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## A History of the Civil Trial in the United States

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### I. INTRODUCTION

For most Americans, the word “trial” conjures up a courtroom drama, usually concerning a crime. Of course, much of what goes on in American courtrooms is not very dramatic, and much of it does not concern crime. But American courts have become the setting for significant decisions about how the country operates. These decisions are sometimes dramatically announced, but they often pass quietly into the public domain. In this article, I will trace the history of the mechanism for these significant decisions—the civil trial.

My focus is on the civil trial in the United States, but no history of the civil trial in the United States could be complete without some consideration of the American trial’s English origins. Thus, I start with a brief history of the English trial. I then consider the American trial during colonial times. The history in the United States is divided into two parts: from the founding to 1938, and after 1938. The year 1938 is significant because it is when the Federal Rules of Civil Procedure took effect, and those rules have had a profound impact on the development of

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the civil trial, in both federal and state courts. I will describe the effect of those changes on the civil trial.<sup>1</sup>

For most of this history, the trial itself remains largely unchanged, while court structure and procedures change around it. The evolving system came to fruition in 1938 with the promulgation of the Federal Rules of Civil Procedure. These rules transformed the trial itself into more protracted litigation, and made the entire procedural system look more like equity than the common law. They also made the system look less adversarial and more inquisitorial. The complexity of the litigation that is possible under these rules has, in turn, led to some experimentation in the form of the trial itself.

## II. THE ENGLISH HISTORICAL ROOTS

Although this article concerns the history of the *American* civil trial, it is impossible to understand the American history without a basic grounding in the English history. American civil trials have their origins in English trial practice. Thus, in this section I will briefly describe the history of such practice. England has had many kinds of courts,<sup>2</sup> includ-

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1. This article is an overview of a history that covers several centuries in America and several more in England. I have not done original research for this overview, but I have relied on published works on various aspects of the history. I have not found a single work that covers the long history of the American civil trial. It is clear from my work here that much more could be done. Thus, I hope that this work will inspire others to undertake more research on the subject, including original research in the court records of the various colonies and, later, the states. Much of the published work relates to court structure or to the subject matter of colonial and early U.S. trials. It is much harder to find accounts of the civil trial process itself, especially for the period prior to the nineteenth century. Descriptions of trials are more likely to focus on criminal trials. Thus, some of what I say here is, necessarily, extrapolation.

2. For discussions of English courts, see S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 13–25 (2d ed. 1981); JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW* 24–51 (David Bates ed., 1996); 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 64–78 (2d ed. 1923); 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 3–77 (3rd ed. 1926); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 79–105 (Little, Brown & Co. 5th ed. 1956) (1929); 3 WILLIAM BLACKSTONE, ESQ., *COMMENTARIES ON THE LAWS OF ENGLAND* 30–60 (Neill H. Alford, Jr. et al. eds., The Legal Classics Library 1983) (1768); MELVILLE MADISON BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* 19–146 (1880); ROSCOE POUND, *ORGANIZATION OF COURTS* 3–25 (Little, Brown & Co., 1979) (1940). In the early post-Norman English history, there was no clear distinction among legislative, executive, and judicial functions. The courts were administrative arms of the king. See MILSOM, *supra*, at 12–13; PLUCKNETT, *supra*, at 79; HUDSON, *supra*, at 30. In addition, Parliament was originally a body of lords called together by the king to advise him and assist him. See 1 *HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT* 4–5 (E.B. Fryde & Edward Miller eds., 1970); PETER SPUFFORD, *ORIGINS OF THE ENGLISH PARLIAMENT* 4 (H.F. Kearney ed., 1967); ALBERT BEEBE WHITE, *THE MAKING OF THE ENGLISH CONSTITUTION 1449–1485*, 298–401 (1908); 1 POLLOCK & MAITLAND, *supra*, at 200; FRANKLIN FERRISS RUSSELL, *OUTLINE OF LEGAL HISTORY* 24 (1929); STRATHEARN GORDON, *THE BRITISH PARLIAMENT* 14–15 (1952); see generally JAMES FOSDICK BALDWIN, *THE KING'S COUNCIL*

ing local courts operated by local lords and the king's courts, which were more centralized. In this article, my primary focus is on the two kinds of king's courts that have had the greatest impact on the American trial: the common law and equity courts.<sup>3</sup> A complete history cannot be given, however, without some discussion of the local courts, so I will discuss them as well.

At the time of the Norman Conquest, English justice was administered largely by the local courts, operated in conjunction with the manors.<sup>4</sup> The Norman kings, like kings all over Europe, would hear petitions from their subjects who could not get justice in the local courts.<sup>5</sup> But the kings quickly adopted a system whereby litigants could obtain writs allowing them to adjudicate their cases in courts established by the king to administer the common law of the land. The writ gave the court jurisdiction over the controversy and the parties, described the nature of the complaint, and prescribed the procedures to be followed in resolving the matter.<sup>6</sup> The king's common law courts normally employed juries to decide disputes of fact.<sup>7</sup> But common law courts could not always do justice, and so subjects of the king continued to petition him to prevent injustice that had no remedy in a common law court.<sup>8</sup> Such petitions

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IN ENGLAND DURING THE MIDDLE AGES (1913) (describing the development of the king's council, which was a precursor of both Parliament and the courts).

3. There were a variety of courts operated by the king, with somewhat overlapping jurisdiction and interchangeable judges. See D.M. KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 7-8 (1890). For example, the Court of Exchequer had some common law and equity jurisdiction. See POUND, *supra* note 2, at 10, 18-19; W.H. BRYSON, THE EQUITY SIDE OF THE EXCHEQUER 16-27 (1975).

4. See George Burton Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 91-92 (1916).

5. See *id.*

6. See ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 69-70, 105-07 (2001).

7. The use of the jury developed over time, and the early common law courts used a variety of methods of proof. See *infra*, notes 28-42 and accompanying text. The early common law courts did not distinguish between questions of fact and questions of law. It is not clear when the distinction came to be important, with judges deciding questions of law and juries deciding questions of fact, but it seems that it was quite well established by the seventeenth century, and could date to the time of Bracton, who wrote in the thirteenth century. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185 (Rothman Reprints 1969) (1898). The distinction between law and fact, while at least a few centuries old, is a difficult one to make. Some issues seem to be part fact and part law, and have been deemed "mixed" questions of fact and law. A classic example is negligence: a decision that someone has been negligent is in part a decision that the law proscribes certain conduct and in part a decision that he has engaged in such proscribed conduct. The law itself is established by reference to what he has done. See SWARD, *supra* note 6, at 273.

8. This is an indication of the unity of what we now view as separate branches of government. See *supra* note 2. In modern federal practice, the executive and the legislative branches cannot overturn a final decision of the Supreme Court. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-25 (1995) (interpreting the Constitution to forbid legislative interference with courts' final judgments).

were eventually regularized in what became known as the court of equity, which did not employ juries as fact-finders.

I divide this section into four subsections, the first focusing on common law trials and the second on equity trials. I then discuss the relationship between law and equity and end with a brief discussion of the local courts in England, which continued to flourish after establishment of the king's courts.<sup>9</sup>

#### A. *The Common Law Trial*

There are three important aspects of common law trials: the stages of common law trials, which are pleading and proof; the early forms of common law proof; and the development of the jury. In this subsection, I will discuss each of these in turn.

##### 1. The Stages of a Common Law Trial: Pleading and Proof

A common law trial had just two stages. In the first, the pleading stage, the parties set forth their claims and defenses orally before the judge.<sup>10</sup> The pleadings were quite important, as they were designed to reduce the dispute to a single issue of fact or law. Thus, the plaintiff would begin with a declaration, which described his complaint against the defendant.<sup>11</sup> The defendant could respond in many ways. A demurrer, the modern equivalent of which is the motion to dismiss for failure to state a claim, raised a question of law, as it challenged the sufficiency of the declaration.<sup>12</sup> A demurrer admitted the facts stated in the declaration, but asserted that they gave rise to no legally recognized claim.<sup>13</sup> Because of the admission as to the facts averred, the defendant who lost the demurrer lost his case.<sup>14</sup>

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9. For much of their early history, the local courts could not use juries because they could not require the jurors (or anyone else) to take an oath. The oath was essential to the operation of the jury system. See THAYER, *supra* note 7, at 48–49.

10. See HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 58–59 (3d Am. ed. Washington, D.C., W.H. Morrison 1882). Again, I am recording ancient history. Oral pleadings long ago gave way to written pleadings. See *id.* at 62; BLACKSTONE, *supra* note 2, at 293. The system of pleading described here developed over time, and certainly did not spring forth fully formed.

11. See STEPHEN, *supra* note 10, at 64–65.

12. See *id.* at 82–83.

13. See *id.* at 159–60.

14. *Id.* at 160.

A defendant could also respond with a traverse, which denied the allegations in the declaration.<sup>15</sup> A traverse raised a question of fact. Both the demurrer and the traverse essentially finished the pleading stage, as they presented a question of law or fact to the court for decision. But a defendant might also respond with a confession and avoidance, equivalent to the modern affirmative defense.<sup>16</sup> The confession and avoidance admitted the allegations in the declaration but asserted that facts not stated in the declaration relieved the defendant of liability. The confession and avoidance required a response, called a replication, as the court needed to get the plaintiff's view of the material asserted by the defendant.<sup>17</sup> The confession and avoidance could, itself, be met by a variety of responses, some requiring further responses.<sup>18</sup> Thus, the pleadings could continue for some time before they finally revealed a single issue of law or fact.<sup>19</sup>

Ironically, there developed, alongside this complex pleading system, a form of traverse called the "general issue" plea, which simply put the entire case at issue and avoided all of the later pleadings.<sup>20</sup> There were formulas for making a general issue plea to each of the various forms of action, which made it useful under some circumstances but not others.<sup>21</sup> Thus, the decision to use the general issue plea was not simply an attempt to avoid the complexities of ordinary common law pleading, though that could certainly be one motivation. The general issue plea could sometimes obscure whether the basic issue was one of law or fact.<sup>22</sup>

This has been a rather simple description of common law pleading, which in fact was quite complicated. Lengthy treatises have been written on common law pleading,<sup>23</sup> and litigants could easily lose cases or be required to begin again because of pleading errors.<sup>24</sup> Common law pleading looked very much like an obstacle course, and not much like a

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15. See *id.* at 166–67.

16. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1270 (2d ed. 1990).

17. STEPHEN, *supra* note 10, at 94–95.

18. *Id.*

19. See *id.* at 93–94 (explaining the lengthy traverse proceeding).

20. *Id.* at 168–70.

21. *Id.* at 170–79.

22. See David Millon, *Positivism in the Historiography of the Common Law*, 22 WIS. L. REV. 669, 675–77 (1989).

23. See generally STEPHEN, *supra* note 10; J. CHITTY, A TREATISE ON THE PARTIES TO ACTIONS, THE FORMS OF ACTIONS, AND ON PLEADING (Philadelphia, Pennsylvania, I. Riley 1819); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING (St. Paul, Minnesota, West Publishing Co. 2d ed. 1895).

24. See STEPHEN, *supra* note 10, at 392–93, 397–98.

step on the path to justice. Once it was completed, the proof stage—the trial itself—was ready to begin.<sup>25</sup>

## 2. The Early Forms of Trial

Early trials depended on a judgment from God. All of them required one of the parties—the one with the burden of proof—to take an oath before God that his cause was just, and then undergo some kind of test, or trial. The best known is the ordeal, though “ordeal” may be overstating the matter.<sup>26</sup> A common form of ordeal was for the party with the burden of proof to have his hand wrapped in leaves and then hold a hot iron for a prescribed period of time. If the hand was unscathed, his cause was just and he won; if the hand was burned, he lost.<sup>27</sup> The ordeals were manipulable, however, and it perhaps seemed curious that most people who had to undergo the ordeal of the hot iron prevailed.<sup>28</sup> Ordeal came to an end in 1215, when the church forbade the participation of clergy, who were needed to administer the oath.<sup>29</sup>

Another early form of trial was wager of law, in which the party with the burden of proof had to find a certain number of men<sup>30</sup> in the community—twelve was a common number—to swear a prescribed oath as to his good character.<sup>31</sup> The oath was quite difficult, and if any of the twelve missed so much as a word, the party lost.<sup>32</sup> Indeed, it was much easier to prevail under the ordeal of the hot iron. A related form of trial was trial by witnesses, though these were not the kind of witnesses that

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25. Pleading and proof were distinct segments of Norman trials, and were held at separate terms of the court. Thus, there was an “issue term” and a “trial term.” BIGELOW, *supra* note 2, at 229–87, 301–40.

26. For discussions of the ordeal, see W.G. Aitchison Robertson, M.D., *Trial by Ordeal*, 38 JURID. REV. 70 (1926); Paul R. Hyams, *Trial by Ordeal*, in ON THE LAWS AND CUSTOMS OF ENGLAND 90–126 (Morris S. Arnold et al. eds., 1981); Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109 (2000).

27. THAYER, *supra* note 7, at 35 n.1. PLUCKNETT, *supra* note 2, at 113–15. Another form of ordeal was for the party with the burden of proof to be thrown into a pool of water, with a rope tied around his waist. If he floated, he was guilty, and if he sank, he was innocent. The theory was that the water would receive the innocent and reject the guilty. THAYER, *supra* note 7, at 35 n.1; PLUCKNETT, *supra* note 2, at 113–15.

28. See 2 POLLOCK & MAITLAND, *supra* note 2, at 599.

29. See THAYER, *supra* note 7, at 37 n.1; PLUCKNETT, *supra* note 2, at 118.

30. For most of the history of common law trials, women could participate only as parties. Indeed, it was not until well into the twentieth century that women in the United States were found to have a constitutional right to participate in trials as jurors. See *Taylor v. Louisiana*, 419 U.S. 522, 535–37 (1975) (holding unconstitutional a Louisiana statute providing that women could serve as jurors only if they registered for service). For a general discussion of the history of participation in trials by women and minorities, see SWARD, *supra* note 6, at 223–27.

31. THAYER, *supra* note 7, at 24–34; PLUCKNETT, *supra* note 2, at 115–16.

32. See 2 POLLOCK & MAITLAND, *supra* note 2, at 601.

we use today. As with wager of law, the witnesses merely swore to the good character of the party who recruited them.<sup>33</sup> The winner was apparently selected on the basis of sheer numbers: whoever had the most witnesses willing to stand up for him won the lawsuit, though if trial by witnesses was inconclusive, the parties had to settle their dispute by one of the other methods.<sup>34</sup>

Finally, combat was an ancient form of trial. It required an actual physical fight, with one side being vanquished by death or capitulation.<sup>35</sup> The parties could sometimes hire champions to fight for them, especially in those civil cases where combat was used, and a cabal of quite unsavory champions developed.<sup>36</sup>

All of these ancient forms of trial eventually fell out of favor as they seemed not to be rational methods of resolving disputes.<sup>37</sup> All of them except ordeal, however, were formally available to litigants in England as late as the nineteenth century, though they were rarely used.<sup>38</sup> The informal vestiges of combat may have been the hardest to eliminate, as duels were employed frequently even after they were declared illegal in 1819.<sup>39</sup> One cannot eliminate one method of proceeding, however, without providing a new one. The new form of trial was the jury.

### 3. The Development of the Jury Trial

The jury trial as an alternative to the ancient modes of trial began developing after the Norman Conquest of 1066.<sup>40</sup> The jury as we know it today is quite different from the early version, which was a variant of the Norman inquest. The inquest was used by the king to get information: he would summon people from the relevant vicinity and require

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33. THAYER, *supra* note 7, at 17.

34. *Id.*

35. THAYER, *supra* note 7, at 39–46; PLUCKNETT, *supra* note 2, at 116–17.

36. *See* PLUCKNETT, *supra* note 2, at 117.

37. *See* POLLOCK & MAITLAND, *supra* note 2, at 598–600 (discussing the problems that the church recognized with ancient forms of trial which led to their abolition).

38. Battle was formally abolished in 1819. *See* THAYER, *supra* note 7, at 45; J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 87 n.10 (3d ed. 1990). Wager of law was abolished by statute in 1833. THAYER, *supra* note 7, at 34. Trial by witnesses was abolished in 1833. *Id.* at 24. Ordeal had been effectively abolished in 1215. *See supra* note 26 and accompanying text. In practice, none of these historical methods of proof had been in much use for several centuries before their formal abolition.

39. *See* V.G. KIERNAN, THE DUEL IN EUROPEAN HISTORY 204–22 (1988).

40. *See* THAYER, *supra* note 7, at 47–84. This is the majority view. There are some who think that the jury developed out of indigenous procedures in England, but most scholars see it as a Norman import, growing out of the Norman inquest. *See* SWARD, *supra* note 6, at 72–73 n.34.

them to provide him, under oath, with the information he wanted.<sup>41</sup> The earliest and best known example of the inquest is the Domesday Book, which was a census of landholdings compiled by a jury of countrymen in the late eleventh century to inform the king as to property ownership (and therefore tax liability) in his new realm.<sup>42</sup>

It was not long after the Norman Conquest that the king began offering a form of inquest as the method of proof, or trial, in his courts. Instead of the ancient forms of proof, litigants in the king's courts were given the opportunity to have their cases determined by an inquest jury.<sup>43</sup> In other words, a jury was summoned, and the jurors had to inform the court, under oath, as to the truth of the matter in dispute. If the jurors summoned did not know the truth, they were required to make inquiries until they were satisfied of the truth so that they could swear to it.<sup>44</sup> This method of proof seemed eminently sensible to people who were used to the vagaries or the outright manipulation of the ancient methods of proof. It was more rational. As a result, litigants flocked to the king's courts, the only courts—at least in the early history of the jury—where it was available.<sup>45</sup>

The transformation of the jury from a jury of witnesses into a jury of impartial fact-finders, who come to court uninformed and base their decision solely on what they hear in court, took place over several centuries, and not so transparently as we would like.<sup>46</sup> The process of the transformation is not well known, but something generally resembling a modern trial was apparently in place by the end of the fifteenth century.<sup>47</sup> It took another three hundred years before that procedure was firmly established. The problem was that the jury as witnesses for a time co-existed with the jury as uninformed fact-finder. As late as 1670, in the

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41. See THAYER, *supra* note 7, at 50–54.

42. See THAYER, *supra* note 7, at 51–53; LLOYD E. MOORE, *THE JURY: TOOL OF KINGS, PALADIUM OF LIBERTY* 33 (2d ed. 1988). For general discussions of the Domesday Book, see V.H. GALBRAITH, *DOMESDAY BOOK* (1974); FREDERIC WILLIAM MAITLAND, *DOMESDAY BOOK AND BEYOND* (Boston, Little, Brown & Co. 1897); R. WELLDON FINN, *THE DOMESDAY INQUEST AND THE MAKING OF DOOMSDAY BOOK* (1961).

43. See THAYER, *supra* note 7, at 54–67. One way the king did this was to provide new writs encompassing new forms of action, and to provide for trial by jury under the newly created writs. *Id.* at 60.

44. *Id.* at 63.

45. See PLUCKNETT, *supra* note 2, at 110–12. This helped to centralize authority in the king's government. See THAYER, *supra* note 7, at 48–49. The jury was unavailable in the local courts because the local courts could not require an oath. See *id.* at 48–49.

46. See John Marshall Mitnick, *From Neighbor–Witness to Judge of Proofs: Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 201–03 (1998) (discussing the uncertainty as to the historical change in English juries); THAYER, *supra* note 7, at 47–65 (highlighting some of the changes in the roles of juries in English law in the centuries following the Norman invasion).

47. See PLUCKNETT, *supra* note 2, at 129–30.



famous *Bushell's Case*, the court ruled that juries could bring their own knowledge to bear on a decision, even when evidence was also presented in court.<sup>48</sup> But by the last third of the eighteenth century, that right had disappeared, and juries were required to base their decision solely on evidence presented at trial.<sup>49</sup>

As the English common law jury trial was transformed from a summoning of witnesses to a presentation of evidence in court, a law of evidence evolved to control the matters that could be presented to the jury.<sup>50</sup> The idea behind evidence law, whether explicitly stated or not, is that a jury of lay persons cannot be entirely trusted to evaluate evidence—particularly evidence with considerable emotional content. Indeed, Thayer is quite plain in asserting the relationship between the jury and evidence law, saying that “the greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English ‘Law of Evidence.’”<sup>51</sup> Those rules generally exclude evidence that it is thought juries could not properly handle, though that is not the only reason evidence might be excluded.<sup>52</sup>

By the late eighteenth century, then, the English common law civil trial consisted of a presentation of evidence to a jury of twelve men who

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48. 135 Vaughan, 124 Eng. Rep. 1006 (K.B.1670). The court in *Bushell's Case*, which was a criminal case, held that jurors could not be punished for a decision contrary to what the judge had directed them to make. The rationale for this decision was that jurors could bring information about the case with them into the courtroom, and as the judge could not know whether they had relied on that information, he could not punish them for seeing things differently from the way he did. *Id.* at 1012. *Bushell's Case* is generally regarded as the seminal case on jury independence for civil as well as criminal juries. For a thorough discussion of *Bushell's Case*, see THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE (1985) (discussing the historical development of the jury in England).

49. See Mitnick, *supra* note 46, at 207 (citing BLACKSTONE, *supra* note 2, at 374–75).

50. For the most comprehensive history of this development, see THAYER, *supra* note 7. In the early English common law, there were no bench trials. Unless one of the ancient modes of trial survived and was selected, the jury was the prescribed method of trying issues of fact until 1854. While English courts continue to use juries for criminal cases, the English civil jury has now all but disappeared. It is available today in only a handful of cases. See SIR PATRICK DEVLIN, TRIAL BY JURY 130–31 (1956); James Driscoll, *The Decline of the English Jury*, 17 AM. BUS. L.J. 99, 107 n.58 (1979) (noting that civil juries were still available in England for cases of fraud, libel, slander, malicious prosecution and false imprisonment, and noting that the English courts could deny a jury trial even in these actions).

51. THAYER, *supra* note 7, at 180.

52. Some evidence is excluded for policy reasons. For example, the attorney/client privilege excludes evidence of communications between lawyer and client because we want to encourage full and open communication between them. That goal, which helps ensure that laws are enforced, would be undermined by admitting evidence of such communications. See 1 JOHN W. STRONG, ET AL., MCCORMICK ON EVIDENCE § 72 (5th ed. 1999); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (John T. McNaughton rev. 1961).

owned a minimum of property,<sup>53</sup> and who were not expected to know anything about the matter before them. The jurors listened to the evidence presented, usually by attorneys representing the parties, and made their decision based on the evidence.

### B. *Trials in Equity*

Trials in the courts of equity were different in several important respects, and could be much more complicated. One of the most important distinctions between common law trials and equity trials is that the latter operated without a jury. Another is that the pleadings and the evidence presented tended to be written rather than oral.<sup>54</sup> Courts of equity also allowed multiple claims and multiple parties.<sup>55</sup>

#### 1. Early History of Equity

There was no distinction between law and equity in the early history of the English courts. Both originated as petitions to the king by persons who could not obtain justice in the existing courts.<sup>56</sup> Equity as a distinct body of law originated around the fourteenth century, as the common law writ system—suffering resistance from those who opposed the growing power of the chancery to issue new writs—became more rigid.<sup>57</sup> Equity

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53. Ownership of property was required until 1972. See Graham Hughes, *English Criminal Justice: Is It Better Than Ours?*, 26 ARIZ. L. REV. 507, 591 (1984). It was a requirement in the early history of the United States as well. See, e.g., CHARLES EDWARDS, *THE JURYMEN'S GUIDE THROUGHOUT THE STATE OF NEW YORK* 54 (1831) (noting that males between 21 and 60 years of age who held \$250 in personal property or a freehold estate worth \$250 in the county where the court sits were eligible to serve as jurors in New York). The men who served on juries could hold the freehold estate either "in their own right, or in the right of their wives," but their wives could not serve regardless of how much property they owned. *Id.*

54. See W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY 190-91* (1967) (describing the bill of complaint in equity as a written document); *id.* at 236 (describing proof in equity as written and using the vernacular). Recall that common law pleadings eventually came to be set down in writing as well. See 3 BLACKSTONE, *supra* note 2, at 293.

55. See 1 JOHN NORTON POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* §§ 113, 257 (Spencer W. Symons ed., 15th ed. 1941); 1 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA* § 28 (Little, Brown & Co., 7th ed. 1857); 1 ROBERT TREAT WHITEHOUSE, *EQUITY PRACTICE, STATE AND FEDERAL* §§ 49-77 (1915).

56. See Adams, *supra* note 4, at 91. See also WILLIAM F. WALSH, *A TREATISE ON EQUITY* 5-7 (1930) (noting that equity was dispensed in the early common law courts so that no separate system of equity was required). The existing courts were local, usually associated with a manor. Adams *supra* note 4, at 91-92.

57. See STORY, *supra* note 55, § 44; WALSH, *supra* note 56, at 1-2, 15-16; Adams, *supra* note 4, at 97-98; 1 HOLDSWORTH, *supra* note 2, at 398, 447. Opposition came largely from the barons, whose power had been growing since the Magna Carta. See 1 HOLDSWORTH, *supra* note 2, at 398. This might be seen as an early skirmish in the battle for power between the king and Parliament. For the history of equity jurisprudence, see 1 STORY, *supra* note 55, at 1-32; WALSH, *supra* note 56, at

was available to those who, because of the growing rigidity of the writ system, could not obtain justice in the king's courts.<sup>58</sup> For example, the common law did not recognize fraud as a defense to a contract under seal.<sup>59</sup> A litigant who wanted to claim that he had been fraudulently induced to enter into a contract under seal had to petition the king himself for relief,<sup>60</sup> though the king's chancellor, the most important legal officer in the king's court, handled most such petitions.<sup>61</sup>

Because the chancellor had responsibility for both the writs, which embodied the common law, and the petitions that ultimately formed the core of equity, there was still considerable overlap in the two systems throughout the fourteenth century. There were different bodies of law, to be sure, and different procedures, but it was not until the fifteenth century that entirely separate court systems began to develop. Part of the reason for this development is that petitions for relief in instances where the common law courts could not provide a remedy had become so numerous<sup>62</sup> that a regular procedure for handling them was required.<sup>63</sup> By

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1-40; Adams, *supra* note 4; 3 BLACKSTONE, *supra* note 2, at 30-60; 1 HOLDSWORTH, *supra* note 2, at 395-476.

58. See STORY, *supra* note 55, § 50; Adams, *supra* note 4, at 91, 96; WALSH, *supra* note 56, at 12. I do not mean to suggest that justice could not be obtained in the king's courts. Most of the time it could. But the common law courts were constrained by the forms of action and by procedural rules such as pleading rules so that sometimes those courts simply could not do what needed to be done. It was in those instances that equity stepped in to do what needed to be done. See generally STORY, *supra* note 55, at 1-32 (describing the nature of equity). Story takes great pains to emphasize that equity did not correct errors of the common law courts, but stepped in where the common law courts could not act. *Id.*

The requirement that the petitioner be unable to obtain justice in the king's courts continues today in the general rule that one cannot have an equitable remedy if one has an adequate remedy at law. See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 2.1(1) (2nd ed. 1993). Thus, one cannot obtain an injunction if money damages would adequately remedy the claimed wrong.

59. See WALSH, *supra* note 56, at 491-92. There were other instances where the common law did not recognize fraud as well. See STORY, *supra* note 55, §§ 184-85.

60. The king generally acted through his council, a body encompassing all of the branches of government. It is the forerunner of Parliament. See WALSH, *supra* note 56, at 12-13. See generally BALDWIN, *supra* note 2 (describing the medieval history of the king's council).

61. See WALSH, *supra* note 56, at 14-16. The chancellor could not act alone in most of the early cases, but acted in conjunction with the judges and the king's council. See WALSH, *supra* note 56, at 16 (citing 1 HOLDSWORTH, *supra* note 2, at 404 and BALDWIN, *supra* note 2, at 246). Under an ordinance of King Edward III, such matters were required to be referred to the chancellor. See *id.* at 28. Such reference to the chancellor was confirmed by statute during the reign of Richard II. See *id.*

There were other reasons why a party might not be able to obtain justice in the king's courts. A litigant might find that his adversary was under the protection of some powerful person, for example. See STORY, *supra* note 55, § 48; WALSH, *supra* note 56, at 17.

62. See WALSH, *supra* note 56, at 18-28; KERLY, *supra* note 3, at 97.

63. The regularized procedure was some time in coming. The procedures developed gradually after chancellors ceased to be ecclesiastical officials and became professional legal administrators. See KERLY, *supra* note 3, at 118.

the seventeenth century, equity in its “modern” sense was fully in place.<sup>64</sup> It would last until the middle of the nineteenth century, when Britain began to merge law and equity.<sup>65</sup>

## 2. Equity Procedure

It is not my purpose here to describe English equity practice and jurisprudence in detail.<sup>66</sup> Some aspects of English equity remain important to modern American trials, however, and must be noted. The first of these is the absence of the jury in English equity trials. As equity was, literally or figuratively, a petition to the king, juries were not involved in equity cases. This distinction remains important in American courts today, as jury trials are generally available when only legal remedies are sought.<sup>67</sup> In the federal courts, that means that juries are available when only legal remedies are sought or when both legal and equitable remedies are sought.<sup>68</sup> The presence of a jury can make a significant difference in the way a trial is conducted. For example, evidence rules are more

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64. *See id.* at 184.

65. For a brief history of the merger of law and equity in England, see SWARD, *supra* note 7, at 102 n.1.

66. There are many treatises and other works on equity, treating many aspects of it. Some concentrate primarily on equity jurisdiction and remedies. *E.g.*, STORY, *supra* note 55; POMEROY, *supra* note 55 (5 vols.); F. W. MAITLAND, EQUITY (A.H. Chaytor & W.J. Whittaker eds., 2d rev. 1909); JOHN FONBLANQUE, A TREATISE OF EQUITY (Philadelphia, P. Byrne, 3d ed. 1807) (2 vols.). Others focus on equity practice and procedure. *E.g.*, WHITEHOUSE, *supra* note 55; GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY (New York, I. Riley 1813). Some works cover both aspects of equity. *E.g.*, JOHN ADAMS, THE DOCTRINE OF EQUITY (Robert Ralston ed., Philadelphia, T. & J.W. Johnson & Co., 8th ed. 1890); LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY' (D.E.C. Yale ed., 1965). In this article, I am focusing on practice and procedure rather than jurisdiction and remedies.

67. For an extensive discussion of the right to jury trial in federal courts, see SWARD, *supra* note 6, at 157–208. The right to jury trial in federal courts is governed by the Seventh Amendment, which says, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII. This amendment has been interpreted to mean that one has the same right to jury trial that one would have had in an English court of equity in 1791, the year the amendment was ratified. *See Dimick v. Scheidt*, 293 U.S. 474, 476 (1935). State courts could have different rules as to the right to jury trial because the Seventh Amendment does not govern state courts. *See Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Burrell v. Davis*, 779 F. Supp. 42, 43 (E.D. Va. 1991); 2 RONALD D. ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW § 17.8 n.12 (1986).

68. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959). For a general discussion of the constitutional right to a jury trial in the United States, see SWARD, *supra* note 6, at 157–208.

strictly observed in jury trials than in bench trials,<sup>69</sup> and the mode of argumentation will differ somewhat depending on whether the decision-maker is a judge or a jury.<sup>70</sup>

Another significant historical difference between common law and equity was that equity developed the practice of conducting most of its proceedings in writing. A suit in equity was commenced by filing a bill of complaint, which set forth the facts of the case and a prayer for relief.<sup>71</sup> Over time, the bill became much more complicated, requiring, among other things, that the complainant set forth interrogatories to be put to the defendant.<sup>72</sup> The defendant was summoned by means of a subpoena and required to answer the bill of complaint.<sup>73</sup> The plaintiff had an opportunity to reply to the defendant's answer, and the defendant at some point was examined under oath.<sup>74</sup> The answers were written down and signed.<sup>75</sup> The trial consisted of a presentation of evidence—documents, including signed depositions, and oral testimony—in the Chancery or before commissioners designated by the Chancery.<sup>76</sup>

Written answers did not begin to appear until the twenty-first year of the reign of Henry VI, which would have been 1443.<sup>77</sup> Eventually, written answers were required.<sup>78</sup> More significant, however, was the fact that equity began to eschew oral testimony, and came to take most if not all of the evidence in writing. Even the examination of witnesses was by deposition, with only the transcript presented as evidence at trial.<sup>79</sup>

69. See STRONG, *supra* note 52, § 60. The reason for this is that it is assumed that the judge can more competently assess the evidence and so does not need to exclude problematic evidence, such as hearsay, from her own consideration. Juries, it is thought, are more apt to be misled by questionable evidence. Thayer, who wrote the most extensive history of evidence and the jury, observed that the law of evidence developed because of the jury. THAYER, *supra* note 7, at 180–81.

70. See, e.g., KERLY, *supra* note 3, at 123 (describing the differences in argumentation in common law and equity courts in the sixteenth and seventeenth centuries).

71. See COOPER, *supra* note 66, at 3–4. A case in equity could also be commenced by an information, which was filed by the attorney-general on behalf of the crown. *Id.* at 1. See also ADAMS, *supra* note 66, at lviii–lix.

72. See COOPER, *supra* note 66, at 4; ADAMS, *supra* note 66, at lix.

73. A refusal to answer was deemed a contempt of court. ADAMS, *supra* note 66, at lx.

74. KERLY, *supra* note 3, at 51–52.

75. See *id.* at 51.

76. See *id.* at 51–52.

77. See *id.* at 51.

78. See *id.* at 67; JOHN G. HENDERSON, CHANCERY PRACTICE § 81 (1904).

79. See WHITEHOUSE, *supra* note 55, at 568; ADAMS, *supra* note 66, at lxiv; KERLY, *supra* note 3, at 121–23; THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE 1101–08 (1909). Adams notes that the difference in the manner of taking evidence in common law and equity was due to a difference in goals in the two systems. The common law sought to present evidence to a jury, which needs to see the conflicting evidence that they need to “compare[] and sift[].” ADAMS, *supra* note 66, at lxiii. The court of equity, by contrast, wanted “a sworn detail of facts on which the court may adjudge the equities, and to preserve it in an accurate record, for the use, if needed, of the appellate court.” *Id.* at lxiii–lxiv.

Courts of equity could entertain actions with multiple parties.<sup>80</sup> Indeed, it was the goal of equity to bring all interested parties before the court so that the matter could be efficiently and expeditiously resolved. This is quite unlike the common law, where joinder of claims and parties was severely limited. In the common law courts, claims could be joined only if they arose under the same writ, or form of action.<sup>81</sup> Parties could be joined only if they had some joint interest in the matter.<sup>82</sup> By contrast, parties could be joined in equity if they had interests that could be affected by the decree that would issue in the case; if they had claims that paralleled the plaintiff's so that multiple litigation on the same matters would likely be required; and if they might be jointly liable with the defendant, or liable as an indemnitor.<sup>83</sup>

### C. *The Relationship Between Law and Equity*

While separate courts handled common law and equity disputes in England, there were interactions between the two courts. The best known is that equity could enjoin common law actions under some circumstances. For example, if equity found a fraud in the inducement of a contract under seal, it could enjoin common law proceedings on the contract, or enjoin enforcement of any judgment rendered in a common law action on that contract.<sup>84</sup> A court of equity could also enjoin common law proceedings that were duplicitous. Thus, if equity had jurisdiction of a matter, it could prevent actions from being pursued in a common law court on the same matter.<sup>85</sup> If equity so enjoined a common law action, it might then proceed with its own case and decide any related common law issues under the so-called "cleanup doctrine."<sup>86</sup> Equity could act only when there was no adequate remedy at common law and when the petitioner would be irreparably harmed without equity's intervention,<sup>87</sup> and multiple proceedings on the same matter were considered irreparable harm.<sup>88</sup> It should be noted that common law courts could not interfere

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80. See WHITEHOUSE, *supra* note 55, at 53–157; ADAMS, *supra* note 66, at lix–lx; COOPER, *supra* note 66, at 20–42.

81. See STEPHEN, *supra* note 10, at 242–54.

82. See JOHN J. COUND ET AL., CIVIL PROCEDURE 625–26 (8th ed. 2001).

83. See ADAMS, *supra* note 66, at lix–lx.

84. See 1 POMEROY, *supra* note 55, §§ 181, 231.

85. See *id.* §§ 181, 231–43.

86. See *id.* §§ 243–45.

87. See 1 DOBBS, *supra* note 58, § 2.1(1).

88. See 1 POMEROY, *supra* note 55, § 243.

with equity proceedings, nor could common law courts hear equity matters.

There were other ways that common law and equity courts interacted. For example, there was no discovery in the common law courts. Equity provided for discovery, however, and common law litigants could come to equity for the sole purpose of obtaining discovery for use in the common law case.<sup>89</sup> Discovery was quite limited, however. It could only be used to obtain information in the hands of another that the litigant needed to press her own case; discovery regarding the opponent's case was not permitted.<sup>90</sup>

These kinds of interactions between common law and equity actions are instructive. They show, first, that the two were complementary, not distinct court systems operating in quite different spheres. This is understandable given the two court systems' common origins. Second, they show that equity had some power over common law courts, but that the reverse was not true. These characteristics seem to underlie the modern merger of law and equity, in which the two systems return to their common origins but with the rules and procedures of equity predominating.

Both common law and equity procedures continued to develop in England after the English began to colonize North America, but the essential characteristics of both the "modern" common law trial and "modern" equity were in place by the late seventeenth century. Subsequent developments in England sometimes had an effect on legal developments in the colonies, particularly in the eighteenth century when the colonial legal systems were reorganized.<sup>91</sup> But as I will show, the colonies did not fall lock-step into the English system.

#### D. *English Local Courts*

The common law and equity courts that I have been describing were the king's courts, and they had a strong influence on the development of

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89. See *id.* § 191.

90. See ADAMS, *supra* note 66, at 8.

91. On the reorganization of colonial legal systems in the eighteenth century, see generally POUND, *supra* note 2, at 58–90. Colonies were established at different times during the seventeenth and eighteenth centuries, and they brought different ideas about the common law trial and equity with them. See HENDERSON, *supra* note 78, at 299. Various English treatises also influenced the colonists on the law that made its way to the colonies. Cf., e.g., Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416, 437 (1931) (suggesting that a seventeenth-century treatise on the English local courts had reached the colonies). In addition, Blackstone's *Commentaries* became quite influential in the time of the Revolution. See Sheldon Gelman, "Life" and "Liberty": *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 648–49 (1978).

courts in the colonies and, later, the United States. But there were also a variety of local courts in England, and these cannot be ignored in any history of the American civil trial. Indeed, in the ordinary, day-to-day lives of English citizens, the local courts may have been more important than the king's courts.<sup>92</sup>

Before the king's courts helped to centralize justice in England, local courts generally handled all legal matters. There were two general classes of local courts in early post-Norman English history: the county or communal courts and the manorial courts.<sup>93</sup> The county courts were the courts for a shire and so were organized around a specific geographic region; the sheriff, an appointee of the king, was the presiding officer in the county courts.<sup>94</sup> The manorial courts grew out of a feudal system that gave lords the authority to operate courts governing their domains, under a franchise from the king.<sup>95</sup> Over time, the feudal system changed, and the king's centralized courts took on more importance, but local courts continued to operate.<sup>96</sup> Indeed, they played a very important role in the lives of ordinary English citizens. Local courts like the court leet, a kind of manorial court, brought justice to people who could not make use of the king's courts.<sup>97</sup>

By the time the British began colonizing North America, English local courts like the court leet had both judicial and administrative responsibilities.<sup>98</sup> But during the seventeenth century, those courts declined, and their duties were largely taken over by the justices of the peace,<sup>99</sup> who were appointed by the king.<sup>100</sup> The justices of the peace

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92. See Goebel, *supra* note 91, at 420–21.

93. See generally 1 HOLDSWORTH, *supra* note 2, at 3–32.

94. See ROBERT C. PALMER, *THE COUNTY COURTS OF MEDIEVAL ENGLAND: 1150–1350*, at 28–32 (1982).

95. See G.R.Y. RADCLIFFE & GEOFFREY CROSS, *THE ENGLISH LEGAL SYSTEM* 22–24 (3d ed. 1954). For general discussions of English local courts, see HOLDSWORTH, *supra* note 2, at 3–193; PALMER, *supra* note 94.

96. See DAVID THOMAS KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629–1692*, at 5–10 (1979).

97. *Id.* at 7.

98. See RADCLIFFE & CROSS, *supra* note 95, at 204–05 (discussing the courts' administrative duties beginning as far back as the Middle Ages).

99. *Id.* at 109, 205.

100. *Id.* at 194; MICHAEL DALTON, *THE COUNTRY JUSTICE 2* (Legal Classics Library 1996) (1655). Dalton's book, which was a guide for English justices of the peace, was apparently quite influential in some of the colonies. See FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 44 (1940) (quoting JUDGE CARROLL T. BOND, *PROCEEDINGS OF THE COURT OF APPEALS OF MARYLAND, 1695–1729*). Maryland seems to have taken a more formal approach to law earlier than did many of the other colonies. *Id.* at 43–46. Virginia was also somewhat more formal. *Id.* at 45–46.



had some criminal jurisdiction, but not civil,<sup>101</sup> and they also retained administrative responsibilities, such as “licensing of alehouses and the appointment of overseers of the poor.”<sup>102</sup>

The most significant aspect of the English local courts was their connection to the community.<sup>103</sup> They were helpful in resolving local disputes, and they tended to apply a customary law that was somewhat different from the common law that applied in the king’s courts.<sup>104</sup> Their procedures were simpler than the procedures employed in the king’s common law courts, though by the time of colonization they did sometimes use juries.<sup>105</sup> But as the communities broke down in England, so did the local courts.<sup>106</sup> This is, perhaps, why some of their functions were taken over by the justice of the peace, who had his commission from the king.

#### *E. Summary*

At the time of colonization, the English legal system was quite complex. While the king’s courts—commonly referred to as common law and equity courts—had moved the country far toward centralization of justice, there remained a complex system of local courts. The customary law applied in the local courts could differ significantly from the common law applied in the king’s courts. Procedure in the king’s courts could be quite complicated, requiring legal assistance to negotiate its pathways. Procedure in the local courts was much simpler. Juries were a feature of adjudication in the king’s common law courts, but they were also found in the local courts. This complex system was the model that the English colonists worked from in setting up their own legal systems.

### III. AMERICAN TRIALS IN THE COLONIAL ERA

There is no simple way to describe American trials in the colonial era because each of the colonies had its own court structure and rules of

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101. See generally DALTON, *supra* note 100.

102. RADCLIFFE & CROSS, *supra* note 95, at 206.

103. See KONIG, *supra* note 96, at 8–9 (describing the breadth of community disputes over which local courts had jurisdiction, and noting the courts’ reliance on the community to enforce the courts’ decisions).

104. See RADCLIFFE & CROSS, *supra* note 95, at 23–24 (noting that local courts administered “the customary law of the district” while the royal court adhered to a uniform and static law).

105. Local courts could not use juries early in England’s Norman history because they could not require an oath. THAYER, *supra* note 7, at 49. By the time of colonization, however, such local courts could and did use juries. See KONIG, *supra* note 96, at 6–7.

106. KONIG, *supra* note 96, at 9.

procedure.<sup>107</sup> Indeed, the colonial era is marked by near-constant change in the structure of legal and political institutions. Nevertheless, the thirteen colonies that ultimately formed the original United States all had English legal roots,<sup>108</sup> and their legal systems reflect that. In addition, there was some judicial oversight from England during the colonial era<sup>109</sup>—a bone of contention during the later colonial period, in fact.

#### A. Courts and Legal Institutions in the Colonial Era

The colonial era featured considerable extra-judicial dispute resolution, particularly in the early years. There were few or no lawyers in the very early history of the colonies, and the primary organizing authority was often the church. The church played a significant role in resolving disputes in many colonies, but especially those that were founded by religious groups.<sup>110</sup> But that was not enough; civil authority was also needed.

The colonies developed out of an English tradition that did not feature much separation of powers. First the king and his council, and then Parliament, performed executive, legislative, and judicial functions.<sup>111</sup> In addition, local affairs were governed by institutions that combined judicial and administrative functions, such as the leet courts or the justices of the peace.<sup>112</sup> The early colonies had even more reason to combine these functions, as there were so few people in the colonies that it was impractical to try to set up different governmental entities to perform different

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107. See AUMANN, *supra* note 100, at 61; POUND, *supra* note 2, at 26–90 (describing the structure of colonial court systems); Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM J. LEGAL HIST. 253, 347 (1967) (discussing varying procedures in colonial small claims courts).

108. New York and New Jersey were Dutch colonies originally, but were English from 1664 on, with the exception of 1673–74. POUND, *supra* note 2, at 36, 43. Pennsylvania originally was a Swedish colony, but was taken over by the Dutch and then, in 1664, the English. *Id.* at 47. For a description of colonial adoption of the common law of England, see Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1907).

109. See Surrency, *supra* note 107, at 262–66.

110. See KONIG, *supra* note 96, at ch. 1 (1979) (discussing the relation between Puritanism and English law); WILLIAM E. NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725-1825, at 13–44 (1981).

111. See generally BALDWIN, *supra* note 2; SPUFFORD, *supra* note 2 (describing the varied powers of Parliament); CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 16–26, 109–256 (1962) (describing the judicial functions of Parliament); POUND, *supra* note 2, at 5–6 (1940) (noting the varied functions of English courts). The functions of government gradually became centered in different bodies, such as the various courts. See MCILWAIN, *supra*, at 38; POUND, *supra* note 2, at 6. England, however, has never followed a strong separation of powers principle. Parliament replaced the king as sovereign following the “Glorious Revolution” of 1688. See CHRISTOPHER HILL, THE CENTURY OF REVOLUTION 1603-1714, at 275–80 (1961).

112. RADCLIFFE & CROSS, *supra* note 95, at 204–06.

tasks. Thus, the early colonies often had a single body that performed all of these functions, usually called the General Court or General Assembly.<sup>113</sup> As colonists spread out from their initial coastal settlements, the land was organized into counties and towns, much like England.<sup>114</sup>

The court structures of the colonies remained relatively simple throughout much of the seventeenth century, generally following the model of the English local courts rather than the king's courts.<sup>115</sup> Thus, for example, there were not generally separate courts of law and equity in the early colonial courts, but rather a single court that handled everything that came its way.<sup>116</sup> When the colonists began to spread out into more of the territory, they tended to govern the various counties and villages using English local institutions as the model.<sup>117</sup> A common feature of this system was the justice of the peace, sometimes called a magistrate, modeled after the justice of the peace of the English local system.<sup>118</sup>

Much of the work of early colonial judicial systems was done by these justices of the peace, who were usually untrained in the law and who had administrative duties as well as judicial.<sup>119</sup> The system was particularly well-suited to a country with a widely dispersed, largely rural population, as it was essentially a system of county courts,<sup>120</sup> though the justices were generally appointees of the king or his representative, the governor.<sup>121</sup> Unlike English justices of the peace, colonial justices had some civil jurisdiction, sometimes, but not always, limited to cases

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113. See POUND, *supra* note 2, at 26–57 (describing the court structures in the original thirteen colonies); Albert Smith Faught, *Three Centuries of American Litigation*, 13 TEMPLE U.L.Q. 488, 489–90, 494 (1939) (showing courts engaged in such tasks as providing for the maintenance of magistrates, establishing schools, and making laws). In the early days of some colonies, the entire company heard and decided disputes. See POUND, *supra* note 2, at 27.

114. See KONIG, *supra* note 96, at 3–34 (tracing the Massachusetts Bay Colony's development).

115. See, e.g., KONIG, *supra* note 96, at 3–34; see also NELSON, *supra* note 110, at 13–44 (1981).

116. See Mark DeWolfe Howe, *The Sources and Nature of Law in Colonial Massachusetts*, in LAW AND AUTHORITY IN COLONIAL AMERICA 1, 4 (George Athan Billias ed., 1965); see also Solon D. Wilson, *Courts of Chancery in America—Colonial Period*, 18 AM. L. REV. 226, 226 (1884) (describing the extensive jurisdiction exercised by the General Court of Massachusetts Bay Colony in 1639).

117. See KONIG, *supra* note 96, at 37.

118. See, e.g., GEORGE WEBB, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, 200–207 (Wm. W. Gaunt & Sons 1969) (1736); see also Martin L. Budd, *The Legal System of 1691*, in COURTS AND LAW IN EARLY NEW YORK: SELECTED ESSAYS 7, 11–13 (Leo Hershkowitz & Milton M. Klein eds., 1978).

119. See POUND, *supra* note 2, at 89–90; Surrency, *supra* note 107, at 348–51. For a general description of the duties, jurisdiction, and authority of justices of the peace in Virginia, see generally WEBB, *supra* note 118.

120. See Budd, *supra* note 118, at 11.

121. *Id.*; WEBB, *supra* note 118, at 200.

where a small amount was at stake.<sup>122</sup> In addition, some justices of the peace had equitable powers.<sup>123</sup> Thus, justices of the peace could wield considerable authority.

This structure made sense when the colonies were small and communal in organization and outlook, but as the colonies grew, a more legal approach was needed. The colonies varied in the timing and nature of this more legal approach, but a substantial reorganization of the colonial courts occurred in most colonies in the late seventeenth and early eighteenth centuries, following the English Revolution of 1688.<sup>124</sup> The courts in most colonies then were organized into a more-or-less hierarchical system, though there were many specialized courts as well as overlapping jurisdiction among the courts.<sup>125</sup> In some colonies, the court structure became quite complex, mirroring, to some degree, the situation in England—so much so that colonists began to complain about the proliferation and incompetence of the colonial courts.<sup>126</sup> But no colony had the range of specialized courts that England had, and the various colonial courts generally had the jurisdiction of several English courts.<sup>127</sup> Differentiation of court function came about slowly over the colonies' histories.<sup>128</sup>

Throughout the colonial era, there continued to be legislative oversight of the courts. Indeed, more than mere oversight, legislative bodies in some of the colonies continued to perform judicial functions, such as reviewing the decisions of courts, until at least the formation of the

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122. See Budd, *supra* note 118, at 11–12; WEBB, *supra* note 118, at 203. For descriptions of the justices of the peace in England, see A.T. CARTER, A HISTORY OF THE ENGLISH COURTS, 122–25 (6th ed. 1935); KONIG, *supra* note 96, at 13–16; DALTON, *supra* note 100.

123. See WEBB, *supra* note 118, at 203.

124. See POUND, *supra* note 2, at 58–63. This growth was aided by the fact that more lawyers began to work in the colonies. See AUMANN, *supra* note 100, at 19–42. They were met with considerable resistance at first, with many colonial legislatures barring them from practice or barring them from collecting fees for representing people in court. See *id.* at 19–21. The real growth in the legal profession occurred in the eighteenth century, when many colonial lawyers trained in England. See *id.* at 26–34.

125. See POUND, *supra* note 2, at 58–90 (discussing the changes American courts underwent in the period between the English and American Revolutions). Colonial officials, including judges, often had multiple roles as well, including some that would clearly be deemed conflicts of interest today. Thus, for example, judges might sit on multiple courts and even represent clients. See PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 56–58 (1992).

126. See Surrency, *supra* note 107, at 254–55. See also POUND, *supra* note 2, at 58–90.

127. See Howe, *supra* note 116, at 7; Herbert A. Johnson, *Civil Procedure in John Jay's New York*, 11 AM. J. LEGAL HIST. 69, 69 (1967); Surrency, *supra* note 107, at 261. This made it possible for the colonies to choose which of the English courts' procedures to apply. See Johnson, *supra*, at 69.

128. See generally POUND, *supra* note 2, at 26–90. In the eighteenth century, courts still exercised administrative powers in many colonies. See *id.* at 88–89.

United States in 1789.<sup>129</sup> This is particularly true of equitable matters, where the legislature was sometimes the only body exercising any equitable power at all.<sup>130</sup>

Equity generated the most controversy in the colonies, and this is, perhaps, reflected in the variety of approaches that the colonies took to equity. There were at least nine different ways the colonies handled equitable matters, including the legislative solution described above. The various colonies tried different approaches over time, so any single colony might have handled equity in several different ways over its history.<sup>131</sup> One solution was to have the royal governor, who was the representative of the king in the colonies, exercise equitable power.<sup>132</sup> This was rare, however, and it was more likely that the governor would be assisted by his council, sometimes called a Court of Assistants, in exercising that jurisdiction.<sup>133</sup> At other times, the governor appointed a chancellor<sup>134</sup> or created a separate court of equity.<sup>135</sup> As the colonies drew closer to rebellion, such bastions of royal power rankled colonial legislatures.<sup>136</sup>

Another method of handling equity, especially in the early history of the various colonies, was for the General Court or General Assembly—

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129. See Surrency, *supra* note 107, at 261 (noting that some state legislatures, following colonial traditions, continued to review judicial decisions until the beginning of the nineteenth century). See also HOFFER, *supra* note 125, at 57–58 (describing extended litigation between two parties in which the legislature at one point enacted retroactive legislation to overturn a judicial decision and at a later point acted as an appellate court with respect to a subsequent decision in the ongoing dispute between the two parties). Colonial legislatures also passed many private bills, which often settled disputes that would otherwise have gone to court. See *id.* at 59–60. One reason for this is, of course, the English model, where the House of Lords is the highest court in the country. See POUND, *supra* note 2, at 67, 111; see also RADCLIFFE & CROSS, *supra* note 95, at 216–25 (stating that the common law courts recognized the Court of Parliament as having the power to correct any erroneous judgments).

130. See POUND, *supra* note 2, at 77 (“Equity jurisdiction was exercised by legislatures throughout the [eighteenth] century.”); Wilson, *supra* note 116, at 226 (describing the petition powers of the legislature in Massachusetts).

131. Much of this discussion comes from Surrency, *supra* note 107, at 271–74 and from Wilson, *supra* note 116.

132. See Surrency, *supra* note 107, at 273–74; POUND, *supra* note 2, at 76.

133. See Wilson, *supra* note 116, at 230 (describing the equitable powers of the Massachusetts Governor and his council under a statute enacted in 1692); POUND, *supra* note 2, at 76 (noting that the governor and any three members of his council constituted a court of equity in New Jersey in 1705); Wilson, *supra* note 116, at 254 (noting that the governor and council exercised chancery jurisdiction in Georgia in the eighteenth century).

134. See POUND, *supra* note 2, at 51 (describing Maryland); Wilson, *supra* note 116, at 232 (describing New Hampshire); *id.* at 239 (describing Connecticut).

135. See Wilson, *supra* note 116, at 229–30 (describing the power of the Governor of Connecticut to appoint a court of chancery).

136. Surrency, *supra* note 107, at 272; see Wilson, *supra* note 116, at 793–95 (describing New York).

the general governing body of the colony—to exercise it.<sup>137</sup> In some instances, colonial legislatures attempted to create separate courts of equity, but these efforts were not always successful, sometimes because the king, who had veto power over colonial legislation, would not approve it, and sometimes because it simply did not work as intended.<sup>138</sup> In many of the colonies, no separate court of equity existed, but the common law courts exercised equitable powers, sometimes using equitable procedures when an equitable matter was at issue.<sup>139</sup> Sometimes this power was granted explicitly, but it was often exercised by the common law courts out of necessity, sometimes after a considerable period of absorption.<sup>140</sup> Finally, some of the colonies had no way of handling equity at all, though that course was quite unpopular, as it left colonists with no way of redressing grievances that the common law courts could not handle.<sup>141</sup> This last point makes it clear that the colonists had some rather inconsistent views on equity. On the one hand, equitable principles were essential in order to do justice in some cases; on the other hand, equity was too reminiscent of royal power and prerogative to leave the colonists entirely at ease with the process.<sup>142</sup>

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137. See Wilson, *supra* note 116, at 226 (describing Massachusetts); *id.* at 233–34 (describing Providence).

138. See, e.g., Wilson, *supra* note 116, at 230–31 (describing a Massachusetts law); *id.* at 235–36 (describing Providence, which repealed its statute creating a court of chancery on its own); *id.* at 233 (describing a New Hampshire law creating a court of chancery that survived, apparently, until the Revolution); *id.* at 244 (describing a Pennsylvania law that was “repealed by the Queen in council”).

139. POUND, *supra* note 2, at 77; see 1 FRANCIS J. TROUBAT & WILLIAM W. HALY, *THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA* 30 (Philadelphia, T.K. & P.G. Collins 1837) (describing a 1701 Pennsylvania statute).

140. See Surrency, *supra* note 107, at 274; Wilson, *supra* note 116, at 230 (describing chancery powers of the common law courts in Massachusetts); POUND, *supra* note 2, at 77.

141. See Wilson, *supra* note 116, at 238–39 (describing New York); *id.* at 244 (describing Pennsylvania). See also HOFFER, *supra* note 125, at 57–58 (describing a colonial case where a mortgage was foreclosed because there was no court of equity to permit redemption; the legislature then passed legislation allowing for redemption and made the law retroactive to cover the case described).

142. As for the substantive law of the colonies, the English common law generally was the basis on which the legal systems were built, but it was not received wholesale into colonial law. Rather, the colonies adapted the common law system to suit their needs. See generally Reinsch, *supra* note 108; Goebel, *supra* note 91. In addition, the colonies were subject to British statutes, many of them enacted specifically to deal with colonial matters. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 162–63 (2001) (discussing the Navigation Acts). Indeed, this statutory oversight from England was one of the grievances that led to the American Revolution. See THE DECLARATION OF INDEPENDENCE ¶ 15 (U.S. 1776) (complaining, of King George III, that “[h]e has combined, with others, to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation”). The colonists also complained of King George’s interference with their own attempts to legislate. *Id.* at ¶ 23.

### B. *Trials in the Colonial Era*

As with legal institutions and the substantive law, the colonists were most familiar with English procedure and tended to adapt it for their purposes. But the colonies were not England, and adaptation was certainly required. This was particularly true early in colonial history, when the populations of the colonies were small and somewhat insular, and when disputes tended to be personal. Thus, the early colonial people relied primarily on informal methods of dispute resolution, including assistance and even pressure from community or church.<sup>143</sup> Arbitration was also well developed and much used in colonial America.<sup>144</sup> Indeed, the people of many colonies, particularly in New England, seemed actively to dislike lawyers and took pains to restrict their practice.<sup>145</sup>

The courts that did exist early in the colonial era tended to use informal procedures, more reminiscent of the procedures in English local courts.<sup>146</sup> Indeed, as I have noted, there were very few lawyers practicing in the colonies early in the colonial history,<sup>147</sup> and most of the people acting as judges were not trained in the law either.<sup>148</sup> While educated colonists undoubtedly knew a lot about law,<sup>149</sup> they were not inclined, in most colonies, to follow strict rules of common law or equity procedure.<sup>150</sup> Rather, they followed “an ideal of rude natural justice dispensed without rule by a jury or a plain man.”<sup>151</sup> Early Pennsylvania cases were described as consisting of each side telling his story to four judges, who then drew lots to see who would decide the case.<sup>152</sup>

Though informal dispute resolution continued to some degree into the eighteenth century,<sup>153</sup> the growth of the colonies and of their trade

143. See HOFFER, *supra* note 125, at 47–50; see generally KONIG, *supra* note 96; NELSON, *supra* note 110; Goebel, *supra* note 91, at 447–48.

144. See Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984); AUMANN, *supra* note 100, at 48–50.

145. AUMANN, *supra* note 100, at 19–25. Other colonies, such as Maryland and Virginia, took a more formal approach to the law quite early in their histories. *Id.* at 43–46.

146. See generally Goebel, *supra* note 91.

147. AUMANN, *supra* note 100, at 19–25.

148. *Id.* at 34–42.

149. *Id.* at 39.

150. There were exceptions, such as Maryland. *Id.* at 52–53.

151. *Id.* at 9, 50–51, 59 n.87. The origin of the quotation in the text is obscure. Aumann, at page 9, purports to be quoting someone, but the quotation is not at either of the sources he cites for it, though both citations support the general proposition. See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 3, 105, 140 (1913) (noting the participation of non-lawyers in colonial legal systems); Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148, 153 (1905) (same).

152. AUMANN, *supra* note 100, at 13.

153. HOFFER, *supra* note 125, at 47–50; NELSON, *supra* note 110, at 13–44.

with each other and with other parts of the world required more formal dispute resolution, with more judicial involvement.<sup>154</sup> This accounts, in part, for the reorganization of courts that we saw during the eighteenth century.<sup>155</sup> Significant growth in the legal profession also occurred at this time,<sup>156</sup> though non-lawyers continued to be heavily represented in the judiciary, in some colonies up to and beyond the Revolution.<sup>157</sup>

As formal law developed, the colonies looked to England for their procedural rules in much the same way as they looked to it for their substantive rules: the English rules were a good place to start, but they were not adopted wholesale. Although most colonies eventually adopted a variant of the English system of common law pleading and trial,<sup>158</sup> significant variations from English practice sometimes developed because “the precision required of English lawyers was often lost in the colonies through the intervention of lay judges or short-circuited by the inexperience of the American practitioners.”<sup>159</sup> In addition, even when trained judges and lawyers were involved, the colonies often had less tolerance for the technicalities of English common law pleading, in which suits could be lost for minor errors.<sup>160</sup>

One aspect of English common law practice was largely the same in the colonies: completion of the pleading phase of the lawsuit led quickly to the trial, with few or no intervening procedures.<sup>161</sup> This brings us, of course, to the jury, which was the primary means of trial in England. But the position of the jury in colonial America is quite hard to pin down. Different colonies had different traditions about adoption of jury trials, and the jury seemed to go in and out of favor over time.<sup>162</sup> Thus, colonial jury practice shows considerable variation both over time and among the various colonies. Indeed, this variation has been given as one reason

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154. HOFFER, *supra* note 125, at 50–55; AUMANN, *supra* note 100, at 24–25.

155. See *supra* notes 146–52 and accompanying text.

156. HOFFER, *supra* note 125, at 63–67; AUMANN, *supra* note 100, at 26–34.

157. AUMANN, *supra* note 100, at 34–40.

158. HOFFER, *supra* note 125, at 67–70; Johnson, *supra* note 127, at 79; AUMANN, *supra* note 100, at 43–63.

159. HOFFER, *supra* note 125, at 67.

160. See Johnson, *supra* note 127, at 72 (noting that demurrers for technical errors were discouraged and unlikely to be granted).

161. See BRUCE H. MANN, NEIGHBORS AND STRANGERS 75–76 (1987) (stating that in Connecticut county courts in 1709, “jurors in civil actions were summoned to appear on the third day of sessions, after the litigants had made their pleas and joined issue”); Johnson, *supra* note 127, at 79, 72–73 (stating that “[o]nce the issue roll, containing the declaration and answer, was on file with the Clerk of the Circuit, the case could be noticed for trial in the usual manner”). In New York in the years before the Revolution, some preliminary motions could arise before the issue roll was filed, but they tended to involve technical matters such as change of venue. *Id.* at 72.

162. See MANN, *supra* note 161, at 75–81 (documenting the decline of the jury in eighteenth-century Connecticut).



why the U.S. Supreme Court chose to interpret the Seventh Amendment in accordance with the common law of England.<sup>163</sup> Because of limitations of time and space, my discussion here will necessarily rely on examples and does not purport to be a complete survey of jury practice in the colonies.<sup>164</sup>

Juries appeared in the colonies shortly after the founding of the Plymouth and Massachusetts Bay Colonies.<sup>165</sup> For much of the seventeenth century, however, judicial resolution of disputes—and thus the jury—competed with the informal methods of dispute resolution that I described earlier.<sup>166</sup> In Connecticut, the colonial government attempted to regulate juries as early as 1643 by allowing non-unanimous verdicts if the jurors could not agree.<sup>167</sup> Two years later, the government also allowed judges “to override jury verdicts that were not to their liking.”<sup>168</sup> These attempts at regulation were not often successful, however, and jury trials were the primary means of trial in Connecticut courts in the last third of the seventeenth century.<sup>169</sup> Thereafter, the rate of jury trials decreased precipitously.<sup>170</sup> This has been ascribed in part to development of a more formal system of pleading, adapted from English common law pleading, that allowed more purely legal issues to be raised.<sup>171</sup> Thus, as society got more complex, so did judicial procedure, and one result, at least in some colonies, was a decline in jury trials.

The colonies experimented with jury procedure in many ways. In addition to Connecticut’s permitting non-unanimous verdicts under some circumstances, many colonies for a time used juries of fewer than twelve persons, perhaps because the colonies were not sufficiently populous to

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163. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C. Mass. 1812) (opinion by Justice Story sitting as a Circuit Justice).

164. *See generally* Henderson, *supra* note 78 (discussing some aspects of eighteenth-century jury practice in various colonies). Jury practice is also discussed, sometimes quite briefly, in books and articles on colonial law more generally. *See, e.g.*, HOFFER, *supra* note 125, at 87–89 (discussing mainly the criminal jury); MANN, *supra* note 161, at 69–81 (discussing Connecticut); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 13–35 (1975); Catherine Menand, *Juries, Judges, and the Politics of Justice in Pre-Revolutionary Boston*, in *THE LAW IN AMERICA 1607–1861*, at 155–85 (William Pencak & Wythe W. Holt, Jr., eds., 1989).

165. *See* Goebel, *supra* note 91, at 436 (describing juries in 1623 in Plymouth); MANN, *supra* note 161, at 69 (describing juries in 1636 in Massachusetts Bay Colony).

166. *See supra* notes 26–39 and accompanying text (discussing the early, non-traditional forms of trial).

167. *See* MANN, *supra* note 161, at 69.

168. *See id.* at 70.

169. *See id.* at 70–71.

170. *See id.* at 77.

171. *See id.* at 81–93.

allow larger juries.<sup>172</sup> Various methods of controlling the jury were also developed.<sup>173</sup>

As revolutionary fervor grew during the eighteenth century, juries began to play a very important role. There are any number of reasons for this, but two are particularly prominent. First, juries, both civil and criminal, resisted unpopular decrees from England, engaging in significant jury nullification.<sup>174</sup> England and its royal governors then sought to remove as many cases as possible from the jury, sometimes by creating special courts,<sup>175</sup> and sometimes by classifying a matter as equitable, thus removing it from common law juries.<sup>176</sup> Second, because much of the work of the courts was done by people untrained in the law, juries were seen as every bit as competent as judges, and perhaps more so.<sup>177</sup> Indeed, colonial systems tended to entrust juries with decisions as to the law as well as the facts, unlike their English parent.<sup>178</sup>

For these reasons, the civil and criminal juries were viewed as important safeguards against official overreaching and incompetence. When the proposed Constitution was presented to the people in 1787 without a guarantee of a right to civil jury trials, there was such an outcry that the guarantee was included in the Bill of Rights as the Seventh Amendment.<sup>179</sup> The Seventh Amendment has led to a uniform federal practice with respect to jury trials. The states themselves, however, have continued to develop their own approaches to jury trials, sometimes distinctly different from the federal practice.

Thus, by the time of the American Revolution, civil trials in the colonies generally followed, more or less, the practice in England, par-

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172. See H. Richmond Fisher, *The Seventh Amendment and the Common Law: No Magic in Numbers*, 56 F.R.D. 507, 529–32 (1973).

173. See generally Henderson, *supra* note 78 (describing jury control devices around the time of the country's founding).

174. See Charles A. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 653–55 (discussing criminal juries); *id.* at 703–08 (discussing civil juries); NELSON, *supra* note 164, at 31 (same). Jury nullification occurs when jurors ignore the law as stated and decide the case in accordance with their views of what the law should be. For a discussion of jury nullification, see SWARD, *supra* note 6, at 41–47.

175. See Joseph H. Smith & Leo Hershkowitz, *Courts of Equity in the Province of New York: The Cosby Controversy, 1732–1736*, 16 AM. J. LEGAL HIST. 1 (1972) (describing the controversy surrounding Governor William Cosby's establishment of courts of equity in New York).

176. See Wolfram, *supra* note 174, at 653–56 (discussing the jury prior to 1787 and the “deeply divisive issue” of taking cases away from the jury).

177. See POUND, *supra* note 2, at 89–90.

178. See JEFFREY ABRAMSON, *WE THE JURY* 73–79 (1994) (explaining that criminal juries had this right until the end of the nineteenth century, but that civil juries were confined to questions of fact much earlier in the nineteenth century); Henderson, *supra* note 78, at 299–335 (same).

179. See Wolfram, *supra* note 174, at 667–73; ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791*, at 106–58 (1955).

ticularly as to common law trials. The colonies usually were less strict in following English common law pleading rules, but the forms of pleading that were used were roughly the same as those in England. Pleading and proof remained the two stages of a common law trial. The predominant method of trying a common law case was to have the parties present the case to a jury. Indeed, the jury had grown in stature with its status as a revolutionary body, so the position of the jury was quite strong. Equity was a hodgepodge, handled in many different ways, but often by the regular courts of the colonies using procedures drawn from English equity.

#### IV. AMERICAN CIVIL TRIALS FROM THE REVOLUTION TO 1938

After the Declaration of Independence was signed in 1776, many of the states embarked on court-reform efforts, which generally continued well into the nineteenth century. Throughout the revolutionary period and under the Articles of Confederation, these were the primary courts in the fledgling country, as the Articles of Confederation provided for federal courts in only four classes of cases.<sup>180</sup> Once the Constitution of the new United States of America was ratified in 1789, the matter of American trial procedure became even more complex. The states all maintained their own systems of procedure, but the federal Congress, exercising power given to it in the Constitution, added another layer of courts—the federal courts—for which a procedure had to be developed.<sup>181</sup> The procedural issues were perhaps complicated by the fact that federal courts could hear matters arising under state law, and that state courts could hear matters arising under federal law. Thus, it was possible that the manner of trying particular matters could vary depending on whether the trial was in state or federal court. Integrating these multiple systems of courts was a major task, and one that continues to this day. In this section, I will separately discuss the periods before and after the advent

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180. See ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 7–11 (1987) (identifying the four as piracies and felonies on the high seas; overlapping claims to western lands; disputes between people claiming the same land under grants from different states; and appeals in cases of captures or prizes). The Articles of Confederation were in effect from 1781 to 1789. They provided for a weak federal system, with considerable power remaining in the states. See 1 GEORGE BROWN TINDALL, *AMERICA: A NARRATIVE HISTORY* 232–33 (1984). See generally MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* (1976) (discussing the history of the Articles of Confederation).

181. The only court the Constitution created by its terms was the Supreme Court of the United States. See U.S. CONST. art. III, § 1. But Congress was given the power to create other courts. See *id.* Congress exercised that power almost immediately, creating two kinds of courts—district courts and circuit courts—in the Judiciary Act of 1789. See An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (Judiciary Act of 1789, Sept. 24, 1789).

of the codes, by which the states made significant changes in their court procedure. I will then briefly discuss the Federal Equity Rules of 1912, which were an important precursor of the Federal Rules of Civil Procedure.

*A. From the Revolution to the Advent of the Codes*

The first period of development began with the Declaration of Independence and continued until the middle of the nineteenth century, when the states began enacting codes of procedure that effected a major overhaul of court structure and procedure. The codes complicated the interaction between state and federal courts somewhat, and led, ultimately, to the Federal Rules of Civil Procedure, which adopted many of the codes' innovations but refined them and carried the reform further than the codes had gone.

1. State Courts After Independence

Once the Declaration of Independence freed the states from the oversight of the English, the states began experimenting with new constitutions and new forms of judicial organization.<sup>182</sup> A number of changes occurred in the years immediately following the Declaration of Independence that presaged the judicial practice under the federal Constitution. For example, many of the new state constitutions provided for separation of powers and placed review functions in higher level courts rather than in legislatures or executive councils.<sup>183</sup> Perhaps because of the long history of legislative oversight of the courts, however, the practice of separation of powers did not always match the ideal.<sup>184</sup> In addition to this newfound reverence for separation of powers, "[t]here was a growing tendency to give equity powers to the courts of general jurisdiction."<sup>185</sup>

Experimentation with judicial structure continued in the states after the federal Constitution was ratified in 1789, with some states having systems that were quite centralized and others systems that were more dispersed and localized.<sup>186</sup> The centralized systems had a single court that had jurisdiction throughout the state, with any judge of the court able

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182. A good summary of these changes is in POUND, *supra* note 2, at 91–103.

183. *See id.* at 102 (summarizing changes).

184. *See id.*

185. *Id.*

186. *See id.* at 118 (listing five types of organization of state court systems).

to conduct a trial anywhere.<sup>187</sup> In some such systems, the Supreme Court itself was the centralizing court, with justices of the Supreme Court actually participating in the lower courts as trial judges.<sup>188</sup> The decentralized systems had local trial courts, often county courts, that were independent of the other courts in the state,<sup>189</sup> except for the appellate function.

The states also continued to vary somewhat in the professionalization of the courts, and, thus, in the manner of trying cases, especially early in the history of the United States. Two accounts of procedure in New York immediately before and after the Revolution give a picture of civil litigation that looked much like that of England.<sup>190</sup> New York had separate courts of law and equity, with different procedures for each.<sup>191</sup> In the law courts, pleading and the trial dominated the procedures. There were no lengthy pre-trial procedures such as we see in modern American litigation. A party could take a deposition of a witness who was likely to be beyond the reach of process when the trial was held,<sup>192</sup> and certain technical motions such as a motion for change of venue were entertained.<sup>193</sup> But when these matters were completed, the case proceeded to trial.

The trial itself was generally before a jury, though some matters, involving complicated accounts, could be referred to what we would now call a master.<sup>194</sup> This practice, which is reminiscent of the equitable accounting,<sup>195</sup> demonstrates the overlap of law and equity even in a state that maintained separate courts of law and equity.<sup>196</sup> Neither of the two accounts of New York practice describes the actual common law trial. It is clear, however, that a trial consisted largely of oral testimony from witnesses called by the two parties.<sup>197</sup> But the New York courts also fol-

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187. See *id.* at 118–19 (describing Massachusetts at the time of the Civil War).

188. See *id.* at 119–20 (describing several states with this system).

189. See *id.* at 122–30 (describing several states with this system).

190. See *THE LAW PRACTICE OF ALEXANDER HAMILTON* 37–196 (Julius Goebel Jr. ed., 1964) [hereinafter *LAW PRACTICE*] (discussing Alexander Hamilton's practice manual); Johnson, *supra* note 127 (describing John Jay's practice procedure). Johnson noted the similarity to English practice, in both common law and equity matters. See *id.* at 79.

191. See *LAW PRACTICE*, *supra* note 190, at 37–196 (describing separately the practice before the New York Supreme Court, which is the trial level court in New York, and the New York Court of Chancery).

192. See *id.* at 94.

193. See Johnson, *supra* note 127, at 72.

194. See *id.* at 75. Johnson describes a late colonial statute regulating practice in the New York Supreme Court, but that practice continued after the Revolution.

195. See 4 POMEROY, *supra* note 55, § 1421; 1 STORY, *supra* note 55, at 443–547.

196. Johnson also notes that the statute seems to regularize a vital arbitration practice. See Johnson, *supra* note 127, at 75 n.25.

197. See *LAW PRACTICE*, *supra* note 191, at 59 (describing the subpoena of witnesses); Johnson, *supra* note 127, at 74–75 (describing the calling of witnesses); EDWARDS, *supra* note 53, at 101–02

lowed general common law rules of evidence that allowed various documents to be brought before the court.<sup>198</sup>

Equitable actions were brought in the Court of Chancery. As in England, witness testimony in New York chancery cases was generally taken by examiners, who posed written interrogatories that had been submitted by the party seeking the examination, and wrote down the witnesses' answers.<sup>199</sup> Cross-examination was possible during this procedure.<sup>200</sup> The "trial" was more of a hearing consisting of the chancellor's reviewing the written answers to the interrogatories and any documentary evidence that may have been submitted,<sup>201</sup> though oral testimony could sometimes be taken.<sup>202</sup>

While New York cannot be considered typical of all the states, there had been movement toward the English model during the colonial era, so a number of states used similar procedures.<sup>203</sup> Many states, however, did not have separate courts of law and equity, and in many of those states, equity was handled by the general courts.<sup>204</sup> Often, equity powers were granted to the general courts in piecemeal fashion.<sup>205</sup> But when common law courts were charged with administering equity, problems arose as to the procedures for doing so.<sup>206</sup> Pennsylvania is an example of a state where equity was handled by the general courts.

An 1836 Pennsylvania statute provided for extensive equity powers in Pennsylvania common law courts, though it was considered experimental and was therefore limited in operation, at first, to the courts in Philadelphia.<sup>207</sup> But the Pennsylvania common law courts had been applying some equitable principles for some time, usually through common law forms and remedies.<sup>208</sup> The 1836 statute left the previous mechanisms in place, and simply filled in the equity jurisdiction of the courts,

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(describing the trial as consisting of the plaintiff's calling his witnesses followed by the defendant calling his). Johnson notes that there are no transcripts of trials from this era. See Johnson, *supra* note 127, at 74–75.

198. See EDWARDS, *supra* note 53, at 121–26.

199. See LAW PRACTICE, *supra* note 190, at 176; Johnson, *supra* note 127, at 78.

200. See Johnson, *supra* note 127, at 78.

201. See *id.* at 79 (stating that the chancellor did not have an opportunity to observe the witnesses and evaluate credibility).

202. See LAW PRACTICE, *supra* note 190, at 177.

203. See *supra* notes 107–80 and accompanying text.

204. See POUND, *supra* note 2, at 102.

205. See, e.g., 1 TROUBAT & HALY, *supra* note 139, at 29–69 (describing the growth of equity powers in the various courts in Pennsylvania).

206. See *id.* at 29.

207. See 1 TROUBAT & HALY, *supra* note 139, at 36–38; WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA 198–99 (1910). The experiment was so successful that it was soon extended to the rest of Pennsylvania. See LOYD, *supra*, at 199.

208. See 1 TROUBAT & HALY, *supra* note 139, at 51; LOYD, *supra* note 207, at 196–97.

providing for equitable forms and procedures for the newly created jurisdiction.<sup>209</sup> That statute provided that when the courts exercised the newly created equitable jurisdiction, they should borrow federal equity procedures.<sup>210</sup>

Common law procedures in Pennsylvania in 1836 were similar to those of New York and, indeed, England. The two main stages of the process were pleading and proof, with little or no intervening procedure.<sup>211</sup> As in New York, it was possible in Pennsylvania to take the deposition of witnesses who were likely to be unable to attend a trial.<sup>212</sup> Otherwise, witnesses could be required by means of a subpoena to attend trial and testify, and they could be required to bring documents with them to trial.<sup>213</sup> Under a statute enacted in 1798, a party could also compel another *party* to produce documents at trial.<sup>214</sup> The party seeking such production from another party, however, had no right to see the documents until they were introduced at trial.<sup>215</sup>

The trial, which was before a jury, consisted of the presentation of witnesses by the plaintiff and defendant in turn, with cross-examination of witnesses by the opposing party or his counsel.<sup>216</sup> Great pains were taken to ensure that the witnesses held no interest in the outcome of proceedings, and they could be rejected if any interest were shown.<sup>217</sup> The defendant made his closing summation first, followed by the plaintiff.<sup>218</sup> The judge then instructed the jury, offering “opinions” on the law, but generally leaving facts to the jury; indeed, the judge would likely leave the whole case to the jury if “the whole case is mixed up of law and

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209. See 1 TROUBAT & HALY, *supra* note 139, at 51–52; LOYD, *supra* note 207, at 196–97.

210. See 1 TROUBAT & HALY, *supra* note 139, at 37. For a discussion of federal equity procedures, see *infra* notes 252–302 and accompanying text.

211. See generally 1 TROUBAT & HALY, *supra* note 139, at 301–375 (describing Pennsylvania civil practice).

212. See *id.* at 301–02.

213. See *id.* at 331–32.

214. See *id.* at 334–38. Discovery was largely unknown to the common law, but the English court of equity provided for a bill of discovery, which parties could use to get materials from their opponents. Discovery was generally limited, however, to material that was essential to prove the discovering party’s claim. Discovery could not be used to discover the opposing party’s case. See generally 1 POMEROY, *supra* note 55, §§ 196–97 (discussing the bill of discovery); 2 STORY, *supra* note 55, at 811–30 (same).

215. See 1 TROUBAT & HALY, *supra* note 139, at 337.

216. See *id.* at 349.

217. See *id.* at 350–51.

218. See *id.* at 352–53. This assumes that the plaintiff had the burden of proof. If the defendant had the burden of proof, as on what we would now call an affirmative defense, the defendant would present his evidence first and his summation last. See *id.* at 353.

fact.”<sup>219</sup> Thus, the general contours of a common law trial in Pennsylvania in 1836 were quite similar to a modern trial.

In the early post-Revolution history of Massachusetts, “all jury trials . . . were conducted before three judges of the Supreme Judicial Court who had to travel about the State, which then included Maine, by carriage or on horseback to hold the sessions.”<sup>220</sup> This was obviously inconvenient, and the jury trial was made more complicated by the fact that each of the three judges could express his own opinion of the law.<sup>221</sup> Significant changes occurred in Massachusetts with the 1806 ascension of Theophilus Parsons as Chief Justice, who began to introduce English pleading and procedure into what had been a very informal system of dispute resolution.<sup>222</sup> Thus, even states that had maintained less formal systems of dispute resolution throughout much of the colonial period began to develop procedural systems modeled on England after the Revolution.

While I have been dealing thus far mostly with the original thirteen colonies, it is apparent that English substantive and procedural law was important in states that joined the Union later as well. For example, a study of Wayne County, Michigan shows that English practices and procedures were in use there, for the most part under the terms of territorial statutes or congressional ordinances.<sup>223</sup> Thus, while judicial organization in the states following the Revolution differed substantially from that of England, particularly in not, generally, providing for separate courts of law and equity, English common law and equity procedures were widely followed, at least in their general outlines, in the state courts. This holds true whether the state was one of the original thirteen colonies or was admitted to the Union later.

## 2. The Federal Courts

The members of the First Congress understood the English system with its complementary systems of law and equity, but they also had

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219. *See id.* at 354.

220. *The Legal History of Massachusetts 1620-1953*, 38 MASS. L.Q. Aug. 1953, at 3, 73 [hereinafter *Legal History of Massachusetts*].

221. *See id.* at 73.

222. *See id.* at 73-74. *See also* NELSON, *supra* note 110, at 76 (1981) (noting that litigation had replaced more informal methods of dispute resolution in Plymouth County by the 1810s). Massachusetts continued to use a centralized system of courts of general jurisdiction throughout this period. *See* POUND, *supra* note 2, at 118-19.

223. *See* Elizabeth Gaspar Brown, *Frontier Justice: Wayne County, 1796-1836*, 16 AM. J. LEGAL HIST. 126, 133 (1972).



considerable colonial-era history with courts that handled all manner of cases. Thus, Congress did not create separate courts of law and equity in the new federal court system. Rather, in the Judiciary Act of 1789, it created a unitary federal judicial system whose courts heard matters of every character—legal, equitable, and admiralty.<sup>224</sup> Congress then provided for different procedures to govern legal, equitable, and admiralty matters.<sup>225</sup>

In the Process Act of 1789, Congress provided that the federal courts in common law actions would follow the common law procedures of the states in which they sat.<sup>226</sup> This Act expired by its terms at the end of the First Congress,<sup>227</sup> but its essence was reenacted in subsequent Congresses, and remained in effect until the Federal Rules of Civil Procedure were promulgated in 1938.<sup>228</sup> For most of its lifetime, it was called the Conformity Act.<sup>229</sup> The Conformity Act was intended to ensure that federal and state courts practicing in a state followed essentially the same procedures for common law actions.<sup>230</sup> In fact, however, because the original Conformity Act required that federal courts continue to apply the state procedural rules that were in effect at the time the Conformity Act was enacted, regardless of subsequent changes in those rules by the

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224. The Constitution itself provided that the judicial power of the United States extended to legal, equitable, and maritime (admiralty) cases. See U.S. CONST., art. III, § 2. Legal and equitable jurisdiction was then given by Congress to the newly created circuit courts, while admiralty jurisdiction went to the district courts. See *An Act to Establish the Judicial Courts of the United States*, ch. 20, §§ 10, 11, 1 Stat. 73, 78–79 (Judiciary Act of 1789, Sept. 24, 1789).

The jurisdiction of the district courts that Congress created overlapped somewhat with that of the circuit courts. See *id.* § 9. Thus, while the names of these courts are similar to the names we use for federal courts today, their structure and function were quite different. Both district courts and circuit courts had original jurisdiction to try cases, though the kinds of cases they could try were somewhat different. Circuit courts could hear appeals from decisions of the district court. See *id.* §§ 11, 21–22. In that case, the district judge who had decided the case would become part of the appellate panel in the circuit court, along with two justices of the Supreme Court, though the district judge could not vote on the appeal. See *id.* § 4.

225. In this article, I am concentrating on legal and equitable matters, and will not discuss admiralty.

226. *An Act to Regulate Processes in the Courts of the United States*, ch. 21, § 2, 1 Stat. 93, 93–94 (Process Act of 1789, Sept. 29, 1789) [hereinafter *Process Act*]. Congress took this approach primarily “to allay as far as possible jealousy between the State and Federal Governments and to relieve the fears of encroachment by the latter.” Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 427–28 (1930).

227. See *Process Act*, Ch. 21, § 3, 1 Stat. 94.

228. For a history of this Act and its subsequent incarnations, see 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1002 (3d ed. 2002); 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 509–51 (1971); Warren, *supra* note 226, at 440–41. Warren’s article is in two parts, with the continuation at 16 VA. L. REV. 546.

229. See 4 WRIGHT & MILLER, *supra* note 228, § 1002.

230. See *id.*

states,<sup>231</sup> federal and state procedures fell out of step as states modified their procedures.<sup>232</sup> This problem with the Conformity Act was ameliorated somewhat by the fact that federal courts could, by local rule, adopt subsequent changes in state procedures, but there was no guarantee that the federal courts would do that.<sup>233</sup> In addition, the federal courts had the authority to modify state rules of procedure as applied in the federal courts, and while the power was not often exercised, it made it possible for further differences between state and federal procedures to develop.<sup>234</sup> This problem was not resolved until 1872, after the adoption of code pleading in many states, when Congress provided that federal common law procedure was to follow the procedure of the state at the time the suit was filed.<sup>235</sup>

The Process Acts did not settle the matter as to what procedure to apply, however. As I have indicated, the Acts gave federal courts the power to modify the procedures of state courts, and that was particularly true of trial practice, where the court might have to decide on the spur of the moment what procedures to apply.<sup>236</sup> In addition, Congress had

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231. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 48–50 (1825).

232. See 4 WRIGHT & MILLER, *supra* note 228, § 1002. Another problem with the Conformity Act was that the original Act applied to only the original thirteen colonies. As new states joined the Union, the federal courts in those states tended to adopt state practice and procedure as their own, but there was no requirement that they do so until 1828. The 1828 statute applied to states admitted to the Union between 1789 and 1828. A new statute, applying the principle to states admitted to the Union after 1828, was enacted in 1842. Between 1842 and 1872, when a major change in the Conformity Act occurred, the statutes that admitted new states to the Union incorporated the requirement that federal courts were to follow the practices and procedures of the state courts in which they sat. See *id.* The 1872 version of the Conformity Act allowed federal courts to follow state practice in effect at the time the case was brought. See *id.*

233. See *Wayman*, 23 U.S. at 47–48.

234. The most extensive discussion of this history is in Warren, *supra* note 226. He notes that the power of federal courts to make their own rules of procedure was granted originally in the Judiciary Act of 1789, and that the power of federal courts to promulgate rules that differed from the state rules was explicitly granted in 1792. See *id.* at 434 (citing § 17 of the Judiciary Act of 1789). Warren notes, however, that the power to make such rules was not often exercised. See Warren, *supra* note 226, at 435. Much of the dispute between states and the federal courts over which rules to apply centered on the rules governing executions. The states were enacting laws that favored debtors, contrary to the old laws that had favored creditors, but if federal courts continued to follow the old laws regarding execution and related procedures, they could undermine the states in their efforts to change the law. The dispute was also, more generally, a dispute over the allocation of power under the federal Constitution. See *generally id.* (describing in detail the history summarized here).

235. See An Act to further the Administration of Justice, ch. 255, §§ 5–6, 17 Stat. 196, 197 (1872); W.S. SIMKINS, A FEDERAL SUIT AT LAW 2 (1912); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 58–59 (1952).

236. See *Philadelphia & Trenton R.R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448, 463 (1840) (saying that “[t]he mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced are, properly, matters belonging to the practice of the Circuit Courts”); MILLAR, *supra* note 235, at 59–60.

power to regulate the procedure of federal courts, and it occasionally enacted such statutes. For example, Congress enacted statutes regulating the taking of depositions of persons who were far from the locus of the trial or who were going overseas,<sup>237</sup> and those statutes were held to apply in federal courts in the face of contrary state law.<sup>238</sup> In general, however, trial in a legal action in federal court would look much the same as a trial in a state court, including, of course, that issues of fact were decided by juries.<sup>239</sup>

The Process Act of 1789 had also provided that in equitable and admiralty actions, the courts would follow “the course of the civil law.” In 1792, Congress authorized the Supreme Court to promulgate rules of equity for the federal courts,<sup>240</sup> but the Court did not get around to doing so until 1822, when it promulgated a set of simple equity rules.<sup>241</sup> The rules went through two amendments before the codification movement in the states, and one more before they were finally abrogated by the Federal Rules of Civil Procedure.<sup>242</sup> The two earliest versions—in 1822 and 1842—did not necessarily cover all matters that might arise in an equity action, so federal courts sometimes borrowed English equity procedure to plug holes.<sup>243</sup>

Indeed, the original federal equity rules consisted of just thirty-three short rules; the 1842 version expanded that to ninety-two.<sup>244</sup> In both versions, most of the rules govern such matters as service of process and

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237. Provisions for such depositions date to the Judiciary Act of 1789. *See* An Act to establish the Judicial Courts of the United States, ch. 20, § 30, 1 Stat. 88 (1789). For general discussions of this statute, see 1 A.H. GARLAND & ROBERT RALSTON, A TREATISE ON THE CONSTITUTION AND JURISDICTION OF THE UNITED STATES COURTS 248 (Philadelphia, T. & J.W. Johnson & Co. 1898); SIMKINS, *supra* note 235, at 90–95.

238. *See* GARLAND & RALSTON, *supra* note 237, at 248 (citing, among others, *Sage v. Tauszky*, 6 Cent. L.J. 7 (1877) and *United States v. Pings*, 4 F. 714, 716–717 (1880)).

239. Juries were required in federal courts under the Seventh Amendment. In the state courts, the right to trial by jury was usually guaranteed by state constitutions. *See* Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 739 (1989) (citing civil jury provisions in the state constitutions). In 1819, the Supreme Court made it clear that litigants in federal courts could waive their right to a jury trial. *See* *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819). The courts interpreted this right narrowly, however, and until 1938 the presumption was that a common law trial in the federal courts would have a jury. *See* SWARD, *supra* note 6, at 108–09. For a general description of common law trials in federal courts, see SIMKINS, *supra* note 235.

240. *See* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792).

241. *See* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) v (1822).

242. *See* MILLAR, *supra* note 235, at 60–61.

243. *See* MILLAR, *supra* note 235, at 60; JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 42 (6th ed. 1929) (quoting Rule 33 of the 1822 version of the Federal Equity Rules); *id.* at 61 (quoting Rule 90 of the 1842 version of the Federal Equity Rules).

244. *See* HOPKINS, *supra* note 243, at 37–61 (reproducing the 1822 and 1842 Federal Equity Rules).

pleading.<sup>245</sup> Both versions reflect a process not far removed from the traditional English equity practice. Upon completion of the pleadings, the parties could require each other to answer interrogatories, usually written interrogatories, with the answers taken down before commissioners appointed for the purpose.<sup>246</sup> If Congress so provided, evidence could also be taken by deposition,<sup>247</sup> and depositions of persons who were at some distance from the court or who were unlikely to be able to attend a trial were provided for in the rules.<sup>248</sup> The answers to the interrogatories and depositions constituted the evidence upon which the decision was made. The judge could make the decision directly, or the matter could be referred to a master, who would report to the court.<sup>249</sup> The master would hold hearings,<sup>250</sup> but otherwise there was no trial in the normal sense.

The procedural system adopted by Congress was a confusing mish-mash. It required that federal courts follow state procedures as to legal actions, but follow federal procedures in equitable matters. But the system must have been difficult to administer, especially in states like Pennsylvania, where many equitable principles had been incorporated into legal forms and procedures.<sup>251</sup> In addition, it left it open for the various federal courts to modify some of the state rules that they would apply, or to adopt some changes that the states had made in their procedural rules, but not others. But the system was about to get more complicated. The period from 1848 to 1938 saw both a significant change in state procedure and a major overhaul of the Federal Equity Rules. Both of these events were to influence the drafters of the Federal Rules of Civil Procedure.

### *B. Trial Practice Under the Codes*

In 1848, the states embarked on a major reformation of procedure. Starting with the Field Code in New York, the states rejected English common law procedure and began regulating procedure by statute. In

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245. In the 1822 version, Rules 4–23 (out of 33) concern service of process or pleading. *See id.* at 37–40. In the 1842 version, Rules 7–66 deal with service of process or pleading. *See id.* at 44–56.

246. *See id.* at 56 (Rule 67, 1842 version).

247. *Id.* at 57 (Rule 68, 1842 version).

248. *Id.* (Rule 70, 1842 version).

249. *See id.* at 58–60 (Rules 73–84, 1842 version) (governing reference to master).

250. *See id.* at 58 (Rules 74–77, 1842 version) (governing proceedings before a master).

251. *See supra* notes 207–11 and accompanying text.

doing so, they made significant changes in the rules governing pleading, and they effected a merger of law and equity, at least in their own courts.

The Field Code takes its common name from David Dudley Field, who was the prime mover behind it.<sup>252</sup> The original version in 1848 was quite compact, but it was amended several times, growing substantially in size along the way.<sup>253</sup> The Field Code was enormously influential, with many of the states adopting the Code or a variation, some of them quite soon after the Field Code itself was adopted.<sup>254</sup> It was a transition between common law procedure and the procedure embodied in the Federal Rules.

The Field Code did two things that were important in this transition: it simplified pleading and it abolished the distinction between law and equity. As for pleading, the Field Code provided that the only pleadings allowed would be the “complaint, demurrer, answer and reply.”<sup>255</sup> The complaint was to contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”<sup>256</sup> Courts were to construe pleadings liberally<sup>257</sup> and to disregard insubstantial errors in pleading.<sup>258</sup> In addition, joinder of claims and parties was broader than under the common law, especially in later amendments to the Field Code, though still not as open as under the Federal Rules.<sup>259</sup>

The changes in pleading brought about by the Field Code were sufficiently radical that there were problems in application. Pleading had been a critical and complicated stage of a common law case, and it apparently was hard to let that complexity—and the learning behind it—go. Thus, some courts held that a pleading had to have a theory, and that the plaintiff could prevail on that theory or none at all.<sup>260</sup> Those courts

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252. There had been movement toward reform in New York for some time before the Field Code was enacted. It was David Dudley Field who made it happen. MILLAR, *supra* note 235, at 52–53. David Dudley Field was a brother of U.S. Supreme Court Justice Stephen Field. Indeed, all of Field’s siblings were quite accomplished. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 L. & HIST. REV. 311, 314 (1988).

253. See MILLAR, *supra* note 235, at 55–56. I will focus on the original 1848 version because the aspects of the Field Code that are important to my discussion remained essentially the same in later versions.

254. *Id.* at 54–55.

255. 1848 N.Y. LAWS ch. 379 § 132 [hereinafter 1848 Field Code].

256. *Id.* § 120.

257. *Id.* § 136.

258. *Id.* § 151.

259. Subrin, *supra* note 252, at 332.

260. For a general discussion of the theory of the pleadings, see Clarke Butler Whittier, *The Theory of a Pleading*, 8 COLUM. L. REV. 523 (1908).

would reject a complaint that seemed to assert two unrelated theories—such as tort and contract—on the same set of facts.<sup>261</sup> They would also refuse recovery for a plaintiff who pleaded one theory and proved another.<sup>262</sup> But not all courts adopted such an interpretation of the codes.<sup>263</sup>

Another problem that arose under the codes was the problem of defining terms, especially the term “facts.” The codes required that the plaintiff plead the “facts constituting the cause of action.” The survival of many complaints turned on whether a statement in the pleading was a statement of fact or a conclusion of law. For example, a New York case in 1920 resolved an issue that had been the subject of considerable controversy: whether a statement that a promise had been made in exchange for valuable consideration was a statement of fact or a conclusion of law.<sup>264</sup> The court decided that it was a statement of fact, so the complaint was good.<sup>265</sup> Courts also had to determine the meaning of “cause of action.”<sup>266</sup> Here the question was whether a “cause of action” is defined by a legal theory, much like the common law forms of action, or is merely a set of facts, independent of a legal theory, that could give rise to recovery on one or more theories.<sup>267</sup> These problems continued to plague the codes throughout their lifetimes.

The abolition of the distinction between law and equity was precipitated by New York’s 1846 constitution, which “eliminated the court of chancery and created a court ‘having general jurisdiction in law and equity.’”<sup>268</sup> But the absence of a separate court of equity was common among state courts and was a feature of the federal courts as well. That alone did not mean that there was no distinction between law and equity; courts could apply separate procedures to the two, as the federal courts did. The Field Code took the next step and established a single set of procedures to apply to law and equity. The Field Code provided:

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261. *Id.* at 531.

262. *See, e.g.,* Jones v. Winsor, 118 N.W. 716, 717–18 (S.D. 1908).

263. *See* Whittier, *supra* note 260, at 532.

264. *See* Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 416 (1921) (discussing California Packing Corp. v. Kelly Storage & Distrib. Co., 126 N.E. 269 (N.Y. 1920)).

265. *Id.*

266. Subrin, *supra* note 252, at 329.

267. *See* Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 837 (1924) (arguing that a cause of action under the codes is “an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons”); O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 619 (1925) (arguing that a cause of action necessarily entails an understanding of “legal relations” in addition to facts).

268. Subrin, *supra* note 252, at 316 (citing and quoting N.Y. CONST. of 1846, Art. XIV, Sec. 5, Art. VI, Sec. 3).

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.<sup>269</sup>

Thus, the rules of pleading and the mode of proof applied to all civil actions, whether they would have been called legal or equitable.

The merger of law and equity was not without difficulty, however. While the original drafters of the Field Code apparently “thought they were abolishing not only the *forms* but the ‘inherent’ distinctions” between law and equity,<sup>270</sup> some judges and commentators thought it impossible to abolish those “inherent” distinctions. A commentator in 1879 said:

It was evidently the intention of the legislature, in framing the code, not to destroy, but to mingle, common law and equitable actions, in so far as form is concerned, but the substance of each remains unchanged and wholly unchangeable, and cannot be united, fused or commingled into one by any human legislation.<sup>271</sup>

Even the courts of New York eventually returned to enforcing a distinction between law and equity in the pleadings, similar to the theory of the pleadings problem discussed above.<sup>272</sup> One commentator described the main distinctions between law and equity that are maintained under the codes as the right to jury trial in legal actions, the restrictions on the use of equitable remedies where legal remedies are adequate, and the use of the contempt power to enforce equitable remedies.<sup>273</sup> Thus, there was some disagreement about the extent of the merger effected by the codes, and it was a disagreement based on a distinction between form and substance: some courts and commentators thought that the forms of law and equity could be merged, but not the substance.

269. 1848 Field Code, *supra* note 255, § 62. The complaint in the Field Code had to be verified. *Id.* § 133. For a discussion of the reasons for this requirement, see Subrin, *supra* note 252, at 330–31.

270. Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 3 (1925).

271. T.A. GREEN, A GENERAL TREATISE ON PLEADING AND PRACTICE IN CIVIL PROCEEDINGS AT LAW AND IN EQUITY UNDER THE CODE SYSTEM 51–52 (St. Louis, Mo., W.J. Gilbert 1879).

272. See Clark, *supra* note 270, at 1–2, 7–8 (citing, among others, *Jackson v. Strong*, 118 N.E. 512 (N.Y. 1917), where the appellate court refused to allow the trial judge to grant legal relief when the plaintiff had sought only equitable relief, and *Poth v. Washington Square M.E. Church*, 201 N.Y. Supp. 776 (1923), to the same effect).

273. CHARLES C. MONTGOMERY, MONTGOMERY’S MANUAL OF FEDERAL PROCEDURE § 473 (2nd ed. 1918).

In one important way, the codes were more similar to the common law than to the Federal Rules that followed: there was very little pre-trial activity, with the parties moving quickly to trial after completion of the pleadings. The pleadings, presumably, had brought out the factual and legal contentions of each party. What remained was to decide any dispute of fact or law that was apparent from the pleadings. There was, however, some limited discovery. Parties could request other parties to admit the genuineness of documents,<sup>274</sup> and could ask other parties for copies of documents that contain “evidence relating to the merits of the action, or the defence therein.”<sup>275</sup> In addition, parties could compel opposing parties and witnesses to testify at trial, though a witness could not be compelled to attend if he lived more than one hundred miles from the courthouse.<sup>276</sup> In that event, the party could examine the witness at his home prior to trial.<sup>277</sup> A party could also examine an opposing party before trial.<sup>278</sup> Examinations of parties or witnesses were conducted before a judge, justice of the peace, or referee.<sup>279</sup> The purpose of this limited discovery seems to have been to secure evidence for the trial rather than to inform the parties.<sup>280</sup>

The Field Code described a trial as “the judicial examination of the issues between the parties, whether they be issues of law or of fact.”<sup>281</sup> It provided for a jury trial whenever there was an issue of fact “in an action for the recovery of money only, or of specific real or personal property.”<sup>282</sup> As such actions were common law actions historically, the Field Code thus preserved the right to jury trial for common law matters, though it also extended the jury trial to some kinds of equitable actions.<sup>283</sup> In this respect, the merger was incomplete.<sup>284</sup> The Field Code provided for trials by jury (which were the default mode), by the court,

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274. 1848 Field Code, *supra* note 255, § 341.

275. *Id.* § 342.

276. *See id.* §§ 344, 353.

277. *See id.* § 354.

278. *See id.* § 345.

279. *See id.* §§ 345, 354.

280. *See* GREEN, *supra* note 271, at 210–11 (arguing that the old equitable bills of discovery were no longer needed under the codes because the codes required that all interested parties could be made witnesses); *see also id.* at 374 (stating that if documents needed as evidence “be in the possession of the opposite party, written notice to produce the same *on the trial* should be served in apt time” (emphasis added)). The codes abolished the equitable bill of discovery, apparently for this reason. *See* 1848 Field Code, *supra* note 255, § 344; GREEN, *supra* note 271, at 210–11; *see also* Subrin, *supra* note 252, at 332–33 (describing discovery under the Field Code as “limited”).

281. 1848 Field Code, *supra* note 255, § 207.

282. *Id.* § 208.

283. Subrin, *supra* note 252, at 333. Subrin calls the Field Code “jury empowering.” *Id.*

284. *See* Clark, *supra* note 270, at 7 (noting that a distinction between law and equity exists under the codes, but that it pertains only to the form of trial).



and, in some circumstances, by referees.<sup>285</sup> The parties could waive their right to a jury trial.<sup>286</sup>

The form of the trial resembled a common law trial more than a trial in equity, even when the trial was before a judge.<sup>287</sup> Indeed, in a bench trial the judge was characterized as sitting “as a jury.”<sup>288</sup> The trial, thus, consisted largely of oral testimony, supplemented by documentary evidence and deposition testimony when necessary.<sup>289</sup> The plaintiff generally presented her case first, and cross-examination was an important part of the trial.<sup>290</sup> The judge controlled the trial and instructed the jury.<sup>291</sup>

It appears, then, that the codes merged law and equity largely by bringing equity into the common law mode, especially with respect to trial procedure. There are some aspects of equity present in the codes, such as limited discovery and somewhat more liberal rules for joinder of claims and parties, but like the common law, civil procedure under the codes consisted primarily of pleadings and trial, with few intervening processes. Pleadings were supposed to define the issues for trial, and the structure of the trial is the structure devised for common law jury trials.

The codes, which were a product of the states, created a complication for the federal courts. The federal courts were supposed to use the state rules of procedure for common law actions, but the Federal Equity Rules for equitable actions. While there had always been some bleeding of equity into law in the states, the merger accomplished by the codes was something entirely new. If there were no legal or equitable actions under state law, but only civil actions, the federal courts could have a more difficult time deciding what rules to apply. The resistance in some states to a complete merger of law and equity may have eased the federal courts to some degree: if the state was still drawing distinctions between legal and equitable remedies, for example, the federal court could simply draw

285. See 1848 Field Code, *supra* note 255, §§ 213–229.

286. See *id.* § 221 (providing that the jury trial could be waived by “failing to appear at trial,” by “written consent,” or by “oral consent in open court, entered in the minutes”).

287. See GREEN, *supra* note 271, at 378–91 (describing trials before the jury and before the court sitting as a jury); *id.* at 393–94 (describing mode of trial in equitable actions); P.W. VIESSELMAN, A BRIEF FOR THE TRIAL OF CIVIL ISSUES BEFORE A JURY BY AUSTIN ABBOTT 10 (5th ed. 1935) (noting that “the same principles of pleading, evidence and procedure apply in the trial court whether the case is tried by the judge and jury, or by the jury alone”). Recall that Green believed that law and equity were inherently separate, so he persists in making this distinction despite the language of the codes. See *supra* note 271 and accompanying text. Recall also that the Codes made the right to jury trial dependent largely, though not entirely, on the legal character of the action. See *supra* notes 281–86 and accompanying text.

288. GREEN, *supra* note 271, at 377–78.

289. See *id.* at 374–75 (describing how parties are to marshal their evidence prior to trial).

290. See *id.* at 380–83.

291. *Id.* at 383–91.

those same distinctions in deciding which procedural rules to follow. But even if the state was not drawing such distinctions, the federal courts often continued to do so.<sup>292</sup> This served to widen the gap between state and federal practice.

### C. *The Federal Equity Rules of 1912*

Another important precursor to the 1938 Federal Rules of Civil Procedure was the set of Federal Equity Rules promulgated in 1912. This was the first major revision of the Federal Equity Rules in the ninety years since they were first promulgated, and they were influenced by changes in equity rules in England as well as by the codes in the states. Like the codes in the states and the new English rules, the Federal Equity Rules of 1912 simplified pleading.<sup>293</sup> They also provided that testimony be taken orally before the judge instead of being taken down before a commission and reduced to writing for the judge to peruse.<sup>294</sup> The reason for this latter change apparently was that the written evidence had become too cumbersome in many cases.<sup>295</sup> This change made equity trials look more like common law trials, though the absence of the jury in equity still would have made trials in the two systems look quite different.

Discovery, always a feature of equity but never very extensive, continued to exist, but did not get much attention.<sup>296</sup> While interrogatories, under previous rules, had been included in the pleading, the 1912 rules provided for them in a separate rule.<sup>297</sup> Interrogatories were limited to

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292. See, e.g., *Gudger v. Western N.C.R. Co.*, 21 F. 81, 82 (C.C., W.D.N.C. 1884) (refusing to allow a single cause of action blending legal and equitable claims despite a state code that merged law and equity); *Montejo v. Owen*, 17 F. Cas. 610, 610–11 (C.C., S.D.N.Y. 1877) (applying federal equity rules to an equitable defense despite a New York state rule that merged law and equity and allowed equitable defense to be asserted to a common law claim); *Beardsley v. Littell*, 2 F. Cas. 1178 (C.C., S.D.N.Y. 1877) (refusing to allow pre-trial examination of witnesses in a legal action despite a state code that merged law and equity and would have allowed it).

293. HOPKINS, *supra* note 243, at 34.

294. *Id.* at 235 (quoting Rule 46 of the 1912 Federal Equity Rules).

295. See *id.* at 34 (citing *Electric Vehicle Co. v. C.A. Duerr & Co.*, 172 F. 923, 924–25 n.1 (C.C., S.D.N.Y. 1909), in which the judge complained about the thirty-six large volumes of evidence submitted in the case, much of which was repetitive and irrelevant).

296. Two treatises published a few years after the 1912 rules took effect each devoted just a short chapter to discovery. See MONTGOMERY, *supra* note 273, at 395–405; W.S. SIMKINS, A FEDERAL EQUITY SUIT, 291–94 (3d ed. 1916).

297. See HOPKINS, *supra* note 243, at 253–55 (quoting Rule 58 of the 1912 Federal Equity Rules). One court noted that Rule 58 “was not intended to change the substantive rules of equity as to discovery, but merely to alter procedure.” *F. Speidel Co. v. N. Barstow Co.*, 232 F. 617, 619 (D. R.I. 1916). In *Speidel*, the court rejected the plaintiff’s interrogatories because they related to the

matters that were “material to the support or defense of the cause.”<sup>298</sup> Depositions could be taken only in “exceptional instances,”<sup>299</sup> though separate statutory authority provided that the parties could also take depositions of persons who were likely to be unable to attend a trial, and the courts could order depositions in other circumstances.<sup>300</sup> When depositions were taken, they could be used as evidence at trial.<sup>301</sup> Discovery still seemed aimed primarily at obtaining evidence for trial. Indeed, courts often interpreted the discovery rules consistently with the traditional English practice, where discovery was limited to matters that would help the party seeking discovery to establish her own case; she could not discover material related to the other party’s claims or defenses.<sup>302</sup> Nevertheless, it is significant that the 1912 rules divorced discovery from the pleadings: that was the model followed twenty-six years later in the Federal Rules of Civil Procedure.

#### V. THE TRANSFORMATION OF THE AMERICAN TRIAL UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The promulgation of the Federal Rules of Civil Procedure in 1938 brought the revolution in civil procedure, which had begun with the simplified pleadings and the merger of law and equity under the Codes, to fruition. The Federal Rules mark the transformation of the trial into litigation: the short trial following soon on the completion of the pleadings became a long process involving considerable pretrial activity, culminating only occasionally in a trial. Both pleadings and trial are diminished in importance under such a system. The Rules also contributed to a significant change in the kinds of cases that are decided in that litigation: while most trials up to that point had involved private disputes, whether in law or equity, litigants eventually began bringing suits that challenged the structure and operation of governmental institutions and the activities of corporations.

The Federal Rules have been enormously influential. Twenty years after their promulgation, some fifteen states and territories had adopted them in full for their own courts, and fourteen more had adopted substan-

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defendant’s defense, and the court, relying on English practice, thought that the plaintiff’s discovery was limited to matters that would help establish the plaintiff’s case. *See id.* at 618.

298. HOPKINS, *supra* note 243, at 253 (quoting Rule 58 of the 1912 Federal Equity Rules).

299. *See id.* at 238–39 (quoting Rule 47 of the 1912 Federal Equity Rules).

300. *See id.* at 239 (evolving from the notes to Rule 47 of the 1912 Federal Equity Rules).

301. *See* MONTGOMERY, *supra* note 273, at 435 (noting that under Equity rule 46 witnesses must be produced at trial unless their depositions were taken pursuant to Equity Rule 47).

302. *See* Speidel, 232 F. at 618; MONTGOMERY, *supra* note 273, at 398–400.

tial parts of them.<sup>303</sup> Today, most states have adopted at least a significant part of the theory and practice of the Federal Rules, and many have simply replicated the Federal Rules for their own courts.<sup>304</sup> Thus, the revolution brought about by the Federal Rules has affected state as well as federal courts. The Federal Rules have been amended numerous times over the sixty-five years that they have been in effect, and sometimes it is those amendments that have made the procedural and substantive transformations described in the previous paragraph possible. But it was the original Federal Rules that provided the theoretical and structural foundations for those transformations.

*A. Procedural Changes: The Transformation of the Trial into Litigation*

The Federal Rules effected a number of significant changes in civil trial practice, some intended and some, most likely, unintended. The Federal Rules followed the codes in merging law and equity, but they took a somewhat different approach to the merger. Other changes include an emphasis on equity procedures, expansion of pre-trial procedures, modification of the adversary system, and changes in the operation of the civil jury. As I have indicated, not all of these changes were immediate; some have evolved along with amendments to the Federal Rules, but the Federal Rules set them in motion.

1. The Merger of Law and Equity

By the time the Federal Rules were promulgated, the merger of law and equity was well-established in both the United States and England. It was a prominent feature of the codes, and it had been adopted in England by 1875.<sup>305</sup> Thus, it is no surprise that the new Federal Rules effected a merger in the procedures for legal and equitable actions in the federal courts.<sup>306</sup> The approach to the merger was somewhat different

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303. See Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 n.2 (1958).

304. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1424-29 (1986) (surveying states' incorporation of the Federal Rules of Civil Procedure).

305. The merger of law and equity in England was a gradual process, beginning in 1854. For descriptions of this process, see BAKER, *supra* note 38, at 122-31; 15 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 102-38 (A.L. Goodhart & H.G. Hanbury eds., 1965).

306. Rule 2 provides, "[t]here shall be one form of action to be known as 'civil action.'" RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, ANNOTATED 2 (1938) [hereinafter 1938 FEDERAL RULES]. Recall that the federal system had never had separate courts of law and equity, but had always had separate procedures.

from that taken in the codes, however. While the codes adopted a common law approach and brought various equitable concepts and procedures into it, the Federal Rules seem to start with equity, and bring in common law concepts and procedures where necessary.

To be sure, the essence of the old common law action, which consisted of just pleadings and proof, remains in the Federal Rules, but only in the sense that the Federal Rules provide for pleading and proof. As in the codes, pleadings were severely limited, generally consisting of just a complaint and an answer.<sup>307</sup> The terms used to describe the various pleadings come largely from equity, though there were similar tools in common law pleading.<sup>308</sup> In addition, pleading is clearly thought to be nothing more than a minor hurdle—a device to notify the defendant that a lawsuit has been commenced and generally what it is about.<sup>309</sup> Pleading is not a very important part of the process.

There were sixteen rules (out of the original 86), under Part VI of the Rules, with the heading “trials;” seven of them related to jury trials.<sup>310</sup> The jury, of course, is one of the defining features of the common law. As the right to jury trial was preserved by the Constitution, these rules were necessary. But the approach to the jury trial in the Federal Rules was quite different from the traditional approach. Parties in federal courts had the right since at least 1819 to waive the right to jury trial, but the waiver had to be explicit and in the proper form or it would be ineffective.<sup>311</sup> In other words, the presumption was that there would be a jury trial, and the presumption was difficult to overcome. In the Federal Rules, by contrast, the presumption was that there would be no jury trial; in order to have a jury trial, a party had to demand one, and failure to

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307. Rule 7(a) limited pleadings to a complaint, answer, reply to a counterclaim, answer to a cross claim, third-party claim and third-party answer. See 1938 FEDERAL RULES, *supra* note 306, at 11.

308. The term “complaint” is equitable, as the common law term was “declaration.” Instead of the common law term “demurrer,” the Rules adopted the term used in the 1912 Equity Rules, the motion to dismiss. See 1912 EQUITY RULES R. 29, *reprinted in* HOPKINS, *supra* note 243, at 189; 1938 FEDERAL RULES R. 12(b), *supra* note 306, at 18–19. Answers under the 1912 Equity Rules were to contain all of the defendant’s defenses, as well as counterclaims. See 1912 EQUITY RULES R. 30, *reprinted in* HOPKINS, *supra* note 243, at 199–200. The 1938 Federal Rules have similar provisions, with an express requirement that affirmative defenses (avoidances in the common law parlance) be stated. See 1938 FEDERAL RULES R. 8(b)–(c), *supra* note 306, at 12–13. Equity had borrowed some kinds of pleadings from the common law, most notably the demurrer, though, as noted, the 1912 Federal Equity Rules had changed the name. See MILLAR, *supra* note 235, at 202.

309. See Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1065–66 (1955); Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

310. See 1938 FEDERAL RULES, *supra* note 306, at 59–79 (Rules 38, 39, 47, 48, 49, 50, and 51).

311. See SWARD, *supra* note 6, at 108–09.

demand a jury trial constituted a waiver.<sup>312</sup> In other words, the presumption is for the equity approach: a bench trial.

## 2. Adoption of Equitable Procedures

Merger of law and equity under the codes had basically preserved the common law form and inserted equitable processes into it. The drafters of the Federal Rules took the opposite approach. I have already shown how the merger of law and equity seemed to look to equity for the terms and concepts behind pleading and proof (with the exception of the constitutionally-mandated jury trial), but the Federal Rules did much more than that. For example, the Federal Rules took the equitable approach to joinder of claims and parties, and then went beyond even the relatively free joinder found in the 1912 Federal Equity Rules. Rule 18(a) allowed parties to join any claims they had against another party, whether legal or equitable, whether related or unrelated.<sup>313</sup> Rule 20(a) allowed joinder of parties if they sought relief “arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.”<sup>314</sup> The rules also allowed third-party claims,<sup>315</sup> counterclaims and cross-claims,<sup>316</sup> interpleader,<sup>317</sup> class actions,<sup>318</sup> and intervention.<sup>319</sup> These joinder rules made

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312. See 1938 FEDERAL RULES R. 38, *supra* note 306, at 59.

313. See *id.*, R. 18(a), at 30. According to the Advisory Committee’s notes, the trend was toward “unlimited joinder of actions.” *Id.* The model for Rule 18(a) was Rule 26 of the 1912 Federal Equity Rules, but the federal rule was “broadened to include multiple parties.” *Id.*

314. *Id.* R. 20(a), at 32. According to the Advisory Committee’s notes, joinder of parties under Rule 20(a) “represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.” *Id.* at 33. It is clear from the notes that the 1912 Federal Equity Rules were the model for this rule as well. See *id.*

315. See *id.* R. 14, at 24. The Advisory Committee’s notes describe third-party practice as “a modern innovation in law and equity although well known in admiralty.” *Id.* at 25.

316. See *id.* R. 13, at 22–23. The Advisory Committee’s notes say that Rule 13 derived from Rule 30 of the 1912 Federal Equity Rules. See *id.* at 23. They also note that the codes generally did not provide for counterclaims. See *id.* at 23.

317. See *id.* R. 22, at 33–34. Interpleader existed at common law, but was not very useful because of the restrictions on it, so the real development of interpleader occurred in equity. See 2 STORY, *supra* note 55, at 800–24 (discussing interpleader procedure in equity). By the time the 1938 Federal Rules were promulgated, there was also a federal interpleader statute. See 1938 FEDERAL RULES R. 22(2), *supra* note 306, at 34.

318. See 1939 FEDERAL RULES R. 23, *supra* note 306, at 34–35. Class actions have an equitable origin, where the device was called a bill of peace. See 2 STORY, *supra* note 55, at 852–60; 7A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1751 (2d ed. 1986).

319. See 1938 FEDERAL RULES R. 24, *supra* note 306, at 37–38. Intervention has origins in Roman Law, and was introduced to England via the ecclesiastical courts. See James Wm. Moore & Edward H. Levi, *Federal Intervention, I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 568–69 (1936). It eventually had a role in both law and equity, but “was allowed more freely in equity than at law.” *Id.* at 572.

for some fairly complicated cases,<sup>320</sup> but the complexity could be alleviated somewhat by the judge's discretionary power to hold separate trials on various claims or even issues.<sup>321</sup>

This brings us to another feature of the Federal Rules that derived from equity: the judge's discretion. Equity, which comes from the power of the king to do justice when the common law courts, because of their rigid rules and procedures, could not, depends on discretion.<sup>322</sup> And discretion was built throughout the 1938 Federal Rules, from the power of the judge to allow amendments to pleadings "when justice so requires,"<sup>323</sup> to the power of the judge to order separate trials "in furtherance of convenience,"<sup>324</sup> to the authority of the judge to take "appropriate disciplinary action" against persons bringing frivolous suits,<sup>325</sup> to the authority of the judge to choose among a variety of sanctions for a party's failure to comply with discovery requests, including the payment of "reasonable" expenses or attorney's fees.<sup>326</sup> There are ample opportunities to exercise that discretion, and those opportunities have grown over the years.

Discovery, which originated with the bill of discovery in equity,<sup>327</sup> was not only made a part of the 1938 Federal Rules, but was substantially expanded. Discovery in equity and under the codes had been limited, for the most part, to discovery of evidence (including testimony from one's opponent) that a party could use to support his own case; he could not discover evidence that his opponent would use to support her case.<sup>328</sup> But under the 1938 Federal Rules, a party could take a deposition as to "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party."<sup>329</sup> Discovery was permitted through depositions, written inter-

320. See, e.g., *Lasa per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 144-45 (6th Cir. 1969) (involving multiple counterclaims, cross-claims, and third-party claims).

321. See 1938 FEDERAL RULES R. 42(b), *supra* note 306, at 64.

322. See SWARD, *supra* note 6, at 88; Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. Summer 1993, at 53, 71-73.

323. 1938 FEDERAL RULES R. 15(a), *supra* note 306, at 25.

324. *Id.* R. 42(b), at 64.

325. See *id.* R. 11, at 17.

326. See *id.* R. 37, at 56-59.

327. See 2 STORY, *supra* note 55, §§ 1483-1485.

328. See MILLAR, *supra* note 235, at 214.

329. 1938 FEDERAL RULES R. 26(b), *supra* note 306, at 41. The original Rule 26 related to depositions. The current Rule 26 governs discovery generally. Rule 26(b) now describes the scope of discovery generally, whether obtained by depositions or some other device. The present rule says that discovery may be obtained "regarding any matter, not privileged, that is relevant to the claim or defense of any party." FED. R. CIV. P. 26(b)(1). This is a more limited discovery than that found in

rogatories to a party, production of documents or other tangible things, physical and mental examinations, and requests for admission of facts.<sup>330</sup>

The 1938 Federal Rules also provided for a number of equitable devices. These include injunctions,<sup>331</sup> receiverships,<sup>332</sup> shareholders' derivative suits,<sup>333</sup> and masters.<sup>334</sup> In short, the 1938 Federal Rules borrowed heavily from equity, looking to the common law primarily for the constitutionally-mandated jury trial.

### 3. Expansion of Pre-Trial Procedures

Prior to the 1938 Federal Rules, pre-trial procedures had been minimal. There might have been a small amount of discovery, but it was limited in scope and would not have taken long. The expansion of discovery under the 1938 Federal Rules is the main reason why pre-trial procedures are now much more extensive. Indeed, pre-trial procedures under the Federal Rules are often the heart of the litigation. Fewer than five percent of civil cases filed go to trial,<sup>335</sup> and the expansion of discovery—which may give the parties a better sense of a proper settlement—is undoubtedly a major reason for that. A vigorous and lively motions practice is another reason. In particular, the motion for summary judgment, which is a recent invention,<sup>336</sup> allows some cases to be resolved without a trial, and if there is a colorable argument for it, the parties may well try. Even if the judge ultimately denies the motion, more time has elapsed. Many courts are now requiring various forms of alternative dispute resolution.<sup>337</sup> If those methods do not resolve the case, yet more time is expended in the pre-trial phase. This expansion of the pre-trial phase of a lawsuit, coupled with the fact that so many cases do not go to trial at all, is the reason why the trial is in eclipse while “litigation” has become the norm.

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the original rules, though the court can still order the broader discovery upon a showing of good cause. *Id.* The limitation was promulgated in 2000 in order to “involve the court more actively in regulating the breadth of sweeping or contentious discovery.” FED. R. CIV. P. 26(b)(1) advisory committee notes.

330. See 1938 FEDERAL RULES R. 26, 27, 30, 33, 34, 35, 36 *supra* note 306, at 40–56.

331. See *id.* R. 65, at 99–101.

332. See *id.* R. 66, at 102.

333. See *id.* R. 23(b), at 35.

334. See *id.* R. 53, at 80–82.

335. See SWARD, *supra* note 6, at 13.

336. See *id.* at 275–76.

337. See *id.* at 334–38 (chronicling the growing judicially mandated alternative dispute resolution prior to trial).



#### 4. Changes in the Adversary System

With the expansion of pre-trial procedures has come significant additional judicial involvement in the litigation process. The original Federal Rules contemplated a discovery process that was managed by the parties,<sup>338</sup> with little participation by the judge, but that has not worked,<sup>339</sup> and the rules have been amended to allow for more judicial participation, though much of the oversight of the discovery process is handled by magistrate judges rather than by the district judges.<sup>340</sup> Judicial involvement in discovery—and in other aspects of the litigation as well—is particularly common in complex litigation, where the parties are many, the issues difficult, and the stakes high. Indeed, the models for judicial management of litigation come largely from the procedures developed for complex litigation.<sup>341</sup>

Rule 16 of the Federal Rules, governing pre-trial procedures, has existed in some form since the original rules, but it has changed significantly in recent years to encourage more judicial management of litigation.<sup>342</sup> Judges vary in the use they make of these new powers, but some have become quite active.<sup>343</sup> The phenomenon of judges managing liti-

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338. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 275–76 (1989). Discovery under prior rules, such as it was, required the substantial involvement of the judge, who had to approve it at the least, and sometimes oversee such procedures as depositions. See *supra* notes 322–30 and accompanying text. On the other hand, party control of investigation and presentation of evidence is a hallmark of the adversary system. See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312 (1989). Party control of discovery was a departure from past practice, but it was consistent with the theory behind the adversary system.

339. See generally, e.g., WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 117–61 (1968); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1303–31 (1978); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

340. Congress enacted the statute creating magistrates (as they were then called) in 1968, to replace an antiquated system of “commissioners.” See *Wingo v. Wedding*, 418 U.S. 461, 462–63 (1974). The current version of the statute is at 28 U.S.C. §§ 631–39 (West. Supp. 2002). Magistrate judges now have primary responsibility for such things as discovery and routine motions. See, e.g., D. ARIZ. R. 1.17(d)(2) (general referral of discovery matters to magistrate judges); C.D. CAL. R. (same). Magistrate judges, who do not have status as Article III judges, cannot determine dispositive motions, such as a motion to dismiss or a motion for summary judgment, but they can hear them and make recommendations to the district judge. See 28 U.S.C. § 636(b)(1) (describing powers of magistrate judges). They can hear and determine non-dispositive motions, such as a motion to compel discovery. See *id.* United States v. Raddatz, 447 U.S. 667, 674–76 (1980) (describing powers of magistrate judges).

341. Those procedures have long been set down in MANUAL FOR COMPLEX LITIGATION, THIRD (1995). This is a guide for judges and litigators on handling complex litigation, and many of its innovations have worked their way into ordinary litigation.

342. For a discussion of the changes to Rule 16, see SWARD, *supra* note 6, at 121–22.

343. See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL 111–67 (1986) (describing judicial involvement in settlement of the Agent Orange case).

gation has generated a considerable literature, some favorable and some not.<sup>344</sup> Whether one favors it or not, however, it cannot be denied that judicial management is inconsistent with adversarial theory, which requires judges who are relatively uninvolved until the trial.<sup>345</sup>

## 5. Changes in the Civil Jury

I have already noted that the Federal Rules require that one of the parties demand a jury trial or the right will be waived.<sup>346</sup> This is a change from the practice before the promulgation of the Federal Rules, where the parties could waive a jury trial but had to do so explicitly.<sup>347</sup> But there have been other significant changes in the way the jury trial works, so that the use and function of the jury have declined. I have detailed these changes elsewhere, and will not describe them at length here.<sup>348</sup>

The Federal Rules have facilitated some of this decline. For example, judges are able to exercise considerable control over the jury through such devices as the summary judgment<sup>349</sup> and the judgment as a matter of law (formerly called the directed verdict and judgment notwithstanding the verdict).<sup>350</sup> Juries have also shrunk in size from twelve to six, and that seems to affect negatively how they function.<sup>351</sup> In addition, the predominance of equity in the Federal Rules may help to complicate liti-

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344. See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (criticizing judicial management); Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978) (same); MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 12-14 (1964) (defending judicial management); Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (same).

345. Sward, *supra* note 338, at 312. For a longer discussion of the decline of the adversary system under the federal rules, see SWARD, *supra* note 6, at 113-29.

346. See *supra* notes 311-12 and accompanying text.

347. *Id.*

348. See generally SWARD, *supra* note 6; Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573 (forthcoming Spring 2003).

349. FED. R. CIV. P. 56. The use of summary judgment, particularly on behalf of defendants, has grown considerably since 1986 when three cases, denoted the "trilogy," were decided that make it easier for defendants to have their motions for summary judgment granted. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 73-74 (1990); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993). The three cases were *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

350. FED. R. CIV. P. 50. In 1993, Rule 50 was amended to use the term "judgment as a matter of law" for both the directed verdict and the judgment notwithstanding the verdict, because the standards for the two were the same, and only the timing of the motions was different. FED. R. CIV. P. 50 advisory committee notes (1993 amendments).

351. SWARD, *supra* note 6, at 210-18.

gation so much that the jury, which evolved in a simplified common law environment, may be less effective.<sup>352</sup> Juries have also been affected by legislation, such as caps on damages and other kinds of legislation that restrict their decision-making,<sup>353</sup> and the expanded use of administrative adjudication, which takes matters out of their hands altogether.<sup>354</sup>

When a jury trial actually occurs—and it occurs in fewer than three percent of civil cases<sup>355</sup>—the trial is not that much different in structure from the trials we have seen for all of the country's history. But the civil jury lives in a milieu much different from that in which it was born.

## 6. Summary

The changes in the rules outlined here make it plain that litigation under the federal rules can be quite complex. Indeed, it has become complex—so much so that casebooks on complex litigation have begun to appear<sup>356</sup> and law schools are offering courses on it. The next section details the kinds of litigation that the rules have helped to make possible.

### *B. Substantive Changes: The Content of the Trial*

For most of the history described in this article, litigation has been overwhelmingly about private disputes. The disputes usually involved property, contracts, or torts. They usually involved one private plaintiff suing one private defendant. Lawsuits still often follow that pattern, but the last several decades have seen a rise in other kinds of litigation: litigation that challenges governmental action, or that seeks to reform governmental institutions such as schools or prisons, or that challenges an entire industry for the alleged damage it does. These changes in the content of the trial have had an effect on the structure of the trial—sometimes a profound effect. While there are many social, political, and economic reasons for these changes in the content of the civil trial, the changes were made possible in part by the Federal Rules of Civil Procedure, with their orientation in equity.

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352. *Id.* at 109–12.

353. *Id.* at 302–10.

354. *Id.* at 130–36.

355. *Id.* at 13.

356. See, e.g., ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL (1999); JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM (1998); LINDA S. MULLENIX, MASS TORT LITIGATION (1996).

## 1. Public Law Litigation

Public law litigation generally challenges governmental action. The phenomenon of public law litigation was first described in detail in a 1976 article by Abram Chayes,<sup>357</sup> though by that time such litigation was quite well established. Indeed, the 1954 case of *Brown v. Board of Education of Topeka*<sup>358</sup> involved a form of public law litigation. Some commentators distinguish two primary forms of public law litigation: public interest litigation, in which a litigant challenges a regulatory decision of the government; and institutional reform litigation, in which a litigant or group of litigants challenges the structure or operation of governmental institutions more generally.<sup>359</sup> Public interest litigation could also involve an effort to have a private entity adhere to federal or state regulations.<sup>360</sup>

### a. Public Interest Litigation

The rise of the administrative state, which got its biggest boost during the New Deal, has created many opportunities for litigation against the government. Indeed, the Administrative Procedure Act specifically provides that persons aggrieved by a decision of an administrative agency can sue in federal court to challenge the decision.<sup>361</sup> Other regulatory statutes provide separate authorization for such suits, sometimes permitting what have come to be known as “citizen suits” to ensure that

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357. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). Since Chayes's article, many other commentators have discussed it, not always favorably. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5–17 (1979) (giving a sympathetic treatment to the need for institutional litigation while acknowledging the constitutional and political difficulties of it); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637 (1982) (arguing that the exercise of judicial discretion in institutional litigation is illegitimate unless the political bodies have abdicated their responsibilities); Richard H. Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 7–9 (1984) (criticizing restrictive standing rules that limit public law litigation); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664 (1978) (arguing that separation of powers requires judicial restraint in public law litigation); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 255–74 (1977) (striking cautionary note on the expansion of judicial capacity to include institutional litigation).

358. 347 U.S. 483 (1954).

359. See Tobias, *supra* note 338, at 293–96 (1989).

360. See, e.g., Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in PUBLIC INTEREST LAW 4–29 (1978) (defining public interest law as the representation of under-represented interests).

361. See 5 U.S.C. § 702 (2001).

agencies or private entities comply with the law, though standing problems might limit the availability of such suits.<sup>362</sup>

Public interest litigation is usually going to be equitable in nature, because it seeks an order that an agency or a private entity (usually a corporation) comply with the law. Thus, a jury will not be a feature of most public interest litigation. In addition, there could be many parties to the litigation, or a party could bring suit on behalf of many other parties, through class actions or citizen suit provisions of federal statutes. But these are, in some ways, standard equitable procedures. The subject matter of the litigation is surely different, especially where the defendant is the government—there were historically few suits against the government because of sovereign immunity.<sup>363</sup> But the procedures are familiar.

#### b. Institutional Reform Litigation

The model for institutional reform litigation is the school desegregation litigation in the 1950s, though prison reform litigation has also been common.<sup>364</sup> This kind of litigation seeks to change the institutional structures of government. As such, it involves the courts much more heavily in the remedies than does ordinary public interest litigation,

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362. For examples of federal statutes providing for citizen suits to seek enforcement of agency regulations against both the agencies themselves and private entities, see 16 U.S.C. § 1536 (Endangered Species Act); 33 U.S.C. § 1365(a), (g) (Clean Water Act); 42 U.S.C. § 11046(a)(1) (Emergency Planning and Community Right to Know Act). The Supreme Court seemed to limit severely the availability of such suits in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992) (holding that the citizen suit provision of the Endangered Species Act did not allow citizens to sue unless they could establish a concrete and particularized injury). The scope of that decision is in some doubt, however, after *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 185–88 (2000) (holding that citizens who alleged injury from pollution of a waterway could seek a civil penalty payable to the United States on the ground that the civil penalty would deter violations of the law and thus redress the plaintiff's injury). The Supreme Court also has recently permitted *qui tam* actions, where citizens bring suit on behalf of the government, at least when the citizen receives a portion of any recovery the government might receive. See *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771–78 (2000).

363. There is a long history of *qui tam* actions, however, where citizens sued private parties for injuries to themselves and to the Crown. See *Vermont Agency*, 529 U.S. at 774–76 (describing the history of *qui tam* actions).

364. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (school desegregation); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968) (same); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971) (prison reform); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (same). For general discussions of institutional reform litigation, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998); Michael Finch, *Fairness and Finality in Institutional Litigation: The Lessons of School Desegregation*, 4 GEO. MASON U. CIV. RTS. L.J. 109 (1994); Theodore Eisenberg & Stephen E. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

which can usually be resolved with a single decree. By contrast, judicial oversight of institutional reform cases can continue for decades.<sup>365</sup>

Like public interest litigation, institutional reform litigation makes use of a lot of equitable procedures. As an injunction of some kind is generally the relief sought, a jury probably will not be a part of institutional reform litigation. Often, though not always, institutional reform litigation will employ complex joinder of parties, including the class action. Discovery will be an essential part of such litigation. It may be necessary to employ a master for some complex questions in the litigation. But once again, these are standard equitable procedures. As with public interest litigation, the subject matter might be different from what equity usually dealt with, but the essential procedures are quite similar.

There are a great many factors that have contributed to the rise of public law litigation: the growth of the administrative state and the rise of rights consciousness are just two examples. But the equitable focus of the Federal Rules helps to make such suits possible. The tools of equity, such as discovery, class actions, and the various kinds of equitable relief, are needed to make such suits work. In addition, the orientation of equity is forward-looking: it marshals the power of the courts to change how entities behave. When that orientation took hold in the Federal Rules, it was perhaps a small step to using equity to make government and society work.

### 3. Mass Tort Litigation

Mass tort litigation is another kind of substantive litigation that has grown in recent years. In this section, I will first describe the kinds of mass tort litigation. I will then describe some experimentation with the structure of the trial that mass tort litigation has spawned.

#### a. Kinds of Mass Tort Litigation

There are two kinds of mass tort litigation.<sup>366</sup> The first, the ordinary mass tort litigation, occurs when a single sudden accident occurs, such as a plane crash or a burst dam. There could be hundreds of plaintiffs, each

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365. This is certainly true of some of the school desegregation cases. *Brown v. Bd. of Educ.*, for example, began in 1951 and was still active in 1994. See PAUL E. WILSON, *A TIME TO LOSE* 223–26 (1995).

366. This distinction has been made in a number of articles and books, which are cited in MULLENIX, *supra* note 356, at 19–20. Professor Mullenix's casebook has been most helpful to me in compiling this brief summary of mass tort litigation. Space and time do not permit the lengthy treatment that these changes deserve in any history of the civil trial in the United States.

seeking unique damages for unique injuries, but their claims are unified by the single event that gave rise to their injuries. The second kind of mass tort litigation is much newer, and has been evolving in recent years. Here, the plaintiffs sue a company or an industry whose product has caused injury to widely dispersed individuals, alleging that the industry is responsible for billions of dollars in damages to individuals and, sometimes, to states. In both kinds of mass tort litigation, the relief sought will be money damages, both compensatory and punitive. Thus, unlike public law litigation, mass tort litigation operates in the general milieu of common law litigation.

Mass accident litigation is the closest to traditional litigation, in both subject matter and structure. Tort, after all, has a long common law pedigree, and a mass accident differs from a simple accident only in scale. Thus, while the Federal Rules allow joinder of all injured parties, either as permissive joinder or, in some circumstances, in a class action, the ultimate trial, if there is one, will likely be before a jury.<sup>367</sup> And if the plaintiffs prevail, they will obtain money damages.

The kind of mass tort litigation that involves more dispersed injury is different, though it still retains the basic features of tort litigation. Here, the argument is that a company has made a product that has injured a large number of people who are geographically dispersed and who were injured over a period of time rather than all at once. One of the best known of such cases is the litigation over the Dalkon Shield, in which women who had used the Dalkon Shield intrauterine device for birth control sought damages for injuries caused by the device.<sup>368</sup> More recently, litigation over the health effects of tobacco has been in the news, with numerous lawsuits, some of them class actions, alleging that tobacco companies, sometimes singly and sometimes collectively, hid information showing that smoking was dangerous to the health of smokers and non-smokers alike.<sup>369</sup> In addition, most of the states sued tobacco

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367. The parties can waive a jury trial, of course, but all parties (or their class representatives) would have to waive it in order for the trial to be before a judge.

368. For discussions of this litigation, see NICOLE J. GRANT, *THE SELLING OF CONTRACEPTION* (1992); RONALD J. BACIGAL, *THE LIMITS OF LITIGATION* (1990); MORTON MINTZ, *AT ANY COST* (1985).

369. See, e.g., *Philip Morris, Inc. v. Engle*, 746 So. 2d 457 (Fla. Dist. Ct. App. 1999) (statewide class action of smokers); *Broin v. Philip Morris Co., Inc.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994), *rev. denied*, 654 So. 2d 919 (1995) (class action of flight attendants concerning second-hand smoke); Associated Press, *Del. Inmate May Sue Over Secondhand Smoke*, Jan. 22, 2003, available at 2003 WL 9526080. For general discussions of tobacco litigation, see Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187 (2000); Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331 (2001); Symposium, *Tobacco Regulation: The Convergence of Law, Medicine, and Public Health*, 25 WM. MITCHELL L. REV. 373 (1999).

companies seeking recovery of the money that states have had to pay out in medical expenses for their citizens, and most of the states ultimately joined in a settlement worth billions of dollars.<sup>370</sup>

In some of these cases, the judge and the parties have had to experiment with the relief to be awarded. For example, some such litigation has resulted in companies seeking bankruptcy protection in order to preserve a fund for those whose injuries have not yet manifested themselves. Litigation involving asbestos is perhaps the best known example,<sup>371</sup> but that was the ultimate result in the Dalkon Shield case as well.<sup>372</sup> In the tobacco suit brought by the states, the tobacco companies agreed to pay the settling states billions of dollars over a period of years.<sup>373</sup> In addition, some courts have experimented with aggregated compensatory<sup>374</sup> and punitive damages.<sup>375</sup>

#### b. Experimentation with the Structure of the Trial

While the subject matter of mass tort litigation is basically familiar, the complexity of much of this litigation and the need to experiment with the relief have resulted in some experimentation with the structure of the trial itself. These experiments are often prompted by a perceived need to narrow issues so that a jury can better understand them. Perhaps the best known experiment is the bifurcated trial.<sup>376</sup> This limits the amount of information that a jury must comprehend at any one time.<sup>377</sup> Rule 42(b) of the Federal Rules allows judges to hold separate trials as to any sepa-

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370. The so-called Master Settlement is available at <http://caag.state.us/tobacco/msa/html> (last visited Feb. 19, 2003). A summary of the tobacco litigation brought by the state attorneys general is available at <http://www.library.ucsf.edu/tobacco/litigation> (last visited Feb. 19, 2003). For commentary on the Master Settlement, see Frank J. Bandall, *The Legal Theory and the Visionaries that Led to the Proposed \$368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473 (1998).

371. See Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583 (1996); Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983).

372. See *In re A.H. Robins Co. Inc.*, 880 F.2d 694 (4th Cir. 1989).

373. See *supra* note 369.

374. For discussions of aggregated damages, see Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. Autumn 1990, at 137; MULLENIX, *supra* note 356, at 838–48.

375. See Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 912–20 (2001) (discussing determination of punitive damages in class actions); MULLENIX, *supra* note 356, at 848–56 (collecting cases and commentary on aggregation of punitive damages).

376. Trials might, in some cases, be divided into more than two phases. See *In re Bendectin Litig.*, 857 F.2d 290, 306–08 (6th Cir. 1988) (upholding trial judge's decision to hold trifurcated trial, with causation decided first, liability second, and damages last).

377. See JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION* 258–66 (2002) (describing bifurcation and other issue-narrowing trial experiments).



rate claim or even a discrete issue, so this kind of trial structure is grounded in the Rules.<sup>378</sup> It is used most commonly in such complex cases as mass tort litigation, however, and can substantially affect the substantive outcome of a case.<sup>379</sup>

Determination of damages is also a problem when there are many plaintiffs, and some courts have experimented with aggregative procedures, where, for example, damages for the entire group of plaintiffs are aggregated and then the plaintiffs get a share of the total.<sup>380</sup> The determination of each plaintiff's share could be done in different ways, but some courts have used a sampling technique, where a few representative cases are tried before a jury and then the shares of the remaining plaintiffs are determined using "inferential statistics."<sup>381</sup> This may require that the plaintiffs waive their right to have their damages determined individually.<sup>382</sup>

Other innovative techniques used in mass tort and other complex litigation include the use of court-appointed experts.<sup>383</sup> This is permitted under the Federal Rules of Evidence,<sup>384</sup> and it is related to the special master, which has its origins in equity but is provided for in the Federal Rules.<sup>385</sup> Some judges have also appointed technical advisors to help them understand complicated issues in the cases before them, including questions as to the admissibility of scientific evidence.<sup>386</sup> The use of such advisors can have a significant impact on the outcome of a case, as

378. FED. R. CIV. P. 42(b).

379. See TIDMARSH & TRANGSRUD, *supra* note 377, at 259–60 (describing trifurcated Bendectin litigation, in which issues common to 844 cases were tried together, with the jury first determining that the drug did not cause the injury, thereby mooted the remaining issues, and discussing the different outcomes for some plaintiffs who opted out of the common trial).

380. See MULLENIX, *supra* note 536, at 570–72 (quoting Jack Ratliff, *Special Master's Report in Cimino v. Raymark Indus., Inc.*, 10 Rev. Litig. 521, 530–35 (1991)). The problem with individualized damages in mass tort class actions was well known to the advisory committee that drafted the significant 1966 changes to the class action rule. Indeed, while the rule changes make it easier to bring a class action, some members of the committee thought that the class action rule would not be suitable for mass torts. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS., Summer 1991, at 5, 9–15.

381. See MULLENIX, *supra* note 356, at 574–96 (quoting Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 815–51 (1992)).

382. See MULLENIX, *supra* note 356, at 575 (quoting Saks & Blanck, *supra* note 381). For a discussion of the problems and experiments related to individualizing recovery in mass tort cases, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1995).

383. See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1986–95 (1999).

384. FED. R. EVID. 706.

385. FED. R. CIV. P. 53. On the master in equity, see JOHN G. HENDERSON, *CHANCERY PRACTICE* §§ 17–28 (1904).

386. Erichson, *supra* note 383, at 1987 n.24, 1988–93.

judges who rely on their advice might exclude testimony essential to the plaintiffs' case.<sup>387</sup> Such advisors can also influence settlements<sup>388</sup> and make the judge look more favorably on motions for summary judgment or for judgment as a matter of law. Judges also have sometimes appointed their own expert witnesses to testify at trial.<sup>389</sup> It is in mass tort cases that court-appointed experts, special masters, and technical advisors are most at home.<sup>390</sup> But the use of such aides to the court reduces the party control that is a feature of the adversary system and makes complex litigation look more inquisitorial.<sup>391</sup>

Mass tort litigation has also been one catalyst for experimentation with management techniques. One innovation that builds on equity procedures is the expanded and sometimes unusual use of the special master.<sup>392</sup> One of the traditional uses of the master was to examine some complicated issue of fact and to make a report to the court.<sup>393</sup> The report would become part of the evidence in the case, and was given considerable weight.<sup>394</sup> In this sense, the court-appointed experts described above are progeny of the master in equity. But masters have taken on much more expansive tasks in recent years, especially in mass tort cases. For example, masters might be appointed with the explicit task of helping the parties to settle a mass tort case.<sup>395</sup> Masters have also been appointed to assist in managing the litigation, including handling discovery disputes and resolving motions.<sup>396</sup>

This is just a brief sampling of the kinds of changes in litigation that are being tried today in complex litigation. Despite the grounding of mass tort litigation in the common law, these changes make the entire litigation process, including the trial, look very different from the common law trial. The litigation looks less like a common law trial and more

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387. See *id.* at 1989 (describing how the judge in *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996), breast implant litigation used his own scientific panel, excluding the plaintiff's expert).

388. *Id.* at 1991.

389. See *id.* at 1993–94 (discussing the pros and cons of testimony by court-appointed experts).

390. See *id.* at 1988 (stating that in the last few years there has been an increase in court-appointed experts in mass tort litigation).

391. *Id.* at 2005–15.

392. See generally WAYNE D. BRAZIL ET AL., *MANAGING COMPLEX LITIGATION* (1983); MULLENIX, *supra* note 356, at 956–1017.

393. See 1 ROBERT TREAT WHITEHOUSE, *EQUITY PRACTICE* §§ 354–355 (1915).

394. See WHITEHOUSE, *supra* note 393, § 361.

395. See MULLENIX, *supra* note 356, at 956–59 (citing asbestos and DES cases).

396. See MULLENIX, *supra* note 356, at 959–68 (discussing a decision regarding the master's duties in *Prudential Ins. Co. of Am. v. United States Gypsum Co.*, 991 F.2d 1080 (3d Cir., 1990)). Some of these tasks are more typically handled by magistrate judges, who, unlike masters, are employees of the court. See *supra* note 340 (describing magistrate judges).

like equity. It looks less like an adversarial trial and more like an inquisitorial trial. Some have argued that these changes are appropriate—that it is quite proper to have different procedures for complex litigation.<sup>397</sup> If these changes are good in complex litigation, however, we might gradually come to accept them in ordinary litigation as well. Thus, the possibility exists that the near future will bring about a much more significant transformation of the American civil trial than anything we have seen so far, though that remains to be seen.

### *C Avoidance of Litigation*

An important recent phenomenon is the avoidance of litigation through alternative dispute resolution (ADR) and other techniques.<sup>398</sup> Sometimes ADR enables parties to a dispute to avoid litigation altogether, as when the parties are subject to mandatory or contractual arbitration.<sup>399</sup> Other times, ADR is an adjunct to a judicial proceeding, so that litigation is not avoided, but the trial might be.<sup>400</sup> Of course, settlement has always been an option, even in England under the common law, and settlement can occur before or during the litigation. But the parties are now expected to think about settlement very early in the proceedings, and judges are now expected to encourage settlement. Rule 26(f) of the Federal Rules requires the parties to consider settlement in their initial conference.<sup>401</sup> And Rule 16 allows the judge to broach the settlement issue at pretrial conferences.<sup>402</sup> Some judges have been quite aggressive about pursuing settlement with the parties, especially in complex or mass tort cases, even to the point of taking a hand in mediating settlements.<sup>403</sup>

The methods of ADR are many and varied, but the term generally encompasses mediation, arbitration, and various kinds of mock trials, where abbreviated presentations of the parties' cases are made to a neutral fact-finder who then renders an advisory opinion.<sup>404</sup> There may be

397. See Erichson, *supra* note 383, at 2023–24.

398. Of course, arbitration involves procedures that can be quite complex and look a lot like the litigation that takes place in courts. When I speak of avoiding litigation, I mean avoiding judicial litigation using the state's court system.

399. See SWARD, *supra* note 6, at 330–32.

400. See *id.* at 334–37 (discussing court-annexed ADR, including arbitration, mediation, and summary jury trials).

401. FED. R. CIV. P. 26(f).

402. FED. R. CIV. P. 16(c)(9).

403. See SCHUCK, *supra* note 343, at 143–67.

404. See SWARD, *supra* note 6, at 328–36 (discussing both voluntary and court-annexed ADR). For a general discussion of alternative dispute resolution, see STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985).

other methods, however, especially in complex cases like mass tort litigation. For example, defendants, or even potential defendants, might set up an entity akin to an administrative agency to handle claims on a limited fund.<sup>405</sup> In some cases, such an entity might be established in lieu of litigating the matter.<sup>406</sup> Indeed, a recent phenomenon is the settlement class action, where the plaintiff class representative and the defendant have worked out the settlement in advance of filing the suit.<sup>407</sup> The class action suit is filed to take advantage of the preclusive effects of a judgment, but in fact there will be no litigation.<sup>408</sup> Whatever form it takes, however, ADR often constitutes an avoidance of trial. If the matter can be resolved through ADR procedures, as it often can, no trial will be necessary. Thus, these techniques help to reduce the role of the trial in modern dispute settlement.<sup>409</sup>

## VI. CONCLUSION

The basic structure of the trial has remained quite constant throughout most of the history described here. Indeed, when trials occur, they still usually look similar to trials that occurred at least throughout the history of the United States, and most likely much longer than that. But with the Federal Rules of Civil Procedure have come some profound changes in the trial. The first is the transformation of the trial—limited in time and space—into litigation, which can be quite lengthy and need not culminate in a trial at all. Another is the experimentation with the forms of the trial brought about by new kinds of litigation, especially mass tort litigation. These changes are more significant than any that

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405. See MULLENIX, *supra* note 356, at 1018–43 (collecting cases and commentary on administrative models).

406. See *id.* at 1018 (citing Lawrence Fitzpatrick, *The Center for Claims Resolution*, LAW & CONTEMP. PROBS., Autumn 1990, at 13).

407. Much has been written about settlement class actions, and I will not attempt an exhaustive list of books and articles. One good place to start reading, however, is Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995), which offers more than a dozen articles on mass torts, with an emphasis on settlement class actions. See also Erichson, *supra* note 383, at 1995–2005 (discussing settlement class actions in relation to the adversary system).

408. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 601–05 (1997). *Amchem* has restricted the use of settlement class actions as it held that the present Federal Rule 23 could not accommodate the attempt in that case to use the class action to settle massive potential liability for damage from asbestos exposure because such a class action could not meet the requirements of Rule 23(b)(3). *Id.* at 613–29.

409. For criticism of settlement as depriving society of definitive statements of law, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) and David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995). But see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995) (defending settlements).

occurred throughout the rest of this history. Coupled with the growing importance of alternative dispute resolution, these changes raise some questions about the future vitality of the trial as we have known it. Among other things, the development of modern litigation has made our procedures more equitable and more inquisitorial than the old common law trial. Even if we limit these observations to complex litigation, we must expect these new structures and procedures to seep into more traditional forms of litigation, if only because history suggests that that will happen.

We seem to be in the middle of a quiet but significant revolution in trial structure and litigation procedure. History, as always, is a work in progress.

