted to convince the opposing party or lawyer or a corporate defendant's management group or the person with the authority to settle.

Discovery has long been the focus of reformers decrying inefficiency and delay in the federal system.⁸⁴ An integrated narrative of law and fact could be useful at the discovery stage to cabin discovery around the essential issues—especially in the five to ten percent of “big cases” that have extensive discovery.⁸⁵ Recent reforms to the discovery rules have added a new tier of “mandatory initial disclosures”;⁸⁶ limited the quantity of certain types of discovery;⁸⁷ and narrowed the scope of discovery.⁸⁸ Yet notice pleading and liberal joinder rules conspire to permit broad discovery, and no integrated narrative is required by rule either before or at this stage.

The 1983 amendments to Federal Rule 16 were intended to enhance case management, expedite the disposition of cases, facilitate settlement and ensure the more efficient handling of cases.⁸⁹ Although the Rule contemplates that the parties would discuss the use

84 See sources cited *supra* note 71 (chronicling recent trends in discovery reform).

85 It is difficult to make a firm estimate on how many cases have massive discovery (however defined), but five to ten percent seems to be in the ballpark. 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, 45 (1994).

86 See FED. R. CIV. P. 26(a) (listing required disclosures). See generally Samuel Is-sacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753 (1995) (evaluating the impact of mandatory disclosure); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (proposing that the politicization of the rulemaking process will lead to ineffective rulemaking).

87 See, e.g., FED. R. CIV. P. 30(a)(2)(A) (permitting ten depositions); FED. R. CIV. P. 33(a) (permitting twenty-five interrogatories). See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (arguing for limits on trial courts' discretion to dismiss cases).

88 See FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”). See generally Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001) (arguing that the 2000 Limitation will be ineffective in limiting discovery).

89 FED. R. CIV. P. 16; see Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599 (1989) (providing an overview of the trends in Rule 16 litigation); Shapiro, *supra* note 4 (discussing the theory and practice of Federal Rule 16).

of extrajudicial procedures to resolve the dispute,⁹⁰ it does not require the parties to prepare an integrated narrative of law and fact as part of the formal litigation system.⁹¹ It is worth noting that the *Manual for Complex Litigation (Third)* contemplates something akin to an integrated narrative of law and fact, but cautions against requiring them "routinely."⁹²

If not by pleadings, discovery, or a case management order, then the only remaining pretrial stage for the formal litigation system to require an integrated narrative is summary judgment. Typically by a local rule derivative of Federal Rule 56,⁹³ parties filing or responding to a motion for summary judgment must file a supporting memorandum addressing whether there are disputed issues of material fact and whether the moving party is entitled to judgment as a matter of law. But the argument on a summary judgment motion often focuses on a limited number of elements of claims and defenses and/or whether the evidence is overwhelming and therefore must be believed. Because the persuasiveness of the evidence on disputed facts is not dispositive, these memoranda by no means always offer an integrated narrative with regard to the entire case.

That leaves only the trial. Although a pretrial conference memorandum may include a summary of the case, suggesting a narrative, the primary purpose of the document, for most lawyers, is to protect their ability to put into evidence whatever they decide they want to introduce during the trial. The memorandum thus is rarely a narra-

90 See FED. R. CIV. P. 16(c)(9).

91 Cf. FED. R. CIV. P. 16(c) ("At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses . . .").

92 See MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.641, at 122 (1995).

One of the methods sometimes used to ensure adequate preparation, streamline the evidence, and prevent unfair surprise is statements of facts and evidence, or contentions and proof. Each party prepares and submits a statement listing the facts it intends to establish at trial and the supporting evidence. The statement should be sufficiently detailed to be informative and complete, but free of argument and conclusions. No evidence not included in the statement would be permitted at trial. The exchange of such statements may be useful in narrowing factual disputes and expediting the trial. The substantial amount of work required for their preparation, however, may outweigh the benefits, and such statements should not be required routinely without prior consideration.

Id. (citation omitted).

93 In light of our thesis, it is worth emphasizing that Federal Rule 56 does not even require a memorandum in support of a motion for summary judgment. See FED. R. CIV. P. 56. Such requirements are the product of local rules.

tive of law and fact integrated for the purpose of convincing the other side. The formal procedural universe thus may not demand an integrated narrative of law and fact until the occurrence of a trial—specifically, the opening statement or closing argument. The extent to which pleadings, summary judgment memoranda, or pretrial documentation in practice provide a sophisticated diagnosis and integration, despite the lack of a rule mandate, may be a fruitful area for empirical research. We may have underestimated what is being accomplished by the current formal rule system and overestimated the utility of pleadings under common law and code systems.

II. THE UNCHARTED PARALLEL PROCEDURAL UNIVERSE

If you have followed us so far, you will have accepted that the essential diagnostic function—integrating law and fact in a manner shared with the court and all parties—may have occurred much earlier under the code, common law, and equity systems that preceded the Federal Rules of Civil Procedure; at a minimum, the predecessor systems attempted to focus and limit civil cases in ways that made diagnosis easier to accomplish. Moreover, we have described how the current procedural regime—with notice pleading, liberal joinder, and broad discovery—makes it uncertain that the opponent will understand the law and pertinent facts of the other party's case. Yet statistics suggest that only a small percentage of cases will be exposed to the law-fact integration that is afforded by trial. Probably fewer than three percent of commenced civil cases reach trial—a precipitous drop from any distant benchmark.⁹⁴ Although we have found it impossible

94 The overall completed state trial rate was estimated at 2.9% of all terminations for 1991–1992; the federal rate was 3.7%. Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Court: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 440–42 tbl.3 (1996). But we know that the federal trial rate has dropped in recent years. For instance, in 2000, only 2.2% of federal civil cases reached trial (5780 trials of 259,234 total civil cases terminated). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2000 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 159 tbl.C-4, available at <http://www.uscourts.gov/judbus2000/contents.html>. For the twelve-month period ending September 30, 2002, 2.3% of the terminated civil cases ended with a trial (6015 trials of 259,537 terminated civil cases; 44% of the tried cases were before a jury—2650 jury cases of the total of 6015 tried civil cases). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2002 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 123 tbl.C, 162 tbl.C-4, available at <http://www.uscourts.gov/judbus2002/contents.html>. Between 1998 and 2002, federal “civil nonjury trials and civil jury trials decreased by 1859 trials, respectively.” *Id.* at 24. A new federal court study shows that in 2002 the percentage of federal civil cases tried had dropped to 1.8% from 11.5% in 1962. Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1. In 1940, the percentage

to find reliable statistics, probably approximately sixty-five to seventy percent settle.⁹⁵ Surely this vast number of settled cases is not being resolved without a meaningful integration of law and fact. But where and how, in a world of increasing numbers of cases, cases with increased numbers of issues and parties, fewer trials, and lawyers often not knowing their lawyer adversaries, are the litigants' stories shared? It should not surprise that the answer to this question lies beyond the familiar constellation of formal rules and doctrine.⁹⁶

Lawyers are practical and professional problem solvers: they want to find effective ways to advocate for their clients. Our friends and former students who are civil litigators tell us that it is increasingly common for lawyers to send demand letters, other (settlement) correspondence, notebooks, edifying brochures and documentary videos to the other side. The demand letter is likely the most popular of these advocacy statements that integrate law and fact. Today a "demand letter" is frequently much more elaborate than a pro forma demand for payment or a simple and inflated settlement demand.⁹⁷ Demand let-

of civil cases terminated during or after trial in the U.S. District Courts was 15.2%. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 44 tbl.2 (1983).

95 In a 1994 article, Marc Galanter and Mia Cahill estimated that the settlement rate, "cases that do settle without a definitive judicial ruling," was two-thirds. See Galanter & Cahill, *supra* note 73, at 1339-40 (1994). In the same year, Professor Yeazell estimated that seventy percent of cases are either settled or abandoned. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662. Professor Gillian Hadfield has evidently said that settlement rates are in decline, and "it looks as though the percentage of cases terminated in settlement has fallen by between 10 and fifteen percentage points, from approximately fifty percent in 1970 to between thirty-five and forty percent during the 1980's and 1990's." Liptak, *supra* note 94. She also apparently has said that "non-trial adjudications . . . based only on papers submitted [to judges] by the parties have risen to fifty percent." *Id.* She has been reported as saying, however, that "[w]e need to follow up on this initial study to confirm these numbers." *Id.* These are the lowest settlement estimates we have seen, and if they are true nationwide we would find it very surprising. Such low settlement figures are not what we experienced in practice, nor what we are told by other lawyers.

96 See Thomas O. Main, "An Overwhelming Question" About Non-Formal Procedure, 3 NEV. L.J. 388 (2003) (discussing the influence of non-formal forms of law in the context of procedural rules); Main, *supra* note 75 (demonstrating the influential role of a local legal culture in merging disparate rule regimes); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (discussing the divergent use of the term "formalism").

97 Of course, we do not mean to suggest that brief letters cannot accomplish much. "Cornelius Vanderbilt once wrote a 'gentleman' who had acted dishonorably in a financial matter, 'You have undertaken to cheat me. I will not sue you because the law takes too long. I will ruin you.'" Jerry Buchmeyer, *The Process: Demand Letters*

ters now often include a sophisticated and integrated narrative of law and fact written to persuade. These letters read much like a closing argument to a judge or jury. The tone is determined by what the lawyer thinks will persuade the other parties to settle.

There is literature of a practical nature offering advice. A recent article in the *Student Lawyer* recommends that demand letters be sent prior to commencing litigation. The author suggests that the letter “should be reasonable and realistic,” and further advises the nascent lawyer to

achieve the right tone and level of specificity. One legitimate purpose of a demand letter is to intimidate, so adopt a formal tone. Be sure the recipient understands (1) your client’s point of view, (2) what your client wants, (3) the specific deadline for complying, and (4) that you have taken account of the recipient’s essential position and found it either wholly or partly unmeritorious.⁹⁸

Similarly, a 2003 article in *Trial*, a magazine for more experienced practitioners, points out that when insurance is involved

[a]n adjuster sets a reserve—the amount that the defense initially claims a case is worth—based on the information the plaintiff attorney provides. Many trial lawyers dictate a quick demand letter outlining the high points of the case and forward it to the adjuster with a medical record or two. A hasty letter typically does not get the job done. It sends the wrong message about your abilities and resolve. To get the results you want, prepare a detailed settlement-demand package that includes:

- a synopsis of the case facts
- an explanation of legal liability
- a detailed explanation of the economic and non-economic damages, as well as how your client’s life has been affected by the injury
- photographs of the injury and the accident scene
- investigative reports . . . bills and expenses
- any other documents that support your claim.⁹⁹

and Settlements, 45 TEX. B.J. 837, 837 (1982); see also *id.* (“H. Allen Smith reported this gem by an Indian attorney: ‘Dear _____, If you do not pay the money you owe my client, I will take steps that will cause you the utmost damned astonishment. Yours very truly.’”).

98 Bryan A. Garner, *Legal Writing—Demand Letters are Designed to Produce Results for Your Clients*, STUDENT LAW., Apr. 2002, at 9, 9.

99 John Elliott Leighton, *Prepare for Trial, But Win at Settlement*, TRIAL, June 2003, at 26, 28. In personal injury cases, for example, it is suggested that the plaintiff’s lawyer make available to the opposition: (1) family photos, film, or video; (2) letters

This “settlement-demand package” thus includes an integrated diagnosis of the law and facts, as well as a preliminary disclosure of important discovery documents. And all of this is happening in the parallel non-formal procedural universe.

Integrated advocacy statements simulate some of the integration of law and fact that might occur at trial. An article in the *American Journal of Trial Advocacy* suggests the preparation of a “settlement brochure,” including a “comprehensive statement of the case . . . [with] case documentation [and] appropriate graphics.”¹⁰⁰ Some of the literature describes elaborate videos designed to convince defendants, particularly insurance companies in personal injury cases, to settle in an amount advantageous to the plaintiff.

Major lawsuits are settled too often on the eve of trial simply because the *eve of trial is the first time all of the relevant law and facts have been adequately packaged and presented to the insurance company or adverse party*. The uncertainty of what evidence will be produced at trial—and how the jury will perceive it—is part of what makes some cases difficult to settle. A video documentary is, in effect a “mini trial”; it gives the insurance carrier a vivid illustration of the evidence that the plaintiff would produce at trial. The video documentary can help plaintiff’s counsel communicate the true value of the case and the likelihood that a jury may award the plaintiff the true value. The video can help you achieve a fair and adequate settlement; therefore the video can help you receive the amount that a jury would likely award, discounted by savings from minimizing litigation expense, uncertainty and delay.¹⁰¹

Another Dallas lawyer lauds the “video settlement documentary” as a “far more powerful communications tool” than the “printed settlement brochure . . . in what former ATLA President Melvin Belli once called the plaintiff’s ‘rush to disclosure.’”¹⁰² Video forces a “review [of] the case in its entirety” and allows “plaintiff counsel a rare opportunity to tell the client’s story without interruption by cross-ex-

and cards (such as valentines) to document love and affection; (3) medical paraphernalia, such as replicas of implants or braces and catheters (4) medical films or slides; (5) medical records and x-rays; (6) news and governmental photographs, film and video; (7) injury photographs; (8) medical drawings; and (9) graphs and charts. See Fred Misko, Jr., *Packaging a Case for Settlement or Trial*, 17 AM. J. TRIAL ADVOC. 461, 462–66 (1993).

100 Misko, *supra* note 99, at 461.

101 *Id.* at 466–67 (emphasis added).

102 Windle Turley, *Getting to “Yes” with the Video Settlement Documentary*, TRIAL, June 2003, at 50, 51.

aminations, objections, and other trial-related procedural breaks in continuity.”¹⁰³

Advice and guidance about the effective use of these integrated advocacy statements is directed almost exclusively to plaintiffs, and primarily to personal injury cases. Our interviews, however, suggest that plaintiffs’ lawyers in diverse types of cases, including employment, commercial, discrimination, intellectual property, and disability litigation frequently utilize lengthy documents, in the nature of a demand letter, to present their best case to the defendant prior to trial. Moreover, various provisions of substantive law now require, or make it otherwise desirable, that an initial letter or other document explaining the plaintiff’s legal and factual position be sent to the defendant as a prerequisite to filing suit.¹⁰⁴

Defense lawyers may not leave the demand letter unanswered. Sometimes they also want an integrated document that the plaintiff’s lawyer can show to her client. The defendant is often an insurance company that needs a thoughtful law/fact response to the demand in order to protect itself against the claim of a bad faith failure to settle. Such a claim can expose the insurer to liability in excess of the policy limit if the plaintiff obtains a verdict beyond that limit and the company is later found to have been unreasonable in its failure to make a reasonable offer of settlement.¹⁰⁵

We asked the lawyers we interviewed why plaintiffs were more vested than defendants in the enterprise of creating integrated advo-

103 *Id.* Professor Howard Erichson has told us about a West Virginia lawyer who produces a “digital settlement” compact disc to be given to defense counsel. He has also provided us with the settlement package protocol describing what plaintiffs should provide in order to facilitate settlements in the *Baycol Products* litigation.

104 See *infra* notes 121–28 and accompanying text.

105 See, e.g., MASS. GEN. LAW. ANN. c. 176D § 3 (imposing liability for amounts in excess of policy coverage where insurer has failed to settle a claim in good faith); *Cain v. State Farm Mut. Auto. Ins. Co.*, 47 Cal. App. 3d 783, 794 (1975) (using implied covenant of good faith and fair dealing to impose a duty upon insurers to make good faith settlement offers). See generally Michael Sean Quinn, *The Defending Liability Insurer’s Duty to Settle: A Meditation Upon Some First Principles*, 35 TORT & INS. L.J. 929 (2000) (discussing the duty that insurers have to settle cases); Stephen R. Schmidt, *The Bad Faith Setup*, 29 TORT & INS. L.J. 705, 716 (1994) (discussing response strategy); Alan O. Sykes, *Judicial Limitations on the Discretion of Liability Insurers to Settle or Litigate: An Economic Critique*, 72 TEX. L. REV. 1345 (1994) (discussing bad faith litigation between insurers and insureds); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113 (1990) (examining the effect of liability insurance on tort litigation). Sometimes an insured will file a complaint with an insurance commissioner’s office; authors have suggested the efficacy of a complete advocacy response. Ronald J. Clark et al., *First Party Bad Faith*, in 2 LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 28.2 (David L. Leitner et al. eds., 2002).

cacy statements. They provided many possible explanations. First, plaintiffs are more likely to be proactive because it is usually the plaintiff who is trying to alter the status quo and who, ultimately, has the burden of proof; defendant's use of contested money during the litigation can justify passivity. Second, some suggested that counsel who will be paid on a contingency fee are more likely to make early efforts to effect a settlement than counsel paid on an hourly basis.

We found a more profound reason for the use of advocacy materials delivered by plaintiffs' counsel lurking within these attorneys' explanations. In a typical civil case, the defendant is either a corporation or some entity that is insured. In many cases, then, it is the management of that defendant corporation or insurance company who must assess their potential exposure and understand the value of the plaintiff's case. Consequently, the plaintiff's lawyer, in order to settle a case advantageously, must get convincing pro-plaintiff information into the hands of the ultimate decisionmaker. An integrated narrative combining the plaintiff's strongest case on the law and facts is the best way to do this—whether through an extensive demand letter, a settlement brochure or notebook, a video documentary, or some combination of these.

Because the plaintiff is often a "one-shot" litigator as opposed to a "repeat player,"¹⁰⁶ plaintiff's lawyers may have more influence than defense counsel over strategy and decisionmaking processes, including settlement. Accordingly, it is the plaintiff's lawyer who often must be convinced about the wisdom and merits of settlement. But the defense lawyer need not produce a document that explains defendant's case because that lawyer can talk directly to the plaintiff's lawyer, who may be making the decision. Moreover, since the defendant does not normally have to prove anything, and can just sit back and poke holes in the plaintiff's position, defense counsel are reluctant to say any more than the minimum. Further, if the plaintiff's lawyer is not a sophisticated player or an experienced trial lawyer, defense counsel are not inclined to do anything that might signal to the plaintiff's lawyer that the defendants are taking the case seriously. Where the plaintiff is a corporation and, thus, also a repeat player, the lawyers with whom we spoke suggested that there was more likely to be an exchange of some form of integrated narrative by both sides. Of course, under these circumstances, both plaintiffs and defendants have the

106 We use the terminology of Marc Galanter. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 97 (1974).

incentive to get a persuasive advocacy statement into the hands of the decisionmaking management on the other side.

The lawyers we interviewed described a dramatic increase in the use of expansive demand letters, extensive notebooks, and other advocacy statements outside the formal procedural universe. Although some lawyers have long benefited from sending detailed demand letters or trial-like notebooks,¹⁰⁷ more lawyers are using them and are experimenting with creative solutions. Several variables seem to have contributed to this phenomenon. The litigator knows that a trial is a most unlikely form of disposition; trials resolve a tiny fraction of the civil cases that are filed and most cases settle,¹⁰⁸ although some cases are resolved by dispositive motion.¹⁰⁹ The expense and delay of litigation—a popular subject of concern since the mid-1970s—have made clients and, in turn, their lawyers, inclined to pursue ever-earlier dispositions. Because so few cases are tried, there is less incentive or reason to resist disclosure to benefit from the surprise at trial. Moreover, because of extensive discovery, the odds of really surprising the opponent have been substantially reduced. Accordingly, the trends favor increased disclosure.¹¹⁰

Another variable that may contribute to this phenomenon is the lack of familiarity among members of the contemporary bar with one another.¹¹¹ Several lawyers we interviewed agreed that since the plaintiff's lawyer may well be unknown to the defendant's lawyer, and so few cases are tried in which the plaintiff's lawyer can build up a reputation, an expansive demand letter or the like is a means for the plaintiff's lawyer to show her skill, determination, and preparation. A

107 One lawyer told us that a well known judge in Massachusetts was admired, as a lawyer, for sending astonishingly complete, brilliantly drafted demand letters in employment discrimination cases. The local bar called her letters "Oh S**t!" letters, because this is what defendants and their counsel thought upon review of these persuasive letters. Interview at Sugarman, Rogers, Barshak & Cohen, in Boston, Mass. (July 16, 2003).

108 See *supra* note 94 and accompanying text.

109 See *supra* note 95 and accompanying text.

110 Some of the lawyers at the Sugarman, Rogers, Barshak & Cohen interview on July 16, 2003, stressed the impact of the discovery rules in eliminating the possibility of surprise at trial, and therefore one was not giving up much by sending the opponent lawyer a complete integrated advocacy document. Interview at Sugarman, Rogers, Barshak & Cohen, *supra* note 107.

111 For statistics on the growth of the profession from the end of World War II to the present (approximately two hundred thousand to over one million) and on the increased numbers of women and people of color in the profession and attending law schools, see Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 207–08 (2003).

plaintiff's lawyer wants to impress the opponent not only with the strength of her case, but with her own ability as a lawyer.¹¹² One lawyer told us that the detailed notebook he presents to the defense counsel contains a carefully drafted narrative telling the story from his client's point of view, as well as backup relevant documents relating both to liability and damages, photographs, and expert reports. He reports that preparing and having something like a full trial notebook not only signals to the other side his strongest case and his readiness for trial, but also prepares him to try the case if that becomes necessary.¹¹³

Some of the lawyers we interviewed suggested that improvements in technology had also contributed to the trend toward utilizing integrated advocacy materials. With the advent of computers it is much easier to draft and redraft a lengthy demand letter or to put together a settlement brochure. The invention, spread and user-friendliness of video cameras and video-editing equipment have enabled and encouraged more sophisticated multimedia presentations.

Moreover, a copy of such materials delivered to one's own client permits that client to appreciate that the lawyer has fulfilled the age-old lawyer's obligation of absorbing the client's story, applying the law to it, and aggressively advocating an integrated narrative. Such legal storytelling increases the sense of the disputants that they have been treated fairly because they have been heard.¹¹⁴ One lawyer, in explaining the advantage of video presentations, makes the point in a manner that is also applicable to each of the types of integrated law/fact methods we have described:

It can fulfill the plaintiff's need to tell his or her story without the uncertainty of trial. Some plaintiffs are reluctant to enter into settlement negotiations or accept a reasonable settlement because they think that by settling a case they are giving up their only opportunity to tell the defendant what it did wrong and how the conduct has affected their lives.¹¹⁵

112 The converse is also true: negative inferences will be drawn from a poorly drafted letter.

113 Interview with Matthew F. Belanger, Feraci & Lange LLP, Rochester, N.Y. We have seen one of his demand letters that was mailed in December 2003 to the opposing attorney. The letter was twelve pages of integrated narrative and a demand, and it had six lengthy exhibits attached.

114 For a comprehensive review of the procedural justice literature that explains the importance to clients of being heard and/or of their witnessing their own lawyer explain their case to the opponent and/or a neutral, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 820-30 (2001).

115 Turley, *supra* note 102, at 51.

Many of the variables that we have linked to the proliferation of integrated advocacy statements echo those variables that have contributed to the increased use of mediation as a means of disposing of cases through settlement. The literature has already linked the popularity of mediation to the lack of familiarity of opposing lawyers with one another, the increased complexity of cases, the demand for earlier settlement, and the lack of trial experience.¹¹⁶ Mediation, itself part of the non-formal parallel procedural universe,¹¹⁷ typically requires a written opening statement from the parties that is often an exemplary, if shorter, form of the integrated narrative of law and fact that we have discussed here. A lawyer-mediator with a Seattle firm has recently described in *Dispute Resolution Magazine* the purpose and nature of such mediation statements:

Be prepared

Given that a large percentage of mediated cases settle, preparation represents one of your best opportunities for influencing the outcome of your client's dispute.

Almost all mediators require a memo from each side summarizing the salient facts and addressing both liability and damages issues. Take time to prepare a thoughtful and concise mediation memo. While your memo should be an advocacy piece, it ought to be more analytical than rhetorical.

Many mediators like to see a confidential submission from each side. Your confidential letter to the mediator should candidly identify all impediments to—and motivators for—settlement. Remember that the mediator is relying on you to assist in developing a settlement offer that realistically meets the needs of all parties.

Share your memo

Prospects for settlement are rarely advanced unless the parties share their basic mediation memos. If there are things about the case or the parties that you'd rather not disclose to the other side, consider putting them in a separate confidential "mediator's-eyes-only" memo.¹¹⁸

116 See Subrin, *supra* note 111, at 207–11.

117 Further, according to interviews, mediation is increasingly the only dispute resolution process that a dispute encounters. A putative litigation matter is often mediated—successfully—before litigation is ever filed.

118 Phil Cutler, *Representing Clients in Mediation: A Mediator's Perspective*, *DISP. RESOL.*, Spring 2003, at 6, 7; see also *ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK* 77–79 (Nancy F. Atlas et al. eds., 2000) (describing counsel's preparation for mediation); BENNETT G. PICKER, *MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES* 77 (2d ed. 2003) (explaining the preparation for mediation including the use of written submissions); J.W. ZEIGLER, JR., *THE MEDIA-*

In the mediation memo, as in the sophisticated demand letter, the lawyer tries to tell a combined law/fact story that will encourage the mediator to view the case in a manner advantageous to the author (and thereby be more critical of and aggressive toward the opponent). The goal of the author “is to persuade the mediator to help convince the other side that his or her position is fair enough to be accepted in settlement.”¹¹⁹ Of course when the memo is also shared with the other side, the audience expands to include the opposing lawyer and her client as well as the mediator (and, in some measure, the author’s own client). Once again, the lawyer tries to select and create from the many facts a coherent story that meshes with the applicable law in a way that convinces others—opposing counsel, their client, a mediator—of the desired outcome. Depending on what a given mediation or arbitration procedure requires, such a law/fact statement will be drafted by each side at the beginning or during the adjudicative process.¹²⁰

Often the substantive law also recognizes the value of an integrated narrative at the outset of litigation. For example, state statutory regimes protecting consumer rights often require plaintiffs to send a demand letter prior to bringing suit for an unfair or deceptive practice.¹²¹ The promotion of negotiation and settlement are among the identified purposes of such a requirement.¹²² Statutes providing a right and outlining the procedure for filing torts claims against public

TION KIT: TOOLS TO SOLVE DISPUTES 57–59 (1997) (discussing the information that should be provided to a mediator in dispute resolution); Stephen Patrick Doyle, *Trial Lawyers Should Add Skilled Participation In Mediation to Services They Provide to Clients*, in ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 209, 212 (Martha A. Matthews ed., 1990) (discussing what information to disclose to mediators); Nicholas J. Taldone, *Winning Mediation Strategies*, 22 TRIAL LAW. 190, 193 (1999) (stating that there is an ongoing debate about how much to include in the mediation summary, but suggesting that “parties should err on the side of full disclosure in mediation summaries”).

119 Mark Hansen, *Selling Your Case a Different Way*, A.B.A. J., June 2003, at 59, 61 (stating in the sidebar: “Effective Mediation Calls for Advocacy Skills, Even if They’re Not the Kind Litigators Use in Court”).

120 See generally Ross B. Intelisano & Rich Intelisano, *Mediation—Getting to the Negotiation Table and Leaving Satisfied*, 1383 PLI/CORP. 451 (2003) (discussing the mediation process). But this may well be closer to the requirements of complaints, a topic to which we will later turn. See *infra* text accompanying notes 133–34.

121 See, e.g., CAL. CIV. CODE § 1782 (West 1998 & Supp. 2004); MASS. GEN. LAWS ANN. ch. 93A, § 9(3) (West 1994).

122 See, e.g., *Spring v. Geriatric Auth. of Holyoke*, 475 N.E.2d 727, 736 (Mass. 1985); *Outboard Marine Corp. v. Superior Court*, 124 Cal. Rptr. 852, 859 (Cal. Ct. App. 1975).

employers often require plaintiffs to present their claims by a letter.¹²³ The purpose of such a document is to ensure that the public officer receives notice of the claim so that the official can investigate whether or not the claim is valid, and to encourage expeditious settlements and remedial action so that similar claims will not be brought in the future.¹²⁴ Similarly, environmental statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) require potential claimants against a fund to send a demand letter to all potential parties.¹²⁵ Of course many other state and federal statutes require presentment or demand letters. Under the Title VII statutory and regulatory schema, for example, a federal employee must notify an EEO counselor of discriminatory conduct; if the matter is not resolved, the employee may submit a formal administrative complaint.¹²⁶

Litigators also tell us that a demand letter may, as a practical matter, be a prerequisite to filing certain substantive claims. For example, in disability discrimination cases, transmission of a thorough narrative of law and fact ensures that the putative defendant is aware of the scope and necessity of an accommodation. The letter may ultimately serve as evidence of notice in the formal universe; yet the documents

123 See, e.g., CAL. GOV'T CODE § 945.4 (West 1995) (setting forth the procedure under the California Government Tort Claims Act); MASS. GEN. LAWS ANN. ch. 258, § 4 (West 1994) (setting forth the procedure under the Massachusetts Tort Claims Act); see also 28 U.S.C. § 2675(a) (2000) (noting that under the Federal Tort Claims Act "[a]n action shall not be instituted upon a claim . . . unless the claimant shall have first presented the claim to the appropriate Federal agency").

124 See, e.g., *Yum Ku v. Town of Framingham*, 762 N.E.2d 855, 858 (Mass. 2002).

125 See 42 U.S.C. § 9612 (2000).

126 See 29 C.F.R. § 1614.105 (2003) (pre-complaint processing); 29 C.F.R. § 1614.106 (individual complaints). Detailed documents are frequently required and/desirable in order to commence claims to state commissions against discrimination. See, e.g., Scott C. Moriearty et al., *Drafting and Filing the Charge of Discrimination*, in REPRESENTING CLIENTS BEFORE THE MCAD IN EMPLOYMENT CASES, pt. 3, at 42 (2001). The article suggests that plaintiff's counsel

should consider sending a demand letter to the employer before filing the complaint with the MCAD (assuming that the six-month period is not due to expire). Such a demand letter may include a copy of the complaint and set out the relief that the client is seeking. Often, demand letters lead to immediate settlement discussions, and it may be easier to achieve settlement before the respondent has been publicly charged.

Id.; MASS. COMM'N AGAINST DISCRIMINATION, KNOW THE FACTS: A PRACTICAL GUIDE TO THE COMPLAINT PROCESS OF THE MCAD, available at www.state.ma.us/MCAD/filing.pdf.

may also be drafted with hope that the dispute can be resolved informally and in its infancy.¹²⁷ In the intellectual property arena, a cease-and-desist letter serves largely the same function.¹²⁸

Many states require that a full law/fact narrative, including expert testimony, be presented to a screening panel prior to commencing medical malpractice cases.¹²⁹ Forcing plaintiffs to write letters to putative defendants may become the norm of contingency fee litigation if a coordinated campaign by the advocacy group Common Good is successful. There are now proposals pending in thirteen states to require such letters in order for the plaintiff's lawyer to collect her normal contingency fee. The New York Times recently summarized the proposal:

The proposal would require the plaintiff's lawyer to send a letter to the defendant at the start of a case, describing the injury and why the defendant was liable for it. The defendant would not be required to make a settlement offer, and the plaintiff would not have to accept one. But if the defendant did make an offer and the plaintiff accepted it, his lawyer would be entitled to no more than 10 percent of the first \$100,000 and 5 percent of anything more.

127 See, e.g., Hope A. Comisky, *Guidelines for Successfully Engaging in the Interactive Process to Find a Reasonable Accommodation Under the American With Disabilities Act*, 13 LAB. LAW. 499, 501-09 (1998) (detailing the steps for resolving a dispute over a "reasonable accommodation"); Alexandra Krueger Hedrick, *Americans With Disabilities Act Obligations and Employer Knowledge*, FLA. B.J., Oct. 1996, at 73, 76 ("At an ADA trial, the employee will need to prove that complete, preferably written, medical information concerning the disability and the accommodation needed was provided to an individual who would ensure that it was acted upon."); Martin K. Brigham & Daniel Bencivenga, *How Do You Spell Relief?*, TRIAL, June 2002, at 19, 26 (discussing the importance for an ADA plaintiff to have requested an accommodation or of the employer's recognition of the need for it).

128 See GREGORY J. BATTERSBY & CHARLES W. GRIMES, LAW OF MERCHANDISE AND CHARACTER LICENSING § 11.12, at 11-21 (2003) (discussing the role of cease-and-desist letters as enforcement actions against infringements); Robert Jossen & Louis M. Solomon, *Trademark*, in 4 BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 64.2(c), at 976-77 (Robert L. Haig ed., 1998) (describing the content and purpose of a cease-and-desist letter); David L. Hoffman & Robert J. Lauson, *Cease-and-Desist Letters in Intellectual Property Disputes*, COMPUTER L., Dec. 1999, at 17 (explaining the use of cease-and-desist letters in intellectual property disputes).

129 See RICHARD E. SHANDELL & PATRICIA SMITH, THE PREPARATION AND TRIAL OF MEDICAL MALPRACTICE CASES § 12.05, at 12-8 (rev. ed. 2001); John J. Fraser, Jr., *Technical Report: Alternative Dispute Resolution in Medical Malpractice*, 107 PEDIATRICS 602, 604 (2001) ("[A]bout half of the states have statutes establishing pretrial screening panels that review malpractice claims and render a nonbinding advisory opinion on the merits of the claim before a suit is filed.").

If plaintiff's lawyers did not send the letter, their fees would be capped at those levels no matter how long or hard they worked on the case.¹³⁰

If such a proposal passes in any one state, it will be interesting to see whether this results in perfunctory demand letters or more complete advocacy documents that in fact attempt to precipitate favorable settlements.

Let us pause now to consider the relationship, from the lawyer's point of view, between the formal civil procedure system of formal pleadings, discovery, and dispositive motions, and its parallel counterpart of integrative law/fact documents and other materials that are not covered by the procedural rules. On one hand, the effective lawyer must adhere to rules, avoid penalties, and seek advantage for the trial that might happen, but almost never does—a trial whose results, if one could predict them, would influence the settlement that usually will happen. So, for example, the complaint is drafted to have enough in it to avoid a 12(b)(6) dismissal, to elude sanctions, to permit massive discovery, to keep multiple causes of action alive, and to avoid commitment to anything that might later embarrass the effort. Likewise, defendants ordinarily will say as little as possible so as to force the plaintiff to its proof on as many elements as possible, and will state affirmative defenses only in a general way as to protect that front. Only after these goals are met might the plaintiff entertain a fuller integrated narrative.

On the other hand, the lawyer when acting in her parallel universe is less concerned with the prerequisites of rules or the needs of the judge, but rather is focused on the states of mind of the opposing lawyer and the opposing party, or a mediator, as well as the need to inform or convince her own client. Now the purpose is to provide information so that the other side will want to settle to the plaintiff's benefit or, if a defendant, so that the plaintiff will be softened up for a less expensive settlement. Some of the same incentives apply at the discovery stage. Historically, each side wants to find out everything relevant from the other side, but is not eager to give information away.¹³¹ As the parallel non-formal universe becomes more explored

130 Adam Liptak, *In 13 States, a Push to Limit Lawyers' Fees*, N.Y. TIMES, May 26, 2003, at A10. One professor thought that the proposals concentrate on the wrong party, for defendants are the ones who need incentives to settle. "The empirical evidence shows that plaintiffs' lawyers are settlement-crazy," Professor [Charles M.] Silver [a law professor the University of Texas in Austin] said 'It's not on the plaintiff's side that we need to create incentives to settle.'" *Id.*

131 See generally Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789 (recounting interviews with lawyers about the state of the discovery system); Wayne D. Brazil, *Views from the*

by the practicing bar and the academy these traditional patterns may be transformed.

III. IMPLICATIONS AND REPERCUSSIONS

The practical desire to convey an integrated narrative of law and fact creates tension for lawyers operating within the formal system. The existence of a robust parallel non-formal procedural universe presently mitigates that tension, but there remain intriguing questions about the future of the practice and teaching of law.¹³² For instance, will the pleadings and motions filed by lawyers in the formal system increasingly resemble the advocacy statements exchanged in the non-formal system? Will discovery practices continue as in the past? Should the procedural rules of the formal system be amended to model the non-formal system? And what, if anything, should Professor Shapiro and other civil procedure professors be teaching students about this emerging parallel procedural universe?

As the practicing bar adjusts to the reality that trial is a “pathological” event that is unlikely to occur,¹³³ the strategy of pleading, discovery and motions in the formal system may change. At the pleading stage, for example, counsel may be more willing to introduce advocacy into their formal pleadings. Much of the literature on complaints, particularly when written for practicing lawyers, emphasizes the need to consider audience, including the judges, opposing lawyers, and the press, all of whom will often get their first, or most important, initial impression of the case through this document.¹³⁴

Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 AM. B. FOUND. RES. J. 217 (same).

132 One question that elicited interesting responses was: “Think of a recent or pending case and tell me what document(s) in that case file would most likely bring another lawyer in your office up-to-speed in a case were they to get involved at some midpoint?” Although the answer always begin with “It depends,” the answer was never a formal pleading, but rather a mediation statement, an internal memorandum, a letter to the client, or a demand letter.

133 See Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 261 (1995) (referring to the incidence of trial as a “pathological” event, saying that the description came from minutes of a meeting of the Federal Advisory Committee on the Rules of Civil Procedure).

134 See CIVIL TRIAL PRACTICE DESKBOOK 92–93 (Robert A. Robbins et al. eds., 1997); Jan Armon, *How to Write a Factual Complaint*, 46 PLI/NY 7 (1999); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 768–72 (1995); Bill Brystrynski, *Drafting Complaints*, N.C. ACAD. TRIAL LAW.: TRIAL BRIEFS MAG., Apr. 1999, at 6, available at 1999 WL 33504653; George G. Mahfood, *Crafting Persuasive Complaints*, TRIAL, Dec. 1992, at 39.

Here is typical advice, taken from a 1995 article in the *Illinois Bar Journal*:

An effectively drafted complaint does more than merely place the defendant on notice of a pending action. It identifies the legal issues for the court, clarifies the facts and law for the plaintiff and his or her attorney, and may even encourage the defendant to come forward with a settlement offer.¹³⁵

In other words, the typical complaint might someday evolve toward something reminiscent of a demand letter. We know from our interviews of one practice that is increasingly common: plaintiffs are attaching a copy of their demand letter to the defendants as an exhibit to their complaint. This practice—as well as its counterpart, attaching the complaint to the demand letter—demonstrates well the interplay of the formal and non-formal systems.¹³⁶

Defendants, too, might benefit from an integrated narrative. Although the pleading rules do not contemplate a narrative, some defense lawyers have successfully introduced them nonetheless. Some lawyers begin their answers with numbered affirmative defenses. These “affirmative defenses” are not affirmative defenses within the meaning of Federal Rule 8(c),¹³⁷ but are integrated narratives of law and fact that tell the defendant’s story.¹³⁸ Further, like their counterparts, defendants’ counsel have been known to attach responses that they have previously sent in response to demand letters.

135 David E. Sorkin, *Not the Same Old Complaint*, ILL. B.J., Apr. 1995, at 201, 202 (1995).

136 In other instances, of course, the demand letter is sent separately and then later becomes the first draft of the complaint. Interestingly, however, we understand that the complaint is often less factually specific and thus a narrative of law and fact that is inferior to the demand letter. Indeed, one young associate with whom we spoke described a recent assignment where they had been told to convert the demand letter into a complaint; and what this meant, in fact, was to strip the demand letter of many of the particulars.

137 See FED. R. CIV. P. 8(c):

[A] party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

138 The popularity of this practice may be spreading, but its roots run rather deep. For example, Thom was taught the effectiveness of this practice from the most admired practitioner with whom he ever practiced; and this most esteemed lawyer had been doing that for decades.

Discovery strategy may also evolve. The conventional wisdom that sophisticated parties want to “discover everything and disclose nothing” assumes that a trial is a realistic possibility. But spending the money and time to discover everything makes little sense in the typical case where the ultimate goal is to come up with a focused integrated statement on only the most important aspects of the case. The potential for increasingly early settlements with only the minimum discovery necessary to make an intelligent determination of value leads one to engage in less discovery, not more.¹³⁹

Parties may also be less resistant to disclosure. A plaintiff’s lawyer, for example, may very much want her client to be deposed so that the opposing side knows her story; if a trial is unlikely ever to occur, there is less reason to withhold testimony. Nor is there as compelling a reason for defendant’s counsel to withhold the clever cross-examination; any tricks or surprises reserved for trial will rarely be used. The Director of the Bartlit Center for Trial Strategy at the Northwestern University School of Law penned this suggestive title in a 2003 issue of *Litigation*, the journal published by the Litigation Section of the American Bar Association: *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*.¹⁴⁰

The informal universe may be sufficiently mature and appealing to ask whether some elements of it should be incorporated into the formal system of procedure. In David’s article on Rule 16, he compared the development of the practice and rulemaking on case management to what Lon Fuller had heard about the construction of a path in Cambridge Common.¹⁴¹ The workmen were evidently told to construct a formal path by pouring the cement where the pedestrians had already trampled an informal path.¹⁴² However, because we are wary of paving an entire universe, both formal and informal, we distinguish that metaphor and search for alternate authority in the corpus

139 See Joyce S. Meyers, *Focusing: When Less is More*, LITIGATION, Winter 2002, at 6, 10–12.

140 Steven Lubet, *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*, LITIGATION, Winter 2003, at 38, adapted from Steven Lubet, *Rethinking Deposition Defense: The Case for Strategic Disclosure*, 26 AM. J. TRIAL ADVOC. 13 (2002). Lubet’s article in *Litigation* was discussed recently by Judge Mark A. Drummond in his article *Rethinking Deposition Defense Strategy: Author Challenges Traditional Wisdom of Instructing Clients Not to Elaborate*, LITIG. NEWS, Nov. 2003, at 5. Drummond’s article ends: “‘For years, the conventional wisdom has been that clients should not volunteer information in a deposition. But today, with so few cases going to trial, we need to rethink this approach,’ says Linda L. Listrom, Chicago, Co-Chair of the Section’s Trial Practice Committee.” *Id.*

141 See Shapiro, *supra* note 4, at 1992.

142 See *id.*

of David's work. To that end, we have considered his insights on whether discretionary standards or more rigid rules offer a more effective solution to problems;¹⁴³ and we have studied his article about the virtues of individual choice and antipaternalism.¹⁴⁴ Our conclusion, although tentative, is to permit the parallel, informal universe of advocacy materials to develop unimpeded by additional procedural rules.

First, as a general proposition, commons in urban areas are more in need of grass and flowers than more cement.¹⁴⁵ The revision process tends to lengthen and complicate rules and, of course, the norms of advocacy will ultimately test the boundaries of rigid rules.¹⁴⁶ If we are right, the lawyers, largely on their own, usually without a rule, and without a standard, seem to be fulfilling the need to integrate law and fact into an advocacy narrative, and to share it with the opposition, their own clients, and when desirable, with mediators. Because our society relies more heavily than most on private litigation to enforce safety and social norms, we are very hesitant to suggest any procedural hurdles that might, in turn, have significant negative substantive consequences on plaintiffs' meritorious claims.¹⁴⁷ The imposition of a burden, such as a mandate that prior to discovery a demand letter contain a threshold quantum of specificity, could be dispositive of some worthy claims and have a chilling effect on still others.

We note, however, that the esteemed Lord Woolf in his reform of English practice does have a rule for a written protocol to be exchanged between potential litigants before a lawsuit is ever commenced.¹⁴⁸ His reasons sound like the reasons that we have suggested

143 See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 945–46 (1998).

144 See David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 521, 567–68, 571 (1988).

145 The shelf life of a Federal Rule of Civil Procedure is in sharp decline. Enacted in 1938, the Federal Rules were substantially amended in 1948, 1961, 1963, 1966, 1970, 1980, 1983, 1985, 1991, 1993, 2000, 2001, 2002, and 2003. Most of the Federal Rules have been amended at least three times. Only ten of the original Federal Rules have never been amended. See Main, *supra* note 96, at 391 (describing the “proliferation of amendments to the Federal Rules”).

146 See Main, *supra* note 30, at 479–86 (noting that [t]he number of amendments to the Federal Rules is striking and is increasing”).

147 For a discussion of the role of civil litigation in the United States' enforcement of safety and social norms, see Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1692–93 (1998); and Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 188–96 (1999).

148 LORD WOOLF, ACCESS TO JUSTICE—FINAL REPORT: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES § 3, ch. 10, at

for why American lawyers are operating in that parallel universe. He suggests that litigation has become so expensive and intrusive that getting potential litigants to tell their stories in advance makes sense, because most cases settle anyway—as they should—and this will help many of them settle earlier and with more information.¹⁴⁹ As previously suggested, our country relies on private litigation to enforce public law in ways distinguishable from other countries. And early requirements for specificity can have untoward substantive consequences. Moreover, as Senator Thomas Walsh observed in the 1920s, the restrained practices of the English bar and the culture of English litigation account for a certain lack of aggressiveness that is distinguishable from our own experience.¹⁵⁰ Perhaps the English bar has become more adversarial and the American bar less, but we would not bet on the latter. Our lawyers are likely to vigorously test and contest any requirement.

American lawyers are finding intelligent and useful ways to convey their positions to the relevant audiences. Cases are settling, although we know almost nothing empirically about why, when, how often, and on what terms they are settling. Yet at this point, particularly given the dearth of relevant factual information, we would leave the informal parallel procedural universe alone.¹⁵¹

The informal universe may have implications for the formal procedure. We—and David—have argued previously that adding litigation steps for all cases in a trans-substantive way may cause a good deal of additional time and expense for the bulk of cases that do not need those levels of activity and will settle anyway.¹⁵² Steve has argued that

107–11 (1996), available at <http://www.dca.gov.uk/civil/final/sec3a.htm#c10>; see Jason Curriden, *Woolf Reforms Target Inefficiency and Inequity in UK Court System*, INSIDE LITIG., July 1999, at 3 (noting the impact of the new rule requiring a Letter of Protocol to be mailed by the claimant's lawyer to defendant before the filing of the writ); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1564–65 n.17 (2003) (discussing Lord Woolf's report as devoting a "substantive section to case management").

149 Curriden, *supra* note 148, at 1, 2, 4.

150 Letter from Thomas Walsh, to Mr. and Mrs. Hutches (Oct. 5, 1925) (on file with authors).

151 See generally Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002) (describing the role of empirical research in civil rulemaking); Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221 (1997) (reflecting on the Civil Justice Reform Act of 1990 by focusing on the actors and processes involved in the conception of the Act).

152 See, e.g., Shapiro, *supra* note 4, at 1995; Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 93–94 (1997).

a firm trial date, seriously enforced, with discovery supervision by the court in the larger cases, is as much case management as is usually required to have an efficient, fair civil litigation system.¹⁵³ And Thom has argued for more judicial discretion in areas where more rigid procedural rules may create needless mischief.¹⁵⁴ Perhaps the realization of this parallel informal procedural universe in which lawyers are finding ways to focus and argue their legal and factual positions to each other will invite the judiciary and bar to reconsider all the formal procedure that has been created. Are mandatory disclosure and the series of discovery, scheduling, and pretrial conferences, and the accompanying burgeoning amounts of paperwork, really necessary or helpful for all but the largest, most discovery-laden cases?

It is difficult to imagine how the informal system could operate on its own, rather than as a complement.¹⁵⁵ The threat of remaining in the formal universe must play a significant part in advancing the development of the case within the parallel informal system. This observation, in turn, leads to the question of how one simultaneously provides an early integrated narrative, advertising the desire to settle, while at the same time backing it up with the clout that comes from the realistic ability to try a winning case. This issue becomes particularly thorny in a world where fewer lawyers have trial experience or a reputation for being effective trial lawyers. What does this dual universe mean for those clients who cannot afford lawyers in firms with deep trial experience or lawyers who are equipped to go the whole distance? Consequently, for those clients and their lawyers, the threats implied in the formal universe, with the possibility of trial, have little or no meaning.

Consider, for example, the plight of the overwhelmed legal service office with ever-decreasing funding trying to zealously represent its impoverished clients in cases involving benefits, discrimination, or consumer protection. For that matter, similar constraints, although not always monetary ones, apply to any firm that lacks lawyers with real

153 Subrin, *supra* note 85, at 45–46; Subrin, *supra* note 152, at 93–94.

154 Main, *supra* note 30.

155 Professor Burbank reminds us of the relevance of Steve Subrin's favorite quote. Professor Maitland warned that "[e]quity was not a self-sufficient system, at every point, it presupposed the existence of common law. . . . [I]f the legislature said, 'Common Law is hereby abolished,' this decree if obeyed would have meant anarchy. . . . Equity without common law would have been a castle in the air, an impossibility." F.W. MAITLAND, *EQUITY AND THE FORMS OF ACTION AT COMMON LAW*, TWO COURSES OF LECTURES 19 (A. Chaytor & W. Whittaker eds., 1920). In a similar manner, the parallel procedural universe that is the topic of this Article requires a robust formal civil trial system and the realistic threat of real trials.

trial experience. Perhaps underfunded or inadequately staffed offices, in terms of trial experience, should recognize (as they probably do already) that in the typical case most lawyers will largely occupy the formal universe, but at a minimal level of required activity, trying to quickly get into the parallel universe with plausible early integrated documents. Most of these cases will settle or be disposed of by motion. But these lawyers could, we suggest, be backed up with a few lawyers known in the community to relish solely the formal universe, and who like nothing more than trying cases, and, in fact, have extensive experience in so doing. Consequently, the other non-trial lawyers would have available the threat of transferring their cases to their trial-experienced colleagues. We know that in some firms such arrangements already exist, and that small “boutique” firms and individuals have emerged who, for the most part, only try cases or handle appeals.

Recognition of the parallel universe presents engaging opportunities for law professors, as well as lawyers, even though at this point we know little about that universe, and can only surmise what seems to be going on. In a sense (forgive us for sounding a bit lofty here) we in this Article have been like theoretical physicists trying to perceive a reality that we infer must be there. It will take empiricists to discover its contours. This presents real problems. Demand letters and responses thereto, and settlement brochures and videos, are not public documents. They are not filed in court, and lawyers may not be eager to divulge them for research purposes. Mediations are normally private and confidential, and so access to mediation statements will not come easily.

The difficulty and complexity of empirical research into the parallel universe may be even more daunting than we have so far suggested. From what we can glean from talking with lawyers, the documents they exchange, including demand letters and responses thereto, seem to vary by the substance of the litigation. Discrimination lawyers, personal injury lawyers, and commercial lawyers probably put different types of things in their advocacy materials. The rhythms of these cases may vary by substantive area. The integrated law/fact documents do not appear in judicial opinions nor do they show up very often, as yet, in form books. Like black holes, this alternative universe may remain unseen and uncharted, but inferred for our lifetime and beyond.¹⁵⁶

156 There are some possibilities for meaningful empirical exploration of the alternative procedural universe. One empiricist friend has given us two ideas: (1) See if an insurance company will permit a comparison of its litigation files now and ten years ago; perhaps this will show the extent that integrated narrative documents were sup-

The parallel universe prompts a number of evidentiary and ethical issues. Some of these have already been faced in the mediation world. There are statutes and mediation practices that treat anything said or written for a mediation as confidential.¹⁵⁷ But what about these extensive integrated demand letters, brochures, and videos that are increasingly being used? Are they part of inadmissible settlement negotiations under the Federal Rules of Evidence?¹⁵⁸ How much “puffery” will be permitted before it becomes a violation of the lawyer’s obligations under the applicable Rules of Professional Responsibility?¹⁵⁹ Will it be fraud to say things in a demand letter for which the writer does not have evidence? If the opposing side relies on that fraud in reaching settlement, will the fraud upset the finality of settlement?¹⁶⁰ If a demand letter is sent after the commencement of suit, is it subject to Rule 11? Could a demand letter affect the removability of a case?¹⁶¹ One topic that has begun to be debated in the scholarly

plied previously and now. One could examine, for instance, whether demand letters have become more detailed and longer; and (2) Send a short survey to both plaintiff and defendant lawyers asking about their and their opponents’ use of integrated documents, videos, and mediation statements. Although looking at what is actually done is normally more reliable, this may not be an area of inquiry in which lawyers are apt to distort reality in their answers. One judge suggested that we could inquire at meetings of litigation sections of bar associations.

157 See generally Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001) (arguing for uniformity); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986) (arguing against a blanket mediation privilege); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS. J. 1 (1988) (discussing protection of confidentiality).

158 See FED. R. EVID. 408 (compromise and offers to compromise); see Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988) (examining ways to enhance the protection of settlement communications); Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91 (1999) (examining the protection for confidential communications in the context of mediation).

159 See MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2004); MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(4) (1980). See generally Peter R. Jarvis & Bradley F. Telam, *The Dishonesty Rule—A Rule With a Future*, 74 OR. L. REV. 665 (1995) (discussing the application of the dishonesty rule).

160 One case of interest is *Slotkin v. Citizens Cas. Co. of New York*, 614 F.2d 301 (2d Cir. 1979), in which a split appellate court held that plaintiffs could maintain their action for fraud based on defendant’s counsel’s misrepresentation of the amount of insurance coverage without first rescinding the settlement. *Id.* at 318. A recent English article explores “how the law should treat a plea of mistake made by a party to a settlement of a disputed or disputable claim.” N.H. Andrews, *Mistaken Settlements of Disputable Claims*, 1989 LLOYD’S MAR. & COMM. L.Q. 431.

161 See Elizabeth P. Allen, *The 30-Day Removal Time Limit*, FLA. B.J., Feb. 2001, at 20 (detailing the removal process).

literature is whether negotiation itself should be subject to more regulation, or rather be left to the self-regulation that comes from attorneys needing to build up trust in their community of lawyers with whom they contend—trust that will be depleted if they are found to be dishonest.¹⁶²

We, the authors, teach civil procedure. So, too, does David Shapiro. To what extent has our growing realization that we are living in a world of settlement largely without trials influenced the nature of our civil procedure courses? Until recently, neither of the authors had ever mentioned the parallel procedure to our students. And yet the demand letter and response to it may well turn out to be the most influential civil litigation documents that they draft. If we are right, the lawyer of the future will continue to search for opportunities to advocate in writing or orally with an integrated law/fact narrative submitted to the opponent, and in many cases a somewhat different rendition for a third-party mediator. And all of this is done while still being conversant and strategically aware of the formal system. Without the formal system and the threat of trial, the parallel universe would usually collapse. We have just added demand letter-writing and mediation statement exercises into the second edition of our casebook, to accompany the many exercises centered on the traditional, formal, rule-bound system.¹⁶³

Current legal education has courses in evidence, trial practice, legal practice, alternative dispute resolution, and negotiation. We suspect that these courses also fail to deal with those written integrative narrative statements that lawyers have long since invented to influence their settlements. Our initial predilection is that rhetoric is the common theme that runs through the parallel universe, and to some extent, is largely influential in the formal universe. Maybe the Greeks had it right.¹⁶⁴ Perhaps rhetoric should be an es-

162 See, e.g., Paul Rosenberger, *Laissez-“Fair”*: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators, 13 OHIO ST. J. ON DISP. RESOL. 611 (1998); Gerald T. Husch & James L. Martin, *Ethics in Settlement Negotiations: Is There Such a Thing?*, ADVOCATE (Idaho), June 2003, at 24.

163 See STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 202–03, 533–34 (2d ed. 2004).

164 See ARISTOTLE, RHETORIC (W. Rhys Roberts trans., Friedrich Solmsen ed., 1984). See generally THOMAS M. CONLEY, RHETORIC IN THE EUROPEAN TRADITION 1–72 (1990) (discussing the important role of rhetoric in Greece); THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT (Patricia Bizzell & Bruce Herzberg eds., 1990) (compiling a canon of recognized authors and works in the rhetorical tradition).

stantial part of a good liberal education, a law school education, or both.¹⁶⁵

Perhaps the most interesting question that the academy, judges, and lawyers may wish to consider concerning the parallel procedural universe of non-rule mandated integrated law/fact narratives is whether this development we have described is a good thing. Is it a good thing in the sense that it makes for a better civil litigation process than in its absence? Our answer is "yes." For us, law is a means whereby societies attempt to replace the law of nature with norms decided upon by the society itself in an attempt to make life less harsh and more predictable. A good civil litigation system, among other goals, tries to have the law applied as predictably as it can, given all of the uncertainties of law and fact and other constraints which arise from competing values, such as the protection of confidential communications and the desire to have lay jury participation in the process.¹⁶⁶ Moreover, such a system seeks to obtain the peaceful resolution of disputes and the acceptance of judicial decisions, resulting from the justifiable belief of the parties and the public that the system is legitimate and fair. In a litigation system in which so many of the cases are disposed of through settlement, it is salutary, it seems to us, that the lawyers have found ways, absent trial, to present their clients' positions in the strongest light. That this is done through narratives that show how the law should be applied to the particular facts is precisely what one would hope happens in order to achieve the goals for a legal system that we have described.

We, along with many others, regret the phenomenon of the vanishing trial.¹⁶⁷ We have written at length about the positive aspects of

165 See generally Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613 (1999) (examining the history of legal rhetoric); Bruce McLeod, *Rules and Rhetoric*, 23 OSGOODE HALL L.J. 305, 308 (1985) (arguing "that the role of rules in judicial decision-making is commonly misunderstood"); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483 (2003) (discussing the historic use of rhetoric in the profession of law); Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566, 566 (1994) (examining "the practical nature and justificatory function of legal argument").

166 Civil litigation systems have many underlying values, some of them at war with each other. See, e.g., Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 140 (1999) (listing "different values and goals" in the U.S. procedural system).

167 Judges, lawyers, and scholars recently discussed and regretted the vanishing trial at a conference in San Francisco, as reported in the *New York Times*. See Liptak, *supra* note 94. See also Miller, *supra* note 87 (arguing that courts have placed such high a value on efficiency that they risk eclipsing the rights of litigants to have their

the public trials of citizen disputes, and the critical part played by the formal litigation system, especially jury trials, in our democracy.¹⁶⁸ We also regret what appears to be the gradual loss of a bar experienced in oral, public advocacy, and the trial of cases in open court. After all, isn't the art of advocacy what lured (and lures) many to this profession in the first place?¹⁶⁹ We have also included in both editions of our casebook an exercise inviting students to make a closing argument to a jury in their first-year civil procedure class.¹⁷⁰

There is, though, no evidence that the integrated advocacy materials we have explored and applauded have produced more settlements than occurred previously, nor that the cases that have settled using such materials would have otherwise ended up in trial. Moreover, perhaps we are gaining a litigation bar trained in skills equally important to those involved in the trial of cases, such as how to write law/fact narratives in a clear, convincing manner and how to settle cases at an earlier time than was the previous norm, with settlements that truly reflect the realistic strengths and weaknesses of each position. We hope that our empiricist colleagues can, over time, figure out whether the gains, and potential losses, are in fact happening.

The pragmatic responses of the American litigation bar in the parallel procedural universe should, we contend, encourage each segment of our legal profession—judges, lawyers, law professors, and empiricists—to reassess and recalibrate their views of civil litigation, procedure, advocacy, and curriculum.

day in court); Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24, 27 (emphasizing push toward ADR); Stephanie Francis Ward, "Vanishing Trials" Issue Won't Go Away, A.B.A. J. E-REP., Dec. 19, 2003 (discussing San Francisco symposium sponsored by the ABA's Litigation Section and its Vanishing Trials Project).

168 See, e.g., SUBRIN, MINOW, BRODIN & MAIN, *supra* note 163, at 375–90; Subrin, *supra* note 111, at 197–98.

169 For an impassioned defense of our professional calling, see LLOYD PAUL STRYKER, *THE ART OF ADVOCACY* (1954).

170 See SUBRIN, MINOW, BRODIN & MAIN, *supra* note 163; see also STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT* 552–53 (1st ed. 2000) (recounting this exercise). Query when these students will again give a closing argument to a jury. But we think that having students give simulated closing arguments is an excellent way to demonstrate the importance of facts and how persuasive narratives of law and fact are constructed.