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Forms of Action under the Federal Rules of Civil Procedure

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I. The Ethos of the Federal Rules

The Federal Rules of Civil Procedure carry out two basic concepts. The first is that the unit of litigation should be the transaction as it occurred in the out-of-court world, and not some part of the transaction that might be encapsulated in one or another single substantive legal theory.[1] This concept is expressed in the Federal Rules' liberalized rules governing joinder of claims and joinder of parties. The rule as to joinder of claims provides that all claims between two opposing parties may be asserted in a single action.[2] A correlative rule of claim preclusion has developed on the basis of this rule, to the effect that, in the absence of excusing circumstances, all "rights" and grounds of relief arising out of the transaction *must* be asserted in the single action.[3]

The Federal Rules as to joinder of parties have not so fully escaped their historic confines. However, they move toward the proposition that when an out-of-court transaction is drawn into litigation, all parties to the dispute should be made parties to the litigation. Thus, Rule 20(a) provides: "All persons may join in one action as plaintiffs if they assert any right . . . arising out of the same transaction. . . . All persons . . . may be joined in one action as defendants if there is asserted against them . . .

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1 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a, and Introduction at 5-10 (1982); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 3.11 (3d ed. 1985).

2 FED. R. CIV. P. 18(a) provides: "A party asserting a claim to relief . . . may join . . . as many claims . . . as the party has against an opposing party."

3 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment c (1982).

any right to relief . . . arising out of the same transaction. . . ."[4] The rules of claim preclusion have moved in the same direction.[5]

The second basic concept in the Federal Rules is that, in general, there should be full mutual access before trial to evidence that might be relevant to the issues, with a view to presentation at trial of all evidence relevant to any claim concerning the transaction. This concept is implemented by discovery mechanisms permitting a party to obtain from any other party "any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."[6]

The conjunction of these two procedural concepts has made it possible for very complicated out-of-court transactions to be embraced in one lawsuit. It should be observed that these concepts do not *create* complicated out-of-court transactions that can be litigated in a single action. The Federal Rules' joinder and discovery rules merely acknowledge that real world events sometimes give rise to controversies involving many parties and complicated evidence. Accepting these complexities as a fact of life, the procedural scheme of the Federal Rules sought to accommodate them.

A. *Joinder of Claims and Parties*

Now that we have become accustomed to the out-of-court transaction as the unit of litigation, it may be difficult to appreciate how that concept contrasts with possible alternatives. There remain today few practitioners who have worked with common law joinder rules in anything like their original form. Indeed, there remain only a few practitioners who have worked with joinder under the Field Code, which was the immediate predecessor of the Federal Rules.[7] Relative to the common law, the Field Code was a model of liberation. Nevertheless, the Field

4 FED. R. CIV. P. 20(a).

FED. R. CIV. P. 13(b) allows a defendant to assert any counterclaim against a defendant, and Rule 13(2) requires assertion of any counterclaim arising out of the transaction out of which the original claim arose. Rules 13(g) and 14 allow cross-claims and impleader claims on the basis of the transaction.

FED. R. CIV. P. 19 requires joinder, inter alia, of those parties without whom "complete relief cannot be accorded among those already parties. . . ." This formulation in terms of "complete relief" implicitly refers to the out-of-court transaction, for it is that event concerning which relief is to be complete.

Rule 24 allows intervention on essentially the same conceptual basis as the rule governing necessary parties. *See, e.g.*, Kennedy, *Let's All Join In: Intervention Under Rule 24*, 57 KY. L.J. 329 (1969); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

Rule 22, dealing with interpleader, by definition involves related multiple claims and multiple parties asserting such claims. *See* Hazard & Moskovitz, *An Historical and Critical Analysis on Interpleader*, 52 CALIF. L. REV. 706 (1964).

Rule 23, dealing with class actions, uses the formulation "common questions of law and fact" as the basis for class definition and therefore joinder. This formulation is interpreted to mean a transaction or series of related transactions out of which the common questions of law or fact arise. *See, e.g.*, Comment, *Class Action in a Products Liability Context: The Predomination Requirement and Cause in Fact*, 7 HOFSTRA L. REV. 859 (1979).

5 *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 29, 40, 41 and 62 (1983).

6 FED. R. CIV. P. 26(b)(1). *See* F. JAMES & G. HAZARD, *supra* note 1, at §§ 3.11, 5.8.

7 *See* Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Procedure*, 61 WASH. L. REV. 1367 (1986).

Code, like the common law, predicated joinder of claims upon the substantive legal character of the claim being asserted in the litigation rather than upon the out-of-court transaction from which the claim arose. It then made joinder of parties dependent on the joinder of claims.

The Field Code rules on joinder of claims were as follows:

> The plaintiff may unite several causes of action in the same complaint, where they all arise out of:
>
> 1. Contract, express, or implied; or,
> 2. Injuries by force, to person or property; or,
> 3. Injuries without force to person or property; or,
> 4. Injuries to character; or,
> 5. Claims to recover real property; with or without damages, for the withholding thereof; or,
> 6. Claims to recover personal property, with or without damages, for the withholding thereof; or,
> 7. Claims against a trustee by virtue of a contract or by operation of law.
>
> But the causes of action, so united, must all belong to only one of these classes, and must equally affect all the parties to the action, and not require different places of trial.[8]

This structure generally corresponded to the classification of claims under the common law writ system, and limited joinder of claims accordingly. The first six situations of permissible joinder corresponded respectively to the common law actions of assumpsit, trespass, trespass on the case, ejectment and trespass q.c.f., and replevin and detinue. But the term 'unite' was taken from Chancery parlance, as was the formula that the several causes of action must 'affect' all the parties to the action.

"With some changes in phraseology, the Field Code formulation on joinder of claims was adopted in all the code states."[9]

These joinder limitations, if they were still operative today, would have constricting effects that have to be illustrated to be appreciated. For example, under the Field Code a claim for breach of implied warranty was usually regarded as arising out of "contract . . . implied" (subsection 1), while a claim for negligence was regarded as one for "injuries without force to person" (subsection 3). A modern products liability case[10] thus would have to be split right down the middle to fit within the Field Code structure. By way of another example, a claim involving termination of an employment relationship would have been regarded as arising out of "contract, express or implied" (subsection 1), if based on the terms of the agreement, but it would involve "injuries without force to person" *or* "injuries without force to property"[11] (subsection 3), depending on the circumstances of the discharge. This would make a pleading nightmare

8 First Report of the Commissioners on Practice and Pleadings § 143, at 157 (1848). *See also* C. CLARK, CODE PLEADING 434-438 (2d ed. 1947).

9 D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE STATE AND FEDERAL 639 (2d ed. 1968). *See also* C. CLARK, CODE PLEADING 441 (2d ed. 1947).

10 *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

11 A claim for termination of employment can be said to involve "property." *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974). Claims of injury to person could not be joined with claims of injury to property. *See* C. CLARK, *supra* note 8, at 441 n.20.

of a modern day claim for wrongful discharge, which "naturally" involves claims formulated in contract, tort law, and often federal employment discrimination law.

The Field Code rules on joinder of parties were taken from equity and on their face appeared to be very liberal. As stated by the Field Code draftsmen:

> The courts of law generally administer justice between those parties only who stand in the same relation to each other; while courts of equity bring before them various parties, standing in different relations, that the whole controversy may be settled, if possible, in one suit, and others avoided. This reasonable and just rule, we would adopt for all actions.[12]

On this basis, the Field Code rules governing joinder of parties were formulated as follows:

> § 97. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.
> § 98. Any person may be made a party defendant, who has an interest in the controversy, adverse to the plaintiff.
> § 99. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants . . . .[13]

However, the principle that parties could be joined on the basis of "the whole controversy" was subordinated to the rules on joinder of claims.[14] Hence, parties could be joined only if they were involved in claims that could fit within the framework of claims joinder, which, as we have seen, was essentially a modernized version of the common law system.

Again, the constricting effects of the system have to be illustrated to be appreciated. A party against whom a claim in contract was asserted could not be joined with one against whom the substantive theory was tort, even if the claims arose out of the same transaction. In the products liability context, for example, a retailer against whom a contract claim was made could not be joined with a manufacturer who was sued on the basis of strict liability in tort.[15] In an action against a securities issuer for fraud,[16] it probably would have been impermissible to join an accounting firm sued for negligence. In a sexual harrassment claim, it probably would have been impermissible to join the aggressor-employee in the same action as the acquiescent employer, because the claim against the former is based on "injuries by force" while the latter could be said to involve "injuries without force" or perhaps "contract . . . implied."[17]

These limitations on joinder under the Field Code were ameliorated only when an additional category of permissive joinder of claims was subsequently added. This category permitted joinder of claims arising out

12 First Report of the Commissioners on Practice and Pleadings 124 (1848).
13 *Id.*
14 *See* C. CLARK, *supra* note 8, at 445-46.
15 *Compare, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
16 *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).
17 *See, e.g.*, Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

of the same "transaction,"[18] expressing the joinder concept ultimately adopted in the Federal Rules. However, restrictive judicial interpretation largely frustrated this provision's purpose.[19]

The structure of the Field Code, following the pattern of the common law, created what amounted to jurisdictional differentiations between types of wrongs. In the scheme of things under the Field Code, as under the common law, there was a "side" of the court that could entertain claims for contract; a side that could entertain claims for intentional physical injury to person; one for unintentional physical injury; one for injuries to "character"; and so on.

These jurisdictional boundaries compressed litigation into narrowly defined substantive categories. In doing so they maintained a simplified structure of litigation. The jurisdictional boundaries prevented chains of interconnected injury and proximate cause in out-of-court transactions from being predicates for drawing multiple claims and multiple parties into a single complicated case. Until the change was made allowing the "transaction action" to be the determinant of the scope of the litigation, in principle every case stood on a single substantive bottom. Correlatively, these boundaries obviated the need for "case management" and exercise of discretion on the part of judges in administration of the joinder rules.[20] Administration of the Field Code rules generated an esoteric procedural jurisprudence, to be sure, but it avoided the perils of transsubstantivity.

Another characteristic of the joinder provisions of the Federal Rules may be noted in passing. Since they permit all kinds of legal wrongs and a large set of parties to be brought to account in a single action, they have pervasive "substantive" legal effects. The *Erie* problem[21] has made us especially aware that procedural rules can have "substantive" effects, and also that substantive considerations cannot be purged from "procedure."[22] Yet, if the Federal Rules are to be searched for provisions having substantive or "outcome"[23] effect, it is unnecessary to inquire into such subtle matters as burden of proof[24] or service of process.[25] The Federal Rules' provisions on joinder of claims and parties pervasively alter the legal consequences of out-of-court transactions. Any doubt on this score can be dissipated by reflecting on litigation situations today where full implementation of the Federal Rules joinder policy is precluded by federal jurisdictional limitations.[26] And all of this says nothing about the effects on joinder of claims of the merger of law and equity effected under the Federal Rules.[27]

18 *See* C. CLARK, *supra* note 8, at 438-39.
19 *See, e.g.*, Ader v. Blau, 241 N.Y. 7, 148 N.E. 771 (1925).
20 *Cf.* Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).
21 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
22 *Compare* Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).
23 *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
24 Palmer v. Hoffman, 318 U.S. 109 (1943).
25 Walker v. Armco Steel Corp., 446 U.S. 740 (1980).
26 *See, e.g.*, Owen Equip. Erection Co. v. Kroger, 437 U.S. 365 (1978); Zahn v. International Paper Co., 414 U.S. 291 (1973).
27 *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 1.4-1.7 (3d ed. 1985).

B. *Discovery*

So far as pretrial discovery is concerned, the old regime's approach depended on whether the case was at law or was in equity. The policy of the common law concerning discovery, until statutory reforms beginning in the early 20th Century, was very clear: There was none.[28] Hence, a party could prosecute an action at law only on the basis of what evidence she might have "in the file" or which she could obtain by self-help investigation.

In an era in which we have become conditioned to broad discovery, it is difficult to fully appreciate the effect of having to rely entirely on one's own evidentiary resources to establish a claim. In yesteryear, an aggrieved person who did not observe the act that resulted in injury, or have documentary evidence to prove it, was dependent upon the voluntary cooperation of third party witnesses and the possibility of inculpating extrajudicial admissions by the opposing party. Moreover, the impediment to effective prosecution was not confined to that of presenting proof at trial. A claimant could get to trial only by filing a claim that could be prosecuted, and doing that in turn required being able to formulate a proper complaint. A properly formulated Field Code complaint had to state the particulars of the defendant's acts that caused the injury, and the plaintiff had to know those particulars in order to plead them.[29] The contrast with Federal Rules procedure is difficult to exaggerate. Typical modern actions based on discrimination in employment, securities fraud, environmental pollution, or violation of civil rights, and many types of professional malpractice and product liability claims, simply could not be asserted under the Field Code because of the absence of full-fledged discovery. Of course, at the time the Federal Rules were adopted in 1938, discovery under the code pleading system had been considerably expanded. Hence, the Federal Rules extended a development under code procedure that had far advanced, but the extension was a quantum leap.[30]

In the old regime, discovery nominally had much wider scope in equity than in common law procedure. However, the mechanics of discovery procedure in equity severely limited its effectiveness as a device to build a case. Under classical equity procedure discovery was not an intermediate stage between preliminary formulation of issues through pleading and the evidentiary showings at trial, as it now is. Instead, discovery requests for information were integral to the pleadings. The pleadings included discovery requests related to these allegations. Responses thereto developed by paper exchanges back and forth. Taken together these eventually constituted the evidentiary record that the Chancellor examined in making a decision on the merits. As described by Langdell:

> [I]n the Court of Chancery, the defendant was required to answer, by way of discovery, not interrogatories, but the bill itself; and hence

28 *See* James, *Discovery*, 38 YALE L.J. 746 (1929).
29 *Compare, e.g.*, Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).
30 *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 225 (3d ed. 1985).

> . . . plaintiffs were permitted . . . to insert interrogatories in their bills, and it was the constant practice to do so; and although in theory it was the allegations and charges, and not the interrogtories that the defendant was required to answer, and hence an interrogatory unsupported by a charge might be disregarded, yet . . . there was a constantly increasing tendency to . . . treat the interrogatories as the thing to be answered.
>
> . . . .
>
> As a plaintiff often had occasion to amend his bill, on the coming in of the defendant's answer, in order to meet a defence set up in the answer, so he often had occasion to do so for the purpose of changing the statement or his case or his prayer for relief, or for the purpose of changing or adding to his charges of evidence. He would wish to do the former, because of the new light which the answer had thrown upon the case; and he would wish to do the latter, because he was not satisfied with the discovery already obtained, and therefore wished to sift the defendant's conscience further.
>
> . . . .
>
> If . . . the plaintiff thought [the answer] insufficient, i.e., that it was not a full answer to his bill in point of discovery, he excepted to it in writing, i.e., pointed out what parts of the bill were not sufficiently answered, and thereupon the question of the sufficiency of the answer was decided, first by a Master, and then by the court (if necessary) on appeal. If it was decided that the answer was insufficient, the defendant was required to file a further answer, and so on till the bill was fully answered.[31]

The discovery provisions of the Federal Rules fully disengaged discovery from pleading, greatly enlarged plaintiff's reach, and indeed made it substantially a substitute for pleading. Moreover, in conjunction with the rules of pleading the discovery provisions radically changed the conditions that plaintiff had to satisfy in order to commence an action. Under the old regime, to file a suit in equity a claimant was required, on the basis of his own evidentiary resources, to formulate the alleged wrongful act and its proximate consequences. Only then could he file the suit and use the court's compulsory process of discovery, such as it was, to develop additional evidence. In contrast, under the new regime, the pleader is not required to have an inculpating case in order to file his suit. As held in *Conley v. Gibson*, "A complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. . . ."[32]

The mechanisms of discovery provide the claimant an alternative means to formulate his case. As held in *Hospital Building Co. v. Trustees of Rex Hospital*, "dismissal prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."[33]

C. *The Transparent Transaction*

The Federal Rules joinder and discovery provisions contemplate litigation that opens up the full scenario of the out-of-court events. The

31 Langdell, *Discovery Under the Judicature Acts*, 11 HARV. L. REV. 205, 208-10 (1897).
32 355 U.S. 41, 45-46 (1957).
33 425 U.S. 738, 746 (1976).

only boundary is legal materiality under any relevant principles of substantive law and legal causation, regardless of the substantive domain from which those principles are drawn and regardless of the number and position of the parties that may be implicated. So far as concerns the scope of the case, the Federal Rules procedure therefore not only "is" transsubstantive: it *defines* the scope of the action so as to make the litigation as procedurally transparent as possible.

At the same time, under the Federal Rules the depth of the factual inquiry extends to "any matter, not privileged, which is relevant to the subject matter."[34] As authoritatively stated, "[T]he discovery-deposition rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts. . . . [E]ither party may compel the other to disgorge whatever facts he has in his possession."[35]

The authorization of discovery in terms of relevance is a criterion fundamentally of substantive law. In this dimension as well, therefore, the Federal Rules are procedurally transparent. They intend that the adjudication be guided by no other policy except full examination of the disputed transactions.

What the Federal Rules contemplate, in short, is that an out-of-court transaction may be examined in all of its substantive ramifications to the extent of all of its evidentiary implications.

II. A System of Forms of Action

A. *Discontent with Transparent Procedure*

A lawsuit consists of either an issue of law or an issue of fact or both, or of several such issues.[36] The sources out of which an issue of law is formulated and tendered for trial are the publicly available texts of the law—constitutional provisions, statutes, judicial decisions, regulations, etc. The factual issues in turn are determined by the legal contentions formulated out of these sources.

An issue of fact once formulated is resolved through the epistemology of ordinary experience. Relevance and probative value of evidence is determined not by any method of reasoning peculiar to the law but upon the human mind's ordinary methods of inference, such as they are.[37] The trial of factual issues thus is not a deeply mysterious undertaking, or at least its mysteries are ones that we practice in everyday life and have learned to accept. Yet this very unmysterious process is difficult to keep in focus when it tries to address multiple issues, particularly those in a complicated "big" case.[38]

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

35 Hickman v. Taylor, 329 U.S. 495, 507 (1947).

36 Michael & Adler, *The Trial of an Issue of Fact: I*, 34 COLUM. L. REV. 1224 (1934), remains the most elegant formal analysis of litigation.

37 *See* Lempert, *Modelling Relevance*, 75 MICH. L. REV. 1021 (1977).

38 *See, e.g.*, Brazil, *Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873.

The factual complexity of some litigation under the Federal Rules results from the transparency of Federal Rules procedure, which has no rule boundaries except relevance. The need nevertheless to impose order on complicated issues has forced reliance on a control mechanism that is not in the form of rules. This mechanism is judicial management through exercise of judicial discretion. The managerial technique is susceptible of overuse or abuse, and the risks of such abuse have invited reconsideration of whether cases ought to be allowed to become as complicated as they now can be. Correlatively, the question arises whether different kinds of procedures can be devised for different kinds of cases.

If the essence of the Federal Rules is to make transparent the complicated transactions that occur in the real out-of-court world, and if that procedure leaves us in discontent, then the obvious solution is to make those transactions less transparent. At least two general remedial strategies are possible. The first is to impose restrictions on the substantive legal contentions that can be made when a transaction is drawn into litigation. The second is to restrict the kinds of evidence that can be pursued.

B. *Forms of Action*

Restricting the substantive legal contentions that can be made about a transaction will immediately simplify the legal questions that the case presents. For example, if a plaintiff is allowed to assert either a tort theory or a contract theory, but not both, plaintiff will have to elect and the defendant and the court will confront only the claim that has been elected. The same approach would apply to legal defenses. Thus, a defendant could defend on the ground of nonliability or on the ground that the statute of limitations has run, but not both, or on the ground of nonliability under state law or preemption of the field by federal law, but not both, and so on. The result would surely constitute simplification.

Restricting the substantive legal contentions upon which the parties may rely would also simplify the factual issues. Since legal issues determine factual issues, restrictions on substantive legal contentions would have a correlative effect in eliminating factual issues. Indeed, the greatest effect of limiting the parties' substantive legal contentions probably would be the effect on fact issues. There would be correspondingly reduced scope for pretrial discovery.

Such a set of limitations would of course re-create the common law forms of action, or at least their more lenient Field Code derivative. The common law forms of action in principle permitted an adjudication to consider only one substantive theory at a time, regardless of the complexity of the out-of-court transaction out of which the litigation arose. In contemplating the virtues of that system we should not imagine that the out-of-court transactions in days of yore occurred in the concise form in which they are discussed in the yearbooks.[39] When Otho the landlord broke into the house of Rollo the tenant, it was not that Otho simply and

39 *See, e.g.*, *Yearbooks of Edward II*, in 81 SELDEN SOCIETY (J. Collas ed. 1964).

solely hit Rollo over the head, thus generating a claim fitting neatly into the category of "injuries to the person involving force."[40] Rather, Otho and Rollo had been squabbling over whether Rollo had paid his full rent ("contract, express or implied"), and whether it was Otho's cattle or someone else's that had strayed into the demised premises ("injury to property without force"), and moreover, before Otho hit Rollo he had called him a thief and a whoreson ("injuries to . . ."), etc. There were even more complicated transactions to which the Chancellor devoted his scarce resources of attention.

The common law system did not yield simple litigation because out-of-court transactions in the common law era were inherently simple. It yielded simple litigation because it forced all out-of-court transactions, simple or not, into simple molds in which only one substantive claim could be asserted. Defendant was subjected to corresponding restrictions. The system had its attractions, and still does. However, those who hunger for a system of procedure that will be simpler by being adapted to specific types of substantive legal controversy ought to recognize that they are pro tanto calling for reinvention of the common law forms of action.

The enforcement of a system of forms of action requires two related bodies of procedural law. The first is a law of jurisdiction, the second a law of res judicata. By rules of "jurisdiction" I mean rules that put boundaries around the kinds of claims that are "arguably within" a particular substantive category of claim. For example, if the procedural rule is that a claim must be in "contract" or in "tort," or whatever, then there have to be rules specifying how far a claim can deviate from the paradigm and still remain within the category designated by the paradigm. For example, a written contract is surely a "contract," but what about an implied contract or a claim based on promissory estoppel? A hit in the head is an "injury to the person with force," but what about negligent infliction of mental distress? The existence of non-paradigm types of claims necessitates a jurisprudence by which to determine whether any particular non-paradigm claim is "colorably" or "arguably" within the procedural form, so that its merits may be entertained in the proceeding. That is, to the extent that a procedural system is to be made substantively specific, it must develop a law of jurisdiction corresponding to every substantive type of claim.

This problem is illustrated in the modern law of federal question jurisdiction in the form of such questions as: When does a claim "arise under" federal law? What are proper "pendent" claims and "ancillary" parties? And so on.[41] Precisely the same penumbra of jurisdictional law evolves around the constitutive provisions of administrative agency authority. In worker's compensation, for example, there is a jurisdictional question as well as a substantive one as to what kind of injury is "in the course of" employment?[42] In labor law, there is a counterpart question

40 *See supra* text accompanying note 8.

41 *Compare, e.g.*, Cort v. Ash, 422 U.S. 66 (1975), *with* Aldinger v. Howard, 427 U.S. 1 (1976).

42 *See, e.g.*, Nelson v. Iowa-Illinois Gas and Elec. Co., 259 Iowa 101, 143 N.W.2d 289 (1966).

as to what is "arguably" an unfair labor practice?[43] In banking regulation, what is a "security"?[44] And so on. If procedure is to be related to specific substantive controversies, there have to be jurisdictional provisions that are defined in substantive terms but which extend somewhat beyond the boundaries of the substantive categories as such. This is what common law pleading, that most arcane of legal sciences, was all about. A system that differentiates procedures according to the substantive character of the claims *is* a formulary system.

The second necessary body of auxiliary law is that of res judicata. Under the Federal Rules system, the rule of res judicata is, in general, that once a litigant has litigated over a transaction, on whatever legal or factual basis, that is the end of the matter. Since the unit of litigation under the Federal Rules is the transaction, the rules of res judicata are defined in corresponding terms. Hence, under the Federal Rules once a transaction has been drawn into litigation by any substantive claim, that litigation generally bars further litigation concerning the same transaction. The term "transaction" is acknowledged to be untidy and in effect confers a good deal of discretion on the judges to decide what ought to be regarded as having been decided in any given previous case.[45] But the concept is clear enough.

In a procedural system based on substantive formularies, however, it would be unjust to have rules of res judicata that are based on the transaction as the unit of litigation. By definition, the procedural system ex ante allowed the parties to assert only some of the substantive claims and defenses that were immanent in the out-of-court transaction. Rules of res judicata that gave the parties in such a system only one chance to elect which substantive issues to submit would amount to a vengeful scheme of election of remedies. The common law indeed inclined in that direction.

A fairer rule of res judicata in such a formulary system would be that preclusion ex post corresponds to the ex ante opportunity to litigate. Such indeed was the law of res judicata under the Field Code, which defined res judicata in terms of "cause of action."[46] The problem was to define what was meant by the same "cause of action." The definitions of res judicata under the Field Code were cast in such terms as "same evidence," "same basic right," etc. Collectively these responses constituted a body of res judicata law almost as arcane as common law pleading. These complications ultimately derived from the same fundamental source, i.e., the fact that the procedural system was predicated on differentiation of substantive claims.

43 *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

44 *See* Gould v. Ruefenacht, 471 U.S. 701 (1985).

45 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment b (1988): "The expression 'transaction, or series of transactions,' is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases."

46 *See* RESTATEMENT OF JUDGMENTS §§ 61-67 (1942); *e.g.*, Sawyer v. First City Fin. Corp., 124 Cal. App.3d 390, 177 Cal. Rptr. 398 (1981).

C. *Forms of Action Under the Federal Rules*

A formulary system of course can be recreated under the Federal Rules. Indeed, the embrionic forms of such a system already exist.

1. Narrowing the Scope of the Action

All procedural disputes over joinder of claims and the scope of res judicata under the Federal Rules procedure can be considered as struggles over how far the rules are to be made into a formulary system.

That there already is a formulary system submerged in the Federal Rules can be seen by considering a few examples. *Eisen v. Carlisle & Jacquelin*[47] comes immediately to mind. It will be recalled that *Eisen* involved questions concerning how Rule 23 should be applied to class actions involving a large number of small monetary claims. One question in *Eisen* was whether the trial court, in deciding whether to certify a proposed class action, could consider the merits of the plaintiffs' claim in a preliminary and tentative way. A second question was whether the cost of giving "opt out" notice to the absent class members could under any circumstances be imposed initially on the defendants.

The Supreme Court answered both questions in the negative in the face of the fact that an excellent case could be made to the contrary on each question. The idea that a trial court might make a preliminary and tentative consideration of the merits is not unheard of in our procedural jurisprudence. Indeed, precisely such a determination is the essence of a judge's decision whether to grant a preliminary injunction.[48] Considering that the class suit has its origin in the same tradition of equity as the preliminary injunction, there is a strong historical case for a procedure of preliminary determination. Such a preliminary decision in an *Eisen* type of suit would determine whether the case was to involve $100 or $1 million. That is indeed a weighty matter to resolve on a merely preliminary and tentative basis. However, it is neither analytically more difficult nor greater in impact on the parties' strategic position than is a preliminary decision whether to grant a temporary injunction. As for the question of the costs of giving notice, it is not unknown to our procedural law that a putative obligor give notice to his supposed creditors, for example, in bankruptcy, and in the administration of decedents' estates.[49] Rule 23(d) certainly admitted of an interpretation to that effect, but the Court declined to give it.

Substantive considerations—matters of "outcome"—seem evidently to have been involved in *Eisen's* resolution of the questions presented. If the trial court could identify those damages class actions that seemed strong on the merits, the certification ruling would become, in effect, a preliminary advisory opinion on the merits. The availability of such rul-

47 417 U.S. 156 (1974).

48 *See, e.g.*, Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986).

49 Indeed, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the putative obligor was required to bear the cost of giving notice under penalty of being unable to have an adjudication determining his potential liability. *See also* Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97.

ings would reduce the economic risks undertaken by a plaintiff in prosecuting a class suit of debatable merit and would substantially illuminate the case's settlement value. That in itself is a form of discovery, in that it provides information of the most valuable kind for the parties' assessment of their respective prospects in the litigation. *Eisen* refused to extend this benefit to the small claims damage class suit.

While the small claims damage class action in federal courts was thus confined by the rules pronounced in *Eisen*, the same kinds of class suits have been more liberally treated in some state court systems.[50] Moreover, the federal courts have treated class suits of other kinds, particularly ones involving civil rights claims, with far more sympathy. At the notice stage of civil rights cases, for example, it has been held that individual notice is required even in injunction suits where Rule 23 does not seem to require it.[51] Moreover, in civil rights suits preliminary evaluation of the merits is recognized as an appropriate part, indeed an integral part, of the certification decision.[52] If this is not essentially the same problem as was involved in *Eisen*, it is different only in name.

These substantively-related differences in the class action joinder rules are paralleled by substantively-related differences in res judicata rules applied in class actions. The Supreme Court has applied the rules of res judicata in civil rights class suits with a tenderness sharply contrasting with its res judicata doctrine in other types of cases.[53] These differences appear unmistakably to reflect substantive considerations. A Rule 23(b)(2) civil rights class suit has become one form of class action, while a Rule 23(b)(3) tort damages suit is another.

The emergence of forms of action under the Federal Rules is illustrated again in the rules governing pendent jurisdiction. Generally speaking, the jurisdiction of the federal courts is predicated upon either legal issues involving federal law or the fact that the litigants are of diverse citizenship.[54] The statutory implementations of the Constitutional provision have been construed to require that in federal question cases the plaintiff's claim be based on federal law[55] and that in diversity cases the diversity be complete.[56] Neither of these is a Constitutional requirement,[57] nor is the restrictive interpretation of the jurisdictional statutes an ineluctable one.[58] But the restrictive interpretation of the jurisdictional statutes has meant that the scope of district court jurisdiction is narrower than the transactions generating the actions having characteristics described in the jurisdictional statutes.

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50 *See, e.g.*, Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975).

51 *See, e.g.*, Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979).

52 *See* General Tel. Co. v. Falcon, 457 U.S. 147 (1982); East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395 (1977).

53 *Compare* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984), *with* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

54 U.S. CONST. art. III, § 2; 28 U.S.C. §§ 1331, 1332 (1982).

55 *E.g.*, Gully v. First Nat. Bank, 299 U.S. 109 (1936).

56 Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

57 *See* Osborn, v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).

58 *See* C. WRIGHT, LAW OF THE FEDERAL COURTS §§ 23-24 (4th ed. 1983).

This discrepancy between the scope of federal jurisdiction and the scope of the typical underlying transaction is the source of the tensions and inconsistencies in pendent jurisdiction doctrine. On one hand, the rules of jurisdiction are supposed to be strictly construed, while on the other hand the rules of jurisdiction ought to allow the federal courts fully to adjudicate the controversies coming before them. The history of pendent and ancillary jurisdiction reveals inconsistency and oscillation in the formulation.

> The concept is the product of decisional law rather than statute and of wavering evolution rather than progressive development. It is internally inconsistent in that it is applied to permit intervention and impleader of third parties, but not joinder of additional parties under the necessary parties rule. . . . Over the course of history, it has been formulated more and less broadly, depending on whether the federal courts of the time were chiefly concerned with observing limitations on their jurisdiction, or with doing a complete job of adjudicating controversies that had come before them.[59]

In some types of cases involving commercial transactions, the concepts of pendent and ancillary jurisdiction have been given relatively expansive scope,[60] while a less expansive approach has been taken in personal injury cases where jurisdiction is based on diversity.[61] A reading of particular cases suggests that the substantive character of the claims often influences whether the scope of the federal action will be relatively narrow or relatively capacious.[62]

2. Foreshortening Exploration of the Facts

As we have seen, the other dimension in which the Federal Rules of Civil Procedure are procedurally transparent is in explorations of the facts. Under the Federal Rules, the facts are explored through discovery, and the scope of discovery depends on substantive relevance under the claims asserted. Exploration of the facts in Federal Rules procedure therefore nominally extends to any topic that can be substantively abstracted from the out-of-court transaction between the parties. On this basis, there would seem to be little room to limit exploration of facts on the basis of substantive considerations.

Nevertheless, there are at least three strategies by which the exploration of facts can be restricted according to criteria that are more or less substantive. These are the law of privilege, the law of immunity, and rules governing burden of proof. Perusal of the law in these three areas indicates how the scope of fact development may be regulated according to the substantive context.

The most obvious basis upon which to limit exploration of facts is through the law of privilege because Federal Rule 26(b) exempts privileged material from discovery. In proportion as the law of privilege im-

59 F. JAMES & G. HAZARD, CIVIL PROCEDURE 61-62 (3d ed. 1985).

60 *See, e.g.*, Fairview Park Excavating Co. v. Al Monzo Constr., 560 F.2d 1122 (3d Cir. 1977).

61 *See, e.g.*, Owen Equip. Co. v. Kroger, 437 U.S. 365 (1978).

62 In Aldinger v. Howard, 427 U.S. 1 (1976), for example, there is an explicit substantive policy basis for applying the concept of ancillary jurisdiction in narrow terms.

mures relevant information concerning a type of out-of-court transaction, that type of transaction is rendered less transparent through discovery procedure and, accordingly, less promising as a basis for a lawsuit in the first place. Enlarging the scope of privilege goes against the grain of modern trends in "freedom of information." However, concurrent with the *glasnost* of the freedom of information movement is a counter movement in which evidentiary privileges have been enlarged or newly created. The path of the law in this respect is not straight and direct, but then the path of the law rarely is. In any event, an illustration makes the point.

The most salient expansion of privilege—or the most salient confirmation of established privilege law, depending on how one looks at it—is the attorney-client privilege as applied in the corporate context. Twenty-five years ago, it was arguable whether the attorney-client privilege applied at all in the corporate context;[63] now it is settled that it does. Until not much earlier than that, it was arguable whether the privilege applied to the communications with counsel employed by the corporate entity, as distinct from communications with a lawyer in an independent firm;[64] now it is settled that the privilege applies to corporate counsel. Ten years ago the emergent rule appeared to be that the protection of the privilege extended only to communications involving the "control group" in the corporation;[65] now it is settled, at least in matters governed by federal law, that the privilege applies to all communications with those having a "need to know." And until fairly recently, the courts drew a sharp distinction between communications *to* legal counsel, and the communications which the client received *from* legal counsel; today, the tendency is to regard the lawyer's communication as implicitly containing the original communication from the client and hence equally protected by the privilege.[66]

All these developments, of course, were made authoritative in *Upjohn Co. v. United States*.[67] The result is that types of corporate transactions in which legal counsel plays a central role generally enjoy extensive immunity from discovery. That includes most management transactions that are substantial in financial significance and nonroutine in character. The law of privilege thus puts these internal corporate matters largely out of bounds of pretrial investigation, because virtually the only way to prove such transactions is through the corporation's own documents. And this in turn significantly shapes the "form of action" that can be brought to challenge corporate decision-making.[68]

The second basis upon which the exploration of facts may be limited is through immunity. If a particular type of conduct is legally immune, to

63 *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963).

64 *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950).

65 *See In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224 (3d Cir. 1979).

66 *Compare In re* Fischel, 557 F.2d 209 (9th Cir. 1977) *with* United States v. Ameranda Hess Corp., 619 F.2d 980 (3d Cir. 1980).

67 449 U.S. 383 (1981).

68 The exception formulated in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), whatever its precise scope, is of course significant.

that extent it may not be the subject of an action. And to the extent that the conduct may not be the subject of an action, it may not be the subject of discovery. It might seem odd to give primacy to immunity's effect in limiting discovery, rather than to its effect in limiting liability. However, maintaining secrecy about the transactions is often of greater practical significance than becoming liable for damages concerning them. This probably is the case of many public officers, who may lose their jobs if discovery is permitted but will not personally pay anything if found liable for damages, because their employer will indemnify them for the latter. In any event, immunity shuts the door on exploration of the facts. In recent years, immunity has been conspicuously enlarged concerning decision-making by public officials. Without going into detail, judges and prosecutors have been reaffirmed to have absolute immunity from liability and, correspondingly, absolute immunity from discovery. Limited immunity has been conferred on various aspects of decision-making by other public officials.[69] While limited immunity does not foreclose discovery, it immediately restricts the ambit of discovery to evidence that will prove "malice" or whatever is the substantive term in which the boundary of immunity is defined. A secondary effect of limited immunity is that claimants will be disinclined to bring suit in the first place unless there is reasonable prospect that discovery will yield evidence to prove the required "malice" or whatever.

The third means by which to limit the practical significance of discovery is allocation of burden of proof. On first analysis, allocating the burden of proof one way or another would seem to have no effect on discovery. No matter which party has the burden of proof, both parties presumably will want to discover all the evidence available concerning that issue.

Nevertheless, allocation of the burden of proof affects the strategic value of conducting discovery in search of probative evidence. If most of the potentially material facts have to be proved by defendant, then plaintiff has less need of discovery than where he has this burden. On the other hand, if the burden as to all the hard-to-prove issues is placed on plaintiff, and the evidence on these issues is usually in defendant's hands, then plaintiff faces the prospect of being able to win only if he can sustain the cost and inconvenience of large-scale discovery.

How this works out can be illustrated in the evolution of the rules as to burden of proof in employment discrimination cases. Originally, in *McDonnell Douglas Corp. v. Green*, the court defined the elements of a plaintiff's case as follows:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[70]

69 *See generally* W. PROSSER & W. KEETON, TORTS § 132 (5th ed. 1984).

70 411 U.S. 792, 802 (1973).

This formulation was understandably interpreted to mean that plaintiff had only to prove these elements to establish a prima facie case. Since proof for these facts was readily accessible to a plaintiff in most cases, this burden of proof allocation meant that plaintiff had little need for discovery, unless defendant raised matters of weight in avoidance.

In *Texas Dep't of Community Affairs v. Burdine*,[71] however, the Supreme Court held that its pronouncement in *McDonnell Douglas* had been misunderstood. The proper rule, said the court, was that if plaintiff proved the elements defined in *McDonnell Douglas*, then defendant had only to present some "legitimate, nondiscriminatory reason" for the employment decision in question. If defendant did that, held the court, then the burden of proving the basis of the decision was restored to the plaintiff. With the burden of proof being allocated as in *Burdine*, the employee would have to pursue extensive discovery to be able to negate the "legitimate, nondiscriminatory reason" that the employer inevitably would offer.

The point of the analysis is not to question the merits of the allocation of the burden of proof in employment discrimination, important as that issue may be as a matter of substantive policy. The point is simply that allocation of burden of proof vitally affects not only ultimate outcomes in litigation but also, as a practical matter, the uses of discovery. It is recognized that the rules for allocation of burden of proof are responsive to substantive policy considerations.[72] The results are various forms of action.

III. Conclusion

If these differentiations among types of claims are considered in aggregate, they amount to a rich jurisprudence of procedural law shaped by substantive considerations. The procedural jurisprudence of the Federal Rules begins with the proposition stated in Rule 1 that the Federal Rules "govern . . . all suits of a civil nature." However, these substantively transparent rules have been modified into substantively particularized variations. Maitland observed nearly a century ago that "the forms of action we have buried, but they still rule us from their graves."[73] Forms of action *redux*.

71 450 U.S. 248 (1981).

72 *See* Cleary, *Presuming and Pleading, An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959).

73 F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (A. Chayton & W. Whittaker eds. 1936).