

## On Thinking About a Description of a Country's Civil Procedure

Stephen N. Subrin\*

I am, for the most part, new to the enterprise of thinking about other countries' procedures. From the time I was invited to join the International Association of Procedural Law, some questions ruminated in my mind: how should we fruitfully consider and learn from descriptions of a particular country's procedure? How can we contemplate the ingredients of a desirable international procedural regime? What lenses can we use to best evaluate procedures? Comparative scholars and those who teach international procedure, like many of the members of the International Association, have, I am sure, long ago constructed and polished their own lenses for such inquiry. But it would help me to examine *how* to think about a description of aspects of a country's procedure, using Edward Sherman's valuable talk on "The Evolving American Civil Trial Process" to launch my inquiry.<sup>1</sup> I would like to review various lenses we can adopt to examine and evaluate procedure. After describing these positions I will provide you with examples of how two of our contemporaries have approached the problem of analyzing aspects of our evolving American system of litigation.

Ed Sherman has described important aspects of American civil litigation: the adversary system, the jury trial, the judge as umpire, the emphasis on pretrial discovery, the uninterrupted trial, reliance on oral testimony, cross-examination, and verbatim transcripts. He has demonstrated how, with our growing reliance on the admission of written testimony, summarized testimony, and pre-packaged videotaped depositions, our system has moved closer to what has been called the "inquisitorial" model. He emphasized the movement in the United States, particularly in complex cases, to discontinuous trials and the collection of a dossier.<sup>2</sup> Discovery was targeted as a major problem on the grounds of expense, wastefulness, and "unduly

---

\* Copyright 1998 by Stephen N. Subrin, Professor, Northeastern University School of law. I am grateful to my student, Amber Klinge, for her help on this speech.

1. Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125 (1999).

2. *See id.*

prolonged pre-trial maneuvering.”<sup>3</sup> “Trial procedures have been challenged,” to use Ed Sherman’s words, “as permitting overly long examination and cross-examination of witnesses, excessive introduction of evidence, and tactics better suited to proving the skill of the lawyer than to getting at truth.”<sup>4</sup>

Using an instrumental method we can think about procedure by contemplating the underlying values that a given procedure serves and the goals that the procedure promotes. These values and goals can be discerned in a variety of ways. We can study how and why the procedures evolved or explore the cultural aspects that resonate with these values. We can read what judges, lawyers, and academics have written about particular procedural attributes. When dealing with procedural rules written by a single person or committee, we can investigate the history of the procedure. Specifically, we can research what historical events led to the drafting, what problems the drafters faced, what reasons they gave for their choices, and how they presented the rules to others. Using these methods, I can identify ten different values and goals in the United States. Others may identify more; the list is not exhaustive: (1) resolving and ending disputes peacefully; (2) efficiency; (3) fulfilling societal norms through law-application; (4) accurate ascertainment of facts; (5) predictability; (6) enhancing human dignity; (7) adding legitimacy and stability to government and society; (8) permitting citizens to partake in governance; (9) aiding the growth and improvement of law; (10) restraining or enhancing power.

Regardless of the length of the list or the country you are examining, you can use the goals and values to evaluate whether the procedural system is meeting the perceived needs of the society in which it is imbedded. Does the procedural rule serve values that are important to you and to your country? Might the procedure serve the goals of a sensible international procedural regime?

In the early history of the United States, borne of distrust of royal power and the embrace of individual liberty, at least for white propertied males, Americans favored a party-controlled adversarial system and reliance on the lay jury. They believed these qualities served to limit the power of judges and also enhance the power, dignity, participation in governance, and education of lay citizens; the lay jury system also added to the legitimacy and stability of the newly

---

3. *Id.* at 127.

4. *Id.*

formed government.<sup>5</sup> I won't repeat the De Tocqueville quotes which you have probably read several times,<sup>6</sup> nor will I repeat now the jury accolades penned by such luminaries as Thomas Jefferson<sup>7</sup> and John Adams.<sup>8</sup> Many of us would repeat the same praises today.

While the adversary system and the lay jury have many positive attributes, we cannot forget that any evaluation rests upon normative choices, and for every accolade there is probably a justifiable criticism. For example, some say juries reduce efficiency, both in terms of monetary costs and time;<sup>9</sup> others claim that jury verdicts are random and unpredictable.<sup>10</sup> These diverse evaluations suggest that it is impossible to escape making subjective choices, even if they are informed choices, based on the value an individual or a society places on a given goal or goals. It is difficult to compare these incommensurate goals because of the impossibility of valuing each goal with a comparable quantitative amount. For instance, it is extremely difficult to compare the values that society or any given individual places on efficiency, dignity and community participation. Further, while parties may express their values in the decisions they make during litigation, these decisions may not be the optimal decisions for society. For instance, a plaintiff or defendant may want to waive a jury or enter binding arbitration. While this decision may benefit each party, the loss to society of jury participation or a public forum may be profound.<sup>11</sup> Unfortunately, even by polling the

---

5. See generally VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 36 (1986); STEPHEN J. ADLER, *TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994); L. MOORE, *THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY* (2d ed. 1985); Note, *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1418 (1997); Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987) [hereinafter Subrin, *How Equity Conquered the Common Law*].

6. Here is one example: "The jury contributes most powerfully to form the judgment, and to increase the natural intelligence of a people; and this is, in my opinion, its greatest advantage." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 337-39 (Schocken 1st ed. 1961).

7. Thomas Jefferson argued that the jury should enter "into the Chancery courts, which have already engulfed and continue to engulf (sic), so great a proportion of the jurisdiction over our property." T. JEFFERSON, *AUTOBIOGRAPHY* (1821), reprinted in 1 *THE WORKS OF THOMAS JEFFERSON* 3, 78 (Ford ed. 1904).

8. See Adams' Diary on the Right of Juries (Feb. 12, 1771), reprinted in 1 *THE ADAMS PAPERS—LEGAL PAPERS OF JOHN ADAMS* 28 (L. Wroth & H. Zobel eds. 1968).

9. See generally ZEIZEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* (1959); See also Harry Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1059-67 (1964) (estimating that bench trials take 40% less time than jury trials).

10. Despite this contention, data suggests there is congruity between jury and judge-rendered decisions. See generally Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

11. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that ADR techniques are highly problematic).

citizenry about their values, we may not ascertain what is best for society. It is said that the majority of Americans vote against freedoms protected by the Bill of Rights when asked in opinion polls.<sup>12</sup> At the end of this discussion, I will turn to the question of how, given the problem of incommensurate goals, one attempts intelligently to choose the ingredients for a sound procedural regime.

As an alternative to this instrumental approach, we might take a more direct historical or sociological approach to evaluating procedure. In doing this, we could consider the political, social, and economic causes for the various procedural trends as well as the people who are likely to benefit or lose from a given procedure. With respect to Ed Sherman's discussion of the procedural trends in the United States we might look to the social changes that heavily influenced the legal climate during the time of these changes. These trends include the curtailing of discovery and restriction on lawyers' freedom through judicial case management. Despite longstanding complaints,<sup>13</sup> the legal system failed to institute many concrete reforms in these areas until the 1980s.<sup>14</sup> Eventually these complaints became more heated and finally precipitated change.

There is a direct relationship between politics and change in substantive and procedural law. In the mid-nineteen seventies, when the country at large and the federal judiciary in particular were turning more conservative, complaints deepened about discovery abuse and acquisitive lawyers.<sup>15</sup> To put events in historical and political perspective, we can look at the change in the composition of the U.S. Supreme Court between 1953 and 1981. In the last decade of this period, the Supreme Court tended to move toward the political "right." For comparative examples, Chief Justice Warren was appointed in 1953 and Justice Brennan in 1957, while Chief Justice Rehnquist was appointed in 1972 (becoming Chief Justice in 1986) and Justice O'Connor in 1981.

---

12. See generally, Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65 (1996).

13. See, e.g., Subrin, *How Equity Conquered the Common Law*, *supra* note 5, at 926-29.

14. See *id.* at 973-75. See also Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980) (adopting modified Rule 26 that expressly grants courts power to limit even relevant discovery on basis of cost-benefit analysis); Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 190-92 (1983) (revitalizing Rule 11).

15. See THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (1979) (reporting on the 1976 Pound Conference). In 1976, Chief Justice Warren Burger organized "the National Conference on the Causes of Popular Dissatisfaction with the American Justice System" (known as the "Pound Conference") to address frustration with the civil justice system that emerged in the 1970s. See 70 F.R.D. 79 (1976).

While evidence existed before 1980 of frivolous litigation, discovery abuse and trial lawyer greed, the historian cannot ignore the progressive changes in substantive law during the 1950s through the mid-1970s. The precipitators of these changes were a liberal and highly active federal court system, some state judges as well, a progressive band of lawyers (enhanced by the Legal Services movement), and an aggressive plaintiffs' torts bar. These actors initiated and accomplished significant changes, including: expanded civil rights, growth in the areas of consumer and environmental protection, and an expanded scope of negligence and products liability law.<sup>16</sup> In reaction to this perceived pro-plaintiff bias, the following decades produced curtailed discovery, enhanced judicial case management, and a movement of disputes from the courts to alternative dispute resolution forums. These changes within the procedural regime can fairly be viewed to have a conservative slant.<sup>17</sup>

However, the history of procedure is a good deal more complicated. Expense, delay, and discovery abuse hurt plaintiffs as well as defendants. This abuse can negatively impact poorer clients even more than wealthier ones.<sup>18</sup> The movement in our country towards mediation and other forms of alternative dispute resolution was also fostered by those with a progressive bent, who were looking for a litigation process that nurtured collaboration, creative remedies, and the empowerment of clients, particularly the poor.<sup>19</sup> Moreover, some members of the legal profession began to develop a self-protective agenda as corporate management gave more of their business to in-house counsel and placed cost-controls on their outside

---

16. See, e.g., Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Transubstantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989); Judith Resnik, *The Domain of the Courts*, 137 U. PA. L. REV. 2219 (1989); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989).

17. In his Eason-Weinmann lecture of October 28, 1998, entitled *Individual Justice in a Bureaucratic World*, Professor Geoffrey Hazard commented on the Private Securities Reform Act of 1995 and the IRS Citizen Rights Act of 1997/1998. Each defines procedural incidents and each had a generally pro-conservative agenda: protecting corporations from individual lawsuits and protecting taxpayers against their government. See Geoffrey C. Hazard, Jr., *Individual Justice in a Bureaucratic World*, 7 TUL. J. INT'L & COMP. L. 73 (1999).

18. See, e.g., Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 2 REV. LITIG. 71, 74 (1981); Phillip G. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y. L. SCH. L. REV. 115, 124-28, 132-33 (1969) (providing a graphic description on how discovery can burden the poor).

19. See generally Frank E.A. Sander, *Varieties of Dispute Processing, The Pound Conference*, 70 F.R.D. 111 (1976); Marc Galanter, *The Emergence of the Judge as Mediator in Civil Cases*, 69 JUDICATURE 256 (1986).

council.<sup>20</sup> To understand the trends Ed Sherman describes,<sup>21</sup> one would have to analyze the coalescence of these conservative, liberal, and professional agendas as well as the very real problems resulting from expansive, time consuming and abused procedure.<sup>22</sup>

There are broader societal trends as well. In some ways the movement towards managing litigation in America parallels health care changes in our country. The search for perfect solutions in both the health and law fields, accompanied by the search for larger fees by doctors and lawyers, has led to expenses that most of those in society cannot afford. Proceduralists from other countries can determine whether similar historical currents are at work by appraising the relevance of the American experience to their countries. Does the procedural evolution in the United States—the movement towards a more restrained and circumscribed litigation process that places limits on a more wide-open, flexible system—suggest intelligent possibilities for international procedural norms?

In addition to the instrumental, goal-oriented and historical-sociological approaches, modern thought provides another interesting group of lenses. How has modern thought helped American civil procedure define this century? I propose two different dimensions: the first moves in the direction of subjectivity, uncertainty, and discontinuity. The second moves in the direction of objectivity and accumulated empirical knowledge, although inevitably incomplete knowledge, about a real world that exists outside our own minds.

William R. Everdell, the Dean of Humanities at Saint Ann's School in Brooklyn, in his 1997 book, *The First Moderns*, has attempted to find the essence of modern thought as we approach a new millennium.<sup>23</sup> In each field humans began to doubt their capacity

---

20. See Darlene Ricker, *The Vanishing Hourly Fee*, A.B.A. J., Mar. 1994, at 66, 67; Robert I. Weil, *Insurance Companies and Their Lawyers—The Cost Squeeze*, 32 DEF. L.J. 391, 396-97 (1983); Andrew Blum, *Insurers' Cutbacks Hit Firms*, NAT'L L. J., Nov. 22, 1993, at 1. See generally, Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 950-53 (1993) (describing the sources of increased competition in attracting large corporate clients, including greater stakes of legal actions and a more sophisticated clientele).

21. See generally Sherman, *supra* note 1.

22. One would also want to consider the agenda of the federal judiciary itself, for judges, like others, have a tendency to want to serve their own professional needs. See, e.g., Stephen B. Burbank & Linda F. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 700-01 nn.122-123 (1997).

23. See WILLIAM R. EVERDELL, *THE FIRST MODERNS* (1997). According to Everdell, intellectual and artistic notions that took hold at the end of the nineteenth and early twentieth century inform and define modern and post-modern thought. Everdell's first chapter, *Century Ends in Vienna*, is dedicated to the fervent resistance in Vienna, where the International

to be objective, the ability of words to capture reality in a manner that conveys exact meaning, and also the ability of any discipline to capture more than fragments of reality. This excerpt from Everdell's introduction is instructive:

We shall see how the atomic assumption in mechanics drove first scientists and then all sorts of thinkers to the conclusion that statistical and probabilistic descriptions of reality were truer than the old deterministic dynamics. We shall see how, beginning not in science but in literature and painting, Modern thought gave up the stubborn old belief that things could be seen 'steadily and whole' from some privileged viewpoint at a particular moment—or, in other words, why it is that Cézanne painted Mont Sainte-Victoire from nearly every available perspective except its summit . . . . Finally, we shall see I hope, how looking at oneself not only produces the sensation of consciousness, but sets an axe to the roots of formal logic and ends by making it impossible to know even the simplest things that the nineteenth century took for granted. Each of these views—statistics, multiple perspective, subjectivity, and self-reference—alone and together can be shown to have devolved from the collapse of ontological continuity. Severally, they lead to the nonlogical, nonobjective, and essentially causeless universe in which (with the exception of a few historians) we all now live.<sup>24</sup>

Charles Clark, who was responsible for much of the initial drafting of the Federal Rules of Civil Procedure on which much of modern American procedure is based,<sup>25</sup> embraced the notion in modern thought that words have severe limitations on what they can convey. In support of his liberal pleading regime, which requires only a plain, simple statement showing that the plaintiff was entitled to relief,<sup>26</sup> Clark was fond of quoting Walter Wheeler Cook about the impossibility of distinguishing meaningfully among fact, evidence, and ultimate fact.<sup>27</sup> He believed that arguments over whether one used the right words in pleadings were a waste of time because there was a continuous spectrum in which descriptive words could become increasingly specific, leading to silly and ultimately meaningless

---

Association of Procedural Law will meet in the Summer of 1999, to virtually every strand of modern thought. *See id.* at 13.

24. *See id.* at 10-11 (citation omitted).

25. *See* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1038-41 (1982); Subrin, *How Equity Conquered the Common Law*, *supra* note 5, at 961; Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 117 (Peninah Petruck ed., 1991) [hereinafter Subrin, *The Disciplined Champion*].

26. *See* FED. R. CIV. P. 8(a) and 12(b)(6).

27. *See* Walter Wheeler Cook, "Facts" and "Statements of Fact," 4 U. CHI. L. REV. 233 (1936-37); *see also* Subrin, *The Disciplined Champion*, *supra* note 25, at 139.

arguments on whether language in a pleading was sufficiently precise.<sup>28</sup> His twentieth century lack of trust in formalism is a far cry from David Dudley Field's attempts in the mid-nineteenth century to tie the hands of judges and lawyers through carefully crafted complaints that contained "facts constituting a cause of action."<sup>29</sup> Where Field believed that the verification of pleadings would lead to agreement on the truth of facts,<sup>30</sup> Clark and other draftsmen of the Federal Rules thought it ludicrous to believe that lawyers could swear to the truth of a client's case or be sure of the facts that they pled.<sup>31</sup>

Interestingly enough, however, Clark and the other drafters of our Federal Rules assumed that "there is a there there," that there is a reality that can be explored through discovery and ultimately unearthed at trial.<sup>32</sup> Alongside the deconstructive, discontinuous, and totally subjective elements running through much of modern and post-modern thought, there is a firm belief in modern scientific thought, which stems from the Enlightenment, that there is an external objective reality. Modern scientific thought has added the idea that our human minds and senses put limitations on our ability to capture that reality whole. In *Consilience, The Unity of Knowledge*, Edward O. Wilson<sup>33</sup> argues that notwithstanding the twentieth century attack by deconstructionists<sup>34</sup> and others on our ability to know anything, we in fact know an enormous amount about the external outer world. Further, we are beginning to know a great deal about the human mind, how we absorb reality, and the limitations of our ability to know. Wilson is a good counter-weight to Everdell's *The First Moderns*. Reading Wilson reminded me of how I feel when first-year law students tell me, after one or two months of my civil procedure course, that they have not understood one word of my class. I try to explain, more patiently sometimes than others, that although they do not know everything (nor do I, nor can we), they have already learned

---

28. See Subrin, *supra* note 5, at 964, 965; Subrin, *supra* note 25, at 138, 139.

29. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 328-31 (1988).

30. See *id.*

31. See Subrin, *How Equity Conquered the Common Law*, *supra* note 5, at 963.

32. See Subrin, *Fishing Expeditions Allowed: the Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV., 691, 716, 717 (1998).

33. Edward O. Wilson is currently Pellegrino University Research Professor and Honorary Curator in Entomology of the Museum of Comparative Zoology at Harvard. In addition, he has written two Pulitzer Prize-winning books, ON HUMAN NATURE (1978) and ANTS (1990), with Bert Holldobler.

34. See generally EDWARD O. WILSON, CONSILIENCE—THE UNITY OF KNOWLEDGE (1998).



a good deal. There is a lot of room between no knowledge and complete knowledge.

Lawyers by definition have to deal as if there is a reality, despite imperfect knowledge. Clients show up with what for them is real pain or a real problem. There is a broken leg or a broken contract. Moreover, the law itself is trying to construct a different, new reality. As some have said, the law is trying to construct a more acceptable regime for humans in place of the sometimes arbitrary and cruel rule of nature.<sup>35</sup> We would probably make rules against hurricanes, and perhaps even cruelty, if we thought such rules would help. Clark, and the others drafters of the Federal Rules, while accurately perceiving the limitations of language, accepted that a reality exists of which one can have some knowledge. Their discovery provisions were one way to attempt to unearth it.<sup>36</sup>

As I mentioned, we are beginning to deal with the recognition that there is an endless amount of reality that may have some bearing on litigation, and realize that at some point the enormous costs outweigh marginal benefits, perhaps an insight from the Law and Economics movement.<sup>37</sup> From modern thought we learn skepticism and become wary of discerning “facts” in a complete, objective way, even under the most carefully controlled scientific experiment. How much more difficult it is to “find facts” in the context of litigation where human beings have limitations of vision, hearing, and memory. Self-interest blurs perception, if it does not lead to outright lying. Lawyers, in the interest of adversarial representation, perpetually “rearrange reality.” “Facts” that can be found are frequently

---

35. Specifically, Justice Harlan expressed this thought in *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) stating:

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

36. In the words of Edson R. Sunderland, “[d]iscovery procedure serves much the same function in the field of law as the X-ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will largely cease to be a game of chance.” Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 76 (1933). Similarly, George Ragland wrote, “Litigation is no longer regarded as a game. The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.” GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL 251 (1932) (quoting unnamed sources on their views of the effects of discovery on trial).

37. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

imprecise in the extreme: “reasonableness,” “discriminatory intent,” “anti-competitive effect.” The modern skepticism about “facts,” joined by efficiency concerns and the realization that trials have functions other than accuracy in fact-finding, make it seem more reasonable to me to place limits on discovery and the time allowed for trial.

Perhaps modern thought on discontinuity and our inability to see any aspect of life whole should make me more sympathetic to Ed Sherman’s description of the discontinuous trial or the trial pre-assembled, in part, with summarized testimony and snippets of videotape. My children, truly modern and more accustomed to *LA Law* than I, are quite comfortable with disconnected and interrupted stories. There are, though, attributes of more complete and more spontaneous narratives, played out live before judge and jury, which are attractive. This is a point I will return to.

E.O. Wilson and modern science teach us one more thing about how to think about descriptions of procedures in our own and other countries. Science has progressed by the steady accumulation of knowledge, painfully gained through looking and counting, and also through hypothesis followed by empirical study. An important part of the story of modern American civil procedure is our growing body of empirical data, only sometimes examined by would-be reformers, and sometimes misused, but increasingly becoming a part of the public debate. The accusations of frivolousness in American civil litigation, of abuses of discovery and over-discovery running rampant, of excessive punitive damages, of run-away and incompetent juries, and the claims of efficiency gains through mediation and arbitration have all been softened or moderated by contrary evidence that is beginning to have some impact on the dialogue.<sup>38</sup> Empiricism, particularly in the international context, may have the advantage of beginning to provide us with a common fund of data that cuts across national boundaries and languages.<sup>39</sup>

Many of the changes Ed Sherman described cry out for empirical inquiry. How will forcing plaintiffs to take depositions of their own parties and witnesses, obligating extended cross-examination of deponents by opposing parties, requiring trial-like evidentiary

---

38. See Marc Galanter, *An Oil Strike In Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 721 n.14 (1998). Galanter provides an excellent list of the current empirically based literature on the civil justice system.

39. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); see also E.O. WILSON, *supra* note 34 at 96-97 (explaining that all humans have the same brain structure).

objections at depositions, compelling lawyers to attempt to agree on summaries, and holding in-chambers hearings on the content and admissibility of summarized testimony and portions of videotape lead to net efficiency gains of time and money? What is the effect on the truthfulness of testimony by experts and others through deposition or affidavit as opposed to live testimony in court? My experience as a trial lawyer was that what witnesses are willing to say in affidavit or in deposition is frequently, if not usually, a good deal more expansive and supportive to their side than what comes out before a judge and jury, after oath given in open court.

With so many lenses—instrumental thinking, history, law and economics, modern thought, and empiricism—through which one can beneficially think about comparative and competing procedures, how can we choose the best procedure for our own country or for international norms? What counts as “good evidence” or a sound argument?

Let me provide two examples of how those knowledgeable in American law have, in fact, approached the problem of analyzing aspects of civil litigation. The more scholarly example was written by a member of our group, Richard Marcus, who ten years ago discussed some of the trends Ed Sherman talked about today.<sup>40</sup> In an article entitled *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*,<sup>41</sup> Rick Marcus examined the movement in American litigation toward such procedural features as increased reliance on written testimony, case management, trial by videotape, and summary jury trial.<sup>42</sup> He first put the trends in historical perspective, and saw them as moving the American civil trial toward the equity model, in a manner similar to equity's providing the underlying basis for the Federal Rules of Civil Procedure.<sup>43</sup> He then analyzed the goals of the common law trial, in a section called “Reconsidering the Preference for the Common Law Mode of Adjudication.”<sup>44</sup> Throughout his analysis Rick turned to empirical studies and reflected on such matters as the effect of demeanor on judgments about truth-telling and lying and the effect of receiving technical information in written form rather than verbally.<sup>45</sup>

---

40. See generally Sherman, *supra* note 1.

41. Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989).

42. See *id.*

43. See *id.*

44. See *id.* at 754.

45. See *id.* at 754-63.

In a section called the “The Spector of the Bloodless Trial,” he called upon his common sense and experience regarding the difference of reading a play or seeing one; the work of our member, Professor Damaska; experiences derived from judicial opinions; and descriptions provided by lawyers.<sup>46</sup> He reviewed the historic means by which equity’s emphasis on documents contributed to delay and obfuscation and perhaps a certain lack of narrative context and empathy.<sup>47</sup> Along with other considerations, such as public access, Rick used his historical analysis to determine that he was “skeptical about returning to the equity mode, given the repeated dissatisfaction with it in the past.”<sup>48</sup> I share his skepticism.

As my second example I suggest an article written by William G. Young, a highly respected United States District Court judge for the District of Massachusetts. In his article entitled *America’s Civil Juries . . . Going, Going, Gone?*, Judge Young explained how the right to a jury trial has been dramatically reduced for those whose health care providers have injured through negligence and breach of contract.<sup>49</sup> Specifically, health care providers are using ERISA preemption provisions to induce participants to contract out of their right to a trial by jury.<sup>50</sup> In addition, Judge Young explained how other developments in American procedure, such as the requirement of heightened pleadings and nonnegotiated binding arbitration agreements, have eroded the citizen right to trial by jury in other areas as well.<sup>51</sup>

Concentrating on the health care field, Judge Young tried to persuade the reader that the erosion of the jury trial is bad for Americans.<sup>52</sup> He has also tried to persuade Congress of this argument, for portions of his essay were presented at a public legislative hearing at the request of Senator Edward M. Kennedy, Representative John Dingell, and others.<sup>53</sup> Judge Young drew on democratic values, emphasizing that the jury “is the most vital expression of democracy in America today.”<sup>54</sup> Echoing the sentiment

---

46. *See id.* at 762-67.

47. *See id.* at 768-71.

48. *Id.* at 788.

49. *See* William G. Young, *America’s Civil Juries . . . Going, Going, Gone?*, LEGAL NETWORK NEWS 1, Fall 1998.

50. *See id.* at 6.

51. *See id.*

52. *See id.* at 6-7.

53. *See id.* at 7 n.1.

54. *Id.* at 6.

of many early Americans as discussed earlier in this talk,<sup>55</sup> Judge Young underscored the value of citizens collaborating with each other in the communal enterprise of doing justice.<sup>56</sup> He called upon De Tocqueville's recognition that "in our jury system, Americans had embarked on a stunning experiment in direct popular rule."<sup>57</sup> Citing our member, Marc Galanter, Judge Young looked to empirical studies showing "that where people have recourse to jury trial, inequalities in economic resources are minimized, most potential litigants avoid staking out patently unreasonable positions, and the great bulk of cases ultimately settle."<sup>58</sup> Citing fellow member, Judith Resnik, Judge Young condemned the reduction in size of some American juries from twelve to six members, claiming that it results in "less representative, and thus sharply less effective civil" juries.<sup>59</sup> Young asked us "to consider the tobacco industry settlement negotiations. The tobacco industry was prepared to pay billions and billions of dollars, if only—if only, they could avoid juries of American citizens."<sup>60</sup>

Judge Young, in a manner similar to Marcus' exploration in his article on the value of nonbifurcated trials, with live testimony and whole stories of real people,<sup>61</sup> made his position more empathetic and understandable by drawing upon a more complete coherent narrative. This is reminiscent of the emphasis placed by feminist legal scholars on narrative.<sup>62</sup> Judge Young, in the longest portion of his three page article, described the heartbreaking case brought before him of an alcoholic who could not get the treatment he was clearly entitled to under his health plan, which ultimately resulted in the patient's death by suicide.<sup>63</sup> Judge Young ruled that he could not grant relief because ERISA preempted the widow-plaintiff's claim.<sup>64</sup> Judge Young ended by returning to history: "The right to a jury trial goes back nearly eight hundred years to the Magna Carta. In a wide variety of circumstances, ERISA has taken away a citizen's access to a jury. Magna Carta got it right."<sup>65</sup>

---

55. See *supra* notes 5-7.

56. See Young, *supra* note 49, at 6.

57. *Id.*

58. *Id.* (citing Marc Galanter, *How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994)).

59. *Id.* (citing Judith Resnik, *Changing Practices, Changing Rules: Congressional Rulemaking on Civil Juries*, *Civil Justice and Civil Judging*, 49 ALA. L. REV. 133, 137-52 (1997)).

60. *Id.*

61. See Marcus, *supra* note 41.

62. See, e.g., Martha Minow, *Stories in Law*, in *LAW'S STORIES* 24 (1996).

63. See Young, *supra* note 49, at 6-7.

64. See *id.*

65. *Id.* at 7.

I am not asking you to agree with Judge Young, although after learning more about health law and additional thought, I suspect I would. My point is that a highly regarded federal judge, in a brief three pages, attempts to convince the reader and Congress of an appropriate procedural choice<sup>66</sup> by drawing on most of the approaches to assessing procedures that I have mentioned and which Rick Marcus also used in his longer article.<sup>67</sup> In neither of these two articles, nor in my own experience, do I find that any one mode of analysis automatically trumps the others. Of course, depending on the question, one type of argument may be more persuasive than others. A wide variety of variables and types of analysis inform our reasoned decisions about choices we make in life, from buying a house, to changing a job, to attending a conference in New Orleans, to supporting a legislative bill. It is not surprising, and perhaps I should have known this all along and saved us all some time: intelligent procedural choices require discussion and debate based upon the multiple modes of analysis and proof that reasonable people draw upon to convince themselves and others in matters they care about.

---

66. *See id.*

67. *See supra* text accompanying note 41 et. seq.