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INTERCEPTING AND DISCOURAGING DOUBTFUL LITIGATION: A GOLDEN ANNIVERSARY VIEW OF PLEADING, SUMMARY JUDGMENT, AND RULE 11 SANCTIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

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Professor Louis marks the 50th anniversary of the Federal Rules of Civil Procedure by examining their near failure in the past decade and recent efforts to revitalize them. He finds that a generation of liberal judicial construction had given the Federal Rules a strong proclamairent, laissez faire bias which left them unable to cope with a variety of abusive litigative tactics or the flood of cases engulfing the federal courts. He then examines recent reform efforts directed towards those devices in the Federal Rules like pleading, summary judgment, and rule 11 which are designed to intercept and discourage the assertion of doubtful or meritless claims and defenses. He finds that the recent judicial resuscitation of fact pleading will create many more problems than it solves, that the judicial revitalization of the motion for summary judgment has generally been desirable, even though the courts have not yet explicated their new approach, and that the implementation of amended rule 11 has generally been successful. He concludes finally that these reforms have probably not gone far enough, that the system is still vulnerable to the tactical assertion of protracted claims that are doubtful but not totally without merit, and that in the foreseeable future we shall have to consider the adoption of even more extreme reform measures.

I. INTRODUCTION

The Federal Rules of Civil Procedure are now fifty years old.¹ For much of this time they were widely acclaimed "the best code of practice that is to be found anywhere in this country, or for that matter anywhere in this world."² Now that acclaim has turned to doubt.³ In recent years the federal courts have

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1. Federal Rules of Civil Procedure 1-86, which were promulgated by the United States Supreme Court by order of December 20, 1987, 302 U.S. 783, under the authority of the Enabling Act, now 28 U.S.C. § 2072 (1982), became effective on September 16, 1988.

2. Parker, Book Review, 57 HARV. L. REV. 735, 736 (1944). See generally C. WRIGHT, THE LAW OF FEDERAL COURTS 405-06 (4th ed. 1983) (citing to other praise of the Federal Rules).

3. See generally Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure In Historical Perspective*, 135 U. PA. L. REV. 909, 911-12 (1987) (listing current critics and criticism of the Federal Rules).

been increasingly mired in congestion, delay, and high litigation costs,⁴ problems the Federal Rules have either partially caused or exacerbated⁵ and with which—at least until the amendments of 1983⁶—they were apparently unable to cope.⁷ Indeed, by 1983 these problems had become severe enough to raise questions about the viability of the federal civil justice system⁸ and even the continuing worth of the Federal Rules.⁹

The Federal Rules have been so widely venerated and copied¹⁰ that this abrupt transition from apparent greatness to potential failure may appear shocking, but it is not without precedent. On the eve of its own golden anniversary the Field Code,¹¹ which preceded the Federal Rules as the dominant American procedural system,¹² was likewise branded a failure¹³ and of course was eventually replaced.

Perhaps the lesson to be learned is that the useful life of a procedural system is only half a century. Nevertheless, it is too soon to consider replacing the Federal Rules or surrendering them to the mercies of contemporary tinkers¹⁴

4. The problems of the federal courts have been analyzed extensively. See generally Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981) (a statistical analysis of the growth in filings and delay); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (questioning the thesis that America is an overly legalized, litigious society); Hufstедler, *The Future of Civil Litigation*, 1980 UTAH L. REV. 753, 754, 756-59 (describing the sources and costs of court congestion and delay); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 33-35 (1984) (attributing the system's problems to byzantine regulatory schemes, a procedural system oblivious to the social cost of litigation, cost allocation rules that encourage meritless advocacy, a plethora of substantive rights, and a corps of eager attorneys).

5. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-44 (1986) (listing the contributions of the Federal Rules to modern procedural problems); Miller, *supra* note 4, at 8 (the Federal Rules may be contributing to the protraction of cases today).

6. Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165 (1983). The highlight of these amendments was the revitalization of rule 11. Other changes involved rule 7 (making it clear that rule 11 applies to motions), rule 16 (substantial changes in the pretrial conference rules, including a strengthened sanctions provision), and rule 26 (provisions limiting the frequency or extent of use of discovery methods and imposing rule 11 type signing requirements on discovery requests, responses, and objections).

7. See generally A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 8 (1984) (describing need for amendments).

8. Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 303 (1979) ("the twin demons of cost and delay are asphyxiating our courts, both state and federal, [with] pernicious effects on the quality of justice.").

9. Labaton, *Federal Court Rules Challenged After 50 Years*, N.Y. Times, Oct. 14, 1988, at B5, col. 3; cf. Subrin, *supra* note 3, at 1001-02.

10. Over half the states have adopted the Federal Rules in whole or substantial part. WRIGHT, *supra* note 2, at 406.

11. Named after its draftsman, David Dudley Field, this Code of Civil Procedure was adopted first by New York in 1848. An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, 1848 N.Y. Laws.

12. By 1900 27 states had adopted codes of civil procedure based in whole or substantial part on the original Field Code. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 18 (3d ed. 1985).

13. The Code was roundly criticized by Roscoe Pound in 1906 in his famous address entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 A.B.A. REPORTS 395 (1906).

14. The phrase is borrowed from former Chief Justice Warren Burger who himself borrowed it

or discretionary trial level management.¹⁵ Their defects still must be identified precisely and possible cures must be considered. Indeed, the 1983 amendments constituted just such an effort,¹⁶ the success of which must be evaluated before the underlying structure of the Rules is fundamentally altered or abandoned. Moreover, because the Federal Rules constitute a mature procedural system in harmony with our overall legal system, their eventual replacement doubtlessly will be more evolutionary than revolutionary. Hence, a firm understanding of what the Federal Rules have accomplished and why before 1983 they almost failed would still be essential to any effort to replace them.

II. THE CONTRIBUTIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules focus primarily on events before trial¹⁷ and, in particular, on the structure of the pretrial system.¹⁸ This system must accomplish four basic tasks: (1) the provision of notice to the parties and the court of the asserted claims and defenses; (2) the ascertainment or discovery of the relevant facts; (3) the identification and narrowing of the issues for trial; and (4) the interception before trial of substantively or factually meritless claims and defenses.¹⁹ For these tasks the Field Code had provided only two basic devices, the pleadings and the demurrer. The pleadings gave notice and the demurrer adequately intercepted substantively meritless claims and defenses.²⁰ Although neither device was designed specifically to accomplish the remaining basic pretrial tasks, of necessity both were pressed into such service. Thus, the pleadings were required to contain a detailed statement of the facts constituting the cause of action or defense.²¹ Those that failed to do so were demurrable;²² those that

from Roscoe Pound. Burger, *Agenda For 2000 A.D.—A Need For Systematic Anticipation*, Keynote Address of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minn. (Apr. 7-9, 1976), reprinted in 70 F.R.D. 83 (1976).

15. Much has been written in recent years about the value and dangers of trial judges as case managers. See generally Miller, *supra* note 4, at 19-22, 33-35 (arguing that more intense case management will improve the system's efficiency); Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 426-31 (1982) (suggesting that pretrial case management taints judicial trial neutrality).

16. See *supra* note 6; see also Miller, *supra* note 4, at 12, 19, 23-24, 26 (comments by the principal author of these amendments on their purposes).

17. The Federal Rules made few changes in trial procedure. Their focus was on those areas of civil procedure traditionally denominated pleading and parties, motions and amendments, all of which deal primarily with events before trial. Not surprisingly these areas of change are also the ones blamed for the failures of the Federal Rules. Miller, *supra* note 4, at 8-9 (blaming notice pleading, inadequate interception through motions to dismiss and for summary judgment, and the "quicksand" of discovery).

18. This system, which processes all cases, has two principal functions: to identify and dispose of cases that lack disputed questions of fact and can be resolved as a matter of law on motion (sometimes hereafter referred to as the interception function), and to prepare the remaining cases, which contain disputed questions of fact and apparently require a trial, for a quality trial on the merits.

19. C. WRIGHT, *supra* note 2, at 438 (assigning these same four functions to "pleadings," which together with the demurrer once constituted most of the pretrial system). The first three tasks together make up what I have called the second basic function of the pretrial system, see note 18 *supra*, preparing a case for a quality trial on the merits.

20. This was the familiar process of demurring for failure to state a cause of action or defense. See generally J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 5.22 (1985) [hereinafter J. FRIEDENTHAL].

21. J. FRIEDENTHAL, *supra* note 20, § 5.5.

did perforce strictly limited the proof which could be offered at trial.²³ In this way the pleadings and the demurrer together helped to ascertain the facts, to define the issues for trial, and to intercept factually meritless claims and defenses.²⁴

Code jurisdictions cannot be faulted for making do in this way with the devices available to them or for adopting certain technical requirements as the necessary means,²⁵ but often they lost sight of the ends sought and rigidly enforced the required means almost for their own sake.²⁶ The net result was a flawed pretrial scheme that unfairly required pleaders to ascertain and set forth the relevant facts fully and accurately at the beginning of the action,²⁷ ordinarily without the benefit of discovery or a liberal amendment policy.²⁸ As a result the demurrer was turned into a nasty, wasteful, and occasionally unjust tactical weapon.²⁹ Although some of the demurrer's victims doubtlessly had been lazy

22. *E.g.*, *Gillespie v. Goodyear Serv. Stores*, 258 N.C. 487, 128 S.E.2d 762 (1963) (sustaining demurrer to factually deficient, conclusory complaint).

23. Evidence offered by a party that is at variance with the allegations in that party's pleadings is not admissible. *F. JAMES & J. HAZARD*, *supra* note 12, § 4.14. In this way the pleadings define the issues for trial, *id.* § 4.12, unless leave to amend is given. In many Code jurisdictions, however, attempts to prove unpleaded causes of action or defenses were regarded as "fatal" variances that could not be cured by amendment. *J. FRIEDENTHAL*, *supra* note 20, § 5.26, at 304.

24. Code courts would ordinarily give leave to amend after sustaining a demurrer to a factually deficient complaint. *J. FRIEDENTHAL*, *supra* note 20, § 5.22, at 295. If the missing allegations were not supplied, the complaint would be dismissed, unless leave to amend were again given. *E.g.*, *Gautier v. General Tel. Co.*, 234 Cal. App. 2d 302, 310, 44 Cal. Rptr. 404, 409 (1965) (upholding dismissal of fourth amended complaint since plaintiff apparently could not state a valid cause of action). If the missing facts are not supplied because they are untrue or unprovable, then the demurrer is being employed, albeit indirectly, to intercept factually deficient claims and defenses. See *Louis, Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 746 (1974) ("The 'implicit assumption' behind the demurrer was that 'the claimant could not prove what he did not allege and would not allege, ordinarily under oath, what he could not prove.'").

25. Code pleading requirements ideally should have been stated in functional terms, for example with sufficient factual detail to show *prima facie* the existence of the claim or defense asserted. Lawyers, however, seem to prefer verbal formulas to functional statements. Hence, Code states adopted the infamous requirement that pleaders set forth the "ultimate facts," rather than "conclusions of law" or "evidentiary facts." *J. FRIEDENTHAL*, *supra* note 20, § 5.5.

26. Like most other verbal distinctions, the differences among conclusions of law, ultimate facts, and evidentiary facts were not clear-cut, but were simply matters of degree. *Cook, Statements of Fact In Pleading Under the Codes*, 21 COLUM. L. REV. 416, 416-19 (1921). Consequently, courts ought to have applied these distinctions in terms of the ends sought. *Id.* at 422 (such questions cannot "be settled by mere logic, but according to notions of fairness and convenience"). Instead they attempted the impossible, a precise verbal demarcation for every element of every claim and defense. The net result was confusion, delay, disagreement, waste, and injustice. *J. FRIEDENTHAL*, *supra* note 20, § 5.5.

27. Despite the alleged prohibition against the pleading of evidentiary facts, some Code courts clearly admitted that what they had in mind was a high level of factual specificity in pleading. *E.g.*, *Gillespie v. Goodyear Serv. Stores*, 258 N.C. 487, 490, 128 S.E. 2d 762, 766 (1963) (noting the complaint's failure to allege "what occurred, when it occurred, where it occurred, who did what"). Commentators have noted that the Code's verbal distinctions tended to obscure the real issue, the level of factual detail required in pleading. *F. JAMES & G. HAZARD*, *supra* note 12, §§ 3.7, 3.8.

28. Code appellate courts rarely found an abuse of discretion in a trial judge's denial of leave to amend, see *Louis, Survey of North Carolina Case Law Civil Procedure (Pleading and Parties)*, 45 N.C.L. REV. 823, 836 (1967) (asserting that no such case could be found in the North Carolina reports), did not recognize the doctrine of implied consent, see *FED. R. CIV. P. 15(b)*, allowed belated challenges to variances, *Louis, supra*, at 825 n.10, and often would not allow either amendment at trial or relation back if the amendment changed the cause of action, *C. CLARK, CODE PLEADING* 730 (2d ed. 1947).

29. See *J. FRIEDENTHAL*, *supra* note 20, § 5.5; *Louis, supra* note 28, at 826-27.

or careless,³⁰ others lacked equal access to the evidence or for some other reason could not obtain all the necessary facts without discovery. Most of the demurrer's victims also were claimants,³¹ who understandably and perhaps rightfully came to regard the system as biased against them and as favoring those defendants able to hide evidence of their own wrongdoing.

To meet these problems, the Federal Rules provided three new pretrial devices, discovery, summary judgment, and the pretrial conference, each of which was specifically designed to discharge one of the pretrial tasks for which the Code had been inadequate. Thus, discovery was designed to deal directly with fact ascertainment, the pretrial conference with issue formulation, and summary judgment with the interception of factually deficient claims and defenses.³² Because of the presence of these specialized devices, the Federal Rules were also able to eliminate or relax many of the Field Code's technical requirements.³³ Thus, pleading³⁴ and amendment³⁵ rules were relaxed, interception before discovery was limited primarily to substantive defects,³⁶ and material variances between pleadings and proof no longer were automatically or even ordinarily fatal.³⁷

These changes alone might have been enough, but together they pointed in a new direction and towards a realignment of the pretrial system. The pleading stage thus was deemphasized and became basically an unsupervised exchange of notice-providing papers among the parties. Substantive interception was still possible at this stage, but factual interception was shifted back to the new devices of discovery and summary judgment.³⁸ The courts still had no direct re-

30. The Federal Rules, say some critics, pander to the lazy and careless attorney. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 125 (1952). Other critics ask why the clients of these attorneys should be punished for, or why the system should expend so much effort correcting, such technical errors. C. WRIGHT, *supra* note 2, at 445. Still others note the general difficulty of obtaining and pleading all the facts at the start of litigation. F. JAMES & G. HAZARD, *supra* note 12, § 3.13, at 159.

31. Fact pleading requirements apply to both plaintiffs and defendants. Nevertheless, as the history of both Code pleading and notice pleading shows, invariably the majority of the cases, and the most famous or notorious of them, involved challenges to complaints. *E.g.*, *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (notorious decision rejecting a motion to dismiss a poorly pleaded complaint); *Gillespie v. Goodyear Serv. Stores*, 258 N.C. 487, 128 S.E.2d 762 (1963) (a frequently cited Code opinion sustaining a demurrer to plaintiff's conclusory allegations of an assault). Perhaps there is some truth to the notion that all questions of pleading and interception invariably turn on whether the system is inclined to indulge plaintiffs alleging wrongs or to protect defendants and the system from doubtful claims. *See, e.g.*, Marcus, *supra* note 5, at 445-46 (suggesting that whereas the lax requirements of the Federal Rules favored plaintiffs, specificity requirements inherently favor defendants). Ultimately this perspective reduces procedure to a question of the degree to which the civil justice system permits the weak and powerless to redress alleged wrongs and redistribute the wealth of the nation. At this point, however, analysis ends and shouting begins.

32. C. WRIGHT, *supra* note 2, at 439.

33. *See supra* notes 25, 28.

34. FED. R. CIV. P. 8(a); *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (defining the relaxed "notice" pleading requirements of rule 8(a)).

35. FED. R. CIV. P. 15.

36. *Conley*, 355 U.S. at 45-46 (1957) (dismissal on pleadings limited primarily to substantive inability to state a claim for relief); C. WRIGHT, *supra* note 2, at 442.

37. FED. R. CIV. P. 15(b); C. WRIGHT, *supra* note 2, at 442-43.

38. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986) (under notice pleading, motion for summary judgment replaces motion to dismiss as device to intercept factually deficient claims and

sponsibility for the progress or success of the pretrial stage.³⁹ The only exception was the optional pretrial conference, but it was to take place at the close of the pretrial period and was to focus primarily on the forthcoming trial.⁴⁰

These changes in the pretrial system reflected a new procedural outlook: any claim or defense asserted in good faith was presumptively entitled to a trial on the merits unless and until its insufficiency was clearly established.⁴¹ This new outlook, which appeared to be a welcome movement away from the antclaimant bias of the Field Code,⁴² soon so dominated the judiciary's view of the new procedural system⁴³ that it often obliterated the Field Code's countervailing concerns for judicial efficiency and fairness to opposing parties. The end result was a system that by 1983 was as biased in one direction as the Code had been in the other⁴⁴—a system so indulgent of dubious claims, defenses, and behavior

defenses); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) (in cases of unequal access to the evidence fact interception ordinarily should not occur until after discovery), *cert. denied*, 464 U.S. 890 (1983).

39. See Miller, *supra* note 4, at 15 (the assumption of a self-executing cooperative pretrial phase was "somewhat naive").

40. C. WRIGHT, *supra* note 2, at 601-02.

41. C. WRIGHT, *supra* note 2, at 445; Marcus, *supra* note 5, at 439, 441 (the Federal Rules embody a "pro-plaintiff," "liberal ethos" in which "the preferred disposition is on the merits, by jury trial, after full disclosure through discovery").

42. See *supra* note 31.

43. *E.g.*, *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) ("bona fide complaints [should] be carried to an adjudication on the merits").

44. Some of the one-sided rules developed by the federal courts to protect the merits are discussed below, one being the infamous statement that a complaint cannot be dismissed 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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This statement, if taken literally, would foolishly protect from challenge complaints alleging only that defendant wronged plaintiff or owes plaintiff a certain sum. F. JAMES & G. HAZARD, *supra* note 12, at 153. Although the statement makes sense only as a guide to granting leave to amend, it is cited endlessly as a guide to whether a complaint states a claim for relief, and serves, along with other similar, strongly worded statements, *e.g.*, *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505, 506 n.2 (5th Cir. 1971) (suggesting that dismissals of complaints for inadequate pleading have "a high mortality rate"), to create a strong presumption against the grant of a motion to dismiss for any reason other than substantive insufficiency. Another developed rule is the rule that leave to amend must ordinarily be granted and that its denial, without giving a reason, is a presumptive abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). A third is the strict construction of rule 12(e), as amended, which barred most attempts to make vague, conclusory pleadings more definite and certain. *E.g.*, *Hodgson v. Virginia Baptist Hosp., Inc.*, 482 F.2d 821 (4th Cir. 1973). The strict, unsympathetic construction and general failure to enforce the original version of rule 11 is yet another rule protecting the merits. See generally Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 5, 15-16, 42-52 (1976) (concluding that original rule 11 was rarely enforced, was replete with textual ambiguities and deficiencies and was not construed sympathetically by courts). For many years the judiciary was disinclined to grant serious sanctions for discovery abuses absent a showing of willfulness. See *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979) (finally extending the "willfulness" requirement to cases of "gross professional negligence"). Courts were also generally reluctant to limit broad, repetitive, or disproportionate discovery, culminating in some questionable proposals by the American Bar Association to limit the scope of discovery, and eventually in the 1983 amendments to rule 26(b)(1). See generally Advisory Committee Note, *1983 Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 165, 217-18 (1983); Schroeder & Frank, *The Proposed Changes in the Discovery Rules*, 1978 ARIZ. ST. L.J. 475 (opposing the proposed redefinition of the scope of discovery). Judges' long-standing judicial reluctance to grant summary judgment against claimants also contributed to the one-sidedness of the system. Louis, *supra* note 24, at 752 (arguing that artificial restrictions upon the use of summary judgment against claimants were foolish and unnecessary and would eventually have to be abandoned); Louis, *Summary Judgment and the Actual Malice*

that it fell prey to adversarial ethics, crowded dockets, rising litigation costs, abusive discovery, and holdup litigation.

III. THE EFFECTS OF THE FEDERAL RULES ON MODERN LITIGATION

The procedural woes of our civil justice system are easy enough to list. The federal courts are currently bursting with cases, claims, and defenses,⁴⁵ many of which are apparently not well founded but cannot be intercepted easily before trial; the cost and demands of litigation, and of discovery in particular, have grown dramatically and have become significant tactical weapons;⁴⁶ modern joinder provisions, perhaps the next *bête noire* of the system, have turned some cases into bloated soap operas with endless plots and characters;⁴⁷ and delays of every kind, particularly in reaching trial, are common and lengthy.⁴⁸ As a result of these problems, and regardless of the accuracy or fairness with which the merits of cases ultimately are resolved, courts are increasingly regarded as forums of last resort to which only those without other alternatives willingly turn.⁴⁹ Indeed, it may now be an accurate generalization to say that those who litigate have lost and that those who triumph in litigation have merely lost less. Not surprisingly, as the process of litigation has become less and less satisfactory, interest in alternative methods of dispute resolution has grown apace.

Although the Federal Rules are not directly responsible for the present flood of federal cases, they clearly have not efficiently contained, managed, or discouraged this deluge. This is hardly surprising. As interpreted, the Federal Rules until recently provided a cautious, indulgent system of civil procedure heavily biased against the early interception of doubtful claims and defenses or the punishment of those who abused the system in any way.⁵⁰ Such a system is inherently unable to cope with an overload of cases, particularly if an increasingly cost-conscious society is not prepared to foot the bill. Indeed, if the Federal Rules represented the culmination of an historical quest for access to justice and the merits, then arguably the quest of the next century will be to determine

Controversy in Constitutional Defamation Cases, 57 S. CAL. L. REV. 707, 708-10 (1984) (asserting that some courts were opposed to prevailing case law restrictions on the use of summary judgment against claimants and were searching for ways around them).

45. In the decade of the 1970s, for example, federal district court filings doubled and trials lasting over 30 days tripled. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981).

46. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (referring to the "widespread abuse of discovery that has become a prime cause of delay and expense in civil litigation"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (liberal discovery gives plaintiff "an *in terrorem* increment of the settlement value").

47. The rise and fall of the "spurious" or rule 23(b)(3) class action is one example. See generally C. WRIGHT, *supra* note 2, at 470-87 (discussion of a class action suit and the controversy over rule 23). Another is the complicated litigation involving all the parties to a failed construction project. E.g., *Amco Constr. Co. v. Mississippi State Bldg. Comm'n*, 602 F.2d 730 (5th Cir. 1979); *Lasa Per L'Industria Del Marmo Societa Per Azione v. Alexander*, 414 F.2d 143 (6th Cir. 1969).

48. See generally Miller, *supra* note 4, at 1-2 (decrying the delay in present day litigation).

49. Miller, *supra* note 4, at 2 (the cost and delay of modern litigation "chills the enthusiasm and debilitates the resolve" to litigate legitimate grievances).

50. See *supra* note 44.

how much less than that society realistically can afford.⁵¹

To understand in precise terms how the Federal Rules have contributed to these problems, a simple example may be helpful. Assume that a large manufacturing corporation suddenly terminates a distributor that reasonably suspects, but cannot prove, that the reason for the termination is joint complaints and pressure from other distributors with which it competes aggressively in price. The terminated distributor files a private antitrust action alleging in general terms a conspiracy between its competitors and the manufacturer to eliminate its aggressive price competition. Such general allegations would almost automatically survive a motion to dismiss⁵² and allow plaintiff to undertake discovery, which in antitrust cases is usually voluminous and expensive. Furthermore, even if the plaintiff could not obtain *prima facie* proof of the alleged conspiracy through discovery, until recently it often was still able to escape summary judgment and get to trial.⁵³ Hence, defendants' first real opportunity to intercept this potentially nonexistent or unprovable claim would be at trial on a motion for directed verdict or after trial and an adverse jury verdict on a motion for judgment notwithstanding the verdict.⁵⁴

Obviously a fair system cannot ruthlessly dispatch before discovery, or sometimes even before trial, every claim that is difficult to prove. Otherwise those who lack equal access to the evidence often would be denied their day in court.⁵⁵ At some point, however—and there is a growing consensus that the Federal Rules as interpreted before 1983 went well beyond this point⁵⁶—the refusal to dismiss such claims is unfair to defendants and the system.⁵⁷ For

51. See Miller, *supra* note 4, at 12.

52. The recent decisions in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515 (1988), and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), have made it much more difficult for terminated dealers to allege and prove a vertical price fixing conspiracy in violation of the Sherman Act, particularly when only a single rival dealer complains to or otherwise pressures the manufacturer to terminate its price cutting rival. To avoid some of these current substantive difficulties, this example posits the existence of several complaining rival dealers, whose joint efforts arguably still could constitute a *per se* unlawful horizontal conspiracy.

53. In *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962), the Supreme Court stated that "summary procedures should be used sparingly in complex antitrust litigation when motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." For many years this language dominated and seemed to limit the use of summary judgment in antitrust litigation. Louis, *supra* note 24, at 765. In the past decade, however, federal courts have increasingly ignored *Poller* and granted summary judgment in antitrust cases. Louis, *supra* note 44, at 710 n.21, 721. The recent decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986), which granted summary judgment against plaintiff in an antitrust case without the usual obeisance to *Poller*, seems to approve the current trend.

54. Unless the insufficiency of the plaintiff's evidence is clear, trial judges normally will deny or reserve decision on a motion for directed verdict in the hope the jury will find for the defendant and eliminate the problem. If the jury finds for the plaintiff, its verdict still may be overturned on a motion for judgment notwithstanding the verdict. C. WRIGHT, *supra* note 2, at 628-29. For these reasons the motion for directed verdict is not often used, and a plaintiff able to reach trial ordinarily may include the costs of a full trial in his settlement calculations.

55. I have suggested previously that such a plaintiff should not be permitted to reach trial unless she has, at the minimum, evidence approaching a *prima facie* case and demonstrably reasonable prospects for obtaining the balance at trial. Louis, *supra* note 24, at 769; Louis, *supra* note 44, at 719.

56. Louis, *supra* note 44, at 709-10.

57. *Celotex Corp. v. Catrett*, 447 U.S. 317, 327 (1986) (rule 56 must be construed with due

example, until recently a plaintiff with a groundless or unprovable claim that would probably fail at trial could too easily hold up the defendant for a substantial settlement reflecting the high price of discovery and trial.⁵⁸ Summary judgment is supposed to prevent such holdups, but ordinarily its consideration must await the completion of discovery⁵⁹ and until recently the motion often was routinely denied.⁶⁰ As a result, the pretrial system in effect before 1983 not only failed to intercept doubtful claims, but it may have inadvertently invited their initial assertion.⁶¹

Plaintiffs of course have not been the only parties who abused the system in these ways. Defendants have often responded in kind with an array of questionable motions, defenses, and claims⁶² of their own, sometimes simply to cause confusion and wear down the opposition.⁶³ Indeed, before 1983 both sides tended to throw into the litigation almost every conceivable claim and defense.⁶⁴ Such tactics obviously did not make for efficient judicial administration, but until the amendments to rule 11 the courts were extremely, perhaps even shamefully, slow to throw out such dross or to sanction those who proffered it.⁶⁵ The courts were similarly hesitant until recently to limit discovery or to sanction those who abused that process.⁶⁶ As a result the pretrial system sometimes became an uncontrolled, expensive, adversarial free-for-all.

The specific contributions of the Federal Rules to these problems as they existed before 1983 can now be identified precisely. First, by eliminating fact interception at the pleading stage,⁶⁷ the Rules permitted most doubtful claims

regard not only for the rights of those asserting claims and defenses but also for the rights of persons opposing such claims and defenses).

58. Louis, *supra* note 44, at 717-18; Miller, *supra* note 4, at 11; *see* note 46 *supra*.

59. *See supra* note 38.

60. Louis, *supra* note 24, at 761 (describing and rejecting the "slightest doubt" approach to summary judgment once followed by some federal courts); Pielemeier, *Summary Judgment in Minnesota: A Search for Patterns*, 7 WM. MITCHELL L. REV. 147, 149-50 (1981) (survey showing that the motion generally is useless in Minnesota and that some trial judges deny such motions as a matter of course).

61. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems In the Struggle Between Compensation and Punishment*, 74 GEO. L. REV. 1313, 1316 (1986) (suggesting that lack of effective judicial oversight and tactical considerations in litigation had clogged the courts with frivolous suits and unnecessary pretrial activity).

62. For many years, for example, answers to complaints filed by large businesses routinely would include an antitrust counterclaim. Indeed opposition to proposals to permit removal of actions if a defendant pleaded a defense or counterclaim arising under federal law was based in part on the fear that in this manner defendants could readily plead their way into federal court. *See generally* Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 270-76 (1969) (evaluating such a removal proposal).

63. Although amended rule 11 applies to both plaintiffs and defendants, it has been applied far more often to the former. Nelken, *supra* note 61, at 1327. Consequently, defendants still may be able to indulge in such excesses of pleading and motion making without substantial fear of retribution under rule 11.

64. *See* Miller, *supra* note 4, at 15 n.49, 17 (asserting that the pretrial system has been afflicted by "gamesmanship, harassment . . . , evasion, delay, and spiralling costs").

65. Nelken, *supra* note 61, at 1316 (suggesting it was less the original textual deficiencies of rule 11—*see* note 44 *supra*—than prevalent ideas about the propriety of sanctions against lawyers that caused courts to ignore the rule for so long).

66. Miller, *supra* note 4, at 17, 19, 22, 24; *see supra* note 46.

67. *See supra* notes 36-38 and accompanying text.

and defenses to reach the expensive discovery stage with its attendant holdup potential. Second, the discovery rules were subject to a variety of abuses designed to inflate costs, wear down opponents, and induce settlement.⁶⁸ Third, judicial reluctance to grant summary judgment except in the clearest cases allowed many doubtful claims and defenses to reach trial and further enlarged their holdup potential.⁶⁹ Fourth, as a result of these difficulties and the failure to enforce the truth-in-pleading requirements of rule 11 of the Federal Rules of Civil Procedure,⁷⁰ the initial assertion of spurious claims and defenses was countenanced and perhaps even encouraged. Finally, the inability or failure of trial judges to take pretrial control of cases resulted in additional cost, confusion, delay, and tactical abuse.⁷¹

It is both ironic and sobering to note that most of these problems grew out of those "improvements" in federal pretrial procedure that were designed to cure the Code's deficiencies.⁷² For example, the de-emphasis of pleading and the postponement of fact interception until after discovery were designed to deny defendants the tactical use of the demurrer⁷³ and to provide pleaders with a reasonable opportunity to obtain proof of their contentions before confronting a challenge on the merits. These fundamental changes were necessary and desirable, but in combination with rigid supplemental judicial rules designed to protect the merits even further,⁷⁴ they made possible until recently the new, burdensome problems and tactics that threatened the viability of the present system. The experience has at least taught us some very hard but important lessons. We have learned that attorneys—if not all of them, then certainly enough of them—will ruthlessly exploit any imbalance in the procedural system, whether it is the propleader bias of the Federal Rules or the antipleader bias of the Code, and that their sense of professional responsibility and collegial interdependence alone cannot restrain them sufficiently.⁷⁵ We have also learned that the judiciary, whose decisional power to fine tune the system arguably makes it

68. See *supra* note 46. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975), the Court noted that "the liberal discovery provisions of the Federal Rules of Civil Procedure" give a plaintiff "an *in terrorem* increment of the settlement value," so that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment."

69. See *supra* notes 44, 53, 60, 68.

70. See *supra* note 44.

71. See *supra* authorities cited in note 15.

72. See *supra* notes 32-37 and accompanying text. To some this irony of cause and effect is quite predictable. Judith Resnik has written that the "history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms." Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).

73. See *supra* notes 20-27.

74. See *supra* note 44.

75. Arthur Miller suggests that attorney misbehavior of this kind is attributable to the attorney's desire to do the best for a client, the effort to harass opponents and drive up their costs, the low cost use of form interrogatories and word processor generated paper, the profitability of raising billable hours, and the current identification of the attorney far more as a hired gun than as an officer of the court. Miller, *supra* note 4, at 17-19. One obvious answer to this problem is rule 11 and equivalent sanction provisions. Another is the elimination of one-sided rules and interpretations that invite tactical exploitation by attorneys.

our first line of defense against emerging procedural problems, may not only be slow to deal with such problems, but may actually cause or contribute to them.⁷⁶ Finally, we have learned that the cost of providing the fullest measure of support and protection to the merits is prohibitively high,⁷⁷ that some portion of this ideal must be sacrificed on the altars of efficiency, affordability, and fairness to the opposing party and the judicial system, and that proposed procedural changes involving such incursions upon the merits are no longer ipso facto unthinkable. We also know in general what must be done to rebalance the system. We must intercept before trial more meritless or unprovable claims and defenses and find appropriate ways to discourage or sanction their assertion. We must find ways to control the scope and amount of discovery and to limit its abuse. Finally, we must manage the entire pretrial process more efficiently.

Despite the attention these three tasks have already received in the literature and in the 1983 amendments to the Federal Rules of Civil Procedure,⁷⁸ an extended analysis of all of them is too substantial a project for the remainder of this study. Consequently, the remainder will consider only the first of these tasks, the interception and discouragement of factually meritless litigation. The discussion will begin with a general examination of the three principal interception/discouragement mechanisms of the Federal Rules, will then consider the general problem of reforming these mechanisms, and finally will examine each in detail.

IV. REFORMING THE PRETRIAL INTERCEPTION/DISCOURAGEMENT SYSTEM OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. *In General*

The Federal Rules employ three basic pretrial interception/discouragement mechanisms: prediscovery interception at the pleading stage, principally through the motion to dismiss for failure to state a claim for relief,⁷⁹ postdiscovery interception through the motion for summary judgment, and sanctions for violation of the truth-in-signing requirements of rule 11. Until recently these mechanisms were substantially underemployed. The motion to dismiss was limited primarily to substantive defects⁸⁰ and performed virtually no factual inter-

76. See *supra* notes 25-30, 44 and accompanying text for explication of the contention that one-sided judicial interpretations of both the Code and the Federal Rules were principal causes of the problems these systems encountered and their inability to deal with them.

77. See Miller, *supra* note 4, at 8-9.

78. See *supra* note 6.

79. FED. R. CIV. P. 12(b)(6). The motion for judgment on the pleadings, FED. R. CIV. P. 12(c), and the motion to strike an insufficient defense, FED. R. CIV. P. 12(f), serve equivalent functions, the interception of substantively insufficient claims and defenses.

80. Basically there are two kinds of substantive defects: a claim or defense based upon a meritless or unrecognized legal theory, and a claim or defense that admits on its face, either absolutely or sometimes *prima facie*, the existence of a defense or avoidance thereto or the nonexistence of an essential element thereof. To illustrate the second defect, a complaint which alleges that plaintiff was exercising due care while traveling down the highway at 100 miles per hour may either admit the affirmative defense of contributory negligence or the nonexistence of the essential element of due care.

ception function;⁸¹ summary judgment was employed so sparingly and grudgingly that often it was regarded as essentially unavailable;⁸² and rule 11 sanctions were almost never imposed.⁸³ Rule 11 suffered from textual deficiencies that the courts were reluctant to overcome by interpretation.⁸⁴ By contrast rules 12(b)(6) and 56 have been general, open-ended provisions that were susceptible to almost any reasonable interpretation but that until recently were construed very narrowly—some would say, were emasculated—as part of the preserve-the-merits philosophy of the federal courts.⁸⁵

It appears then that through narrow or restrictive interpretations adopted before 1983 the federal courts caused or contributed to the breakdown of the interception/discouragement mechanisms of the Federal Rules and then failed to respond decisively to the emerging crisis. A century before, other courts had similarly fiddled while the Field Code burned.⁸⁶ In both situations a triumphant, extreme philosophy of civil procedure—first, the antclaimant bias of the Code and then, in obvious overreaction thereto, the save-the-merits extremism of the Federal Rules—had been the motivating force. If form holds, today's procedural reform efforts will soon be engulfed by a resurgent antclaimant bias fueled by a desire to make the judicial system efficient and claimants accountable.⁸⁷ This century of imbalance and failure raises some difficult questions.

81. Such motions, which challenge only the face of a pleading, serve a factual interception function indirectly if it is assumed that the pleader is unable to allege in good faith whatever necessary facts have been omitted. See *supra* note 24. Needless to say, this assumption is not always correct. That is not a sufficient reason never to dismiss a factually deficient claim, however. Leave to amend could still be given and in appropriate cases discovery could be permitted before dismissal was ordered. The problem, as experience under the Code illustrated, is to identify those omissions warranting dismissal without generally inviting tactical use of the motion to dismiss—in situations, at least, not now effectively covered by rule 11 sanctions. In half a century of trying, the federal courts have not done very well here. Concepts like notice pleading or liberal construction merely identify a mood. The infamous and unreliable *Conley* rule, see *supra* note 44, though often cited, is just as often violated, particularly in civil rights cases. See *infra* note 99. Comparisons with the forms contained in the Appendix of Forms are useful, but courts have never attempted to explain what is common to these forms, even though that seems to be obvious. Each of the forms contains sufficient detail to identify the transaction or occurrence complained of and the legal theory relied upon. Clearly most complaints satisfy this minimal requirement, including the infamous one sustained in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (pro se complaint in broken English still sufficiently identified the transaction complained of and the legal theory). Of course a complaint satisfying this minimal requirement could still omit an essential element of the claim. That need not be a ground for dismissal, however, except perhaps where the element is crucial to the claim's existence and is not implicit in or readily inferred from the facts alleged. Cf. *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) (a complaint will not be dismissed for omitting facts in support of its arcane elements, but the omission of facts that would dominate the case justifies the assumption that they do not exist), *cert. denied*, 431 U.S. 914 (1977). But see *Garcia v. Hilton Hotels Int'l, Inc.*, 97 F. Supp. 5 (D.P.R. 1951) (refusing to dismiss a defamation complaint failing to allege publication).

82. See *supra* notes 44, 53, 60.

83. Nelken, *supra* note 61, at 1315; Risinger, *supra* note 44, at 34-37.

84. Risinger, *supra* note 44, at 5, 15-16, 42-52.

85. See *supra* note 44.

86. Marcus, *supra* note 5, at 438 (attributing the Code's failure in part to "judicial sabotage").

87. See Resnik, *supra* note 72, at 1030 (suggesting that today's procedural efforts usually are directed at solving the problems caused by yesterday's reforms). One who searches for evidence of backlash can perhaps readily find it. Nevertheless, in today's strident calls to correct the abuses of the Federal Rules, see *supra* notes 44, 46, 68, one sees the seeds of backlash in the federal courts' current, occasional reemployment of fact pleading, seemingly unaware of its historical difficulties, Marcus, *supra* note 5, at 444-51 (describing the revival of fact pleading in the federal courts), and in

Why do our attitudes towards civil procedure, as well as our procedural systems, lurch from one extreme to another in apparent rejection of some theoretical golden mean? Why are the judges, supposedly the best of our profession, so susceptible to its momentary passions and biases⁸⁸ and so unable to make midcourse corrections when the evidence of disaster is all about them? Perhaps appellate courts are guilty of employing reversals and overly strong language to induce change⁸⁹ and then of ignoring the one-sided results a cowed trial bench dutifully produces.⁹⁰ Perhaps trial judges are too fearful of reversal to deal with emerging procedural problems and too inclined to pass the buck to appellate courts when new problems arise and precedent must be distinguished.

Despite these problems, the reformation of the interception/discouragement systems of the Federal Rules appears to be within reach. Rule 11 has already been successfully amended,⁹¹ and courts today are much more inclined to grant motions to dismiss⁹² and for summary judgment.⁹³ The doctrine that

their haste to employ the motion for summary judgment, even in state of mind cases, with no recognition of why they formerly moved cautiously, Louis, *supra* note 44, at 710-12 (describing the forceful use of summary judgment in constitutional defamation cases with little concern for the state of mind issues present therein), one sees the first signs of backlash. See generally Risinger, *Another Step In The Counter-Revolution: A Summary Judgment On The Supreme Court's New Approach To Summary Judgment*, 54 BROOKLYN L. REV. 35, 35-36 (1988) (suggesting that federal civil procedure is presently undergoing an antipointiff counterrevolution).

88. The Federal Rules, liberally interpreted, enjoyed wide support for many years throughout the legal profession. The federal judges, therefore, can hardly be accused of leading the profession by the nose or down the garden path. Nevertheless, the judiciary is responsible for extending the general philosophy of the Federal Rules even further through interpretation, see note 44 *supra*, and then reacting too slowly, if at all, to the crisis these interpretations helped to cause. Moreover, the judiciary also sometimes seems to take its cues from the election returns or the prevailing ethos of the community. A decade ago, for example, federal judges seemingly could find no end to the liberal ethos of the Federal Rules or, for that matter, the antitrust laws; today these judges are quick to spot procedural limits, see, e.g., Schiavone v. Fortune, 477 U.S. 21 (1986) (finding limits on relation back of amendments under FED. R. CIV. P. 15(c)), and seem unable to find an antitrust violation anywhere. Compare *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (asserting a very lenient view of claims of predatory pricing) with *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) (asserting almost a presumption against a finding of predatory pricing). A change in approach to both bodies of law was probably necessary and inevitable. The degree of change and its rapid, general acceptance by the federal judges is surprising, however, and suggest that judicial attitudes towards these fields of law, and perhaps some others, are not independently formulated but to a large extent simply mirror the intellectual fashion of the time.

89. The United States Supreme Court hears so many constitutional cases that it has limited time for other federal questions, which can be heard only sporadically and often only in response to some perceived difficulty in the area. See, e.g., Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 408-09 (1980) (noting that the Court had not decided a long-arm jurisdiction case in twenty years and then, in response to the perception that the states were exceeding the limits of due process, had suddenly granted certiorari in a number of cases). Consequently, to deal quickly and decisively with a perceived problem, the Court might naturally employ overly strong language. Such strong arm tactics, however, could stampede the lower courts in the opposite direction.

90. Ultimately a balanced system requires judges who understand when the limits of a rule have been reached and who are not afraid to say so, even if it requires that higher court opinions be explained, qualified, or distinguished. That is what finally occurred in the area of summary judgment, even though it arguably took far too long. See *supra* note 53. Elsewhere it took so long that the Code failed and the Federal Rules almost followed suit.

91. See the evaluation of current practice under amended rule 11 in Part IV.D. *infra*.

92. Marcus, *supra* note 5, at 444-51 (describing areas in which federal courts are again dismissing factually deficient complaints).

93. See *supra* note 53.

formerly restricted the use of these motions already is being replaced or softened. This new, more balanced doctrine, however, often amounts to little more than a set of new, countervailing cliches from which the judges may pick and choose.⁹⁴ Such flexibility, which amounts to a discretionary license or its functional equivalent,⁹⁵ is sometimes desirable,⁹⁶ but here it involves judicial power to resolve the merits.⁹⁷ Without more appellate guidance and supervision, it could lead to ad hoc, unjust dismissals, as well as to the possibility of judicial overcorrection and backlash.⁹⁸ Indeed, many recent opinions granting motions to dismiss or for summary judgment are dangerously slanted in the direction of aggressive interception, ignore or fail to mention the countervailing considerations that formerly commanded the opposite result, and in some cases are alarmingly redolent of supposedly repudiated Code rhetoric.⁹⁹ For these reasons balanced, but unexplicated, doctrine that fails to educate or control lower court

94. For example, the *Poller* rule, see *supra* note 53, that summary judgment should be used sparingly in antitrust cases because issues of intent are usually involved and access to the evidence is often unequal, has been limited by countervailing reminders of the cost of antitrust litigation and the temptations of the treble damage remedy. See, e.g., *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979). See generally S. Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L. REV. 1065, 1119-22 (1986) (documenting authorities and cases following and then disregarding or limiting *Poller*). Similarly, *Poller's* obvious application to the issue of actual malice in constitutional defamation cases was limited by lower court reminders about the effect of such actions on freedom of speech and of the press. See generally *Louis*, *supra* note 44, at 710-15. In this area even the Supreme Court has adopted the practice of the countervailing cliché. Compare *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (noting the applicability of the *Poller* rule to this area) with *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2514 (1986) (explaining the *Hutchinson* footnote as stating that in such cases the *Poller* rule is simply a nonabsolute caution). Missing from all these opinions are efforts to develop workable doctrine setting forth the obvious compromise intended. Indeed, the federal courts seem oblivious to the need for such doctrine and academic efforts to develop it. See, e.g., *Louis*, *supra* note 44, at 714-15.

95. In his dissenting opinion in *In Re Japanese Prods. Antitrust Litig.*, 631 F.2d 1069, 1093 (3d Cir. 1980), Judge Gibbons stated that a complexity exception to the seventh amendment would "permit the exercise of trial court discretion," a discretion that "in any practical sense will be completely unreviewable," and that could "some times be influenced by unarticulated sympathies for or hostilities toward the underlying policies sought to be advanced in the lawsuit." Such concerns are applicable to other procedural rulings that are discretionary or that, by virtue of the doctrinal gap in the center, are functionally discretionary.

96. Rosenberg, *Judicial Discretion of the Trial Court Viewed from Above*, 22 SYRACUSE L. REV. 635, 642 (1971) (discretion allows courts to fine tune the law by adjusting results to specific fact situations).

97. In part because of the consequences of an erroneous ruling, the grant of a motion to the merits of a claim or defense constitutes a question of law, which appellate courts may review without mandatory deference to the lower court decision. *Louis*, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, The Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 1040 (1986) (noting and explaining why the grant of any motion to the merits is a question of law).

98. See *supra* note 87 for a description of the manifestations of that emerging backlash.

99. Many recent opinions in support of or affirming the dismissal of factually deficient complaints asserting causes of action in the area of civil rights or securities fraud demand, in scatter-gun fashion and in language reminiscent of older Code opinions, the specific allegation of a variety of evidentiary facts, without regard to the plaintiff's lack of access to the evidence and need for discovery. E.g., *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2d Cir. 1979) (securities fraud), cert. denied, 446 U.S. 946 (1980); *Fisher v. Flynn*, 598 F.2d 663 (1st Cir. 1979) (civil rights); *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976) (civil rights); Additional cases in these two areas are collected in *Marcus*, *supra* note 5, at 447-50. Similarly, many recent decisions granting or affirming the grant of summary judgment in state of mind, unequal access to the evidence situations fail even to note the presence of these once crucial factors, let alone to make allowance for them. See *supra* note 94.

judges may create as many problems as it solves. Although more detailed explanation of doctrine would seem to be the answer, it is difficult to prepare and is not always understood and obeyed. Perhaps that is why appellate courts so often resort to one-sided doctrine strongly or presumptively suggesting the result favored.¹⁰⁰

Having considered the general problems of reform, the discussion now turns to its specifics, beginning with interception at the pleading stage.

B. *The Reintroduction of Fact Specificity Requirements in Pleading Claims and Defenses*

One way to intercept or discourage the assertion of factually questionable claims and defenses is to require greater particularity in the pleadings asserting them.¹⁰¹ Particularized fact pleading was the Field Code's most condemned requirement,¹⁰² however, and the first to be eliminated by the Federal Rules.¹⁰³ Its general reintroduction today would, therefore, probably be politically impossible, as well as unwise. Some people, however, would support the reimposition of such a requirement upon selected claims and defenses, particularly those that are inherently vague or doubtful or that seem to generate an abundance of complex, protracted litigation. The selection process could even be left to the courts, some of which already have a few candidates in mind and no compunctions about choosing them.¹⁰⁴ Such common-law implementation, however, would obviously be controversial, random, and uncertain. It also would seem to violate the Federal Rules, which specifically adopt a few such special pleading requirements in rule 9 and supposedly govern the rest of pleading through the more general requirements of rule 8.¹⁰⁵ Consequently, if such changes are to be made, they probably should be effected by amendments to the Federal Rules. Rule 9(b), which already requires that averments of fraud and mistake be pleaded with "particularity," could easily be amended to include other troublesome claims and defenses.

Two popular candidates for inclusion in rule 9(b) are antitrust and civil rights claims, both of which are inherently vague and seem to generate an abun-

100. See *supra* note 44 (setting forth several instances of one-sided preemptive doctrine interpreting the Federal Rules).

101. See *supra* note 24.

102. See *supra* notes 25-27.

103. See Marcus, *supra* note 5, at 439; *supra* note 34 and accompanying text.

104. The most familiar candidates are antitrust and other conspiracy cases. *E.g.*, *Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) (allegation of antitrust conspiracy requires supporting facts); *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) (rejecting arguments for applying a more demanding pleading standard to antitrust complaints). In recent years securities fraud and civil rights cases have often been targeted. Marcus, *supra* note 5, at 447-51.

105. *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 924 (3d Cir. 1976) (Gibbons, J., concurring in part and dissenting in part) (Federal Rules contain no special pleading rules for civil rights cases). Securities fraud cases, of course, do cite the particularity requirement of rule 9(b), which, in the opinion of most commentators, does not require or support the extreme pleading requirements such cases attribute to it. Marcus, *supra* note 5, at 447 n.87.

dance of complex, protracted, and ultimately unsuccessful litigation.¹⁰⁶ Both claims, however, are founded on congressionally created rights. Undermining them procedurally, which is the ultimate effect—and for some perhaps the purpose—of including them within rule 9(b), could be viewed, therefore, as an improper judicial assault on substantive congressional policy and its chosen beneficiaries. Thus, the selection of these or other candidates for this procedural hit list would be endlessly controversial.

Moreover, because antitrust and civil rights claims often involve clandestine wrongdoing and unequal access to the evidence, they sometimes cannot be pleaded initially with particularity.¹⁰⁷ To dismiss them on the merits before discovery often would be unjust and at odds with the preserve-the-merits philosophy of the Federal Rules.¹⁰⁸ On the other hand, postponing interception until after discovery—either by watering down the particularity requirement or by creating exceptions thereto when access to the evidence is unequal—would effectively retain the status quo.¹⁰⁹ Choosing the lesser of these two evils is not easy and, as we shall see below, has continually divided the federal courts in their interpretation and application of existing rule 9(b).

The definition and application of any such particularity requirement is also very difficult. A century ago the courts were unable to state the Code's pleading requirements clearly or apply them consistently.¹¹⁰ In recent times federal judges have not done much better with rule 9(b). Indeed, those currently making the effort often seem to be unaware of the difficulty, let alone of their inability to surmount it. Moreover, particularity requirements are typically enforced by means of interlocutory rulings¹¹¹ in factually unique, easily distinguished sit-

106. In recent years the number of civil rights cases filed have grown dramatically from 270 in 1961 to over 30,000 in 1981. *Patsy v. Board of Regents*, 457 U.S. 496, 533 (1982) (Powell, J., dissenting). These cases already show a high incidence of rule 11 sanctions, Nelken, *supra* note 61, at 1327, arguably a better way to deal with insubstantial civil rights claims than expanded pleading requirements. See *Rotolo*, 532 F.2d at 922 (expanded pleading requirements designed to weed out frivolous and insubstantial cases at an early stage in the litigation). Antitrust litigation has long been regarded as the paradigm of the protracted or big case. See Report to the Judicial Conference of the United States, *Procedure in Antitrust and Other Protracted Cases*, 13 F.R.D. 62, 66-68 (1953); Freund, *The Pleading and Pre-Trial of an Antitrust Claim*, 46 CORNELL L.Q. 555 (1961). In recent years courts have imposed substantial limitations upon the substantive reach of the antitrust laws. Consequently, fewer private actions presumably are now being filed, those that are filed are more easily disposed of before trial, and collectively such litigation doubtlessly does not burden the federal courts as much as it once did.

107. See, e.g., *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962) (in antitrust cases often "the proof is largely in the hands of the alleged conspirators"). See generally Louis, *supra* note 44, at 714-15 (in constitutional defamation cases plaintiffs often lack equal access to evidence of defendant's actual malice); Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1442 (1984) (noting the plaintiff's difficulty in securities fraud cases of pleading with particularity when access to the evidence is often unequal).

108. See *supra* notes 38-41 and accompanying text.

109. The postponement process, needless to say, creates waste and delay and provides a tactical advantage to defendants, even though their pleading challenges are denied or delayed until after discovery. Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases*, 104 F.R.D. 143, 150-51 (1984) (asserting that many rule 9(b) challenges to fraud complaints result only in delay).

110. See *supra* note 26.

111. An appealable final judgment will result, of course, if a plaintiff is denied leave to amend, stands on the complaint, or fails to supply what is demanded and eventually suffers a dismissal. But

uations. Appellate control of these rulings tends, therefore, to be sporadic and weak, and of necessity decisional power over such questions is concentrated in the hands of the trial judges, whose numbers, isolation, and relative independence virtually guarantee diversity of opinion and nonuniform, sometimes highly idiosyncratic and unjust, results.

Not surprisingly these very problems have continually plagued the federal courts in their application and interpretation of the present particularity requirement of rule 9(b), the precise purpose and extent of which is still unresolved almost fifty years after its adoption. Indeed, cases can be cited in support of almost any colorable interpretation and approach thereto.¹¹² By and large, however, the cases can be divided into two basic approaches or lines of authority—one strict and one lenient and each generally oblivious of the other.¹¹³ The lenient approach holds that rule 9(b) merely enlarges the notice pleading requirements of rule 8(a) in order to overcome the vagueness inherent in allegations of fraud and mistake.¹¹⁴ If the pleading of fraud were governed only by

it appears that few cases are dismissed outright for failure to plead with sufficient particularity. *Sovern, supra* note 109, at 150-51.

112. Early rule 9(b) cases emphasized that fraud allegations must be detailed enough to advise defendant of the claim to be met, e.g., *Hirshhorn v. Mine Safety Appliances Co.*, 54 F. Supp. 588, 591 (W.D. Pa. 1944), or that plaintiff must plead all the many material elements of fraud with particularity, e.g., *National Steel Corp. v. Maryland Casualty Co.*, 18 F.R.D. 166, 168 (W.D. Pa. 1955); *C.I.T. Fin. Corp. v. Sachs*, 10 F.R.D. 397, 397-98 (S.D.N.Y. 1950). Other courts emphasized that rule 9(b) must be read in conjunction with the liberal pleading requirements of rule 8, e.g., *United States v. Dittrich*, 3 F.R.D. 475, 477 (E.D. Ky. 1943), that plaintiff need only plead ultimate facts and not evidence, e.g., *Brown v. Fire Ass'n of Philadelphia*, 1 F.R.D. 450 (S.D.N.Y. 1940), and that the provision's basic purpose was to make plaintiff allege more than that merely "defendant fraudulently induced the plaintiff to enter into a contract or something of that sort," *Union Mut. Life Ins. Co. v. Simon*, 22 F.R.D. 186, 187 (E.D. Pa. 1958). This was the lenient view of the provision. In recent years, however, opinions have asserted that the provision is designed to minimize strike suits, to protect the reputation of defendants from harm caused by allegations of moral turpitude, to assure that a complaint is based upon a reasonable belief, and to inhibit filing of complaints as a pretext for discovery of unknown wrongs. E.g., *Segan v. Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975); *Bender v. Rocky Mountain Drilling Assoc.*, 648 F. Supp. 330, 335-36 (D.D.C. 1986); *Goldman v. Belden*, 98 F.R.D. 733 (S.D.N.Y. 1983); *Gilbert v. Bagley*, 492 F. Supp. 714, 725 (M.D.N.C. 1980). See generally, *Marcus, supra* note 5, at 447 n.87 (arguing that these purposes do not justify this strict version of the rule); *Sovern, supra* note 109, at 164-79; Note, *supra* note 107, at 1440-47. With one exception—harm to reputation—these new purposes, which amended rule 11 also attempts to control, appear to be modern rationalizations of the particularity requirement. At common law, fraud was a disfavored action and required greater particularity in its pleading. *Sovern, supra* note 109 at 144-47. Why then was mistake, obviously not an action or defense harmful to reputation, included in rule 9(b)? Moreover, why is it that today, when assaults on corporation reputations are commonplace and may include even more serious allegations of racketeering, federal courts have suddenly developed this special concern for reputation? See Note, *supra* note 107, at 1446. In my opinion federal courts are concerned primarily with the threat of strike suits and fishing expeditions in the securities industry and have simply seized upon rule 9(b) and its historical link with the protection of reputation. Note, *supra* note 107, at 1440-43.

113. Most of the strict modern cases simply ignore the earlier, lenient cases. In one modern case, however, Judge Friendly, having been cited cases from the lenient line, remarked: "We see no profit in attempting to analyze these decisions, which may or may not be consistent and each of which necessarily rests on its particular facts. We follow the rule laid down by our own decisions" *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978).

114. E.g., *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959) (reversing dismissal of a complaint generally alleging that defendant was estopped by fraudulent or unintentional misrepresentations from relying upon the running of the statute of limitations); *Denny v. Carey*, 72 F.R.D. 574, 578 (E.D. Pa. 1976) (fraudulent conduct need not be alleged in great detail); *Union Mut. Life Ins. Co. v. Simon*, 22 F.R.D. 186, 187 (E.D. Pa. 1958) (complaint must allege only something more

rule 8(a), fraud in the sale of a house presumably could be generally alleged without specifying its nature,¹¹⁵ just as vehicular negligence may be generally alleged under rule 8(a) without specifying its nature—for example, that defendant driver was intoxicated or speeding.¹¹⁶ Hence, rule 9(b) requires only an additional allegation identifying the nature of the fraud—for example, that defendant fraudulently sold a house by falsely misrepresenting that it was free of termite infestation.

Satisfying such a limited pleading requirement ordinarily will pose no real problem for pleaders, even those who lack equal access to the evidence. Indeed, most fraud and antitrust complaints probably are already that specific. But such a limited requirement obviously will not make possible the desired early interception of factually doubtful claims and defenses.

By contrast the alternative, strict approach to rule 9(b) posits a provision independent of rule 8(a) that requires a much higher level of factual particularity¹¹⁷ amounting to or at least approaching a *prima facie* demonstration of the claim's factual validity¹¹⁸ and that is designed to make possible the interception of factually doubtful claims and defenses. Whether this strict approach would succeed at such interception and at what cost are the questions. Studies suggest that despite the tough talk in opinions few fraud complaints are dismissed outright and that those evidencing the pleader's best efforts on the available evidence will ordinarily lead to the promised land of discovery.¹¹⁹ Such results obviously will not generally deter strike suits or ill-founded claims.¹²⁰ On the other hand, when dismissal is granted or results because the plaintiff fails to supply the detail demanded, the interception/discouragement function is obviously served, but at the risk that meritorious claims will be prematurely terminated.¹²¹ Practice under this strict approach to rule 9(b) also commonly reveals some familiar, Code-like constants, the cost and delay of resolving "particular-

than mere fraud). Official Form 13 of the Federal Rules, which alleges a fraudulent conveyance in general terms, strongly suggests that the lenient approach is the correct interpretation of rule 9(b).

115. In *Union Mut. Life Ins. Co. v. Simon*, 22 F.R.D. 186, 187 (E.D. Pa. 1958), the court stated that "[t]he purpose of this rule is to require more of a plaintiff who charges a defendant with fraud than merely a statement that 'the defendant fraudulently induced the plaintiff to enter into a contract' or something of that sort."

116. See Official Form 9, FED. R. CIV. P.

117. See *supra* note 112 and accompanying text.

118. Judges employing the strict approach do not ordinarily articulate the requirement in these terms, which are, of course, at odds with the general pleading philosophy of the Federal Rules. But in their incessant demands for evidentiary detail and their avowed efforts to deter strike suits and fishing expeditions, see *supra* note 112, they are obviously seeking something like a *prima facie* demonstration that the plaintiff has a *bona fide*, provable claim.

119. Sovern, *supra* note 109 at 150-51. It has been suggested that outright dismissal is inflicted primarily upon claims that, in the court's private opinion, clearly lack real merit. Note, *supra* note 107, at 1442 n.52.

120. Sovern, *supra* note 109, at 171-77.

121. Note, *supra* note 107, at 1442. The danger obviously is greatest to claimants who lack access to the evidence and need discovery to flesh out their allegations. *Id.* at 1436-39, 1442. Despite the familiarity of the problem of unequal access to the evidence, many of the opinions articulating the strict approach do not either mention the problem or do not make any doctrinal allowance for it. See *id.* at 1436-39.

ity" challenges¹²² and the general uncertainty as to what facts are required to satisfy the approach.¹²³ These constants invite tactical challenges to all complaints governed by the provision, even though most such challenges do not result in dismissal before discovery.

Nothing in the language or history of rule 9(b) requires this strict approach, which is so offensive to the general philosophy of the Federal Rules and so redolent of the dark ages of Code pleading. Consequently, I agree with those who have concluded that the lenient interpretation of rule 9(b) is the correct one.¹²⁴ That conclusion obviously does not bar an amendment adopting the strict approach and adding other claims or defenses. But how would such an amendment define the requirement and deal with the problem of unequal access to the evidence? Ignoring these problems would involve a fundamental retreat from the pleading philosophy of the Federal Rules and a partial return to the injustices and waste of Code pleading. Permitting discovery in unequal access situations, however, would often frustrate the purpose of the amendment. Until these problems can be resolved—and I see no answer other than a blind and, in my opinion, unjustified faith in the case-by-case judgment of individual trial judges¹²⁵—the case for an expanded particularity requirement cannot be made. In any event, summary judgment and rule 11 sanctions both offer alternative, arguably superior, means of dealing with the same problems and, as we shall see below, have already been so employed.

C. *Post-Discovery Interception—Summary Judgment*

If more effective factual interception before discovery is not possible or practical, then effective factual interception after discovery through the motion for summary judgment is essential. For many years, however, summary judgment was a chimera, a theoretical possibility often unattainable in practice.¹²⁶ The problem was not in the text of rule 56 of the Federal Rules of Civil Procedure but in its restrictive interpretation and grudging application by federal judges obsessively concerned with preserving the merits.¹²⁷ This resistance to summary judgment obviously could not withstand indefinitely the increasing pressure of court congestion and escalating litigation costs, and eventually the

122. *Sovern*, *supra* note 109, at 150-51.

123. *See supra* note 112.

124. *Marcus*, *supra* note 5, at 447 n.87 (citing 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1298, at 406 (1969); 2A J. MOORE, W. TAGGART & J. WICHER, *MOORE'S FEDERAL PRACTICE* ¶ 9.03, at 9-28 (2d ed. 1985)).

125. Perhaps thoughtful judges are requiring only a best efforts pleading attempt by plaintiff, at least in unequal access cases, as a condition to reaching discovery, and dismiss only those claims that clearly appear to be without merit. *See supra* note 121. There is no guarantee, however, that all judges will understand or follow this unarticulated rule. Presumably some reasonable Code judges followed a similar rule, the general acceptance of which would have made the Code much more workable.

126. *Louis*, *supra* note 44, at 708-09 (describing the doctrinal barriers to the use of summary judgment); *see also* F. JAMES & G. HAZARD, *supra* note 12, § 5.19, at 274 (stating that the motion is put to little use). *But see infra* note 129 and accompanying text.

127. *See supra* note 44.

judicial tide turned.¹²⁸ In the past decade summary judgment motions have been granted much more readily, even in areas once regarded almost as taboo¹²⁹ and often to an accompaniment of judicial rhetoric suddenly responsive to the need for more effective interception.¹³⁰ These developments have now received the imprimatur of the Supreme Court of the United States, which handed down three supportive decisions in its 1985 term.¹³¹ Even the United States Court of Appeals for the Second Circuit, long regarded as the circuit most hostile to summary judgment, has now publicly disavowed its alleged hostility.¹³²

Although the federal courts now grant motions for summary judgment more readily, they still have not specifically replaced the underlying legal doctrine developed years ago in support of their more restrictive approach. They have simply developed a set of countervailing cliches in support of granting the motion.¹³³ Now, depending on whether the motion is denied or granted, either the old restrictive cliches or the new generous ones are cut and pasted into the opinion. The actual decisional process appears to rely primarily on the facts of each case and a general, unarticulated sense of when summary judgment is appropriate. This "discretionary" process could become arbitrary and unjust or lead to a backlash if trial courts, anxious to respond to the problems of today, begin to grant summary judgment too eagerly and readily.¹³⁴ In short, it poses the very problems and dangers described above of an unexplicated shift towards balanced procedural doctrine.¹³⁵

Over a decade ago I decried the prevailing, restrictive view of summary judgment, predicted that a more vigorous use of the procedure was inevitable, and proposed new doctrine to explain, guide, and ultimately contain this new

128. Louis, *supra* note 44, at 709-10.

129. Even in cases involving state of mind questions, for which summary judgment was once thought inappropriate, see *supra* note 53, summary judgment is being used with increasing regularity. Louis, *supra* note 44, at 709-710; see also Calkins, *supra* note 94, at 1104 (suggesting that summary judgment played an important role in antitrust cases despite doctrinal cautions against its use there).

130. Celotex Corp. v. Catrett, 447 U.S. 317, 327 (1986) (rule 56 must also be construed with due regard for "the rights of persons opposing such claims and defenses"); Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978) (summary judgment must be used to counter the attraction of the antitrust treble damage remedy towards vexatious litigation), *cert. denied*, 440 U.S. 982 (1979).

131. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex, 447 U.S. 317; Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986).

132. Knight v. United States Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986) (opinion stating that the perception that this court is unsympathetic to summary judgment is "decidedly inaccurate at the present time"), *cert. denied*, 480 U.S. 932 (1987).

133. In response to the Poller caution that summary judgment should be used sparingly in antitrust cases involving state of mind issues, see *supra* note 53, courts now respond that the rule is not absolute and that much can be gained through the summary disposition of meritless, protracted cases. E.g., Texaco Puerto Rico, Inc. v. Medina, 834 F.2d 242, 247 (1st Cir. 1987) (courts now more freely affirm grants of summary judgment in antitrust cases and such cases do not require special treatment); accord Coverdell v. Department of Social and Health Servs., 834 F.2d 758, 769 (9th Cir. 1987) (summary judgment useful in disposing of meritless civil rights actions despite presence of state of mind issues).

134. Some evidence of such a tendency has already appeared. See *supra* note 87 and accompanying text.

135. See *supra* text accompanying notes 93-100.

vigor.¹³⁶ This proposal achieved wide academic currency and approval¹³⁷ but, until recently, almost no recognition by the federal courts, which seemed to be almost unaware of the emerging doctrinal vacuum. In its recent decision in *Celotex Corp. v. Catrett*, however, the Supreme Court recognized and appears, in part at least, to support this new approach.¹³⁸ Except for Justice Brennan's dissenting opinion, however, the Supreme Court's doctrinal development is minimal and so buried within the opinions that it may be discernible only to the most careful observer. Consequently, I shall restate that approach here and show what parts the Court has embraced and what questions remain open.

Although rule 56 seems to treat all motions for summary judgment alike, functionally such motions can be divided into two types: those motions by a party seeking to establish the existence of a claim for relief or affirmative defense that the party has pleaded and upon which she bears the trial proof burden (hereafter sometimes referred to as a motion by a party with the trial proof burden), and those motions by a party seeking to establish the nonexistence of facts upon which the opposing or nonmoving party bears the trial proof burden (hereafter sometimes referred to as a motion by a party without the trial proof burden).¹³⁹ The paradigm example of the second type is a motion by a defendant seeking to show the nonexistence of an essential element of the plaintiff's claim for relief. Those who move for summary judgment must satisfy burdens of production and persuasion.¹⁴⁰ Because of the seventh amendment, the burdens imposed upon a moving party with the trial proof burden are very heavy and cannot be lightened.¹⁴¹ For years these same heavy burdens were also imposed upon motions for summary judgment by the party without the trial proof burden, even though the seventh amendment was inapplicable.¹⁴² The end re-

136. Louis, *supra* note 24.

137. Louis, *supra* note 44, at 715 n.49.

138. *Celotex*, 477 U.S. 317, 323-24, 331. The foundation of this approach is the contention that different burdens may and should be imposed when a motion for summary judgment is made by a party who seeks to show the nonexistence of an essential element of a claim or defense that has been asserted by the nonmoving party and upon which the nonmoving party bears the trial proof burden. Louis, *supra* note 24, at 748. In *Celotex* both Justice Rehnquist's opinion for the majority and Justice Brennan's dissenting opinion adopt this distinction. *Celotex*, 477 U.S. at 323-34 (Rehnquist, J., for the majority), 331 (Brennan, J., dissenting).

139. *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting).

140. *Id.* at 330 (Brennan, J., dissenting).

141. These burdens are essentially the same as those imposed on a party with the trial proof burden moving for directed verdict. In both cases this party must present proof so strong no reasoning person may reject it. Louis, *supra* note 24, at 748-49. This heavy burden may well be a requirement of the constitutional right of trial by jury established by the seventh amendment to the Constitution of the United States. Cf. *Galloway v. United States*, 319 U.S. 372, 388-96 (1943) (insubstantial verbal changes in directed verdict standard would not violate right to jury trial; presumably substantial changes would).

142. Louis, *supra* note 24, at 751-52 (under traditional summary judgment doctrine, the moving party without the trial proof burden was required to demonstrate the nonexistence of an essential element of the nonmoving party's claim or defense with proof so strong no reasoning person could reject it, the constitutional standard imposed upon the party with the burden of proof). At trial, however, the party without the burden of proof is not required to present any evidence of a fact's nonexistence to obtain a directed verdict; it is enough that the party with the burden of proof has failed to present a *prima facie* case. Hence, in moving for summary judgment, the party without the trial proof burden should not be constitutionally required to present overwhelming evidence of the same fact's nonexistence. To discourage meritless, tactical motions, this party perhaps should face

sult was an unwise, constitutionally unnecessary impediment to the factual interception of doubtful claims and defenses—what had become both statistically and strategically the most important use of the motion for summary judgment.¹⁴³

In *Celotex* the Supreme Court finally recognized the distinction between the two functional forms of the motion¹⁴⁴ and implied that in the case of a motion by the party without the trial proof burden, the movant's production burden should be different and presumably lighter.¹⁴⁵ That same term the Court had already held that if the moving party's production burden is discharged, an opposing party with the trial proof burden must respond with *prima facie* proof.¹⁴⁶ In neither case, however, did the Court attempt to redefine this moving party's production burden.¹⁴⁷ The lower federal courts have also ducked this question, but in practice today they sometimes accept less than their traditional, still unrepudiated doctrine requires.¹⁴⁸ This judicial failure to reexamine the moving party's production burden is inexplicable, given the importance of the question and the obviousness of the answer. There are three possible *lesser* burdens of production that might be imposed upon the moving party seeking to show the nonexistence of a fact: a reasonable or persuasive amount of proof, *prima facie*

some smaller production burden. Louis, *supra* note 24, at 753, 759. But that would be a policy determination, not a constitutional requirement.

143. See Louis, *supra* note 24, at 745 n.4 (survey of summary judgment cases showing that a majority of the motions were made by defendants seeking to show the nonexistence of an essential element of plaintiff's claim for relief).

144. See *supra* note 138.

145. *Celotex* says nothing specific about the production burden imposed on a defendant who seeks to establish through affirmative evidence the nonexistence of an essential element of the plaintiff's claim. *Celotex* merely gives this moving party defendant the option of showing that the plaintiff lacks *prima facie* proof of one or more essential elements of the claim. See *infra* text accompanying notes 157-60. This option often will be expensive and impractical, however, see *infra* text accompanying notes 163-64, and, as a result, eventually there will be consideration of a reduction in the defendant's traditional production burden. When that consideration occurs, *Celotex*'s recognition of the basic distinction between a motion by the party with and the party without the trial proof burden, see *supra* note 138, should help to achieve a relaxation in the production burden imposed upon the moving party without the trial proof burden.

146. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248-50 (1986).

147. *Id.* at 250 n.4; see *supra* note 145. The question of the moving party's burden seems to be addressed only when the opposing party submits no affidavits or other materials in response to the motion. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-160 (1970) (defendant discharged its burden of showing no preexisting agreement with local police to deny plaintiff lunch counter service but failed to preview any proof of the nonexistence of a similar agreement made after plaintiff entered defendant's store followed by a policeman). Most opposing plaintiffs do submit some materials, however. Courts then could, but ordinarily do not, engage in a two-step analysis, asking first whether the defendant has discharged its burden as the moving party and then asking whether the plaintiff's response is adequate. Instead, courts simply ask, under standards yet to be clearly defined, whether on the basis of all the previewed proof a genuine issue of fact exists. Arguably *Celotex*, 477 U.S. at 324, and *Liberty Lobby*, 477 U.S. at 248-50, resolve this standard as follows: if the plaintiff elects to respond, it must respond with *prima facie* proof of the challenged essential element. See *infra* note 173, suggesting that lower federal courts may have so construed *Celotex*. To my knowledge, however, no court has specifically refused to engage in the two-step approach described above or denied a plaintiff whose challenge to the defendant's proof failed an opportunity to submit affidavits and contend at a second hearing that they raised genuine issues of material fact. If courts eventually hold that neither option is available, they will force a plaintiff to choose between previewing her own proof and challenging the discharge by the defendant of his burden as the moving party. Because most plaintiffs would probably choose the former, few would get to challenge the latter, which would remain an open and generally ignored question.

148. Louis, *supra* note 44, at 709-12.

proof, or no proof at all. The first possibility has no analog in civil procedure and would be difficult to define and apply;¹⁴⁹ the last, which has some academic support,¹⁵⁰ has been uniformly rejected by the federal courts.¹⁵¹ That leaves prima facie proof, which is a well-defined concept, as the only acceptable standard.

The objection to a prima facie production burden is that it can be met so easily. The eyewitness affidavit of a party, which is prima facie proof, will itself satisfy this burden and shift to the opposing party the burden of response.¹⁵² But the opposing party can also discharge her burden of response with such an affidavit, or any other prima facie proof.¹⁵³ If she cannot obtain such proof by the time discovery is completed, why should she be permitted to escape summary judgment and proceed to trial? Such a result may seem unfair when she lacks equal access to the evidence, but even in this situation her chances to obtain the missing evidence at trial are very slim. If, however, she has some evidence, though falling short of a prima facie case, and reasonable prospects for obtaining the rest at trial, she may ask the court to deny the motion under rule 56(f) and allow her to proceed to trial anyway.¹⁵⁴ This discretionary dispensational power is rarely mentioned in recent opinions advocating a more vigorous use of summary judgment. Without it, however, summary judgment could become an oppressive tool, particularly in its application to issues of conspiracy, intent, or state of mind, and other situations involving unequal access to the evidence.

In the *Celotex*¹⁵⁵ decision the Supreme Court of the United States recognized an alternative route to the discharge of defendant's production burden. There, fifteen manufacturers and distributors of asbestos had been charged with wrongful death. Defendant Celotex successfully moved for summary judgment because in answers to interrogatories plaintiff was unable to name any witnesses who could testify to decedent's exposure to Celotex products.¹⁵⁶ The Court of Appeals reversed, holding that under rule 56 defendant must make an affirmative showing that decedent had not been exposed to its products.¹⁵⁷ The

149. Louis, *supra* note 24, at 753.

150. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 78 (1977) (suggesting that the moving party without the trial proof burden should face no production burden whatsoever).

151. *Celotex*, 477 U.S. at 332 (Brennan J., dissenting). The objection to eliminating this burden altogether is that it could allow summary judgment to be a "tool for harassment." *Id.* Such motions, however, are now subject to the sanctions of amended rule 11, which might itself be sufficient to discourage meritless, tactical motions by defendants. Nevertheless, a plaintiff still "might contend that [such a] minimal effort on the part of defendant would compel him to develop a prima facie case before trial, reduce it to affidavits or other supporting materials satisfying the requirements of rule 56(e), and disclose it all to defendant." Louis, *supra* note 24, at 756; accord Risinger, *supra* note 87, at 41-42.

152. Louis, *supra* note 24, at 755 (interested party's affidavit is prima facie proof of a fact's nonexistence).

153. *Cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986).

154. Louis, *supra* note 24, at 767-69 (analyzing the requirements of rule 56(f)).

155. *Celotex*, 477 U.S. at 322-37.

156. *Id.* at 319-20.

157. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184-85 (D.C. Cir. 1985), *rev'd*, 477 U.S. 317 (1986).

Supreme Court unanimously rejected this conclusion, holding that a moving party without the trial proof burden may also discharge the production burden with a demonstration that the opposing party lacks or cannot obtain prima facie proof of an essential element of the challenged claim.¹⁵⁸ The Court, however, divided over the question of whether defendant had satisfactorily demonstrated plaintiff's lack of evidence. In response to a previous motion for summary judgment, plaintiff had proffered three inadmissible documents suggesting that decedent had been exposed to Celotex products.¹⁵⁹ Being inadmissible, these documents probably could not satisfy plaintiff's burden of response, but they did identify at least one person who might so testify in plaintiff's behalf.¹⁶⁰ Although defendant knew of this potential witness when it again moved for summary judgment, it made no effort to expose this person's testimony as unavailing. For this reason at least four,¹⁶¹ and probably five,¹⁶² of the justices felt that defendant had failed to demonstrate plaintiff's lack of evidence. In other words, perhaps defendant was required to depose or obtain an affidavit from every witness named by plaintiff in order to satisfy its burden under this alternative approach.¹⁶³ If that is so, then *Celotex* is hardly a simplified approach to summary judgment for defendants. Indeed, as I suggested more than a decade ago, although this approach

is necessary when direct proof is generally lacking and commends itself whenever the opposing party's witnesses are few and can be deposed without undue effort or expense, it can be] burdensome and costly when the opposing party potentially will rely upon a large number of witnesses or documents. In such a situation the second approach [of offering affirmative proof of the nonexistence of the essential element] may be more attractive.¹⁶⁴

For these reasons *Celotex* does not seem to be a milestone in the law of summary judgment.¹⁶⁵ Admittedly, the majority opinion states that there is no genuine issue of material fact, and summary judgment, therefore, is appropriate

158. *Celotex*, 477 U.S. at 322-27.

159. *Id.* at 335 (Brennan, J., dissenting). The three documents, all of which were hearsay, consisted of the transcript of a deposition upon oral examination of the decedent taken before his death, a letter from an official of one of decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to plaintiff's attorney. All three documents tended to show that decedent had been exposed to petitioner's asbestos products.

160. *Id.* at 336 (Brennan, J., dissenting).

161. Chief Justice Burger and Justice Blackmun joined Justice Brennan's dissenting opinion arguing that defendant's showing had not been sufficient to obtain summary judgment. *Id.* at 336-37 (Brennan, J., dissenting). In a separate dissenting opinion Justice Stevens found that the insurance company letter, *see supra* note 159, was sufficient to bar summary judgment. *Celotex*, 477 U.S. at 338 (Stevens, J., dissenting). Moreover, the five Justices in the majority did not find that the motion should be granted. They found only that there was no legal bar to a grant of the motion and remanded the case for a finding on whether the motion in fact should be granted. *Id.* at 327-28.

162. In a separate concurring opinion, *Celotex*, 477 U.S. at 328, Justice White said that a plaintiff "need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit." *Id.* (White, J., concurring).

163. *Id.* (White, J., concurring) (quoted in *supra* note 162); *id.* at 332 (Brennan, J., dissenting).

164. Louis, *supra* note 24, at 751.

165. *Accord* Calkins, *supra* note 94, at 1115.

if a nonmoving party cannot establish the existence of an essential element of his case.¹⁶⁶ This language, however, correctly describes the opposing party's burden of response. It says nothing about what the moving party must do to trigger that burden. Perhaps it suggests to some readers that the moving party need not do very much. In the very next paragraph, however, Justice Rehnquist reminds us that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact."¹⁶⁷ What this demonstration must consist of is not indicated, a "lack of clarity" that, says Justice Brennan in dissent, probably will produce confusion at the district court level.¹⁶⁸ Justice Brennan clearly rejects as insufficient a conclusory assertion that the opposing party has no evidence.¹⁶⁹ The demonstration instead must be a substantial one. Thus, if the moving party ignores a witness who apparently could provide relevant evidence for the opposing party, the moving party has failed to discharge its initial burden of production and the motion must automatically be denied.¹⁷⁰ Perhaps some members of the majority would not go this far.¹⁷¹ Justice White, however, apparently would.¹⁷² Thus, he and the dissenters appear to constitute a majority that denies *Celotex* any true revolutionary potential.¹⁷³

166. *Celotex*, 477 U.S. at 322-23.

167. *Id.* at 323 (quoting FED. R. CIV. P. 56(c)). To satisfy this burden the moving party must identify portions of the record that affirmatively show that the plaintiff lacks evidence to establish an essential element of her case, for example plaintiff Catrett's failure in answering interrogatories to name any witnesses who could testify to the fact in issue, a failure which was treated as an admission that plaintiff had no such witnesses. Thus, it would not be sufficient for a defendant to note only that the record contains no evidence affirmatively establishing the plaintiff's contentions. The record must contain admissions or the equivalent affirmatively establishing that the plaintiff cannot prove her contentions. Of course if the burden is waived whenever the plaintiff responds with her own proof, then as a practical matter the burden ordinarily will not exist. See *supra* note 147.

168. *Celotex*, 447 U.S. at 329 (Brennan, J., dissenting).

169. *Id.* at 332 (Brennan, J., dissenting).

170. *Id.* (Brennan, J., dissenting).

171. The majority merely remanded the case for further proceedings not inconsistent with its holding that the moving party could properly support its motion with a showing that plaintiff lacked prima facie proof. *Celotex*, 447 U.S. at 327-28.

172. See *supra* note 162.

173. This is not to deny the occasional usefulness of the *Celotex* alternative or the importance of *Celotex*, *Liberty Lobby*, and *Matsushita* as indicative of the Court's present favorable attitude towards the use of summary judgment. See *supra* note 131 and accompanying text. But to some these decisions, particularly *Celotex*, seemed to represent a breakthrough that would unleash summary judgment against all doubtful claims. This belief finds no real support in the *Celotex* opinion, see *supra* note 167, or the subsequent cases citing it. On the other hand, a scan of the recent court of appeals decisions citing *Celotex* shows a heavy emphasis on the majority's restatement of the opposing party's burden of response, see *supra* note 166 and accompanying text, and little concern with the moving party's burden of production, see *supra* note 167 and accompanying text. Indeed, most of these opinions merely assert or assume that the moving party has met the production burden without citing the portions of the record or the preview of evidence establishing this conclusion. Only one recent opinion holds that the moving party has failed to satisfy the burden of production. *Higgins v. Scherr*, 837 F.2d 155, 156-57 (4th Cir. 1988) (reversing a trial judge's grant of summary judgment against plaintiff on three claims for services rendered because defendant had, at best, demonstrated plaintiff's lack of evidence with respect to only one of the three claims). Given this disappointing,

Justice Brennan's helpful exegesis on the *Celotex* approach leaves many questions unanswered. He argues that the moving party must expose as unhelpful the testimony of those witnesses properly identified by the opposing party¹⁷⁴ but never indicates what constitutes proper identification. If the opposing party, for example, tendered a list of one hundred potential witnesses, would the moving party have to depose, interview, or obtain affidavits from each of them in order to perfect the *Celotex* approach? Or would the opposing party, as in *Celotex*, also first have to make some showing that the persons named were in fact potentially helpful witnesses? Not requiring such a showing might allow unscrupulous plaintiffs to thwart the *Celotex* approach, even though they would presumably expose themselves to rule 11 sanctions. On the other hand, requiring such a showing could lead to endless disputes over its sufficiency. In any event, if the opposing party identifies relatives, employees, or friends as potential witnesses, i.e. persons from whom he presumably may readily obtain affidavits, arguably he should bear the minimal burden of exposing their testimony.¹⁷⁵ Otherwise the moving party would be saddled with the much higher cost of deposing these presumably hostile witnesses. Moreover, if the testimony of many of the identified witnesses is likely to be cumulative—for example, the witnesses to an airplane crash—perhaps the moving party can discharge his burden with an acceptable sample of this testimony and the averment that no contrary witnesses are known to exist.¹⁷⁶ Finally, perhaps there should come a time—presumably at the close of discovery, at the final pretrial conference, or on the eve of trial—when the opposing party, in response to a showing that a prima facie case is lacking, must finally deliver the missing proof and can no longer simply point to the existence of potential witnesses or other information subject to subpoena at trial. Such a rule would help to make summary judgment the ruthlessly efficient interception device that some persons desire.

Not surprisingly this discussion of *Celotex* has returned us to the fundamental, unresolved question of summary judgment: What is the burden of production on the moving party, particularly the defendant, when this party will not have the burden of proof at trial? Ultimately it really does not matter very much whether the defendant employs the *Celotex* approach or the traditional one. As defendant's production burden rises, both the cost and difficulty of succeeding on the motion and the system's inability to intercept spurious or unprovable claims rises. As defendant's burden falls, claimants will find it increasingly difficult to reach trial and the jury. A minimal burden, says Justice Brennan, "would simply permit summary judgment procedure to be converted into a tool

clichéd, one-sided view of *Celotex* in the courts of appeals, a real shift in the direction of granting summary judgment is certainly possible.

174. *Celotex*, 447 U.S. at 332-33.

175. Cf. *Louis*, *supra* note 24, at 754 (suggesting that the burden of exposing the testimony of a friendly witness should fall on the party who is the witness' friend and presumably can readily obtain an affidavit from him).

176. Cf. *Dale Hilton, Inc. v. Triangle Publications, Inc.*, 27 F.R.D. 468, 472-73 (S.D.N.Y. 1961) (allowing a party moving for summary judgment to sample a large number of similarly situated potential witnesses).

for harassment.”¹⁷⁷ Such harassment, however, is subject to rule 11 sanctions and might not be a major problem. On the other hand, some plaintiffs with prospects for success at trial cannot readily or economically assemble a prima facie case before trial. Should such plaintiffs sometimes still be permitted to escape summary judgment and go to trial, as rule 56(f) currently allows?¹⁷⁸

These many unresolved summary judgment questions, and the disappointing slowness of the federal courts in recognizing and dealing with them, suggest that amendment of rule 56 may, as in the case of rule 11, again be the superior route to reform. Not surprisingly the amendment process is already well under way. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the Committee) currently has under study sweeping changes in interception practice under the Federal Rules.¹⁷⁹ Most of these changes, however, are structural and organizational and will cause no real change in current practice. Thus, the proposal merges all interception motions going to the merits—the motion to dismiss under rule 12(b)(6), the motion for judgment on the pleadings under rule 12(c), the motion to strike a legally insufficient defense under rule 12(f), the motions for directed verdict and judgment notwithstanding the verdict under rule 50, and the motion for summary judgment under rule 56—into a proposed rule 56 entitled *Judgment As A Matter of Law*.¹⁸⁰ In addition, many of the operative provisions of present rule 56 have been transferred to a proposed rule 40(b) entitled *Establishment of Law and Fact*. Proposed rule 40(b) establishes the procedures for finding that material facts are not genuinely in dispute and sometimes permits such findings even though they cannot result in the entry of judgment.¹⁸¹ When such findings would permit the entry of judgment, the proceeding becomes a motion for judgment as a matter of law under proposed rule 56. In short, the two rules combine

177. *Celotex*, 447 U.S. at 332.

178. See generally Louis, *supra* note 44, at 720; Louis, *supra* note 24, at 767-69 (both considering what rule 56(f) presently requires to permit a plaintiff without a prima facie case to escape summary judgment and proceed to trial).

179. Reporter's Tentative Draft, Amendments to the Federal Rules of Civil Procedure, Advisory Committee, July, 1987 [hereinafter Draft Amendments].

180. Proposed Rule 56, *Judgment As a Matter of Law*, Draft Amendments, *supra* note 179. These motions can be divided into two types: those motions that challenge the face of a pleading—rules 12(b)(6), 12(c), and 12(f); and those motions that challenge the sufficiency of the evidence or a preview thereof—rules 50, 56. Both types of motion similarly assert, however, that the challenged claim or defense can be resolved as a matter of law without the necessity of a trial to decide disputed questions of fact. Is this common thread a sufficient reason to unite all these motions into one? Clearly all the motions of the first type should be united. Whether these motions should be united with the fact-based motions for summary judgment, directed verdict, and judgment notwithstanding the verdict is the more difficult question. Moreover, because the ancillary procedures of rules 56 and 50 are so different, a case can be made for keeping these two fact-based motions separate.

181. In response to an unsuccessful motion for summary judgment, courts today are permitted under present rule 56(d) to find that the moving party has at least established that certain “material facts exist without substantial controversy.” Proposed rule 40(b) would permit an original motion to establish that a fact exists, even though its existence cannot itself result in summary judgment. Committee Note, *Pre-Trial Establishment of Facts*, Proposed rule 40, Draft Amendments, *supra* note 179. Because such motions could be wasteful and invite tactical use, the procedure's availability is limited and subject to the trial judge's discretion. Committee Note, *Limitation on Motion Practice Under This Rule*, Proposed rule 40, Draft Amendments, *supra* note 179.

to govern the summary disposition of claims; proposed rule 40(b) alone governs the summary disposition of material facts.

These proposed changes recast the interception provisions of the Federal Rules into a coherent framework freed at last from the historical baggage of the Code and the common law. The present rules, however, are well understood and trouble free, at least in the areas marked for change, and the proposals may be resisted, therefore, as cosmetic and unnecessary. The great disappointment is the Committee's failure to confront the unsettled questions of federal interception practice, in particular the questions plaguing summary judgment. In an effort to atone in part for this omission, the Committee has included the following paragraph within the Comment to Proposed Rule 56:

THE PRETRIAL MOTION FOR JUDGMENT. Proposed subdivision (b) (2) of this rule would clarify the burdens imposed on a moving party seeking a pretrial judgment as a matter of law. The moving party, whether or not having the burden of proof on an issue, must at least specify the fact as an appropriate one for determination as one not genuinely in dispute and explain the basis on which such a determination can be made. There is, however, no burden to disprove the existence of a fact that the moving party would not have the burden of proving at trial. Cf. *Celotex Corp. v. Catrett*, 106 Sup.Ct. 2548, 2555. And the moving party may rely upon the pleadings of the adversary to demonstrate the absence of genuine dispute, at least until the opposing party comes forward with amendments or affidavits suggesting the existence of contrary evidence. The opposing party, likewise without respect to burdens of proof, is required to identify any triable issues which would justify retention of the case on the court's docket. No longer applicable is the line of cases based in part on the opinion of the Supreme Court in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), which placed on the proponent of judgment the burden of disproving the availability of evidence to his adversary, even where the adversary would at trial bear the burden of producing evidence and would experience an adverse judgment on failing to do so.¹⁸²

The above paragraph attempts to make an all-inclusive statement about the burdens imposed upon those who seek pretrial judgment as a matter of law, namely those who today would make any of the motions that are to be merged into proposed rule 56. With one notable exception, however, there is no dispute or controversy with respect to the burdens imposed upon those who make these motions. Therefore, most of what the paragraph says is of no real consequence. The notable exception is the motion for summary judgment by the party *without* the burden of proof at trial, and what the above paragraph says about the burden imposed on this moving party could be important. In this regard the paragraph seems to make the following statement: a moving party without the trial proof burden must at least specify that a fact is not genuinely in issue and explain the basis on which such a determination can be made; this moving party

182. Committee Note, *The Pretrial Motion for Judgment*, Proposed rule 56, Draft Amendments, *supra* note 179.

need not, however, disprove either the fact's existence or the availability of evidence to the opposing party to prove the fact at trial.¹⁸³ At first blush this is merely a restatement of the *Celotex* decision and can be criticized, like the majority opinion there, for its obvious failure to show how the moving party can "explain" the basis of the contention that there is no genuine issue without either disproving the fact's existence or the availability of evidence to the opposing party to prove its existence. In its unequivocal rejection, however, of the moving party's need to prove the unavailability of such evidence to the opposing party, the paragraph implies that something less than what the dissenters and Justice White required to satisfy the *Celotex* approach will now suffice.¹⁸⁴ What that "something less" might be, however, is unclear.

There is also an important but unannounced change in the Committee's proposals. Present rule 56(f) is repealed and reincarnated in proposed rule 40(b)(2), the comment to which suggests it is even more protective of the opposing party than the present rule.¹⁸⁵ The proposed rule, however, omits language from present rule 56(f) allowing an opposing party to whom affidavits are unavailable sometimes even to reach trial anyway.¹⁸⁶ This discretionary, dispensational power is, as described above, a necessary safety valve for summary judgment practice, particularly in cases in which a claimant lacks equal access to the evidence and would otherwise have to respond before trial with prima facie proof whenever a defendant swore to his or her denials. In combination with an extreme reading of *Celotex*, this repeal of rule 56(f) would create a new order in which summary judgment could ruthlessly eliminate almost all hard-to-prove claims before trial.¹⁸⁷ Perhaps that is what the times demand, but it is a major departure from the protect-the-merits philosophy of the Federal Rules. If the Committee supports such a change, it should say so clearly and set forth its reasons.

In sum, this recodification is very disappointing. The focus is on unimportant, though unobjectionable, cosmetic changes to general interception practice. The major unresolved questions of summary judgment and the new *Celotex* approach are mostly ignored. It is as if the old car, having been sent to the garage

183. The paragraph suggests that a line of cases based in part on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), once placed on a moving party defendant the task of disproving the availability of evidence to the plaintiff to establish an essential element of plaintiff's case. That is a novel indictment of *Adickes*. The two court of appeals justices who initially decided *Celotex* incorrectly, Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir. 1985), cited *Adickes* for the proposition that a defendant cannot discharge the moving party's burden in this manner but must demonstrate with affirmative evidence the nonexistence of an essential element of the plaintiff's case. In *Celotex*, however, the Court not only rejected such a requirement but denied that *Adickes* had ever imposed it. *Celotex*, 447 U.S. at 325, 334; accord *Louis*, *supra* note 24, at 764. Hence, I see no reason why the Committee should still be flogging this dead horse.

184. See *supra* notes 161-62, 171-72.

185. Committee Note, *Discovery and Investigation Prior To Establishment*, Proposed rule 40(b)(2), Draft Amendments, *supra* note 179.

186. See *supra* note 154 and accompanying text.

187. The paradigm case for this exercise of rule 56(f) discretion is one in which key witnesses hostile to the opposing party have been evasive in deposition and this party, who lacks access to the evidence but still possesses proof approaching a prima facie case, seeks to examine them at trial as on cross-examination. *Louis*, *supra* note 44, at 718-19.

for a tuneup, was returned with a new paint job but with the engine still sputtering. Perhaps the Committee was unable to reach a consensus on these unanswered questions. If so, then perhaps rule 56 should not be amended until a comprehensive solution can be proposed.

D. *Sanctions and Cost Shifting*

The success rate of an interception system probably cannot be significantly raised without also threatening to terminate some claims and defenses that raise genuine issues of fact. For this reason such systems generally err on the side of, or give the benefit of the doubt to, the party opposing interception.¹⁸⁸ Factual interception also must ordinarily await the completion of discovery¹⁸⁹ despite its high cost and potential tactical value. Consequently, interception systems cannot always discourage the prosecution of marginal claims and defenses and may even invite their assertion if the cost of defeating them is high enough. One solution to this dilemma is financial, the imposition of monetary sanctions or the shifting of costs to the losing party. Thus, most procedural systems tax the winning party's costs against the losing party.¹⁹⁰ Foreign systems usually include the attorney's fees within the bill of costs; American systems traditionally do not.¹⁹¹ Since the attorney's fees generally are by far the largest cost item, their noninclusion in American systems means that these systems usually cannot provide adequate economic disincentives.

American systems, however, traditionally permit the imposition of sanctions upon procedural miscreants, including those who willfully assert baseless claims and defenses. At the time of the adoption of the Federal Rules of Civil Procedure, for example, federal courts had inherent power to proceed by contempt or summary application against miscreant attorneys;¹⁹² they had statutory power to make counsel personally liable for increased "costs" produced by his or her "multiplying . . . proceedings . . . unreasonably and vexatiously";¹⁹³ and under rule 11 they had power to strike pleadings signed with intent to defeat the rule's purposes and to discipline attorneys for willful violations thereof.

All of these powers, however, were subject to doubts, gaps, or ambiguities

188. On motions for summary judgment, directed verdict, and judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the party opposing the motion; this party also must receive the benefit of all reasonable inferences that may be drawn from the evidence. *C. WRIGHT, supra* note 2.

189. *See supra* note 38.

190. *See generally* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-64 (1975) (historical review of the American practice of awarding costs but not attorney fees).

191. *See generally* Symposium, *Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 1 (1984) (everything anyone ever wanted to know about the question).

192. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980). *See generally* *Risinger, supra* note 44, at 44-52 (describing the Anglo-American practice of punishing attorneys who act in bad faith). In *Alyeska Pipeline*, 421 U.S. at 258-59, and *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974), the Supreme Court stated that even attorneys' fees may be awarded if the opposing party acts in bad faith, vexatiously, wantonly, or for oppressive reasons.

193. 28 U.S.C.A. § 1927 (West Supp. 1988).

that the federal courts generally declined to overcome,¹⁹⁴ in part out of a genuine reluctance to sanction attorneys for litigation-related misconduct.¹⁹⁵ With attorneys correspondingly reluctant to seek sanctions,¹⁹⁶ the system became impotent and invited the many abuses that followed.¹⁹⁷ Indeed, by 1975 litigation abuses, particularly in discovery, were reported to be both frequent and flagrant, but courts generally refused to react until "provoked beyond endurance."¹⁹⁸ Finally in 1976 the United States Supreme Court signaled a change in attitude towards sanctions and an end to the heyday of the adversary system.¹⁹⁹ By 1979, however, the federal courts were still hesitant, even with adequate statutory authorization, to impose heavy sanctions upon egregious misconduct.²⁰⁰

The sum total of these deficiencies in federal litigation sanctions seemed to require amendment of the Federal Rules. In 1983 rule 11 was totally rewritten,²⁰¹ and its substance was also incorporated into a new discovery provision.²⁰² The rule now provides that the required signature of an attorney or party proceeding pro se upon a pleading or motion certifies that it has an adequate legal and factual basis, as determined "after reasonable inquiry," and that it is not interposed for "any improper purpose." For a violation of the rule, sanctions, usually attorneys' fees and other expenses incurred in defeating the pleading or motion,²⁰³ are now mandatory²⁰⁴ and may be imposed upon either the party, the attorney, or both. Findings of willfulness or bad faith are not required to impose sanctions, and good faith is not a defense.²⁰⁵

These amendments to rule 11, which were designed to "reduce the reluctance of courts to impose sanctions," to reduce "pleading and motion abuses," and to "discourage dilatory or abusive tactics and help to streamline the litigation,"

194. Risinger, *supra* note 44, at 42-61 (reviewing federal judicial reluctance to interpret these provisions aggressively).

195. Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985).

196. Miller, *supra* note 4, at 24-25.

197. Miller, *supra* note 4, at 15, 18-19.

198. R. RODES, K. RIPPLE & C. MOONEY, *SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE* 85 (Fed. Jud. Center 1981).

199. See *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam) (in awarding sanctions—in this case for discovery abuse—courts are free to consider the general deterrent effect such awards will have on the instant case and on litigation in general).

200. See, e.g., *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066-68 (2d Cir. 1979) (well-known decision holding, but only after a great deal of huffing and puffing, that on egregious facts amounting to "a grossly negligent failure to obey an order compelling discovery" a serious sanction such as preclusion under rule 37(b)(2)(B) may be imposed).

201. See generally FED. R. CIV. P. 11 advisory committee notes (1983) (explaining the reasons for the amendment).

202. New rule 26(g) imposes a similar certification requirement upon discovery requests and responses. In addition rule 16(f) now authorizes the imposition of sanctions, including those serious sanctions for discovery abuses listed in rule 37(b)(2), upon parties and attorneys who misbehave with respect to scheduling and pretrial conferences or orders issued pursuant thereto.

203. One survey reports that in 96% of the cases studied in which rule 11 sanctions were imposed, "reasonable" costs and attorneys' fees were awarded. Nelken, *supra* note 61, at 1333.

204. Rule 11 states that for a "violation of this rule, the court . . . shall impose . . . an appropriate sanction." The Advisory Committee Note, however, states that a court has discretion to tailor its sanction to the facts of the case. FED. R. CIV. P. 11 advisory committee notes (1983). Presumably that permits merely a slap on the wrist in appropriate situations.

205. Schwarzer, *supra* note 195, at 195-96.

tion process by lessening frivolous claims or defenses,"²⁰⁶ seem to be succeeding.²⁰⁷ Attorneys apparently are no longer reluctant to request sanctions, and the federal courts generally have accepted the obligation to impose them, thus far without artificial limitations of any kind.²⁰⁸ Indeed, rule 11 has become a familiar and important feature of federal civil practice, and inevitably it must achieve at least some of its authors' goals.²⁰⁹

Since rule 11 became effective, the federal courts have rendered more than a thousand decisions thereunder,²¹⁰ enough to reveal some trends. Initially the practice was concentrated in the largest cities²¹¹ and was aimed primarily at plaintiffs,²¹² particularly those asserting civil rights claims.²¹³ Typically sanctions were sought after the grant of a motion terminating the litigation²¹⁴ and were imposed only for misconduct that could be characterized as frivolous, egregious, irresponsible, unreasonable, or meritless.²¹⁵ Findings of willfulness or bad faith, though not a prerequisite to the imposition of sanctions, did tend to increase the severity of the sanction imposed.²¹⁶

These developments do not establish, of course, that rule 11 will accomplish all of its goals or will not have undesirable side effects. Thus, critics of the rule, who originally expressed the fear that it might chill legal enthusiasm and crea-

206. FED. R. CIV. P. 11 advisory committee notes (1983).

207. Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. L. REV. 587, 590-91 (1987) (asserting that the new rule has worked well and has sanctioned and, it is hoped, deterred the filing of frivolous suits).

208. The only announced limitation—and arguably a correct one—is the refusal of some courts to make the certification under rule 11 a continuing one. *Thomas v. Capital Sec. Serv., Inc.*, 836 F.2d 866, 874-75 (5th Cir. 1988) (en banc); *Oliveri v. Thompson*, 803 F.2d 1265, 1274-75 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

209. See *supra* notes 206-07.

210. A LEXIS search on March 5, 1987, generated more than 700 district court cases containing a discussion of rule 11 sanctions. Levin & Sobel, *supra* note 207, at 592 n.24. At the rate such cases are being decided, more than a thousand such decisions were likely by the middle of 1988.

211. Nelken, *supra* note 61, at 1326-27.

212. *Id.* at 1327-28.

213. *Id.* at 1327. Securities cases, another type of disfavored action, also were disproportionately represented. *Id.*

214. *Id.* (in one third of all rule 11 cases sanctions were sought in connection with, and ordinarily after the grant of, motions to dismiss or for summary judgment).

215. Most of the decisions require an extreme element of meritlessness, carelessness, or bad faith as a prerequisite to a finding of violation. *E.g.*, *Indianapolis Colts v. Mayor and City Council*, 775 F.2d 177, 181 (7th Cir. 1985) (claim not "utter[ly] meritless[]"); *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985) (sanctions appropriate when it is "patently clear" that a claim has absolutely no chance of success); *Lussy v. Haswell*, 618 F. Supp. 1360, 1361 (D. Mont. 1985) (totally unrecognized claim based on legal theory that justice was being "hoarded"); *Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985) (claim based on allegations known to be false or unprovable); *Hecht v. United States*, 609 F. Supp. 264, 267 (S.D.N.Y. 1985) (suit clearly barred by statute); *McLaughlin v. Bradlee*, 602 F. Supp. 1412, 1418 (D.D.C. 1985) (multiple meritless actions and frivolous postjudgment motions); *Young v. Internal Revenue Serv.*, 596 F. Supp. 141, 151-52 (N.D. Ind. 1984) (one of many frivolous actions challenging the validity of the income tax); *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852, 857 (C.D. Cal. 1984) (action clearly barred by statute), *rev'd*, 780 F.2d 823 (9th Cir. 1986). Levin and Sobel suggest that when trial judges have sanctioned nonegregious conduct, appellate courts have tended to reverse. Levin & Sobel, *supra* note 207, at 591 & n.17 (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986)), *cert. denied*, 480 U.S. 918 (1987); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006 (2d Cir. 1986)).

216. Nelken, *supra* note 61, at 1331.

tivity and restrict access to the courts,²¹⁷ now point to the statistical evidence of disproportionate impact upon civil rights plaintiffs as some proof that these fears have been realized.²¹⁸ The evidence, however, is very slim. Even before the adoption of rule 11, civil rights cases were regarded as a major source of meritless litigation and had already become the subject of increased interception efforts.²¹⁹ Thus, it was perhaps inevitable that plaintiffs asserting these and other disfavored or troubling claims would initially be the most visible targets of the new rule.²²⁰ The notes to amended rule 11,²²¹ and now the vast majority of cases, go out of their way, however, to emphasize that legal enthusiasm and creativity are not proper targets and that reasonable lawyering, undiscounted by the wisdom of hindsight, is not to be sanctioned.²²²

Inevitably some judges will exceed these limits, appeals will become necessary and sometimes fail, injustice will be done, legitimate advocacy will be chilled, and access to the courts will be denied. The question is not whether such evils will occur but how often. Thus far their incidence has been very small,²²³ small enough to make them, for the time being, an acceptable cost of eliminating other, greater evils from the system. This is not to deny that access to the courts and the right to advance factual and legal contentions are fundamental goals of our legal system. Without some controls on these goals, however, the system almost failed. Rule 11 established such controls and will not fail simply because they are succeeding. The question is whether they will succeed too well—whether they are greater than necessary to achieve systemic efficiency and individual accountability.²²⁴ Thus far the evidence suggests that the controls are

217. E.g., Nelken, *supra* note 61, at 1338-43; Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 634-44 (1987); Note, *Reasonable Inquiry Under Rule 11—Is the Stop, Look, and Investigate Requirement a Litigant's Roadblock?*, 18 IND. L. REV. 751, 773 (1985).

218. Nelken, *supra* note 61, at 1340.

219. See *supra* note 106.

220. Not surprisingly, cases asserting securities fraud, antitrust violations, and other conspiracies, which have also been targeted for more careful scrutiny at the pleading level, see text accompanying notes 106-07, have apparently also generated their share of rule 11 motions. See, e.g., *WSB Elec. Co. Inc. v. Rank and File Comm.*, 103 F.R.D. 417 (N.D. Cal. 1984) (civil rights and common law conspiracy, RICO); *Goldman v. Belden*, 580 F. Supp. 1373, 1381-82 (W.D.N.Y. 1984) (securities fraud); see also Nelken, *supra* note 61, at 1327 (securities fraud cases constitute disproportionate percentage of rule 11 cases in survey).

221. FED. R. CIV. P. 11 advisory committee notes (1983) (rule not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories); accord *Eastway Constr. Corp. v. City of New York*, 637 F. Supp. 558, 574-75 (E.D.N.Y. 1986), modified, 821 F.2d 121 (2d Cir.), cert. denied, 108 S. Ct. 269 (1987).

222. See *supra* note 217.

223. That is my personal reading of the cases. Others read them similarly. Levin & Sobel, *supra* note 207, at 591 (courts are taking a balanced approach to rule 11); Schwarzer, *Commentary, Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1988) (no anecdotal evidence that attorney conduct has been chilled by rule 11).

224. One study has wisely pointed out that rule 11 by itself cannot possibly achieve a radical reduction in the filing of new actions or in the incidence of discovery abuse. Levin & Sobel, *supra* note 207, at 591-92. To the extent sanctions can punish and discourage the worst offenses, however, they will do some good and eliminate some of the system's worst irritants. Once again the question is whether this gain is worth the cost of administering rule 11, as well as the negative pressure it imposes on attorneys. One suspects that if European attorneys and litigants can survive the pressure of full-cost shifting rules, see *supra* note 191, their American counterparts can survive this comparatively modest imposition on their access to courts.

neither too successful nor too formidable.

Although rule 11's critics frequently ask whether it goes too far, almost none ask whether it goes far enough, that is, whether in combination with a revitalized interception system, it can eliminate enough of the dross currently clogging the civil litigation system. I believe that it cannot and that eventually we will have to address the question of the next procedural reform.²²⁵ The present system will fall short, in my opinion, because of several incontrovertible realities. First, many factually and legally doubtful claims and defenses are not so obviously without merit that they can be intercepted before trial or, after failing at trial, will result in sanctions under rule 11, as it is presently, and probably correctly, interpreted.²²⁶ Second, the tactical settlement value of such claims will continue to commend their assertion and prosecution, despite substantial doubts as to their merits or provability. As a result of these two realities, a spate of doubtful claims probably will continue to clog the courts and undermine the efficiency and fairness of the civil justice system. That is not a pleasing outcome to today's reform efforts, but its inevitability is, I believe, logically demonstrable.

Rule 11 sanctions have been imposed primarily upon cases or claims so lacking in merit that they were quickly dismissed.²²⁷ Because such dross lacks

225. Substantive reform must also be considered. Professor Miller has suggested that one source of the current litigation explosion in the federal courts is the growth in federal substantive rights. Miller, *supra* note 4, at 5-8. He also notes that the federal courts and the executive branch are currently in the process of curtailing or limiting some of these rights. *Id.* at 7. I have already alluded to the recent reduction in the reach of the antitrust laws, *see supra* note 52, which will probably do more to unburden the federal courts than any procedural reform. At the state level statutory efforts to curtail the reach of the tort laws are widespread. Common-law courts also have a role to play. For the past few decades courts would almost never conclude that on the law and the facts alleged or proved, no reasoning person could find that the act was negligent or the product was defective. *See, e.g.,* Friedman v. General Motors Corp., 43 Ohio St. 2d 209, 331 N.E.2d 702, 707 (1975) (reversing the grant of a directed verdict on weak evidence of a defective product). Hence, almost any allegation of negligence or defective product would create a jury question. As the substantive law contracts, the interception of the worst of these cases will again become possible and their tactical settlement value will correspondingly be diminished.

226. For example, a tort claim that approaches the limits of what constitutes unreasonable conduct under all the circumstances, or that is based on interested testimony and stretches the limits of the factfinder's credulity, may nevertheless still present a question for the jury. If so, should or could rule 11 sanctions be imposed on a plaintiff if the jury finds for the defendant on such a claim or, after a verdict for the plaintiff, the court grants a motion for judgment notwithstanding the verdict or new trial on the ground that the verdict is against the weight of the evidence? I know of no cases addressing these issues specifically. I doubt that many courts today would consider imposing sanctions in these situations, unless evidence had been concealed or some other improper act had occurred. If so, then rule 11 will rarely be applied to cases that fail on the merits at trial and will find its principal application to claims that are intercepted before trial. Moreover, some types of pretrial interception are probably not appropriate situations for sanctions. For example, a claimant who suffers summary judgment probably will escape sanctions if the claim involved unequal access to the evidence and was based at least on reasonable suspicion that discovery failed to substantiate. *E.g.,* Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1011-12 (2d Cir. 1986) (both cases suggesting that in unequal access situations, plaintiff could appropriately file a claim without a prima facie case in hand and obtain discovery before confronting a challenge on the merits; both opinions implying that plaintiff would not be sanctioned if the discovery did not succeed). Of course if a plaintiff stoutly resists a motion for summary judgment after discovery has failed to uncover the missing proof, the plaintiff perhaps should be required to pay the moving party's costs and fees arising out of this successful motion.

227. Nelken, *supra* note 61, at 1327 (one-third of all rule 11 sanctions followed successful motions to dismiss for failure to state a claim for relief or for summary judgment; many other cases involved other rule 12 grounds or motions to remand removed cases to state court).

the staying power to run up the bill or accumulate settlement value, its elimination may not substantially unburden the system.²²⁸ Arguably the system is more often and more heavily burdened by those doubtful claims and defenses that may fail at trial but possess enough factual and legal validity to avoid early interception and rule 11 sanctions and to accumulate reasonable settlement value.²²⁹ Until recently many private antitrust actions arguably fell within this description.²³⁰ These were cases that ultimately failed or were settled for their nuisance value; many were based on suspicion or surmise rather than evidence in hand, or upon very doubtful legal theories. Consequently, the prospects for success of many such actions were more dependent on settlement value, which included the high cost of discovery and a potential trial, than on their ultimate merits. Although the number of such actions has doubtlessly declined in recent years because of changes in the substantive law, many are still filed, fail, and now encounter requests for rule 11 sanctions. In *Norton Tire Co. v. Tire Kingdom Co.*,²³¹ for example, plaintiff, a tire retailer in Broward County, Florida, charged defendant, a major seller of tires in nearby Palm Beach County, with an attempt to monopolize retail tire sales in Broward County, in which defendant had a small but growing operation.²³² Ultimately this charge was dismissed with prejudice and defendant moved for sanctions under rule 11. One of the elements of the offense of attempted monopoly is that defendant's conduct, if unchecked, shows a dangerous probability of successfully achieving monopoly.²³³ But monopoly requires more than half and probably at least a two-thirds

228. Of course it does unburden the defendants, who recover their attorney fees and other costs and may be spared such harassment in the future.

229. See *supra* note 226 for a more detailed consideration of such cases.

230. Private antitrust cases, most seeking the remedy of treble damages, constituted the bulk of all antitrust litigation. The number of private cases grew dramatically after World War II and as "big cases" obviously consumed a large share of judicial and litigative resources. See K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 12 & n.12 (1976). Scholars disagree as to whether the net contribution of the private antitrust action has been positive. See Pitofsky & Salop, *Foreword to PRIVATE ANTITRUST LITIGATION* xiii (L. White ed. 1988) (noting that some scholars conclude the private antitrust action "does not appear to be excessively expensive, to consume a large amount of judicial resources, or to result in inappropriate recoveries," whereas other scholars think that "the present system unduly encourages frivolous suits and deters efficient behavior"). Nevertheless, one scholar points out that a majority of private actions have little to do with forwarding the basic economic goals of antitrust enforcement and too many are competitor actions, where the danger of misuse of antitrust litigation for anticompetitive purposes is greatest. Millstein, *The Georgetown Study of Private Antitrust Litigation: Some Policy Implications*, in *PRIVATE ANTITRUST LITIGATION*, *supra*, at 399-400. Another scholar concludes that "a substantial number of private antitrust cases are ill-founded, brought in hopes of obtaining substantial cash settlements from defendants seeking to avoid the costs of litigation and the risk that bits of evidence . . . will lead to adverse jury verdicts." Turner, *Private Antitrust Enforcement: Policy Recommendations*, in *PRIVATE ANTITRUST LITIGATION*, *supra*, at 407.

231. 116 F.R.D. 236 (S.D. Fla. 1987) (reversing on reconsideration an earlier opinion at 108 F.R.D. 371 (S.D. Fla. 1985) awarding rule 11 sanctions), *aff'd*, 858 F.2d 1533 (11th Cir. 1988).

232. Plaintiff had almost 10% of the Broward County market, whereas defendant had just less than 5%. *Id.* at 237. According to a newspaper article, defendant had more than 20% of the Palm Beach County market, which defendant was also accused of attempting to monopolize. *Id.* But because there was no allegation that plaintiff also did business in Palm Beach County, arguably plaintiff lacked standing to challenge defendant's activities in that market. In any event 20% of that market probably was still too small to support a claim of attempted monopoly. See *infra* note 234.

233. *Norton*, 116 F.R.D. at 237.

share of the market,²³⁴ particularly one as fiercely competitive and easy to enter as the retail tire market.²³⁵ The chances that defendant, which had only a five percent share of the Broward market—when plaintiff had ten percent—could obtain even half of this market, let alone two-thirds, were so slim that they approached impossibility. Nevertheless, the trial judge ultimately denied sanctions. Plaintiff had argued that it was relying on a minority rule of the United States Court of Appeals for the Ninth Circuit, which in attempted monopoly cases will accept proof of bad intent in lieu of proof of a substantial market share.²³⁶ This rule, which most other circuits including the fifth and eleventh have rejected,²³⁷ is widely regarded as bad law and economics.²³⁸ With anti-trust law in decline today, the rule would have had little chance of acceptance in any other circuit. Nevertheless, the trial judge was persuaded that plaintiff had been prepared to argue in good faith for the modification or reversal of existing law and accordingly denied defendant's request for sanctions.²³⁹

Perhaps the decision is correct under present rule 11.²⁴⁰ Nevertheless, the

234. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (asserting it is doubtful that 60 or 64% of a market is enough to constitute monopoly power and that 33% clearly is insufficient); P. AREEDA & D. TURNER, 3 ANTITRUST LAW ¶ 835, at 350 (1978) (suggesting that claims of attempted monopoly involving market shares less than 30% should presumptively be rejected).

235. *Norton*, 116 F.R.D. at 237.

236. The Ninth Circuit's minority position originated with the decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), in which the court opined that when "the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'" *Id.* at 474. More recent decisions of the Ninth Circuit, which were relied on by the district court in *Norton*, 116 F.R.D. at 238, and which amount to a partial retreat from *Lessig*, now assert that a dangerous probability of success may be inferred from intent to monopolize, which in turn may be inferred from the nature of the anticompetitive conduct. The intent or anticompetitive acts from which the intent is inferred must be of a kind that would not be undertaken by a firm without substantial market power or its prospect. P. AREEDA, ANTITRUST ANALYSIS 297 (3d ed. 1981).

237. *Norton*, 116 F.R.D. at 374. Opinions of the Fifth Circuit were regarded as binding on district courts in the Eleventh Circuit, which was carved out of the Fifth. In any event, the Eleventh Circuit eventually followed the Fifth in apparently rejecting the minority position of the Ninth Circuit on the issue in question. *Id.*

238. P. AREEDA & D. TURNER, *supra* note 236, ¶ 835a, at 346. The principal reason for opposing the minority rule is that it can transform almost any business tort that poses no threat to overall competition in the market into a federal antitrust offense with its attendant criminal and treble damage sanctions. Areeda and Turner do support a narrow exception to the rule requiring proof of market power in cases of attempted monopoly, namely, an exception for outright exclusionary conduct like predatory pricing that lacks redeeming social virtue and that would ordinarily not be undertaken by a firm without substantial market power or the prospect of obtaining it. *Id.* ¶ 834, at 350-55. This exception is somewhat similar to the Ninth Circuit's present version of its minority rule. See *supra* note 236. There is nothing in the *Norton* opinions, however, suggesting that plaintiff ever alleged conduct by defendant—such as predatory pricing—that would invoke this narrow exception. Indeed, the *Norton* opinions are silent as to what defendant allegedly may have done to invoke the Ninth Circuit's minority rule. Moreover, given the ease of entry into the retail tire market and the giant companies like Sears that compete therein, the attainment and retention of a monopoly in any such market through predatory pricing is so unlikely as to cast serious doubts on the applicability of the exception to this case. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 (1986) (predatory pricing cannot succeed unless the wrongdoers can prevent new entry and escape antitrust liability). Thus, even if this minority rule is, at least in part, intellectually defensible, there was no demonstrated factual basis for invoking it in *Norton*.

239. *Norton*, 116 F.R.D. at 239-40.

240. That would obviously depend on whether the plaintiff in *Norton* ever seriously alleged the kind of predatory conduct contemplated by the minority rule. See *supra* note 238.

litigation probably imposed a heavy burden on both defendant and the court and, like too many other private antitrust claims, may have been motivated principally by an anticompetitive desire to slow defendant's aggressive expansion into plaintiff's market. Moreover, from the start the claim had virtually no chance of success, particularly in today's free market climate. Why then did plaintiff enjoy a free run at defendant? It is no answer to suggest that if defendant could have shown plaintiff's anticompetitive, improper purpose, defendant could have succeeded anyway. Because direct evidence of such a purpose ordinarily is unavailable, its existence must be inferred from the meritlessness of the claim itself. Consequently, improper purpose will be used much more often to underscore a rule 11 violation than to establish it.²⁴¹

The federal reports are filled with questionable minority antitrust case law on which other litigants could similarly rely in "good faith."²⁴² Moreover, like antitrust cases, civil rights cases, public figure defamation actions, and shareholder derivative suits often involve state-of-mind issues or other situations involving unequal access to the evidence. Persons asserting these protracted claims, therefore, have a built-in excuse under rule 11 for undertaking complex litigation despite its low success rate and the lack of prima facie evidence in hand. Thus, an expensive but unsuccessful attempt through discovery, or examination of hostile witnesses as on cross-examination at trial, to obtain evidence that defendants had acted maliciously or conspired with each other would probably not be sanctioned if the plaintiff at least had had good reason to be suspicious.²⁴³ These types of cases arguably demonstrate that the system is as vulnerable to those who gamble at litigation as it is to those who intentionally or negligently employ it for abuse, and that rule 11 will probably fall short if it cannot also deter the former.

What then can be done to discourage those who gamble at litigation by asserting expensive, burdensome claims and defenses that apparently have little chance to succeed but that possess substantial settlement value and sufficient color to escape pretrial interception and rule 11 sanctions? The most likely answer, which is apparently still an unacceptable one in America, is greater use of attorney fee shifting. As a half-way step, rule 11 could provide that expenses, including attorneys' fees, would be awarded to the prevailing party, unless the court finds that the losing party's position "was substantially justified or that special circumstances make an award unjust."²⁴⁴ Such a provision would not,

241. See *supra* note 216.

242. For example, some courts have found the requisite power in attempted monopoly cases by excluding brands in competition with the defendant's product from the market definition. *E.g.*, *Mt. Lebanon Motors, Inc., v. Chrysler Corp.*, 283 F. Supp. 453, 460 (W.D. Pa. 1968), *aff'd on other grounds*, 417 F.2d 622 (3d Cir. 1969) (defining product market as Dodge cars). Although acceptance by other courts of this generally invalid approach is most unlikely today, would reliance thereon in litigation similarly be in "good faith"?

243. See *supra* note 226.

244. This language is borrowed from the Equal Access to Justice Act, 5 U.S.C.A. § 504(a)(1) (West Supp. 1988), which imposes one way cost and attorney fee shifting upon the United States in favor of a party prevailing in adversary adjudication against a government agency. For general use in civil litigation, the provision would of course have to provide, as the text suggests, for two way cost and attorney fee shifting.

by definition, penalize bona fide litigation, but it could certainly chill it, particularly for risk-averse plaintiffs.²⁴⁵ Moreover, because of the inevitable breadth and vagueness of such a half-way standard, trial courts applying it would enjoy a large amount of discretionary power, or its functional equivalent.²⁴⁶ Such augmented trial-level disciplinary power would make even more uneasy those who represent unpopular causes and litigants and who are already understandably troubled by rule 11.²⁴⁷

These concerns over judicial discretion and bias in the award of attorneys' fees could of course be eliminated by adoption of the English or continental rule, under which such fees are generally awarded to the prevailing party.²⁴⁸ This rule, however, is regarded by some as offensive to democratic notions of open access to courts,²⁴⁹ particularly because it apparently would have much greater impact on ordinary, risk-averse persons than on those with assets and familiarity with the litigation process.²⁵⁰ In any event, there clearly is insufficient support today for the adoption of any such cost-shifting system. Thus, a less far reaching proposal in 1983 to add attorneys' fees to cost awards under rule 68²⁵¹ was stoutly resisted and resoundingly defeated.²⁵²

Some years from today it should become generally apparent that additional procedural change is necessary to unburden the system from the crush of doubtful or risky litigation. The adoption of general attorney fee shifting will proba-

245. See Rowe, *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139, 153 (examining the possible effects upon litigants of various attorney fee shifting schemes).

246. See *supra* notes 95-97 and accompanying text.

247. As mentioned above, civil rights plaintiffs and their attorneys have already received more than their share of rule 11 sanctions. See *supra* notes 217-18 and accompanying text. Some of the attorneys have told me privately that they are already fearful of and troubled by rule 11, particularly when they appear before recently appointed, very conservative federal trial judges. Therefore, an even broader discretionary standard, such as the one suggested, would presumably be unacceptable to them. Needless to say, the discretion vested by the Equal Access to Justice Act, see *supra* note 244, is not similarly troubling because it involves only one way cost and attorney fee shifting upon the United States, which has in effect chosen to impose this sanction upon itself.

248. See generally Pfennigstorf, *The European Experience With Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 37 (describing the English and the various continental European systems).

249. See generally *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (asserting that a traditional justification of the American rule is that "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel"); Schwartz, Foreword, *Symposium on Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 1, 2 (the American rule does not discourage those with limited financial means from using the judicial system).

250. Rowe, *supra* note 245, at 142, 153 (assessing the impact of attorney fee shifting upon well-financed organizations that litigate regularly and upon individuals of modest means).

251. This proposal would have enabled parties to recover attorneys' fees in cases involving settlement offers rejected and not bettered in the final judgment. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 339, 361-67 (1983). The effects of such a provision are studied in Rowe, *supra* note 245, at 164-70.

252. See generally Note, *The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions*, 70 IOWA L. REV. 237, 251 (1984) (criticizing the proposed addition of attorney fee shifting to rule 68 and asserting it might abridge substantive rights in violation of the Rules Enabling Act); Note, *Current Federal Rule Of Civil Procedure 68 And Official Proposed Changes: Important Impacts On Attorney's Fee Awards*, 31 S.D.L. REV. 209 (1985) (analyzing case law under and proposed changes in rule 68).

bly then be considered carefully, since the only other alternative, the elimination of the civil jury, will probably still be even less palatable.²⁵³ By then we should at least have more understanding of the overall effects of cost shifting and greater ability to choose wisely among the variations and alternatives.²⁵⁴

V. CONCLUSION

Extreme approaches to the interception and discouragement of doubtful litigation apparently are hazardous to the success of a civil procedure system. The Field Code failed because of its antclaimant bias; the Federal Rules have almost failed because of their proclaimant bias. In both cases the litigation bar recognized and ruthlessly exploited these biases, and the courts, which should have reacted to the emerging difficulties, instead too often ignored or exacerbated them. In the past decade the federal system has begun a correction process designed to eliminate its extreme proclaimant bias. Whether it will overcorrect and again acquire an antclaimant bias remains to be seen. Meanwhile, as past doctrinal limitations are removed or softened, increasingly large amounts of undefined discretionary power will accrue to trial judges, many of whom could individually begin to overcorrect.

A contemporary survey of the principal pretrial interception/discouragement mechanisms—pleading, summary judgment, and rule 11 sanctions—demonstrates that the federal system is now moving aggressively to deal with the present procedural crisis and the system's perceived deficiencies. The most questionable development has been the selective reintroduction of fact pleading by the federal courts in defiance of, or at least with little regard to, the text and history of the Federal Rules, the affected substantive statutory rights, and the failure of fact pleading under the Field Code. Not surprisingly, the federal courts have not done much better with fact pleading than their code counterparts. With rule 11 sanctions and a reinvigorated motion for summary judgment available to them, they should seriously reconsider their present fondness for fact pleading.

A more aggressive use of the motion for summary judgment is now an accepted feature of the federal procedural landscape. The appellate courts have

253. Great Britain has already undertaken all three major steps, abolition of the jury in most civil cases, general attorney fee shifting, and attorney fee shifting pursuant to an offer of settlement or, as the process is described there, payment into court. See Rowe, *supra* note 245, at 165. Apparently its civil justice system does not now suffer from near breakdown or gridlock. The British system with its more carefully selected bench and litigating bar is of course quite different from America's system and the favorable results it achieves are not necessarily transferable here.

254. Many state and federal statutes now provide for the one-way shifting of attorneys' fees in favor of prevailing plaintiffs, particularly in litigation against the government. See Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-"Subsidized" Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 210; Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233. Thus, major change will require the possibility of awards *against* claimants in favor of prevailing defendants beyond what is provided by rule 11 today. (Presumably, attorney fee awards pursuant to offers of judgment or settlement under FED. R. CIV. P. 68 would also be considered.) Of course, a general two-way attorney fee shifting scheme modeled along European lines would make unnecessary all current proclaimant one-way fee shifting statutes.

failed, however, to define the new approach with any precision. Instead, they have simply provided the trial judges with a new, countervailing set of clichés favorable to the grant of the motion and encouraged them to go forth and do justice. Under such circumstances the resulting “justice” could be idiosyncratic or inhospitable to particular disfavored causes of action. Although appellate courts are available to correct any resulting injustice, they (or those who would revise rule 56) must eventually articulate the requirements of the motion with greater precision.

In five short years rule 11 sanctions have become an important and controversial aspect of federal practice. These sanctions provide in effect for attorney fee shifting against those who assert claims and defenses lacking *any* basis in law or fact. Although a few trial judges may have attempted to go farther than this, their attempts have generally failed to survive appellate scrutiny. Nevertheless, this new sanctioning process must to some small degree dampen legal creativity and limit access to the courts. Such undesirable effects are, I believe, the small but necessary price we must pay to impose a modicum of responsibility on those who litigate and who, in the absence of such sanctions and other effective interception/discouragement devices, almost brought the civil justice system to its knees. Critics point to empirical evidence showing that such sanctions fall principally upon plaintiffs, particularly those who assert civil rights claims and other currently disfavored causes of action, and argue that rule 11 is simply one more weapon in today’s efforts to stifle claimants. Although the facts are true, the criticism is premature. It is hardly surprising that those who principally caused the present crisis and against whom countermeasures were specifically instituted were initially the most visible and favored targets of these countermeasures. That does not prove—and for the moment there is no other evidence—that these groups have been unfairly targeted or that any heightened judicial scrutiny they may receive today will not eventually dissipate.

Arguably the real flaw in this flirtation with attorney cost shifting is that it is too limited—that it will have virtually no impact upon complex or protracted litigation involving claims that are not baseless but that are very doubtful or hard to prove. These claims, which may survive pretrial interception and possess enough tactical value to justify their otherwise questionable assertion, are largely immune to rule 11 today. Until their assertion is somehow discouraged or taxed and the existing invitation to gamble at litigation is either conditioned or withdrawn, the civil justice system cannot be substantially unburdened. The obvious solution is greater use of attorney fee shifting, which, however, appears to be politically unacceptable today.