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Geoffrey C. Hazard Jr.

UC Hastings College of the Law, hazardg@uchastings.edu

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From Whom No Secrets Are Hid

Geoffrey C. Hazard, Jr.*

I. Introduction

The title of this contribution to the Charles Alan Wright *festschrift* is taken, as some will recognize, from the version of the Collect for Purity from the Book of Common Prayer used in the Episcopal Church, of which Professor Wright has been a life-long, devoted member. The title is thus appropriate personally for Professor Wright. The title is also topically appropriate because it states epigrammatically the policy of discovery under the Federal Rules of Civil Procedure, which is the subject of this Paper. In the Collect, the Personage from whom no secrets are hid is, of course, God. The phrase reminds supplicants that the matters under confession are already known to the Addressee.

The basic policy in the Federal Rules is that this same openness should apply as between opposing litigants. With certain important exceptions, the scope of discovery under the Federal Rules is that stated in Rule 26(b)(1): "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."¹

As stated by the Supreme Court in *Hickman v. Taylor*,² "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."³ Such, however, is not the basis of procedural policy in any other country in the world. In most other countries, the premise is different and the rules of discovery in civil cases are very different. These differences constitute a problem for harmonization of the law of procedure among jurisdictions with modern law. This Paper examines aspects of that problem with specific reference to discovery of documents in other

* Trustee Professor of Law, University of Pennsylvania; Director, The American Law Institute. I express appreciation to Aron Izower, University of Pennsylvania Law School Class of 1997, and to Eric Grush, Class of 1998, for great help in documentation of this article.

1. FED. R. CIV. P. 26(b)(1).

2. 329 U.S. 495 (1947).

3. *Id.* at 507.

common-law jurisdictions.⁴ It also offers an analysis of how the American rules on the subject have evolved.

II. International "Harmonization" of Procedural Law

The human community of the world lives at closer quarters today than in ancient days: international trade is at an all time high and steadily increasing; international investment and monetary flows increase apace; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries; business people travel abroad as a matter of routine; and increasing numbers of ordinary citizens live temporarily or permanently outside of their native countries. As a consequence, there are positive and productive interactions among citizens of different nations in the form of increased commerce and wide possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation.

In dealing with these negative consequences, it is recognized that the costs and misery resulting from legal conflict can be mitigated by reducing differences in legal systems, whereby the same or similar "rules of the game" apply no matter where the participants may find themselves.⁵ The effort to reduce differences between national legal systems is commonly referred to as "harmonization."⁶ Another term, more often used in other countries, is "approximation," meaning that the rules of various legal systems should be reformed in the direction of approximating each other.⁷

4. In another paper I discuss certain aspects of document discovery directed at targets located in civil-law jurisdictions. See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. (forthcoming May 1998).

5. See Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485, 488-90 (1993) (describing the European Community as a model of harmonization, from which other economic integration organizations can learn); see also Larry Catá Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federative and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185, 186 (1997) (commenting on the trend to compel "all law to 'look alike'").

6. See Eleanor M. Fox, *The Central European Nations and the EU Waiting Room—Why Must the Central European Nations Adopt the Competition Law of the European Union?*, 23 BROOK. J. INT'L L. 351, 357-59 (1997) (discussing the various characteristics of harmonization and putting different countries on the same "track").

7. See Backer, *supra* note 5, at 187 (noting the European use of the term approximation). Although similar, harmonization and approximation do have different connotations. One commentator described the difference as follows:

The word "approximation" is rarely used except in the formal language of directives. The word "harmonization" is used more widely. Strictly speaking, "approximation" refers to the process of orienting different . . . laws and legal processes to a defined standard. The word "harmonization" is used more broadly to mean simply acting to make differing conditions more similar to each other.

Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions. There is a profusion of treaties and conventions governing these subjects, as well as similar arrangements addressing personal rights such as those of employees, children, and married women.⁸ A conspicuous example is the North American Free Trade Agreement ("NAFTA").⁹

Another example of approximation is a project of The American Law Institute on Transnational Insolvency. This project aims at approximating the laws of bankruptcy of the United States, Mexico, and Canada and, in due course, of other countries as well.¹⁰ Professor Wright is, of course, President of The American Law Institute and Professor Jay Westbrook of the University of Texas is Reporter and chief coordinator of the ALI Transnational Insolvency Project. The ALI Transnational Insolvency is a procedure project so far as it addresses bankruptcy procedure as well as the substantive law of insolvency. In this respect the project is nearly unique, for the international harmonization movement has largely avoided the law of procedure, particularly attempts at harmonization between common-law adversarial systems and the civil law judge-centered systems.

Harmonization of the law of procedure is avoided, so it appears, on the supposition that national procedural systems are too different and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences between legal systems. For example, UNIDROIT ("International Institute for the Unification of Private Law"), an institution engaged for more than 70 years in the work of legal

Janice R. Bellace, *The European Works Council Directive: Transnational Information and Consultation in the European Union*, 18 COMP. LAB. L.J. 325, 332 n.39 (1997).

8. See, e.g., Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1148 (recognizing formal international human rights for children, including the child's civil, political, economic, social, cultural, and humanitarian rights); Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, U.S.-Egypt, S. TREATY DOC. No. 99-24 (1986) (adopting a general framework for encouraging foreign investment through nondiscriminatory treatment); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (affirming that women are entitled to equal participation in social, economic, and political processes); International Covenant on Civil and Political Rights, S. TREATY DOC. No. 95-2 (1982), 999 U.N.T.S. 171 (endorsing the creation of conditions to insure human rights and freedoms including civil, political, economic, social, and cultural rights); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (establishing the International Centre for Settlement of Investment Disputes to encourage arbitration and conciliation).

9. See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (entered into force Jan. 1, 1994).

10. See TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF CANADIAN BANKRUPTCY LAW (A.L.I., Tentative Draft 1997); TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW (A.L.I., Preliminary Draft No. 1, 1996); TRANSNATIONAL INSOLVENCY PROJECT: INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW (A.L.I., Discussion Draft 1996).

harmonization, traditionally has regarded procedural law as beyond its agenda.¹¹ There are some international conventions dealing with procedural law—notably The Hague Convention on the Taking of Evidence Abroad¹² and European conventions on recognition of judgments¹³—and effort continues on a more general convention on personal jurisdiction and recognition of judgments.¹⁴ The international conventions on procedural law, however, have thus far addressed the front and back ends of procedural law, but not procedure as such. That is, the conventions and draft conventions govern the bases of personal jurisdiction and the mechanics of service of process to commence a lawsuit on one end of the litigation process and recognition of judgments on the other end. The events in between—the formulation of claims, the development of evidence, and the decision procedure—remain matters governed by local national law.¹⁵

International arbitration often is a substitute for adjudication in national courts. However, the international conventions on arbitration have the same limited scope as the conventions dealing with international litigation in judicial forums. Thus, the international conventions on arbitration specify aspects of commencement in an arbitration proceeding and specify also the recognition to be accorded an arbitration award, but they say little or nothing about the procedure in an international arbitration proceeding.¹⁶ Rather, the typical stipulation concerning hearing procedure in international arbitration is that the procedural ground rules shall be as determined by the neutral arbitrator.¹⁷

Nevertheless, The American Law Institute is now engaged in a project seeking to take the next step in international harmonization of procedural law. The project is entitled “Transnational Rules of Civil Procedure” and is under the direction of Professor Michele Taruffo, of the University of Pavia, Italy, and myself. Our approach has been to draft proposed

11. See Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 695-96 (1998) (stating that the early drafts of UNIDROIT concerned the substantive principles involved in international sales and contract law).

12. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

13. See European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *opened for signature* Sept. 27, 1968, 8 I.L.M. 229 (entered into force Feb. 1, 1973); European Communities—European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *opened for signature* Sept. 16, 1998, 28 I.L.M. 620, 629.

14. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 442, 473 (1987) (dealing with requests for disclosure and obtaining evidence in a foreign state).

15. See, e.g., CATHERINE KESSIDJIAN, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 4-14 (trans., April 1997).

16. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

17. See Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 96 (1995).

procedural rules that a country could adopt for adjudication of private international controversies that find their way into the ordinary courts of justice.¹⁸ Perhaps this venture involves fools walking where angels fear to tread. The project is inspired in part by the model of the Federal Rules of Civil Procedure, undertaken over a half century ago in pursuance of the Rules Enabling Act of 1934.¹⁹ The Federal Rules established a single procedure to be employed in courts sitting in forty-eight different semi-sovereign states, each of which had its own procedural law, its own procedural culture, and its own bar. The Federal Rules thereby accomplished what many thoughtful observers thought impossible—a single system of procedure for four dozen different legal communities. If experience with the Federal Rules proves that it has been possible to establish a single procedure for litigation in Louisiana (civil-law system), Virginia (common-law pleading in 1938) and California (code pleading), the ALI project conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

In any event, The American Law Institute, in sponsoring the project for Transnational Rules of Civil Procedure, has assumed that the task of procedural harmonization has to start sometime.

III. Fundamental Similarities in Procedural Systems

As Professor Taruffo and I have worked our way into international harmonization of procedural law, we have come to identify fundamental similarities and differences among procedural systems. Obviously, the fundamental differences present the difficulties. It is important, however, not to forget that all modern civil procedural systems have fundamental similarities. These similarities result from the fact that a procedural system must respond to several inherent requirements. Recognition of these requirements makes the task of identifying functional similarities in diverse legal systems easier, and it simultaneously puts the ways in which procedural systems differ from one another into sharper perspective.

The fundamental similarities among procedural systems can be summarized as follows: (1) standards governing assertion of personal and subject matter jurisdiction;²⁰ (2) specifications for a neutral adjudicator;²¹

18. See Geoffrey C. Hazard, Jr. & Michele Taruffo, *Transnational Rules of Civil Procedure*, 30 CORNELL INT'L L.J. 493, 493-94 (1997) (introducing the background and goals of the project).

19. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1994)).

20. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that personal jurisdiction may be exercised over a defendant who has certain minimum contacts with the forum and where traditional notions of substantial justice and fair play are not offended).

21. See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (drawing on American and English common law to prevent an adjudicatory officer, whose compensation was tied to a defendant's conviction, from deciding that defendant's fate).

(3) procedure for notice to defendant;²² (4) rules for formulation of claims;²³ (5) rules governing development of evidence, particularly evidence beyond that presented by the respective parties through their autonomous efforts;²⁴ (6) in modern litigation, provisions for expert testimony;²⁵ (7) rules for deliberation and decision leading to judgment by the tribunal, and in modern systems for appellate review;²⁶ and (8) rules governing the finality of judgments.²⁷ The extent of transnational similarity, of course, varies from rule to rule.

Of these, the rules of personal jurisdiction, notice, and recognition of judgments are so similar from one country to another that they have been susceptible to substantial resolution through international conventions.²⁸ Although the United States is aberrant in having an expansive concept of "longarm" jurisdiction,²⁹ this difference is one of degree rather than one of kind.

Similarly, with specification of a neutral adjudicator we can begin with the realization that all legal systems have rules to assure that a judge or other adjudicator should be disinterested as between the parties.³⁰ Accordingly, in transnational litigation reliance generally can be placed on the local rules maintaining that principle. Similarly, an adjudicative system by definition requires a principle of finality. The concept of "final" judgment therefore is also generally recognized, although some legal systems permit reopening a determination more liberally than other systems. The corollary concept of mutual recognition of judgments is also universally accepted.

22. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (holding that due process requires notice to be sufficient and given within a reasonable time to allow parties to make their appearance).

23. See *In re Ruffalo*, 390 U.S. 544, 550-51 (finding a due process violation when, in an attorney disciplinary proceeding, charges were added after and on the basis of the attorney's testimony), amended by 392 U.S. 919 (1968).

24. See FED. R. CIV. P. 26.

25. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993) (stating that prior to finding expert testimony admissible, judges first must assess whether the expert will testify to scientific knowledge that will assist the trier of fact in making a factual finding).

26. See FED. R. APP. P. 3-12 (governing appeal from judgment); FED. R. CIV. P. 54-63 (governing judgment); FED. R. EVID. 606(b) (governing inquiry into jury verdict).

27. See *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) (holding that a judgment constitutes an absolute bar to a subsequent action on the same merits and between the same parties).

28. See *KESSEDIAN*, *supra* note 15, at 4-14.

29. See RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION* 27-28 (2d ed. 1997) (noting that the Court of Justice of the European Communities requires a much greater degree of direct contact in order to establish personal jurisdiction than the minimum contacts required in the United States).

30. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 127 (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690) (asserting that because "it is unreasonable for man to be judges in their own cases[,] the imposition of a neutral adjudicator is fundamental to the creation of civil government).

IV. Rules of Pleading

Beyond this, the rules governing formulation of claims are substantially identical in most legal systems. The pleading requirements in other common-law systems require that the claimant state the claim with reasonable particularity as to facts concerning persons, place, time, and sequence of events involved in the transaction sued on. The ALI Transnational Rules of Civil Procedure has accordingly adopted that requirement. Our rule would require the plaintiff to:

[S]tate the facts on which his claim is based [and] the legal rules that he contends support the claim. The statement of facts shall be in reasonable detail as to time, place, parties and participants, and events The plaintiff shall attach copies of all documents, such as contract documents, on which he intends to rely in supporting the claim.³¹

This pleading rule is essentially similar to the old Code Pleading requirement that governed in most American states prior to 1938. In this perspective, the aberrant system is the one prescribed in Rule 8 of the Federal Rules of Civil Procedure. Rule 8, in providing the requirements that a complaint must state, refers mysteriously to a “short and plain statement of the claim.”³² The terms “short and plain” are adjectives, not nouns, and leave unresolved what kind of statement is to be short and plain. Moreover, every legal document is a “statement” of some kind, so that term does not help either.

It is familiar procedural history that the term “facts” was deliberately avoided in Rule 8 in an attempt to obviate the supposedly pointless disputations under previous Code Pleading over whether a pleading stated facts rather than “mere conclusions” or, less commonly, whether it pleaded “evidence.”³³ However, from one viewpoint this attempt to eliminate disputes over sufficiency of the statement of the facts was unsuccessful. Instead of eliminating dispute over the sufficiency of statements of the facts, Rule 8 postponed these disputes to resolution after discovery through motions for summary judgment, disputes over the scope of discovery, disputes over framing a pretrial order, and motions to exclude evidence at trial.³⁴ This postponement in turn empowered a claimant to pursue at least some measure of discovery before a judicial determination could be made as to whether the claimant’s claim was substantively tenable. The

31. Hazard, Jr. & Taruffo, *supra* note 18, at 499 (stating Rule 10).

32. FED. R. CIV. P. 8(a).

33. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE §§ 3.5, 3.6 (4th ed. 1992); Leland Lock Tolman, *Advisory Committee's Proposals to Amend the Federal Rules of Civil Procedure*, 40 A.B.A. J. 843, 844 (1954).

34. See Moses Lasky, *Memorandum for the Committee on Rule 8*, 13 F.R.D. 275, 277-79 (1952).

postponement of this critical stage was in general helpful to claimants because it opened an opportunity for discovery prior to showdown. Although Rule 8 permits a claimant to plead in vacuous terms, ordinarily plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world. Doing so helps the judge understand what the case is about, and it incidentally helps the opposing side.

The estimate that Professor Taruffo and I made in the draft ALI Transnational Rules is that the “fact pleading” rule will operate in transnational litigation neutrally as between claimants and defendants. The cost and uncertainties in international litigation caution a claimant against attempting to prosecute a suit in contemplation of establishing his case through discovery. Prosecution of a claim in international contexts ordinarily is practical only when the claimant already has substantial evidence to prove some kind of substantively valid claim. Having such evidence enables a claimant to plead with sufficient particularity to stay in court at least for that claim and thereby to proceed to the next stage.

So far, so good. It is at the next stage—after initial statements of claim and defense—that the fundamental differences between procedural systems are manifested.

V. Fundamental Differences Between Procedural Systems

The fundamental differences in civil procedural systems are, along one division, differences between the common-law and civil-law systems. Equally significant differences exist, however, among the common-law systems. Here, as in the case of the pleading rules, it is the American system that is aberrant.

The common-law systems all derive from England and include the United States, Canada, Australia, New Zealand, South Africa and India, as well as other smaller regimes such as Israel, Singapore, and Bermuda. The civil-law systems originated on the European continent and include systems derived more or less from Roman law (the law of the Roman Empire codified in the Justinian Code)³⁵ and canon law (the law of the Roman Catholic Church, itself substantially derived from Roman law).³⁶ The civil-law systems include those of France, Germany, Italy, and Spain and virtually all other European countries and, in a borrowing or migration of legal systems, those of Latin America and Japan.

There are many significant differences between common-law and civil-law systems. First, the judge in civil-law systems rather than the advocates

35. See HANS JULIUS WOLFF, *ROMAN LAW 4-5* (1951) (recognizing the legal achievements of the Romans as one of the most basic foundations of modern civil law).

36. See *id.* at 205.

in common-law systems, has responsibility for development of the evidence and exposition of the legal concepts that should govern decision.³⁷ However, there is great variance among civil-law systems in the manner and degree to which this responsibility is exercised,³⁸ and no doubt variance among the judges in any given system. In general, however, in the civil-law systems the final selection of witnesses to be examined and the examination itself are done by the judge and only indirectly by the advocates, who nominate the witnesses and who may suggest questions that should be asked.³⁹ Second, civil-law litigation proceeds through a series of short hearing sessions—sometimes less than an hour each—focused on development of evidence.⁴⁰ The products of this are then consigned to the case file until an eventual final stage of analysis and decision.⁴¹ In contrast, common-law litigation has one or more preliminary or pretrial stages, and then a trial at which all the evidence is received consecutively, including all “live” testimony.⁴² Third, a civil-law final hearing usually takes less time than a common-law trial of a similar case.⁴³ This is partly due to a difference in the role of judge and advocates, but it also results from the different character of a common-law trial and a civil-law final hearing. Fourth, a civil-law judgment in the court of first instance (i.e., trial court) is generally subject to a more searching re-examination in the court of second instance (i.e., appellate court) than a common-law judgment.⁴⁴ Also, re-examination in the civil-law systems extends to facts as well as law.⁴⁵ Fifth, a judge in a civil-law system serves his entire professional career as a judge, whereas the judges in common-law systems

37. See Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 411-12 (1960) (explaining that in the German system the court does not rely on the parties to bring relevant law forward, and judges play a central role in leading the parties to the development of their case).

38. Darrell Prescott & Edwin R. Alley, *Effective Evidence-Taking Under the Hague Convention*, 22 INT'L LAW 939, 952-53 (1988) (describing the judicially led fact finding process in European civil-law proceedings).

39. See Kaplan, *supra* note 37, at 412 (noting that under the German system, the court acts as the principal interrogator and thereby leaves the lawyer with a relatively “meager” role in the selection and examination of witnesses).

40. See *id.* at 412.

41. See *id.* at 412-13 (“The German system relies on the succession of conferences and prooftakings to show up strength or weakness with reasonable dispatch.”).

42. See *id.* at 419 (arguing that the pretrial structures of the American system are designed to allow the parties to fully prepare for the “concentrated trial”).

43. See *id.* at 424-25 (contrasting the inordinate delay that occurs in American trial calendars because relatively few judges serve on the major courts with the German system’s large complement of judges whose numbers can be expanded as necessary).

44. See *id.* at 413 (stating that “on appeal to the court of second instance from final judgment . . . the parties are entitled to redoing of the case[,] including new proofs, new legal theories, and similar procedures).

45. See *id.*

are almost entirely selected from the ranks of the bar.⁴⁶ Thus, civil-law judges lack the experience of having been a lawyer, which may affect their views.

These are important differences, but not worlds of difference. The American common-law system, however, has differences from most other common-law systems that are of equally great if not greater significance. The American system is unique in many respects. First, jury trial is a broadly available right in the American federal courts and, more or less to the same extent, in the state court systems.⁴⁷ No other country routinely uses juries in civil cases.⁴⁸ Second, the American version of the adversary system generally affords the advocates far greater latitude in the form and style of the case's presentation than in other common-law systems.⁴⁹ This is in part because of our use of juries. Third, in the American system, each party, including a winning party, pays his own lawyer and cannot recover that cost from a losing opponent.⁵⁰ This rule has been changed by statute for specific types of cases but almost invariably in the direction of allowing recovery of litigation costs only by a successful plaintiff.⁵¹ In most all other countries the winning party, whether plaintiff or defendant, recovers at least a substantial portion of his litigation costs.⁵² Fourth, American rules of discovery give wide latitude for exploration of potentially relevant evidence. Depositions of parties may be taken of right under rules such as Federal Rules of Civil Procedure 26 and 30, and usually are actually taken in cases likely to go to trial as distinct from being settled or simply abandoned. The same is true to a lesser degree of depositions of third party witnesses.⁵³ In our system, under

46. See *id.* ("They are career men . . ."); see also John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 851 (1986) ("The distinguishing attribute of the bench in Germany (and virtually everywhere else in Europe) is that the profession of judging is separate from the profession of lawyering.").

47. See generally Kaplan, *supra* note 37, at 419 (describing the jury trial as the "historic centerpiece of civil procedure"); see also U.S. CONST. amend. VII.

48. See STEPHEN GOLDSTEIN, *THE ANGLO-AMERICAN JURY SYSTEM AS SEEN BY AN OUTSIDER* 3-5 (Institute of Anglo American Law, Clifford-Chance Distinguished Lecture Series) (Mar. 4, 1994) (characterizing the continued use of juries in civil trials as a technique peculiar to the American system).

49. See Langbein, *supra* note 46, at 830-31 (distinguishing the level of control German courts hold over the requirement of trial and the presentation of facts with the American system's reliance on dividing pretrial from trial).

50. See 10 CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2675 (2d ed. 1987).

51. *Id.*

52. See generally ALAN J. TOMKINS & THOMAS E. WILLGING, *TAXATION OF ATTORNEY'S FEES: PRACTICES IN ENGLISH, ALASKAN AND FEDERAL COURTS* (1986); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1963); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651.

53. See FED. R. CIV. P. 45(c)(3).

rules such as Federal Rule 34, discovery of documents is effected by simple demand by the discovering party without court order. Thus, discovery of documents requires no prior judicial intervention, as it does in all civil-law systems, nor is the demanding party required to show "good cause," as was formerly required under Federal Rule 34.⁵⁴ Discovery is not limited to "relevant" documents but extends to documents whose production, in the words of Rule 26(b), "appears reasonably calculated to lead to the discovery of admissible evidence."⁵⁵ Fifth, American judges are selected in a variety of ways in which political affiliation plays an important part. In most of the other common-law countries, judges are selected on the basis of professional standards.⁵⁶

VI. Discovery of Documents: The American Phenomenon

It is on discovery of documents that this paper now focuses. The reasons are as follows:

First, discovery through deposition of witnesses, to an important extent, is subject to an inherent self-limitation. In any given contested case, ordinarily there are only so many witnesses who could have anything useful to recount and only so many questions that they can be asked. Theoretically, there could be a tort committed in the presence of the audience in an athletic stadium at full capacity. But in the ordinary course of life the relevant facts to be proved through witnesses will have been observed by relatively few observers. In contrast, the clues that can be sifted from a set of documents cannot be predicted without seeing the set of documents, and there is no inherent limit on the number of documents in a "set."

Second, discovery of documents in American litigation often is wide-ranging, with intrusion on the discovered party and expense to both parties. In high stakes litigation, discovery usually occurs on a massive scale, the sheer volume of documents going far beyond that produced in civil litigation in any other country.⁵⁷ The targets of this document discovery

54. See FED. R. CIV. P. 34(a) advisory committee's note ("Good cause is eliminated [in the 1970 Amendment] because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) . . .").

55. FED. R. CIV. P. 26(b).

56. See Langbein, *supra* note 46, at 851-54.

57. See Gerald Walpin, *America's Failing Civil Justice System: Can We Learn From Other Countries?*, 41 N.Y.L. SCH. L. REV. 647, 649 (1997) (arguing that the uniquely broad American discovery practices constitute the majority of American litigation expenses); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 442 reporters' note 1 (1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.").

regard it as particularly invasive.⁵⁸ Managerial-level employees in public and private organizations feel more or less able to hold their own in deposition interrogation and recognize that everyone has a duty to give testimony about what he knows. But discovery of the documents goes after what public and private officials regard as their most private thoughts, such that this kind of discovery, to them, resembles self-incrimination.⁵⁹ Discovery of documents is especially sensitive in international litigation. Put bluntly, the impression of American discovery in most foreign countries is that of an alien legal regime conducting a warrantless search in someone else's domestic territory.⁶⁰ The scope the American system affords to private litigants for compulsory production of documents is ordinarily afforded in other countries only to prosecutorial criminal investigations by government agencies.⁶¹

Third, document discovery is a surrogate for the more general problem of "harmonization" of procedural systems between the United States and the rest of the world. Discovery depositions present less serious disharmony. Although discovery depositions are more numerous and more lengthy here than abroad, they are similar to examinations at trial in other common-law systems and examinations at hearings in civil-law systems. But document discovery American style is something unto itself.

Finally, in my reading of the historical record, the broad ambit of discovery of documents in American procedure is not a direct artifact of the Federal Rules of Civil Procedure as promulgated in 1938. Rule 34 of the 1938 Rules, in authorizing document discovery, laid the legal foundation for our contemporary system.⁶² However, as I interpret the historical record, modern American document discovery is a consequence of a

58. See Karen A. Feagle, *Extraterritorial Discovery: A Social Contract Perspective*, 7 DUKE J. COMP. & INT'L L. 297, 299 (1997) (arguing that most other countries consider American discovery practices a "fishing expedition" and limit the scope of discovery to protect personal privacy).

59. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (1991) (describing the document demand as the most onerous and intrusive aspect of discovery).

60. See Feagle, *supra* note 58, at 299 ("[M]ost other countries do not even recognize the legitimacy of direct extraterritorial discovery, but instead regard it as a violation of their sovereignty and territorial integrity."); Vincent Mercier & Drake D. McKemey, *Obtaining Evidence in France for Use in United States Litigation*, 2 TULANE J. INT'L & COMP. L. 91, 93 (1994) ("[M]any civil law countries consider American discovery practices to be encroachments upon their internal security and judicial sovereignty.").

61. See Walpin, *supra* note 57, at 649-50 (noting that in Britain and Israel document production in civil cases is controlled by what the producing party deems to be relevant, while in Australia civil discovery is severely restricted to what is "necessary" to prevent "fishing" for evidence).

62. For an admirable historical analysis of the 1938 Federal Discovery Rules, see Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998). This paper was also delivered at a conference on discovery held by the Advisory Committee. See Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 1 (Sept. 4, 1997) (on file with the *Texas Law Review*).

complicated evolution that drew force from several important legal developments not directly associated with discovery as such. The outcome of this evolution can be displayed by contrasting the present American rules governing discovery with the counterpart rules in the other principal common-law jurisdictions—England, Canada, and Australia.

VII. Document Production in Other Common-Law Systems

The rules for document production in the other common-law systems all derive from English law, particularly those established under the English Judicature Acts of 1873 and 1875.⁶³ (Those rules were in turn a basis for the counterpart provisions of the 1938 Federal Rules.) The interpretation that is given in modern litigation to the English Rules in other common-law countries is nominally as broad as the modern American formulation.⁶⁴ Thus, as in our sister common-law countries, discovery was and is allowed of documents that “may” lead to relevant evidence.⁶⁵ However, although the same verbal formulation continues to be employed both in this country and in our sister common-law countries, the operative meanings of the terms “may” and “relevant” are quite different.

The Rules of the Supreme Court in England promulgated under the Judicature Acts provided that discoverable documents are those “relating to matters in question.”⁶⁶ On its face, this standard could be read to require that documents sought in discovery must be directly relevant to a stated cause of action. However, the English courts interpreted the standard in a formulation that is a forebear of Rule 26(b) of the Federal Rules. In 1882 the standard for discovery was held in the leading *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.*⁶⁷ decision to cover any document that

relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not which *must*—either directly or indirectly enable the party . . . either to advance his own case or to damage the case of his adversary. . . . [A] document can

63. See 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2201 (2d ed. 1994) (stating that modern American discovery rules were originally patterned, in part, after the English Judicature Acts); BERNARD C. CAIRNS, AUSTRALIAN CIVIL PROCEDURE 348 (4th ed. 1996) (noting that discovery procedures in other common-law jurisdictions are derived from the nineteenth century judicature reforms in England).

64. See STEPHEN CROMIE, INTERNATIONAL COMMERCIAL LITIGATION 143 (2d ed. 1997) (explaining that for discovery in the U.K., “[a] document will be relevant if it contains information which may advance one party’s cause, or damage the other’s, or lead to a train of enquiry which may have either of those consequences”).

65. See *id.* at 142.

66. R.S.C. O.24, r.1.

67. 11 Q.B.D. 55 (Eng. C.A. 1882).

properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences⁶⁸

The court recognized that it was not applying a plain reading of the language of the rule. In his opinion, Lord Justice Brett stated:

We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it obvious . . . that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action⁶⁹

This broad reading of the standard for discovery of documents still applies in England and has been embraced as well in Australia and Canada.⁷⁰

Hence, the rules concerning scope for discovery of documents in the other leading common-law countries are framed in terms essentially similar to Rule 26(b) in this country. Yet very different and much narrower meaning evidently is given to the scope rule in other common-law countries. How does one account for the difference in the meaning that is given to essentially the same verbal terms?

An important part of the explanation requires reference to the English rules of pleading. Prior to the adoption of the Judicature Acts of 1873 and 1875, the pleading system in England "was too technical and it led to cases being decided on narrow points of pleading rather than on merits."⁷¹ The Judicature Acts set out the basis for the pleading practice that now obtains in England, Australia, and Canada.⁷² Order 18, rule 7 of the English Rules of the Supreme Court states that "every pleading must contain, and contain only, a statement . . . of the material facts on which the party

68. *Id.* at 61 (emphasis in original). The court was interpreting Order XXXI, rule 12 from the 1875 Rules of Supreme Court, which required production of documents "relating to any matters in question in the action." *Id.* at 63.

69. *Id.* at 62.

70. *Compagnie Financiere* is good law in all three jurisdictions. See *Dynamic Control Sys. v. Newnes Mach. Ltd.* 100 F.T.R. 154, 157 (1995) (quoting *Compagnie Financiere* as a good statement of Canadian discovery rules); DAVID BARNARD & MARK HOUGHTON, *THE NEW CIVIL COURT IN ACTION* 209 n.25 (1993) (citing *Compagnie Financiere* as authority for the types of documents English courts require); BERNARD C. CAIRNS, *AUSTRALIAN CIVIL PROCEDURE* 320 (3d ed. 1992) (paraphrasing *Compagnie Financiere* as the statement of modern Australian law).

71. CAIRNS, *supra* note 70, at 89.

72. *Id.* at 91.

pleading relies. . . .”⁷³ The term “material facts” has been interpreted as those allegations “necessary for the purpose of formulating a complete cause of action; and if any one ‘material’ fact is omitted, the statement of claim is bad; it is ‘demurrable’ in the old phraseology, and in the new is liable to be ‘struck out’. . . .”⁷⁴ If a party fails to plead a material fact, that party will be prevented from giving any evidence on the fact at trial.⁷⁵ Furthermore, the pleadings must contain a “statement of particulars”⁷⁶ sufficient to put the defendant on notice as to the case he has to meet.⁷⁷ The pleading party must give “particulars of any misrepresentation, fraud, breach of trust . . . or undue influence on which the party pleading relies”⁷⁸ Additionally, the party must state whether he is relying on the mental condition of any party and what that condition is.⁷⁹ The rules further provide that when the pleading party alleges that the other party had notice or knowledge of a fact, the pleading party may be required by the court to serve particulars of notice or knowledge.⁸⁰

These requirements of specificity in pleading limit the scope of document discovery. This has been noticed by commentators in the common-law systems. Cairns says that

[w]hen the pleadings define the ambit of the dispute, they also limit the scope of what must be given as particulars as well as the scope of discovery of documents and interrogatories. This comes about because particulars and discovery and interrogatories must be relevant to the issues, which are raised by the pleadings.⁸¹

In effect, therefore, in the other principal common-law countries the pleadings define the universe of relevance within which the discovery rules operate. In employing the conventional analogy to a “fishing expedition,” an Australian jurist stated “that a person who has no evidence that fish of a particular kind are in a pool desires to be at liberty to drag it for the purpose of finding out whether there are any there or not.”⁸² In Canada

73. R.S.C. O.18, r.7(1).

74. *Bruce v. Odhams Press Ltd.*, 1 K.B. 697, 712 (Eng. C.A. 1936).

75. *See West Rand Cent. Gold Mining Co. v. The King*, 2 K.B. 391, 399 (1905) (rejecting the proposition “that it is sufficient to allege what may be a ground of action if something else be added which is not stated”).

76. R.S.C. O.18, r.12(1).

77. *See Bruce*, 1 All E.R. at 294.

78. R.S.C. O.18, r.12(1)(a).

79. R.S.C. O.18, r.12(1)(b).

80. R.S.C. O.18, r.12(4).

81. CAIRNS, *supra* note 70, at 102.

82. *Hooker Corp. v. Australia*, (1985) 80 F.L.R. 94, 104 (Kelly, J.) (quoting *Associated Dominions Assurance Soc’y Pty. v. John Fairfax & Sons Pty. Ltd.* (1952) 72 N.S.W.W.N. 250, 254 (Owen, J.)).

(at least in Ontario), if a pleading fails to disclose the required detail of material fact, the opposing party can move to strike the pleading.⁸³ One judge has stated that:

Perhaps the best test of a well and properly drawn pleading is this, that a stranger to the proceeding, reasonably versed in legal terminology, might pick up the document and upon first reading readily ascertain the particulars of the cause of action, the specific nature of the defendant's alleged breach of duty or other deficiency, the precise nature of the remedy sought and the reason why such remedy is, in fact, sought. Unless all of this information is patently and readily available on the face of the record, then, it seems to me, the pleading is, itself, defective.⁸⁴

A second effective limitation on the scope of document discovery in the other common-law countries is apparently an artifact of the mechanics in the procedure for document production. In the other common-law countries, the description of documents to be produced is made in the general rubric of the rule embodying the "may be related" standard.⁸⁵ Also in those countries, the time for disclosure is much more limited, implying a much narrower scope of disclosure.⁸⁶ Thus, in England document lists are exchanged simultaneously by the parties fourteen days after the close of pleadings.⁸⁷ In Australia's federal courts, the demanding party makes a general demand and the responding party thereupon produces documents whose production the responding party considers to be required.⁸⁸ In Canada, some provinces follow the English practice, i.e., simultaneous disclosure at a specified time after close of the pleadings, while others follow the Australian practice.⁸⁹

83. See *Copland v. Commodore Bus. Machs. Ltd.* [1985] 52 O.R.2d 586, 589 (explaining that a minimum level of material fact must be set forth in the pleading to withstand a motion to strike the pleading as irregular).

84. *Mazzeo v. City of Kingston*, No. 8979/95, 1996 Ont. C.J. LEXIS 1989, at *7-*8 (Ont. Ct. Gen. Div. May 8, 1996) (quoting *Touche Ross Ltd. v. McCardle* [1987] Nfld. & P.E.I.R. 257, 258 (P.E.I.) (McQuaid, J.)).

85. See *supra* note 65 and accompanying text.

86. See CROMIE, *supra* note 64, at 107-08, 143-44 (noting that as compared to the United States, discovery in common-law countries occurs further into the proceedings, and courts typically oppose pre-action discovery).

87. R.S.C. O.24, r.2(1) ("[E]ach party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.").

88. Federal Court Rules, O.15, r.2 (Austl.) (requiring the responding party to file a list of documents relating to any matter in question between the respondent and the party giving notice of discovery).

89. See Teresa M Dufort, *Canada, in PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE* 215, 216 (Charles Platto ed., 1990) [hereinafter *PROCEDURES WORLDWIDE*] (explaining that civil-law matters are governed by the individual provinces, and therefore some follow the simultaneous disclosure practice while others require the responding party to disclose all relevant documents).

In the other common-law countries, as in American procedure, the responding party is responsible for *applying* the discovery standard to the documents in that party's possession or control.⁹⁰ Such an allocation of responsibility to the responding party is inevitable under any discovery system short of giving the discovering party direct access to all of the respondent's documents and allowing the discovering party to choose among them. However, only in our system is the discovering party empowered to *define* the documents that are to be produced. Under American procedure as formulated in the Federal Rules, the description of the documents to be produced is made by the *discovering* party in his documents demand. The key term in Federal Rule 34(a) is "designated" documents and this is done by the demanding party.⁹¹ In contrast, in the other common-law countries the designation is made by the discovery rule itself in terms of documents that "may be related."⁹² Thus, in the other common-law jurisdictions the discovering party is not allowed to particularize or intensify the specification. It would appear that, in our sister common-law countries, the combination of specific pleading, the short time limit imposed for document production, and the definition of the obligation to produce set forth in the general rule results in considerably narrower response in the way of document production than that to which we have become accustomed in this country.

A final factor resulting in narrower document discovery in common-law jurisdictions abroad is ineffable but no doubt very real and probably of greater practical significance. This factor is the general culture of the bench and the bar in other countries and their orientation to disclosure and to litigation—what the Germans might call the professional *Weltanschauung* and what the French might call the legal profession's *mentalité*. It is my impression that lawyers in other common-law countries, for plaintiffs as well as defendants, believe that a civil case should not be commenced

90. In Australia, "[a] party therefore has an obligation to disclose, by way of a description in a list of documents, all documents in its 'possession, custody and power' relating to any matter in issue in the proceedings." Peter J. Perry, *Australia*, in *PROCEDURES WORLDWIDE*, *supra* note 89, at 3, 6. In Canada, "a party to an action in any province will be required to disclose the existence of all documents relating to any matter in issue in the action that are or have been in the possession or control of the party" Dufort, *supra* note 89, at 215-16. The statute governing civil procedure in England "provides that 14 days after the close of pleading each party must send to the other a list of documents 'which are or have been in his possession, custody or power relating to any matter in question between them in the action.'" Peter Leaver & Jeremy Carver, *England*, in *PROCEDURES WORLDWIDE*, *supra* note 89, at 76, 91 (quoting R.S.C. O.24, r.2).

91. FED. R. CIV. P. 34(a) ("Any party may serve on any other party a request . . . to produce and permit the party making the request . . . to inspect and copy, any designated documents . . .").

92. See *supra* note 85 and accompanying text; *supra* notes 87, 89; see also GEORG A. WITTUHN, *PRE-TRIAL DISCOVERY IN CANADA: INTERNATIONAL LITIGATION IN CANADIAN AND GERMAN FORUMS* 17, 17-20 (1989) (describing the scope of discovery in Canada, which allows discovery of all documents "relating to the matter at issue in the action").

unless the claimant has among his own resources—in testimony, documents and other proof—enough to establish a prima facie case without obtaining any further evidence from the defendant. In contrast, the outlook in this country is that a case can legitimately be prosecuted if the claimant's lawyer reasonably supposes that a case can be established through use of discovery. This outlook was manifested in the debates over Federal Rule 11 concerning the standard of investigation prior to bringing suit and is manifested in pending debates over proposals to amend Rule 26(b) to require that the discovery material, including documents, be relevant not merely to the "subject matter" of the litigation but more precisely to the claims and defenses presented.⁹³

In contrast to common-law jurisdictions, a word is sufficient about document discovery under the civil-law systems. There is none. Under the civil law, a party has a right only to request the court to require the opposing party to produce a document. This arrangement is a corollary to the general principle in the civil-law system that the court, rather than the parties, is in charge of the development of evidence. Moreover, in some civil-law systems, a party cannot be compelled to produce a document that will establish liability against him—something like a civil equivalent of our privilege against self-incrimination. However, in some civil-law systems, a party may be compelled to produce a document when the judge concludes that the document is the only evidence concerning the point of issue. This result can also be accomplished by holding that the burden of proof as to the issue shall rest with the party having possession of the document. Whether on request of a party or on the court's own initiative, however, the standard for production under the civil law appears uniformly to be "relevance" in a fairly strict sense. That is, the court will require a party to involuntarily produce a document only when the court can see that the document will be probative on a fact issue identified by the court. Documents that are suggestively relevant, or relevant only in cumulative effect, do not meet this standard. The *mentalité* of the bench in civil-law systems thus is perhaps stricter still than that in common-law countries other than the United States.

VIII. The American Experience

Upon the adoption of the Federal Rules in 1938, one would have expected the practice concerning document discovery to evolve

93. See, e.g., American College of Trial Lawyers, Monograph of the Committee on Federal Rules of Civil Procedure, The Deletion of the "Subject Matter" Phrase From Federal Rules of Civil Procedure 26(b)(1) (Aug. 1997) (on file with the *Texas Law Review*). This monograph was presented September 1997 at a conference on discovery held by the Advisory Committee at Boston College School of Law. See Judicial Conference of the United States, *supra* note 62.

approximately as it has in our sister common-law jurisdictions. The original Rule 34 authorized production of documents for discovery as follows:

Upon motion of any party showing *good cause* therefor and upon notice to all other parties, *the court* in which an action is pending *may . . .* order any party to produce and permit the inspection and copying . . . of any designated documents . . . not privileged, which *constitute or contain evidence material to any matter involved in the action*⁹⁴

The drafters of the 1938 Rules, thus, certainly did not foresee the extent of modern document discovery. For one thing, in their discussions of the scope of discovery the commentators evidently assumed that the significant expansion of discovery was in the procedure for deposition discovery, not in the document discovery. They also assumed that the ethical standards of the profession would prevent discovery abuse.⁹⁵ Professor William W. Dawson, in his remarks to members of the American Bar Association, saw the scope of Rule 34 as analogous to the practice in England.⁹⁶ He said:

You have to know of the document in order to request it, and know that it is in the custody of the opposite party. Now, if you do not have such information, then the custody of the document may be learned on deposition, under Rule 26 or perhaps by the filing of an interrogatory. That would then lay the foundation for the application of Rule 34 or of a subpoena *duces tecum* in either the deposition or at the trial of the case.⁹⁷

Other drafters shared this interpretation of the 1938 Rules. Professor Edson Sunderland saw document discovery as flowing from information revealed during depositions. He said:

If one does not know what documents exist and needs such information to enable him to apply for an order for their discovery,

94. AMERICAN BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 74, 75 (William W. Dawson ed., 1938) [hereinafter CLEVELAND] (emphasis added).

95. Hon. William D. Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.*, 23 A.B.A. J. 966, 969 (1937) (suggesting a strengthening of disbarment or disciplinary procedures as a means of curbing abuse of federal discovery procedure).

96. See AMERICAN BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 102 (Edward H. Hammond ed., 1939) (comparing Rule 34 to the practice in England because Rule 34 “provides a short cut when the existence and the custody of the document are known”).

97. *Id.* (emphasis in original).

either an oral examination or written interrogatories may be employed, since Rule 26(b) . . . permits such discovery regarding the existence, description, . . . and location of documents or things which are relevant to the case. . . . [A] preliminary discovery examination as to the existence and location of documents may be employed against a party or a mere witness, and after the location and custody has been discovered, an order of the court may be obtained directed to a party for inspecting, copying or photographing the document.⁹⁸

William D. Mitchell, the Chairman of the Advisory Committee, felt that the Committee had “fortified the provisions for protection against improper examinations and fishing expeditions.”⁹⁹ Mr. Mitchell noted that Judge Finch of the New York Court of Appeals had warned that the discovery rules would lead to an increase in strike suits, but dismissed this concern by stating:

It may be that in large metropolitan areas like New York City where the conditions are admittedly bad and many dishonest actions are brought in the courts, the rules relating to discovery and examination before trial offer opportunities to lawyers of low ethical standards. As applied to the country as a whole, we think the rules relating to these subjects are in line with modern enlightened thought on the subject and will not be subjected to abuse.¹⁰⁰

These interpretations of what was intended and expectations as to how the federal system for discovery of documents would work did not portend the kind of document discovery we now have. Hence, it is not quite accurate to say that “equity” (meaning equity as of 1938) “conqu[er]ed” law so far as document discovery is concerned.¹⁰¹ On the contrary, the expectation of the draftsmen evidently was that Rule 34 would operate essentially as the rules of document discovery had operated in the other common-law jurisdictions.

The American pathway, however, took a different direction. Essentially, there has been a gradual but sweeping transformation in American jurisprudence as to the right of a party claiming injury to obtain documents from alleged wrongdoers that may illuminate the course of

98. CLEVELAND, *supra* note 94, at 288 (quoting the remarks of Professor Edson R. Sunderland).

99. Mitchell, *supra* note 95, at 969. It is interesting to note that Mitchell mentions the Committee’s rejection of the idea of allowing a party to demand that the other party produce a list of relevant documents. *See id.* This feature is still part of the discovery process in Australia, England, and Canada. *See supra* notes 87-89 and accompanying text.

100. Mitchell, *supra* note 95, at 969.

101. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987) (proffering that “an historical examination . . . reveals that the rules of equity prevailed over common-law procedure”).

action leading up to the injury. The immediate transformation occurred within the law of procedure. However, the change was consonant with, and reinforced by, more pervasive social and legal change in the same general direction.

A. *Changes in Procedural Law*

The most important change in procedural law was in the rules of pleading. Mr. Moses Lasky, a leading trial lawyer, observed long ago that the problem was not with the language of the federal pleading requirement in Rule 8, but rather with the interpretation of Rule 8 pronounced by the courts.¹⁰² Here, the key decision by the Supreme Court was *Conley v. Gibson*.¹⁰³

Prior to the line of lower court cases that culminated in *Conley v. Gibson*, it was quite possible to interpret Rule 8's requirement of a "short and plain" statement to require, in essence, a detailed narrative in ordinary language—one setting forth all elements of a claim under applicable substantive law. That is, the key would have been not that the complaint was to be above all "short," but that it was to be above all "plain" and showing entitlement to relief as a matter of law. *Conley v. Gibson* turned Rule 8 on its head by holding that a claim is insufficient only if the insufficiency appears from the pleading itself.¹⁰⁴ Under that interpretation, a pleading is insufficient only if the pleader "pleads himself out of court."¹⁰⁵ Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment. Another form of compliance is found in the long rhetorical recitals and denunciations that have come to characterize much modern pleading.

The significance of *Conley v. Gibson* on the scope of discovery is evident. If a claimant can proceed to discovery without any legally relevant allegations at all, then the plaintiff's pleading sets no standard of relevance to control the scope of discovery. Since discovery extends under Rule 26 to anything "relevant to the subject matter,"¹⁰⁶ relevance must be ascertained by some other mechanism. The only effective alternative is discovery itself. Hence, under *Conley v. Gibson*, an opposing party and the court can ascertain the limits on what is being sought in discovery only by ascertaining what is being sought in discovery.

102. See Lasky, *supra* note 34, at 276 ("What is needed is to end the improper application of Rule 8.").

103. 355 U.S. 41 (1957).

104. See *id.* at 45-46 ("[W]e follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

105. *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992).

106. FED. R. CIV. P. 26(b)(1). HeinOnline -- 76 Tex. L. Rev. 1685 1997-1998

Of course, plaintiffs do not generally approach document discovery in such an unconstrained way. Rather, they have some ideas of what they want, derived from substantive law, and make demands guided by those ideas. The effective constraint on scope is not the law of procedure, but rather the prudence of plaintiff's counsel to avoid processing low-grade yield from broadly inclusive demands.

The practical consequences of *Conley v. Gibson* on document discovery have since been ratified by revision of Rule 34. As originally drafted, the rule required court approval and a showing of "good cause" to obtain documents.¹⁰⁷ As amended, these requirements were omitted on the ground that they had become needless formalities because courts had come to grant discovery requests as a matter of routine.¹⁰⁸ Hence, Rule 34 now provides that "[a] party may serve on any other party a request . . . to produce . . . any designated documents"¹⁰⁹

Other changes in procedural law greatly enhanced the impact of the change in pleading and discovery effected in *Conley v. Gibson*. These included changes in the scope of jury trials, the composition of the jury, and the formulation and application of the summary judgment rule. These procedural changes are represented by the decisions in *Beacon Theatres, Inc. v. Westover*,¹¹⁰ *Thiel v. Southern Pacific Co.*,¹¹¹ and *Arnstein v. Porter*.¹¹² The theme and substance of these decisions is that a jury's sense of justice, rather than the judiciary's, should be used in assessing a party's conduct. There is, of course, no necessary connection between a broad definition of jury trial and broad rights of discovery. However, it seems plausible that a layman's concept of justice—the concept of justice expressed by a jury—involves "letting it all hang out" and that this too is the underlying rationale for comprehensive discovery.

The decisions concerning the right of jury trial, composition of the jury, and scope of jury authority are familiar. As of 1938, and prior to *Beacon Theatres*, the right to a jury trial in federal court extended to actions seeking remedies afforded under the traditional common-law actions or under statutes patterned on those actions.¹¹³ Correlatively, the right to jury trial did not extend to "suits in equity," in which judges decided issues of fact.¹¹⁴ Equity had a broad jurisdiction, including any case in

107. FED. R. CIV. P. 34 advisory committee's note on 1970 amendment, subdivision (a).

108. *See id.*

109. FED. R. CIV. P. 34(a).

110. 359 U.S. 500 (1959).

111. 328 U.S. 217 (1946).

112. 154 F.2d 464 (2d Cir. 1946).

113. *See* 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302, at 17 (2d ed. 1994).

114. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE 917-18 (7th ed. 1997).

which an injunctive or other equitable remedy was sought along with a legal claim. Equity jurisdiction included, notably, all stockholder derivative actions, taxpayer and citizen suits seeking an injunction, and suits in which a claim was made for specific performance, or cancellation, or revision of a contract.¹¹⁵ Moreover, under the rule in *American Life Insurance Co. v. Stewart*,¹¹⁶ equity's jurisdiction also reached suits commenced as actions for damages in which an equitable claim was asserted by way of a counterclaim.¹¹⁷ Equity's jurisdiction also extended to various types of claims for monetary relief or return of specific property if the claims could be cast in the mold of classical ethical remedies—as many of them could.¹¹⁸ In addition, equity's jurisdiction could plausibly have been held to extend to claims for declaratory relief, which could be regarded as a form of equitable relief *quia timet*.¹¹⁹ Since at least the middle of the nineteenth century, there had been a wide “gray area” in which a claimant could elect whether to sue in law or in equity.¹²⁰ Additionally, another wide area existed when an action originally “at law” would be remanded to equity because an equitable claim had been interjected into the action, as in *American Life Insurance*.¹²¹ Moreover, a plausible argument could have been made that many other types of cases were “equitable in nature.” The procedural devices of free joinder of claims and discovery were the creatures of equity jurisdiction and were unknown at common law.¹²² Accordingly, it could be said that any case employing those procedural devices “partook” of equity and therefore was outside the scope of the jury trial right.

All of this received lore and procedural possibility concerning the broad scope of equity, and therefore the correspondingly broad scope of a judge's authority to decide fact issues, was turned upside down in *Beacon Theatres*. That case can be understood as reversing the “default rule” for allocation of authority as between the “law side” of the court, acting through a jury, and the “equity side,” acting through the judge alone.¹²³

115. See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 649 (4th ed. 1996).

116. 300 U.S. 203 (1937).

117. See *id.* at 215-16.

118. See YEAZELL, *supra* note 115, at 649 (“A given plaintiff had to show that the traditional legal remedy of money damages was inadequate and that he otherwise qualified for equitable relief.”).

119. See JAMES, JR., *supra* note 33, § 8.11, at 446.

120. See YEAZELL, *supra* note 115, at 650 (“As time went on, distinctions between the two jurisdictions blurred even further . . .”).

121. See *American Life Insurance*, 300 U.S. at 215; YEAZELL, *supra* note 115, at 666.

122. See JAMES, JR., *supra* note 33, § 9.1, at 464.

123. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959) (explaining that the enactment of the Declaratory Judgment Act and the Federal Rules requires a re-examination of the availability of some equitable remedies and of “the justification of equity's deciding legal issues once it obtains jurisdiction”).

The default rule prior to *Beacon Theatres* was that all issues of fact could be tried by the judge without a jury, except issues subsumed in an action consisting solely of a distinctively common-law claim.¹²⁴ The default rule announced in *Beacon Theatres* was that all issues of fact are to be tried by a jury except issues subsumed under a distinctively equitable claim.¹²⁵ Moreover, the *Beacon Theatres* court observed that claims falling within the latter category were difficult to imagine, an observation that amounted to an instruction to lower court judges that they should be unlikely to encounter such issues in the future.¹²⁶ *Beacon Theatres* thus established a position no less radical than that expressed in the previous anti-jury decisional lines, but in the opposite direction: All claims in which the remedy was monetary compensation, or which could otherwise be assimilated to a claim at common law, were held to be within the realm of trial by jury. Subsequent decisions extended *Beacon Theatres* to these logical conclusions.¹²⁷

The transformation of the jury itself accompanied the expanded scope of the jury trial pronounced in *Beacon Theatres*. The key decision here was *Thiel v. Southern Pacific Co.*¹²⁸ As revealed in the Court's opinion in that case, a previously prevalent method of jury selection in federal court was the "key man" system.¹²⁹ Under this system, the court clerk summoned citizens regarded as upright and responsible, and also summoned other veniremen identified by that kind of citizen.¹³⁰ Consequently, the typical jury consisted of white, male, middle-class persons of substance or at least steady employment. Some states took a step farther in authorizing a "blue ribbon" jury in serious criminal cases, a jury defined in terms of educational attainments that ordinarily would correlate with middle-class, socio-economic status.¹³¹ Common sense and sociological analysis would suggest that juries constituted through the "key

124. *See id.* at 505.

125. *See id.* at 510-11 ("[A] long-standing principle of equity dictates that only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.").

126. *See id.* at 511.

127. *See* *Ross v. Bernhard*, 396 U.S. 531, 542-43 (1970) (finding the plaintiff entitled to a jury when the relief sought is money damages and the allegations are breach of fiduciary duty, breach of contract, and gross negligence); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476-79 (1962) (holding that *Beacon Theatres* requires a jury trial when plaintiffs claim money damages and trademark infringement).

128. 328 U.S. 217 (1946).

129. *See id.* at 221-25.

130. *See id.*

131. *See* Richard C. Baker, *In Defense of the "Blue Ribbon" Jury*, 35 IOWA L. REV. 409, 409-11, 415-16 & n.32 (1950) (describing "blue ribbon" jury statutes that condition eligibility for jury duty on, *inter alia*, property ownership, intelligence, education, and good character).

man” procedures would have an outlook and value system more likely to resemble that of typical judges than would a jury drawn from the general population. The result of using juries so constituted would, of course, narrow whatever gap might exist between assessment of conflicting evidence made by such a jury and an assessment made by a judge. Hence, the change in composition of the jury resulted in changing the practical significance of the enlarged scope of jury trial under the rule in *Beacon Theatres*. The transformation of the composition of the jury is now validated by legislation.¹³²

Contemporaneous with *Thiel*'s expansion of the jury pool, *Arnstein v. Porter* contracted the scope of summary judgment.¹³³ The Supreme Court, in *Adickes v. S.H. Kress & Co.*,¹³⁴ ratified the thrust of *Arnstein*'s discussion of the curtailment of summary judgment: The counterpart of the province of jury trial is the province of a court to grant summary judgment.¹³⁵ The adjacency of these concepts is now recognized in the terminology of Rule 56, referring to “judgment as a matter of law.”¹³⁶ The same concept, however, had been expressed in the Federal Rules beginning in 1938 in the concept of “genuine issue of material fact.”¹³⁷ An “issue of fact” is what a jury decides in cases that are jury-triable, which under *Beacon Theatres* was almost any kind of case. A “genuine” issue of fact is an issue upon which, under the evidence available, reasonable minds could differ. Whether reasonable minds could differ in light of the evidence available is itself a legal question for the judge.¹³⁸ Thus, the key question under summary judgment procedure is whether, in the available proofs, there is an evidentiary conflict sufficient to preclude the judge from awarding judgment upon motion.

The significance of *Arnstein* is its holding: Little evidentiary conflict is required to create a “genuine issue of material fact.”¹³⁹ According to familiar summary judgment doctrine, the judge must view all inferences and presumptions regarding witness credibility and the evidence in the light

132. See Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified as amended at 28 U.S.C. §§ 1861-1869, 1871 (1994)); see generally Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590 (1990) (discussing Congress's passage of the Jury Selection and Service Act of 1968).

133. See *infra* text accompanying notes 139-42.

134. 398 U.S. 144 (1970).

135. *Id.* at 159 & nn.18 & 20 (explaining the purpose to the 1963 amendment to Rule 56(e) as restricting the ability of a party opposing summary judgment to create a dispute regarding a genuine issue of fact through a contrary allegation in his pleading alone).

136. FED. R. CIV. P. 56(c).

137. *Id.*

138. See, e.g., *Adickes*, 398 U.S. at 160 (stating that the party moving for summary judgment has the burden of establishing the absence of a genuine issue of material fact).

139. See *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946).

most favorable to the nonmovant—the party against whom the motion is made.¹⁴⁰ The facts in *Arnstein*, combined with this fundamental summary judgment doctrine, demonstrate the relatively low threshold required to create a “genuine issue of fact.” The testimony of plaintiff Arnstein appeared to any rational observer to be incredible on its face. The music that plaintiff Arnstein composed did not sound at all like that of defendant Cole Porter, as indeed a jury eventually found.¹⁴¹ However, the Second Circuit held that only the jury could decide such an issue; the court would not be allowed to anticipate or speculate about the jury’s interpretation.¹⁴²

A corollary, compatible if not necessary, is that a party must have an adequate opportunity to pursue discovery in search of evidence sufficient to meet this standard. That procedural doctrine remains established today.¹⁴³

B. Operative Meaning of “Admissible Evidence” Under Rule 26

The aggregate effect of this evolution in decisional law is a change in the operative meaning of the term “admissible evidence” under Rule 26’s formula, “may lead to . . . admissible evidence.”¹⁴⁴ Putting aside the special problems of the protections accorded by the rules of privilege,¹⁴⁵ the aggregate effect is as follows.

First, *Beacon Theatres* establishes that the trier of fact in federal litigation is the jury, except when the parties decide to waive their right to a jury trial.¹⁴⁶ Hence, the operative meaning of “admissible evidence” is evidence that could be regarded (“may be”) as admissible before a jury. Apart from privilege and problems of cumulative evidence, the key concept under *Beacon Theatres* is not whether a judge would suppose the evidence to be relevant—the question posed in our sister common-law jurisdictions that do not use juries. Rather, the question is whether a judge thinks that

140. See 10A WRIGHT, MILLER & KANE, *supra* note 63, § 2727, at 121-28.

141. See *Arnstein v. Porter*, 158 F.2d 795, 795 (2d Cir. 1946).

142. See *Arnstein*, 154 F.2d at 470-72.

143. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that adequate time for discovery is required in summary judgment cases).

144. FED. R. CIV. P. 26(b)(1).

145. Rules of privilege exclude evidence that may be material, often very material. Hence, the definition of a privilege is a critical limitation on discovery. Compare, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981) (rejecting a narrow construction of the attorney-client privilege as inconsistent with “the principles of the common law as . . . interpreted . . . in light of reason and experience” (quoting FED. R. EVID. 501)), with *Herbert v. Lando*, 441 U.S. 153, 169-75 (1979) (denying the expansion of the First Amendment privilege in libel actions taken against editors to include the thoughts, opinions, and conclusions of a publisher).

146. See *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 501, 510-11 (1959).

as a trial judge, he could permit a jury to consider the evidence on the basis of relevance. Thus, the question is transformed from a first-person inquiry (“Do I think the evidence is relevant?”) into an inquiry once removed (“Do I think a jury should be able to consider the evidence under the standard of relevancy?”).

Second, under *Thiel*, the jury now consists of a cross-section of the population rather than a group of “respectable citizens.”¹⁴⁷ Hence, such a cross-section is the reference point in responding to the question of whether a jury could consider the evidence under the relevancy standard. A cross-sectional jury does not have the same orientation to the world—the same “take” on life’s experiences—as a jury of “respectable citizens.” Every politician and every marketing executive knows this, and such is the premise of the *Thiel* decision, subsequent judicial decisions, and legislation implementing the cross-section requirement.¹⁴⁸ It is such a jury whose “rationality” or “reasonableness” must be predicated in considering relevance and sufficiency of evidence.

Third, the standard for granting or denying summary judgment, pronounced in *Arnstein and Adickes v. S.H. Kress & Co.*, prohibits the court from making a first-person decision as to whether there is a genuine issue of fact. The court does not ask itself whether *a judge* would properly be able to find for the party against whom the summary judgment motion has been made. Instead, it must ask whether a jury (specifically, a cross-sectional jury) would properly be able to make such a finding.

These legal standards operate in conjunction with other legal standards, some of which have been long established and others of which are necessary incidents of a discovery system in conjunction with a jury system. Chief among these other standards is that the province of the jury extends not only to “historical” issues concerning what occurred in fact but also to normative issues concerning the issue of right and wrong.¹⁴⁹ Hence, the question of admissibility must contemplate normative implications of potential evidence—its possible effect of giving color or meaning to the circumstances beyond establishing historical fact. A second important standard is that the evidence presented at trial must be considered as a whole, not item by item. Hence, the question of admissibility must contemplate the reinforcing effect of one item of evidence on another, and not focus on an item of evidence in isolation. Third, a jury trial

147. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220, 225 (1946) (holding that because an impartial jury is one drawn from a cross-section of the community, class distinctions should not be used to exclude prospective jurors); *supra* notes 128-32 and accompanying text.

148. See *Thiel*, 328 U.S. at 220, 223-24.

149. See *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 663-64 (1873) (observing the power of the jury to decide issues of negligence and due care).

concentrates all proofs of all issues into a single, continuous hearing. Hence, the question at the discovery stage is whether the material sought is relevant to any issue that may still be in the case when it goes to the jury. Fourth, this assessment of discovery material must be made in advance of trial, usually long in advance. The longer the range of the prediction, the greater the possibility for error in exclusion. The prudent course for a judge (who ordinarily does not bear the cost of discovery that is more extensive rather than less) is to allow the discovery rather than to deny it. After all, allowing evidence to be obtained in discovery does not mean that the evidence thereby becomes admissible.

Considering all of these standards and rules, the operative meaning of Rule 26 is as follows: Evidentiary material, specifically documents, is subject to production when the responding party considers it too costly to dispute whether a cross-sectional jury would be allowed to consider the relevance of the material in light of all of the evidence that might eventually be admitted at trial, according to a judge-monitored layman's sense of justice as regards historical facts and the normative judgments juries are permitted to make under the rubric of "issues of fact."

This standard means that very few secrets may be hid.

C. *Changes in the Larger Legal Context*

The changes in procedural law outlined above have legitimated the broad discovery permitted in the American system, particularly document discovery, which is the most expensive and troublesome. But these changes have been effectuated in a larger context that supports this result and thereby ratifies it on a broader basis. Discussing this larger context in detail would carry us far afield, so a sketch will do.

I have in mind many kinds of changes. The following are illustrative. First, the Freedom of Information Act¹⁵⁰ requires, in principle if it does not always result in fact, that all government transactions, except for matters of national security and like sensitivity, be open to public inspection.¹⁵¹ Second, the federal public meetings laws that prohibit private meetings of government officials engaged in deliberations and decisions have counterparts at the state level. Appropriately called "government in the sunshine" legislation, they collectively now govern most agencies of government, state and local as well as federal.¹⁵²

150. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 522 (1994)).

151. *Id.* at § 522(a)-(b).

152. *See* Government in the Sunshine Act § 3, 5 U.S.C. § 552b (1994); *see also, e.g.*, MASS. GEN. LAWS ch. 30A, § 11A 1/2 (1996) (requiring open meetings of governmental bodies but without reference to national security).

Third, administrative law often requires that all interested parties have an opportunity to submit evidence and argument, and, up to a point, to see the submissions to an agency that have been made by other interested parties.¹⁵³ Fourth, statutes such as the securities laws and the Hart-Scott-Rodino Antitrust Improvements Act of 1976¹⁵⁴ require significant disclosures, including financial information about publicly held corporations¹⁵⁵ and business mergers,¹⁵⁶ respectively. Fifth, the civil investigative demands statutes give the Justice Department sweeping subpoena powers in antitrust, RICO, and false claims investigations.¹⁵⁷ Sixth, the Foreign Corrupt Practices Act of 1977¹⁵⁸ requires accuracy and completeness in corporate financial records.¹⁵⁹ And seventh, there are pervasive and apparently ever-increasing "required records" regulations, concerning, for example, environmental risks and employment practices.¹⁶⁰

This list could easily continue, but one final example may illustrate the extent of this environment of openness and disclosure. That example may be found in the emerging requirement in corporate law that the board of directors of publicly held corporations consist primarily of independent directors, combined with the longer-established requirement that there be an audit committee.¹⁶¹ This combination subjects the once-intimate internal affairs of public corporations to ever greater external scrutiny.

153. See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (holding that interested parties must have an opportunity to comment on proposed rules, and that a record of comments made by interested parties to an agency must be made available to the public).

154. Pub. L. No. 94-435, 90 Stat. 1384 (1976) (codified as amended at 15 U.S.C. § 1312 (1994)).

155. See Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (1994) (prohibiting misstatements and omissions of material facts in securities registration statements); Securities and Exchange Act of 1934 § 17, 15 U.S.C. § 77q(a) (1994) (prohibiting misstatements and omissions of material facts in an interstate offer or sale of securities); 17 C.F.R. § 240.10b-5 (1996) (prohibiting untrue statements of material fact in connection with the purchase or sale of any security).

156. See 15 U.S.C. § 1312 (requiring merging parties in a civil antitrust investigation to supply public notification and to observe a waiting period before completing the merger).

157. See *id.* (antitrust); 18 U.S.C. § 1968 (racketeering); 31 U.S.C. § 3731 (false claims); see also Graham Hughes, *Administrative Subpoenas and the Grand Jury*, 47 VAND. L. REV. 573, 587 (1994) (calling subpoena power vested in civil agencies "widespread").

158. Pub. L. No. 95-213, 91 Stat. 1494 (codified in scattered sections of 15 U.S.C.).

159. *Id.* § 78o(d) (requiring all corporations with registered securities to keep "books, records, and accounts" accurately and with "reasonable detail").

160. See, e.g., ALA. CODE § 22-30-18 (1997) (requiring the retention of records by operators of hazardous waste facilities); CAL. LAB. CODE § 1776 (West 1989) (requiring the retention of employee information by certain contractors of the government); 820 ILL. COMP. STAT. 105/8 (West 1996) (requiring the retention of employee wage and hour records by employers); 35 PA. CONS. STAT. ANN. § 7309(c) (West 1993) (requiring the retention of employee chemical exposure records by employers).

161. See *Principles of Corporate Governance: Analysis and Recommendations*, 1 A.L.I. § 3.05, 3A.01 (1994) (suggesting the creation of an audit committee in public corporations whose members have no other significant relationship with the corporation).

IX. Conclusion

In the foregoing light, it would be a mistake to consider broad document discovery as an isolated legal development, let alone a “sport” in American law. Rather, the American approach to discovery has been consecrated by judicial decisions, notably decisions of the Supreme Court, over approximately half a century, and by express or implied legislative approval, or at least acquiescence. Broad discovery is thus not a mere procedural rule. Rather it has become, at least for our era, a procedural institution perhaps of virtually constitutional foundation.

The essence of this procedural institution is that, when litigation eventuates, no secrets shall be hid. This institution is quite different from the view prevailing elsewhere in the world. A question in the future of “harmonization” of procedural law is the direction of movement between the American view and that held by others.