

2008

Recasting Complaints: An Argument for Procedural Alternatives

Paul David Menair

Follow this and additional works at: <http://digitalcommons.chapman.edu/chapman-law-review>

Recommended Citation

Paul D. Menair, *Recasting Complaints: An Argument for Procedural Alternatives*, 12 CHAP. L. REV. 333 (2009).
Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol12/iss2/3>

This Article is brought to you for free and open access by the Fowler School of Law at Chapman University Digital Commons. It has been accepted for inclusion in Chapman Law Review by an authorized administrator of Chapman University Digital Commons. For more information, please contact laughtin@chapman.edu.

Recasting Complaints: An Argument for Procedural Alternatives

Paul David Menair*

In the time that has passed since the academic debate regarding “substance-specific” procedure reform that took place during the 1980’s and 1990’s, numerous changes in the civil procedure landscape targeted at specific substantive categories of litigation have either been formally adopted in the Federal Rules of Civil Procedure or judicially adopted, despite the continuing trans-substantive premise of the Rules. This Article suggests that increased tailoring of procedure to specific cases may be inevitable and that reformers could better approach such tailoring by creating alternative non-exclusive procedural mechanisms, rather than by adapting existing procedure to the “type” of case in a mandatory fashion. This approach, modeled after the variety of “special statutory proceedings” that currently exist in state law, would encourage and allow reformers to avoid political conflict and the inevitable unintended consequences of containerizing lawsuits into litigation categories like the “product liability case.” The approach might also help address some of the other concerns of critics of substance-specific procedure, such as the threat of a return to technical rules of common law pleading.

INTRODUCTION

Imagine that you are a young lawyer who has filed a lawsuit against a trustee in a state court. Your complaint demands, among other things, an “accounting” of the trust fund.¹ Perhaps you are not entirely sure what that thing called an “accounting” would actually look like if you got it, but you ask for it anyway.²

Now imagine that, with your complaint, you diligently sent out a complete set of written discovery requests, including routine requests for copies of account statements and other financial records of the trust—material that you believed to be eminently within the scope of allowable discovery under your state’s civil procedure code.³ In response, you

* J.D., Georgia State University, 2003.

¹ See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.3(5) (2d ed. 1993) (discussing the accounting remedy).

² You would not be alone in being confused. See Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L.J. 463, 476 (1985) (citing cases showing that “some confusion remains” with respect to the meaning of the accounting remedy in contemporary practice).

³ Most likely modeled on Federal Rule of Civil Procedure 26(b)(1) (defining the scope of

receive an objection stating that your opponent refuses to provide the requested material because to do so would be the “functional equivalent” of the relief sought in your demand for an accounting.⁴

Assuming there are no controlling cases in your jurisdiction to show that this is clearly wrong, what does one make of this assertion? On the one hand, it seems ludicrous to contend that a trustee can avoid producing ordinarily discoverable documents just because the complaint includes a demand that the court order the defendant to do something that seems conceptually similar.⁵ On the other hand, there is certain logic to the argument that if a demand for an “accounting” is understood as a demand that the court order the defendant to produce certain information, it seems unfair to allow the plaintiff to get the same information without having to first prove entitlement to the remedy.⁶

This confusion arises from competing understandings of the accounting remedy. Some would argue that at least one such understanding—accounting as a procedural mechanism for obtaining information about the trust fund—has been rendered meaningless by contemporary discovery practices, even if it continues to haunt the legal imagination.⁷ The confusion has led to a call for reform of the substantive law by “remedying the remedy” of accounting to make it clear that what is meant is simply accounting for profits as an element of damages.⁸ However, contemporary discovery practice may be an imperfect substitute for the remedial discovery conducted under pre-reform equity procedure—managed discovery conducted before a special master after a preliminary showing of entitlement to the judicial resources of the court.⁹ Accordingly, this recollection of the old meaning of accounting may suggest the possibility of innovation in the form of “selective substance-specific procedure.”¹⁰

discovery as including “any nonprivileged matter that is relevant to any party’s claim or defense”).

4 The author has encountered this objection on several occasions in practice.

5 See Eichengrun, *supra* note 2, at 476 (arguing that contemporary discovery practice makes the aspect of the remedy that he calls “accounting for discovery” obsolete).

6 Eichengrun argues that this “logic” is simply confusion arising from a misunderstanding of the remedy. See *id.* The present author will present a somewhat different argument. See *infra* Part IV.

7 See Eichengrun, *supra* note 2, at 476; see also DOBBS, *supra* note 1, § 4.3(5) (adopting Eichengrun’s description of the remedy in contemporary practice).

8 See Eichengrun, *supra* note 2, at 476.

9 See JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA §§ 436–45 (13th ed. 1988) (describing the remedy in equity under the old system).

10 See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 28–29 (1994) (proposing “selective substance-specific procedure” as alternative terminology for what commentators had previously described as “non-trans-substantive procedure.”); see also Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1974) (initiating the discussion of substance specific reform); Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1159 (2006) (arguing that Cover’s “deeper point” was that “sometimes the justification for a procedural choice necessarily had to take account of substantive policies,” and there may be value in making this connection explicit); Stephen B. Burbank, *The Transformation of American Civil*

Any proposal to adapt different procedures to different types of civil action inevitably harkens back to the dark, ancient days of common law pleading rules—a frightening prospect for some.¹¹ Contemporary civil procedure professors mention the “forms of action,” if they mention them at all, as being only of limited and primarily theoretical interest to the contemporary student.¹² The fundamental premise of civil procedure as it is taught in law school today is derived from Rule 2 of the Federal Rules of Civil Procedure: “There is one form of action.”¹³ This “trans-substantive” premise of civil practice assumes that the entire scope of civil litigation is best governed by a single set of procedural rules.¹⁴ Since the late 1980’s, certain academics have advocated a partial return to substance-specific procedure.¹⁵ However, other scholars have roundly criticized any proposal to depart from the trans-substantive premise. These critics insist that substance specificity would open the door to the evils supposedly associated with the old system—notably a waste of judicial resources in settling procedural disputes and resolving cases on technicalities rather than on the merits.¹⁶

Procedure: The Example of Rule 11, 137 U. PA. L. REV. 1925, 1929–41 (1989) (defending substance specificity and criticizing proponents of trans-substantivity for relying on judicial discretion to tailor general rules to individual cases in the name of procedural neutrality); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1508 (1992) (arguing that “the trans-substantive center will not hold”); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin’s New-Old Procedure as a Possible Antidote to Dreyfuss’s “Tolstoy Problem,”* 46 FLA. L. REV. 57 (1994) (discussing Subrin’s specific proposals).

¹¹ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989) (describing substance-specific procedure as “a ghost in the darkness surrounding academic discussions of the future of civil procedure.”).

¹² See, e.g., STEPHEN C. YEAZELL, *CIVIL PROCEDURE*, 371–93 (4th ed. 3d prtg. 1996). Yeazell duly notes Subrin’s argument for a selective return to substance specific procedure but maintains that the primary reason why students should understand common law pleading is its relevance to understanding its lingering impact on substantive law. See *id.* at 372–73 (citing Stephen Subrin, *How Equity Conquered the Common Law: The Federal Rules in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter *How Equity Conquered*]).

¹³ FED. R. CIV. P. 2; see also Subrin, *How Equity Conquered*, *supra* note 12 (discussing the evolution of contemporary civil practice).

¹⁴ See, e.g., Carrington, *supra* note 11, at 2068 (“[J]udicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future.”).

¹⁵ See *supra* note 10 and accompanying text.

¹⁶ See, e.g., Carrington, *supra* note 11. For a brief summary of arguments in favor of trans-substantive procedural rules, see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1885 (2002):

First, trans-substantive rules are efficient. If the same set of procedural rules governs every form of action, lawyers and judges need only master this one form. Moreover, trans-substantive rules are efficient in that adjudicatory resources do not have to be expended determining which rules of procedure to apply to a given action. Second, trans-substantive rules make procedure more transparent and adjudication on the merits more likely, because the time not spent on selecting the appropriate procedural rules can instead be spent assessing the merits of the action. Finally, trans-substantive rules appear fair because all cases are treated ‘equally.’

(footnote omitted).

It is worth noting that “substance-specific procedure” does exist, and always has existed, at the state level. Take, for example, procedures for eviction of a non-paying tenant.¹⁷ For obvious practical reasons, an eviction proceeding cannot conform to the contours of a “civil action” in which the parties exchange pleadings, bicker about discovery for six months or more, and then attempt to try the case by motion.¹⁸ Accordingly, the state legislatures have enacted or retained special statutory proceedings adapted to the needs of landlords for prompt eviction of non-paying tenants despite protestations in state civil procedure codes about there being only one allowable form of civil action.¹⁹

In light of this stubborn persistence of substance-specific civil procedure at the state level, despite the efficiency supposedly derived from the exorcism of substance from procedure in contemporary civil practice, one suspects that something other than fidelity to an abstract principle was driving the negative reaction to the discussion of substance-specific procedure during the 1980’s and 1990’s. It is apparent that the defenders of civil trans-substantivity did not fear the proposals for substance-specific reform in the abstract so much as the potential havoc that interested parties could wreak in the rule-making process if such reform were to occur in politically-charged contexts such as civil rights litigation.²⁰ Paul Carrington, the harshest critic, describes what he believes was really going on as follows:

[N]umerous academics were proposing to make the Rules non-trans-substantive in the misguided belief that this would advance the ability of civil rights

¹⁷ See Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759 (1994) (discussing summary eviction). For an attempt to argue around the existence of such substance-specific procedure, see Carrington, *supra* note 11, at 2079–80 (“There are, to be sure, rules specifically applicable to the representation of corporate shareholders, suits in admiralty, or proceedings in eminent domain. These rules do not apply to litigation between individuals disputing liability for an auto accident. Such special rules are exceptional in their limited application.”) (footnotes omitted).

¹⁸ See Gerchick, *supra* note 17, at 764:

Intending to provide landlords a more cost-effective means of removing problem tenants than would otherwise be available, most states have established summary eviction proceedings, which move the landlord’s eviction lawsuit through the court system much faster than in most civil proceedings by (1) allowing litigation only of issues that are immediately relevant to determining which party retains the right to possession of the rental unit, (2) drastically reducing the time a tenant has to answer the complaint or conduct discovery, and (3) requiring the trial to take place within twenty days of the landlord’s request for a trial date.

(footnote omitted).

¹⁹ *Id.*

²⁰ See, e.g., Carrington, *supra* note 11, at 2074–75:

Moreover, if the procedure rules were the result of a test of strength among political organizations, it is obvious, at least in our political system, that rules would generally favor those litigants with the greater resources, especially those identifiable ‘repeat players’ who have the larger stakes in procedure rules and hence the greater political energy.

(footnote omitted).

plaintiffs to enforce their claims; I was obliged to resist that idea on the ground that it would have put the rulemaking process into the political cockpit.²¹

Whatever one makes of the arguments for and against trans-substantivity, the attempt by scholars like Carrington to draw a line in the sand against substance-specific reform has begun to fail at the federal level. There have been recent changes in the judicial application of purportedly trans-substantive procedural rules with a substance-specific component, primarily the erection of barriers against certain types of litigation in the form of heightened pleading standards—exactly the sort of unfortunate “political” outcome that scholars feared would arise if we opened the door to expressly substance-specific reform in the rule-making process.²²

The example of the special statutory proceeding for eviction suggests that tailoring procedure to cases, even if “political,” may be the only acceptable compromise in some instances.²³ While some might conceivably argue that a proceeding against a non-paying tenant should be procedurally “equal” to any other lawsuit, states have developed or maintained through the political process alternative procedural mechanisms.²⁴ The further evolution of substance-specific civil procedure is not necessarily evil and is likely inevitable. A model for approaching it can be found in state ancillary, non-exclusive “special statutory

²¹ Paul Carrington, *Civil Procedure and Politics*, <http://www.paulcarrington.com/Civil%20Procedure%20Politics.htm> (last visited Aug. 30, 2008). An example of the type of substance-specific argument that Professor Carrington was objecting to can be found in Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 105–12 (1994), in which the author argues that Rule 12 dismissals of civil rights claims are often the result of racial subordination and that no civil rights case should be subject to dismissal until after the parties have engaged in discovery. For a critique of Carrington’s position, see Burbank, *supra* note 10, at 1935–36:

Professor Carrington is alert to the costs of departing from the appearance of “political neutrality” but deaf to the costs of what Judge Weinstein calls “procedural subterfuge.” Indeed, at times he appears to swallow his own propaganda, as when he portrays as a central feature of our legal system, upon which Congress “relies,” the class action amendments in 1966, yet fails to acknowledge that the impact of those amendments on power relations was anticipated, if not intended, by his predecessor, Judge Kaplan.

(footnote omitted).

²² See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1059–64 (2003) (discussing judicially created heightened pleading standards); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) (same); Jeffrey A. Parness, Amy M. Leonetti & Austin W. Bartlett, *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412 (1999) (reviewing new substance-specific pleading standards relating to securities litigation, professional malpractice litigation, punitive damages claims, childhood sexual abuse claims and civil rights claims, and arguing that these amount to revision of the underlying substantive law, raising choice of law and separation of powers issues). For the law and economics argument in favor of such heightened pleading standards, see Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards* (Boston Univ. Sch. of Law Working Paper Series, Law and Economics Working Paper No. 06-06, 2006). See also Burbank, *supra* note 10, at 1929–41 (arguing in the 1980’s that procedural uniformity has always been a sham).

²³ See Tobias, *supra* note 10, at 1508 and throughout (“The preferable approach is to transcend trans-substantivity, to acknowledge candidly its limitations, and to recognize and meet forthrightly the compelling challenge of formulating procedures that will efficaciously treat civil litigation in the twenty-first century.”).

²⁴ Although the devil is, of course, in the details. See Gerchick, *supra* note 17, at 777–81.

proceedings.” Rather than directly attempt substance-specific reform in the context of the fraught and contentious federal procedure reform process, where most of the players are heavily invested in complex cases and have little interest in or knowledge of the more routine cases, the expansion of ancillary procedures at the state level might provide a laboratory for experimentation with smaller cases that could ultimately be adopted at the federal level.²⁵

Instead of the heightened pleading standards and other mechanisms proposed by those who would depart from the spirit and letter of the federal rules only when they deem it necessary to keep people out of the courthouse, the rules should provide for streamlined, tailored procedures in appropriate cases as an alternative to procedural rules tailored to meet the conflicting demands of litigants in the most complex, expensive, and discovery-intensive cases. By focusing on providing procedural alternatives, as opposed to defining all lawsuits by “type,” substance-specific procedure reform might avoid the potential for boundary disputes among revived “forms of action” because the focus would be on what the pleading parties want, as opposed to what theory of action will most closely conform to the facts as developed in discovery.²⁶ Finally, a focus on providing procedural alternatives, as opposed to tailoring default rules to different types of cases, could help de-politicize the debate regarding substance-specific reform.

To clarify what critics of substance specificity fear, Part I of this article begins by discussing “substance-specific procedure” as it used to exist, using the example of the forms of action with respect to title to land. Part II examines a specific set of special statutory proceedings established in Georgia with respect to title actions, showing that the existence of these procedures has neither led to technical pleading requirements nor the other evils critics associate with non-trans-substantive procedure. Part III looks at the example of the action for accounting and discusses whether there exists a specific set of cases that might benefit from the revival of an ancient remedy—the judicially managed accounting—in the form of an ancillary substance-specific proceeding. Part IV discusses how revival of the original conception of accounting as a discovery-oriented remedy might relate to standing proposals for the reform of discovery practice in general.

²⁵ See Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Trans-substantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113 (1994) (arguing that the Federal Rules are well-adapted to complex litigation for a variety of historical reasons and that substance specific reform should focus on streamlining “small” cases).

²⁶ Compare with Carrington, *supra* note 11, at 2081 (“The teaching of [the Anglo-American tradition’s] adverse experience is that complexity resulting from categorization of procedures in courts of general or broad subject matter jurisdiction produces wasteful disputes as to which set of procedural rules controls.”).

I. TITLE ACTIONS AND THE PREHISTORY OF CONTEMPORARY PROCEDURE

To assist in developing an understanding of the debate regarding trans-substantivity, one should recall what “substance-specific” procedure looked like in the era prior to the evolution of trans-substantive procedure in the nineteenth century. One window into the world of writ pleading is the history of title actions in the common law—a history that was once a core aspect of the first-year legal curriculum but is increasingly forgotten as fewer civil procedure instructors feel the need to explain to their students that there once was more than one form of action.²⁷

Note that the history retold here is not necessarily the history of title actions as it might be told by a contemporary historian based on contemporary research. Rather, it is the history of the forms of action respecting title to land as that story was known and told during the decades around the turn of the last century—during the era of procedural reform.²⁸

The story, as told by Frederick Maitland in a series of lectures first published in 1909, begins with the writ of right, which read something like this:

Breve de recto

Rex K (a bishop, baron or other lord of manor) salutem. Praecipimus tibi quod sine dilatione plenum rectum teneas A de uno mesuagio cum pertinentiis in Trumpington quod clamat tenere de te per liberum servitium [unius denarii per annum] pro omni servitio, et quod X ei deforciat. Et nisi feceris, vicecomes de Cantabrigia faciat, ne amplius inde clamorem audiamus pro defectu recti.

The King to K greeting. We command you that without delay you do full right to A of one messuage with the appurtenances in Trumpington which he claims to hold of you by free service of [so much] *per annum* for all service, of which X

²⁷ See YEAZELL, *supra* note 12, at 372 (“Until a few decades ago the material in this section [discussing the forms of action] would have taken up almost all of a beginning civil procedure course.”); see also Mary Brigid McManoman, *The History of the Civil Procedure Course: A Study In Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998) (discussing the evolution of the contemporary civil procedure course).

²⁸ For a discussion of the history of procedural reform in the early twentieth century, see Subrin, *How Equity Conquered*, *supra* note 12, at 943–75. Our version of the story of the forms of action at common law mainly derives from F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1965) (1909). This focus reduces the relevance of the fact that traditional narrative relies on the explanatory framework represented by the term “feudalism,” a term largely abandoned by medievalists. See Elizabeth A.R. Brown, *The Tyranny of a Construct: Feudalism and Historians of Medieval Europe*, 79 AM. HIST. REV. 1063 (1974) (arguing against “feudalism” as a conceptual framework for understanding medieval society); SUSAN REYNOLDS, *FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED* (1994) (same). However, it is worth noting that, despite a near consensus among historians against the utility of the traditional feudal pyramid as a lens through which to understand medieval texts, the idea persists in legal literature. See, e.g., Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 REAL PROP. PROB. & TR. J. 507, 516 (2003) (“As a system of land ownership, [feudalism] is a pyramid with the king at the top beholden to no one, layers of lords in the middle beholden to their superiors, and serfs at the bottom beholden to everyone.”).

deforceth him. And unless you will do this, let the sheriff of Cambridge do it that we may hear no more clamour thereupon for want of right.²⁹

There are a few things to note in this. First, the writ is addressed to the lord of the territory in which a property dispute has arisen, commanding that person to give justice to someone who claims to have a right to land “by free service” in that territory (i.e., a tenancy in land of some sort within the lord’s larger territory).³⁰ Setting aside the vexed question of the manner in which a tenancy “by free service” might differ from what we would in present terms understand to be a fee simple estate,³¹ the purpose of the writ is to initiate a process designed to identify who has the right to this property, whatever that “right” may consist of.³² The second thing to note is that the King is assuming the authority to tell the territorial lord what to do about the claim, but the action is not initially in the King’s court. It is to be initiated, rather, in the local courts controlled by “K,” and the writ itself is simply a threat to intervene if the local lord’s court does not resolve the matter.³³

As Maitland tells the story, there also were writs of right directing the sheriff to take immediate action—originally used only in cases involving claims by or affecting the King’s own direct tenants, which later came to be used as a vehicle for direct intervention in territorial disputes outside of the king’s personal territory—leading to tension between the King and his barons:

In saying that this simple writ . . . was only used when the demandant claimed to hold of the king as tenant in chief, we have been guilty of some inaccuracy. Glanville tells us that such a writ is issued when the king pleases; Henry II was not very careful of the interests of mesne lords and would send a [writ] to the sheriff when a Writ of Right addressed to the lord would have been more in harmony with feudal principles. But this was regarded as a tyrannical abuse and was struck at by a clause of the Great Charter.³⁴

So, there is conflict here respecting jurisdiction, which shall be discussed further in a moment.

There were, Maitland explains, various problems associated with the writ from the outset. The first and perhaps most important was that the mode of trial was trial by combat.³⁵ The second problem was delay.³⁶ In addition to various customary mechanisms allowing the parties to delay

²⁹ MAITLAND, *supra* note 28, at 82–83 (internal citations omitted).

³⁰ *Id.* at 23.

³¹ See Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 282–84 (criticizing Maitland’s assumption of a rough equivalence between medieval concepts of “right” and “seisin” and contemporary notions of “ownership” and “possession”). See generally S.F.C. MILSOM, *A NATURAL HISTORY OF THE COMMON LAW* (2003).

³² MAITLAND, *supra* note 28, at 21–27.

³³ *Id.* at 22–23.

³⁴ *Id.* at 23.

³⁵ *Id.* at 26.

³⁶ *Id.* at 24.

trial—the most extreme being, apparently, a right to take to bed for a year and avoid the whole thing—the entire process depended at a certain basic level on individuals finding the time to represent themselves in a world without trial lawyers.³⁷ Accordingly, there was any number of excuses for non-appearance that would not be tolerated in today's regime of advocacy by representatives.³⁸

As Maitland notes, new procedures arose to mitigate these problems that, not coincidentally, served the royal interest in consolidating legal authority in the King.³⁹ Indeed, this is Maitland's primary theme. The forms of action grew increasingly elaborate through discrete attempts to resolve difficulties with earlier writs, a process largely driven by the tension between centripetal and centrifugal forces acting on the distribution of authority in medieval society, leaving the substantive law to grow and develop “in the interstices of procedure.”⁴⁰

The initial development was the emergence of the “assizes” of Novel Disseisin, Mort d’Ancestor, Darrein Presentment, and Utrum.⁴¹ These were procedures responding to specific land issues in which resort could be had to a royal court in the first instance, with trial by a deliberative body known as an “assize.”⁴² For our purposes, the latter two possessory assizes are worth ignoring because an understanding of them would require an unnecessary detour into the history of ecclesiastic land tenure and what was known as “advowson,” the right of certain landholders to appoint persons to hold church office.⁴³ But Novel Disseisin and Mort d’Ancestor are worth briefly considering.

Novel Disseisin was an assize available to a person claiming to have been unjustly dispossessed of “seisin,” a concept reduced by Maitland and reducible for our purposes to meaning simply possession of the land pursuant to a *claim* of freehold title (as opposed to and distinct from an absolute right to the land equivalent to “ownership” in the contemporary sense).⁴⁴ In modern terms, this action would be somewhat analogous to an action for wrongful eviction, except that it was not an action between landlord and tenant as we would understand those terms, and no rights other than the right to immediate possession were determined in the action, with the only question being whether the “disseisor” unjustly deprived the plaintiff of possession.⁴⁵ Having lost, the disseisor could still dispossess

³⁷ *Id.* at 25.

³⁸ *Id.* at 24–25.

³⁹ *Id.* at 25–26.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 27–33.

⁴² *Id.* at 34–35.

⁴³ *But see* Tate, *supra* note 31, at 283–84 (arguing that the advowson writs have not received sufficient attention by scholars).

⁴⁴ MAITLAND, *supra* note 28, at 27–29. *But see* Tate, *supra* note 31, at 295–99 (arguing against this alleged equivalence).

⁴⁵ MAITLAND, *supra* note 28, at 27–28.

the plaintiff in an action on a writ of right.⁴⁶ The understanding that the case was solely about possession, as opposed to what we would think of as ownership, allowed the King to assert jurisdiction over the case despite the local lords' claim that the rights of their "tenants" should be decided in their local courts.⁴⁷

The Assize Mort d'Ancestor was similarly conceived as a matter of possession rather than right.⁴⁸ In this form of action, an heir would attempt to show that his near ancestor died "seised" of the land and that someone had taken seisin in the property before the plaintiff was able to do so himself.⁴⁹ Once again, the action did not determine rights to the land in the same manner as the writs of right did, with the only question being who was entitled to immediate possession of the land.⁵⁰

These new forms of action remained procedurally onerous, so litigants continued to seek alternatives.⁵¹ In the next phase of procedural development, instead of expanding on the assizes, the procedures in land cases in the crown courts expanded by the development of a profusion of "Writs of Entry."⁵² Like the assizes, these writs excused the royal assumption of jurisdiction over proprietary rights to land outside of the King's own property by limiting the action to a consideration of who had the right to seisin, without any determination as to who had the ultimate proprietary right to the land.⁵³ Unlike the assizes, however, the theory underlying the writs of entry was that one of a variety of possible specific and recent incidents (depending on the form of writ) justified a claim that the seisin of the one in possession was improper and an immediate demand that the possessor abandon the property.⁵⁴ By a proliferation of these forms of action, the royal courts blurred the "feudal" distinction between proprietary actions, which needed to be brought in the courts where the tenancy was located, and purely possessory actions, which could be brought in a more efficient manner in the royal courts.⁵⁵

In the next phase of evolution, the pendulum shifted against the royal prerogative to expand the number of writs, with one exception opening up a whole new line of expansion into the realm of what we would today call tort law:

The whole system stiffens. Men have learnt that a power to invent new remedies is a power to create new rights and duties, and it is no longer to be suffered that

⁴⁶ *Id.* at 28.

⁴⁷ *Id.* at 27.

⁴⁸ *Id.* at 29–30.

⁴⁹ *Id.* at 29.

⁵⁰ *Id.* at 27–30.

⁵¹ *Id.* at 41–45.

⁵² *Id.* at 41–42.

⁵³ *Id.* at 44.

⁵⁴ *Id.* at 42.

⁵⁵ *Id.* at 44. For a more recent discussion of these writs, see Joseph Biancalana, *The Origin and Early History of the Writs of Entry*, 25 LAW & HIST. REV. 513 (2007).

the chancellor or the judges should wield this power. . . . But when we say that but little use was made of this Statute there is one great exception. It is regarded as the statutory warrant for the variation of the writs of trespass so as to suit special cases, until at length—about the end of the Middle Ages—lawyers perceive that they have a new form ‘Trespass upon the special case’ or ‘Case.’⁵⁶

Out of the law of trespass arose the action of ejectment, designed to protect from dispossession tenants in the contemporary sense (i.e., persons with a right to occupy the land for a term, as opposed to free tenants in fee).⁵⁷ Because the writs of right and entry and the assizes were subject to procedural delay and hyper-technical rules of pleading, plaintiffs developed a legal fiction to recover possession of land. They would lease the property to a straw man and, upon his ouster from the property, bring an action in the name of John Doe for trespass in ejectment.⁵⁸ This fiction became refined and elaborate and expanded to take up most real property litigation by the Tudor period:

The development of this action is a long story and about such a matter it is hard to fix any dates—one cannot tell the exact moment at which a proceeding becomes fictitious—but I believe we may say that during the Tudor reigns the action of ejectment became the regular mode of recovering the possession of land.⁵⁹

The “real actions” remained for their utility in special cases and eventually, albeit not until the nineteenth century in England, the action for ejectment was reformed to eliminate the element of legal fiction.⁶⁰ Moreover, in the intervening years, various forms of equity were also utilized to meet the demands of the unprovided-for case where a petitioner had possession but knew of a competing claim that cast doubt on his right to the land.⁶¹

In reasonably short form, such is the history of the development of the forms of action relating to title to land as it stood around the time of the procedural reforms that attempted to do away with all of this nonsense. And it makes a case for trans-substantive civil procedure, as each attempt to provide a substance-specific avenue for the pursuit of title actions falls in favor of a newer, faster, more flexible alternative. However, it is worth noting a number of things. To begin with, the “boundary disputes” that were arguably the fatal flaw in this system arose from specific conflicts over jurisdiction that required the pretext of distinct forms of action, not from any lack of understanding of the nature of the action or the remedy sought. The story is complicated, but its complexity was context dependent and was not the product of substance specificity itself. As Part II will demonstrate, this proliferation of writs was easily reformed during the

⁵⁶ MAITLAND, *supra* note 28, at 51–52.

⁵⁷ *Id.* at 57.

⁵⁸ *Id.* at 58–59; *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *150–51.

⁵⁹ MAITLAND, *supra* note 28, at 59.

⁶⁰ *Id.* at 60–61.

⁶¹ *See, e.g., infra* notes 62–83 and accompanying text.

nineteenth century into two readily and rationally distinguishable forms of action—one at law for dispossessed claimants and the other in equity for parties in possession who wanted to remove a cloud on their title.⁶² It is unclear whether the nineteenth century requirement to plead one or the other of these two fundamental forms of title action at the outset of a case caused a vast amount of unfair prejudice in the form of dismissals, as the critics of substance-specific procedure suggest.⁶³

Finally, as any practitioner dealing with these matters can tell, the forms of action discussed by Maitland never entirely disappeared from the substantive law—they persist in the form of claims and remedies.⁶⁴ Procedure reform was just that—a reform of procedure—with the substantive law that was once so closely attached to procedure left unmoored as free-floating “causes of action.”⁶⁵ A plaintiff in contemporary practice need only state a claim in simple terms, but ultimately must prove a set of defined elements and mold his or her case to those elements in a process no less restrictive than the old forms of action from which these “causes of action” derive.⁶⁶ The liberality of contemporary procedure derives not from elimination of category distinctions from the law but from the possibility of amendment and the elimination of demurrer practice.

II. CONTEMPORARY TITLE ACTIONS AND THE PERSISTENCE OF REFORM

As Maitland himself said: “The forms of action we have buried, but they still rule us from their graves.”⁶⁷ The persistence of the forms of action in the substantive side of civil practice can be seen by taking a look at a recent ejectment case in Georgia.⁶⁸ Georgia is an interesting state to look at in studying the more recent evolution of the common law forms of

⁶² See discussion *infra* Part III.

⁶³ As authority for their contention that common law pleading consisted in large part of “petty haggling over pointless distinctions,” resulting in unfairness and a waste of judicial resources, the critics of substance-specific procedure tend to either cite to one another or simply assert the premise as self-evident. See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974 & n.12 (1989) (citing no authority); Carrington, *supra* note 11, at 2080 n.77 (citing to himself); Rubenstein, *supra* note 16, at 1885 n.77 (citing Carrington and Shapiro).

⁶⁴ See Subrin, *How Equity Conquered*, *supra* note 12, at 915 (“[The] organized body of what is now commonly called substantive law evolved from the writs.”).

⁶⁵ See *id.* at 975–82 (discussing the attempt to purge the concept of a “cause of action” from the Federal Rules of Civil Procedure).

⁶⁶ See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1177 (1993):

No matter how we describe it, most civil litigation examines events and determines if they add up to believed facts which fit within the elements of a cause of action. I have written about how Clark and his cohorts eschewed the terms facts and cause of action. But that is the reality within which litigators have to work. . . . Many of the individual pieces of the litigation process—pleading, 12(b)(6), discovery, burdens of production and persuasion, relevancy issues, summary judgment, directed verdict, jury instructions, opening and closing arguments, one's sense of various methods of ADR—require a mastery of the concept of causes of action and their elements.

⁶⁷ MAITLAND, *supra* note 28, at 2.

⁶⁸ MVP Investment Co. v. North Fulton Express Oil, 639 S.E.2d 533 (Ga. Ct. App. 2006).

action in their reincarnation as substantive “causes” of action, divorced from the rigid procedural formulas of writ pleading practice, because Georgia was one of the first states to attempt codification of the substance of the common law, including the maxims of equity enacted as actual statutes.⁶⁹ With respect to land title actions, the original Georgia Code of 1863 contained a statutory provision for equitable action to quiet title in the form of what eventually came to be known as “conventional quia timet.”⁷⁰ This was modeled after the traditional bill in equity seeking an injunction to prevent an anticipated future harmful act, “quia timet” being Latin for “because he fears.”⁷¹ The ordinary proceeding at common law for ejectment was similarly codified, albeit later, in the 1895 code.⁷² Accordingly, on the one hand, ejectment was available in cases of dispossession. On the other hand, in cases involving a “cloud on title,” in which the plaintiff was in possession but feared a challenge to title or possession due to the existence of, for example, a void deed, the action in equity was the appropriate avenue for seeking relief because ejectment did not provide an adequate remedy at law.⁷³

In 1917, the Georgia General Assembly attempted to provide an alternative mechanism for establishing title to land in the Georgia Land Registration Act of 1917.⁷⁴ This Act allows a petitioner to obtain certification from the superior court of their title to the land by means of an in rem action, with notice to interested parties and adjoining landowners.⁷⁵ The action is noticed both by publication in newspapers and by physical posting on the property.⁷⁶ In practice, this procedure is seldom utilized, either because lawyers are more familiar with the older causes of action, which remain in place, or because they are suspicious of a procedure that

⁶⁹ See, e.g., GA. CODE ANN. § 23-1-6 (1982) (“Nature of equity—Follows the law”). For the history of Georgia’s codification efforts, beginning in 1860–63, see R. Perry Sentell, Jr., *Codification and Consequences: The Georgian Motif*, 14 GA. L. REV. 737 (1980). Regarding codification, see generally Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979) and Lewis A. Grossman, *Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149 (2007).

⁷⁰ GA. CODE § 3153 (1863) (current version at GA. CODE ANN. §§ 23-3-40 to -44 (1982) (conventional quia timet)).

⁷¹ BLACK’S LAW DICTIONARY 1281 (8th ed. 2004); see also STORY, *supra* note 9, at ch. XXI (discussing the quia timet bill in traditional equity practice).

⁷² GA. CIV. CODE § 5004 (1895) (current version at GA. CODE ANN. §§ 44-11-1 to -15 (2002) (ejectment)).

⁷³ See *Newcomer v. Newcomer*, 606 S.E.2d 238, 239 (Ga. 2004):

The reason of this rule is that, where the defendant is in possession, the plaintiff has a remedy to test his title at law by bringing an action in ejectment, which is ordinarily deemed an adequate remedy, and in consequence there is no ground for the exercise of equitable jurisdiction, which is based upon the fact that, where the plaintiff is in possession, he can maintain no action at law to test his title.

(quoting *Mentone Hotel & Realty Co. v. Taylor*, 130 S.E. 527, 529 (Ga. 1925)).

⁷⁴ Currently codified at GA. CODE ANN. §§ 44-2-60 to -84 (2008). See GEORGE PINDAR, *GEORGIA REAL ESTATE LAW AND PROCEDURE WITH FORMS* § 25-10 (Daniel F. Hinkel ed., 6th ed. 2004) (discussing the procedure).

⁷⁵ PINDAR, *supra* note 73, § 25-10.

⁷⁶ GA. CODE ANN. § 44-2-67 (2008).

requires broad notification of a weakness in their client's claim of title to outside parties and another set of records to keep track of in addition to deeds, certificates of registration that are physically issued to the owner as proof of title.⁷⁷

In 1966, the Georgia General Assembly tried again to reform title litigation by passing the Quiet Title Act of 1966, this time creating a statutory proceeding called "quia timet against all the world."⁷⁸ This statutory proceeding allows any person claiming an estate in land, defined as "an estate of freehold present or future or any estate for years of which at least five years are unexpired," to bring an action to obtain a court order recognizing their rights in the property, regardless of whether they are in possession and regardless of whether they are able to identify a specific "cloud" on their asserted title.⁷⁹ The proceeding applies to boundary line disputes and disputes relating to easements.⁸⁰ The statutory scheme provides for appointment of a special master to determine who should receive notice and hear the title question.⁸¹ Upon receipt and acceptance of the master's report, title is noted in the land records themselves and no separate certification issues.⁸²

Viewed in light of its history, the purpose of this enactment was to create a convenient, omnibus special proceeding for all instances in which the central dispute is with respect to title to land, with its own pleading requirements and specific set of remedies.⁸³ However, the prior causes of action in ejectment and conventional quia timet were not repealed; indeed, the act expressly states that it is not intended as an exclusive remedy.⁸⁴ This raises the question, "why not?" One suspects that the real reason the legislature left the Georgia Code littered with increasingly overlapping remedies, where once there were distinct remedies for distinct purposes, was fear of unintended consequences that might deprive someone of a remedy.⁸⁵ This is the old view of the law as an organic thing, each part

⁷⁷ PINDAR, *supra* note 73, § 25-10.

⁷⁸ Currently codified at GA. CODE ANN. §§ 23-3-60 to -73 (1991). PINDAR, *supra* note 73, § 25-11.

⁷⁹ GA. CODE ANN. § 23-3-61 (1982).

⁸⁰ See *Middleton v. Robinson*, 244 S.E.2d 7 (Ga. 1978) (boundary lines); *Wiggins v. S. Bell Tel. & Tel. Co.*, 266 S.E. 2d 148 (Ga. 1980) (easements).

⁸¹ GA. CODE ANN. §§ 23-3-63 to -66 (1982).

⁸² *Id.* § 23-3-67 (1982).

⁸³ See *id.* § 23-3-60:

The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein.

⁸⁴ *Id.* § 23-3-72 (1982).

⁸⁵ See Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 418-20 (2004) (discussing fear of unintended consequences as a rationale for what the author calls "historical justification" of legal doctrine).

linked to the other in ways that are so complex that coherent, constructive reform is difficult if not entirely impossible.⁸⁶

An example of why this attitude persists can be found in the case of *MVP Investment Co. v. North Fulton Express Oil*.⁸⁷ In *MVP*, the plaintiff, a land developer, alleged that an adjoining landowner had built an earth slope on the plaintiff's property in order to provide lateral support to the defendant's property.⁸⁸ The plaintiff brought the action in plain trespass, seeking damages, and the defendant moved to dismiss on the grounds that the four-year statute of limitations for actions to recover for trespass to realty had passed.⁸⁹ The plaintiff, apparently in response to the appearance of this defect in its case and not from any newfound interest in clarifying its title to the land, took advantage of Georgia's liberal amendment rules to amend its complaint to add a claim for ejectment, in essence recasting the claim as a title claim for which the period of limitation would derive from the adverse possession statute and not the statute respecting trespass to realty.⁹⁰ The Georgia court of appeals allowed this, holding that the plaintiff had a legitimate claim for ejectment.⁹¹

This was undoubtedly the correct decision in the narrow sense that the court correctly applied the cited precedents to the facts before it.⁹² Conceptually, it is probably the correct outcome because, as the court argues, the dirt slope is certainly analogous to a structure erected by someone else and occupying the land, which would very clearly raise a title issue.⁹³ As soon as the court accepted the framing of the issue as being whether the dirt slope constituted a continuing occupation of the property authorizing ejectment, the court appears to have had no choice but to decide as it did.

On another level, however, the case is a bit troubling. At first blush, this case appears to support an argument for trans-substantivity and against

⁸⁶ See David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040 (1991) (describing suspicion of "rationalism" and "modernism" as "law's aboriginal grand tradition").

⁸⁷ 639 S.E.2d 533 (Ga. Ct. App. 2006).

⁸⁸ *Id.* at 534.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 535.

⁹² See *id.* at 534–35 (citing *Wachstein v. Christopher*, 57 S.E. 511, 512–13 (Ga. 1907) (holding foundation occupying plaintiff's property subject to removal); *Navajo Constr. v. Bringham*, 608 S.E.2d 732, 734 (Ga. Ct. App. 2004) (holding a portion of a neighbor's house occupying plaintiff's property subject to removal); *Dep't of Transp. v. Arnold*, 530 S.E.2d 767, 771–72 (Ga. Ct. App. 2000) (holding that government's "slope easement" constituted a taking).

⁹³ See *MVP*, 639 S.E.2d at 534:

Georgia law allows an owner of real property to bring an ejectment action to remove an adjoining property owner who, either by inadvertence or with predatory intent, encroaches upon the property of his neighbor. The purpose of the action is to eject the defendant from possession of the disputed land. A land owner's entitlement to an action in ejectment stems from our deep-rooted belief that the owner of real property has the right to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use.

(internal citations and quotations omitted).

substance-specific procedure in that the plaintiff is protected by liberal modern pleading and amendment rules from any negative consequences arising from the fact that it chose initially to cast its complaint as an action for trespass, thus avoiding the alleged evil of punishing litigants for technical pleading defects.⁹⁴ On the other hand, it is difficult not to see the attempt to reconfigure this case as an ejectment action as something of a pretext, given that the plaintiff really wanted monetary damages for the reduction in value of their property and not a writ of possession and award of mesne profits (the remedy in an ejectment action).⁹⁵ Turning the case into a title action was clever lawyering, and no doubt a serious incentive to settlement by the defendant, but it is difficult to see this as being much different from the legal fictions of the writ-pleading era.⁹⁶

For present purposes, however, it is enough to note that the existence of special, substance-specific statutory proceedings respecting title to land did nothing to prevent the plaintiff in *MVP* from saving its case by recasting it as a title action. Moreover, this would likely have still been the case even if the Georgia legislature had enacted the omnibus remedy to quiet title as the exclusive form of proceeding in title cases. Imagine that the Georgia General Assembly had established the “quia timet against all the world” remedy as the sole and exclusive means of trying title issues in Georgia. The critics of substance-specific reform argue or imply that substance-specific procedure will have the same perceived fundamental problems as existed under code pleading—endless arguments regarding the nature of the claim and dismissal of cases for pleading errors.⁹⁷ In this instance, however, there is no reason to assume that resort to an exclusive substance-specific procedural mechanism would necessarily have been unavailable by amendment under Georgia’s liberal version of Rule 15, with relation back to preserve the claim against the statute of limitations.⁹⁸ The infamous arguments over technicalities in code pleading were more a product of demurrer practice than of substance specificity in the abstract.⁹⁹

⁹⁴ See John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 513–15 (2000) (identifying the avoidance of “dispositions on the basis of technicalities of pleading” as a principal benefit of contemporary procedure).

⁹⁵ GA. CODE ANN. §§ 44-11-7 (mesne profits), -14 (writ of possession) (2002).

⁹⁶ Notoriously and ironically associated with the action in ejectment. See *supra* note 58 and accompanying text.

⁹⁷ See *supra* note 16 and accompanying text.

⁹⁸ See GA. CODE ANN. § 9-11-15 (2006); see also *id.* § 9-11-81:

[The Georgia Civil Practice Act] shall apply to all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by the law; but, in any event, the provisions of [the Georgia Civil Practice Act] governing the sufficiency of pleadings, defenses, amendments, counterclaims, cross-claims, third-party practice, joinder of parties and causes, making parties, discovery and depositions, interpleader, intervention, evidence, motions, summary judgment, relief from judgments, and the effect of judgments shall apply to all such proceedings.

⁹⁹ See *Hill v. Lariscy*, 165 S.E.2d 315, 316–17 (Ga. Ct. App. 1968) (explaining the difference between the demurrer and the motion to dismiss for failure to state a claim); *Martin v. Approved Bancredit Corp.*, 163 S.E.2d 885, 886 (Ga. 1968) (same); see also *Burbank*, *supra* note 10, at 1940 (“No one I know is suggesting a return to the forms of action or a wholesale rejection of trans-substantive

Moreover, if anything is clear from *MVP*, it is that boundary disputes among conceptual categories of cases persist, despite trans-substantive procedures, due to the persistence of category distinctions in the substantive law.¹⁰⁰

In any event, the “quia timet against all the world” remedy, enacted in the form of a non-exclusive proceeding, shows that substance-specific reform need not be in the form of exclusive categories of proceeding, but can instead appear in the form of procedural alternatives. In sum, a broad range of substance-specific procedural mechanisms exist at the state level in the form of remedy-specific special statutory proceedings, and this reality does not necessarily lead to trial by technicality.

III. ACCOUNTING AND THE HISTORY OF EQUITY JURISPRUDENCE

Let us turn now to a proposal for a more innovative procedural reform premised on the accounting remedy scenario discussed in the introduction. The equitable accounting remedy needs to be understood in terms of its historical origins as a remedy with a procedural focus—a mechanism for providing a specific form of discovery to litigants able to avail themselves of equity, discovery that was not available in the ordinary course of civil practice at the time.¹⁰¹ A return to the remedial understanding of discovery on which this form of proceeding was premised provides the basis for a useful procedural alternative in fiduciary cases. As discussed in the next section, it even suggests a way around the fraught political and ideological difficulties at the heart of the current debate regarding discovery reform.

There was a procedure for accounting at law in common law pleading practice, which developed in response to the problem of assessing unliquidated damages against manorial bailiffs, for example, who collected rents and managed property on behalf of a landlord.¹⁰² Over time, however, equity courts proved to be a more flexible and efficient venue for accounting actions, in part because of the availability of more effective enforcement mechanisms.¹⁰³ This remedy in equity was initially limited to cases involving the “special grounds of equity” such as accident, mistake or fraud.¹⁰⁴ But it quickly expanded to include other cases because it fulfilled a legitimate and substantial need for this type of discovery in aid of restitution in cases of unjust enrichment by fiduciaries.¹⁰⁵

procedure.”).

¹⁰⁰ These distinctions not only persist but have continued to evolve. See, e.g., Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001) (discussing category distinctions in general and describing the evolution of Justice Holmes’ understanding of torts as a category organized around the negligence principle).

¹⁰¹ See STORY, *supra* note 9, at §§ 436–45; see also Eichengrun, *supra* note 2, at 463–67 (discussing the history of the accounting remedy).

¹⁰² Eichengrun, *supra* note 2, at 464.

¹⁰³ *Id.* at 466.

¹⁰⁴ STORY, *supra* note 9, §§ 437–40.

¹⁰⁵ *Id.*

Accounting remained part of the more or less unique province of equity until 1848, when New York adopted David Dudley Field's "Field Code" and began the still unfinished process of banishing the distinction between law and equity.¹⁰⁶ "Code practice" was adopted in a number of other jurisdictions and was an inspiration for the adoption of the merger of law and equity in the Federal Rules of Civil Procedure.¹⁰⁷ This in turn inspired its universal adoption at the state level and, along with it, liberal, trans-substantive discovery rules.¹⁰⁸ With minor variations from one jurisdiction to the next, every American jurisdiction now allows extremely liberal discovery in civil practice without regard to whether the case is one that traditionally would have been brought in law or equity.¹⁰⁹ And, with a few peculiar exceptions of little or no real consequence, the states purport to have abolished entirely the concept of exclusive jurisdiction over equity cases in special courts of equity.¹¹⁰

The truth about the merger of law and equity from the standpoint of practitioners "on the ground," however, is a good deal more complicated. To begin with, "equitable remedies and defenses" persist as distinct creatures with distinct rules, both substantive and procedural.¹¹¹ Moreover, equity continues to have an impact on jurisdiction, despite the creation of courts of "general" jurisdiction.¹¹²

¹⁰⁶ See Subrin, *How Equity Conquered*, *supra* note 12, at 931–40 (discussing the merger of law and equity in the Field Code).

¹⁰⁷ *Id.* at 943–82.

¹⁰⁸ *Id.* Note, however, that Subrin is very critical of the view that the Field Code was "a parent of" the Federal Rules, because he wants to emphasize the ways in which the Code continued common law pleading. See *id.* at 931–40.

¹⁰⁹ See 4 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, COMM. ON THE JUDICIARY 611 (Comm. Record 1947) ("In final result, New Jersey, Arkansas, Mississippi and Delaware remained the only states which still have an independent Court of Chancery with a separate body of judges administering equity exclusively."). Of these four states, Arkansas eliminated its Chancery courts in 2001. See Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 496 n.409 (2003).

¹¹⁰ New Jersey still has a Chancery division of its superior court, which serves a purpose similar to the Delaware Court of Chancery in providing judges with special expertise in business matters. Main, *supra* note 109, at 496 n.409. The other states that have retained the nomenclature of distinct courts, such as Mississippi and Tennessee, have so far departed from the original distinction between law courts and equity courts that the use of the word "Chancery" to describe these courts is an anachronism with little if any contemporary meaning. *Id.*

¹¹¹ See DOBBS, *supra* note 1, §§ 2.1–2.6.

¹¹² In Georgia, for example, the constitution of the state provides for direct appeal of "equity cases" to the Supreme Court of Georgia. See GA. CONST. art. VI § 6, ¶ III ("Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of . . . [a]ll equity cases."). That court has responded to the resulting burden by narrowing its understanding of "equity cases" to such an extent as to essentially eliminate its jurisdiction over cases involving equitable remedies and defenses, taking the transparently self-serving position that the cases that come before them involving injunctions and so forth are really determined by legal issues and the role of equity is secondary. See *Redfearn v. Huntcliff Homes Ass'n*, 524 S.E.2d 464, 465–67 (Ga. 1999). However, the distinction remains, haunting sleep and sowing confusion. See, e.g., *Viola E. Buford Family Ltd. P'ship v. Britt*, 642 S.E.2d 383, 384 n.1 (Ga. Ct. App. 2007) ("We note that the Supreme Court has determined that this equity case does not fall within its jurisdiction."). Similarly, distinctions between law and equity continue to limit the jurisdiction of probate courts and other special statutory courts in Georgia, leading to the strange result that it is now possible to obtain an order in probate court directing the fiduciary of a decedent's

One example of the confusion arising from the persistence of equity in both substance and procedure is the remedy of equitable accounting. As traditionally understood, this remedy has been difficult to reconcile with contemporary discovery rules that allow a party to obtain any financial information from a fiduciary without making a showing of entitlement other than the allegations in the good faith pleading.¹¹³ In response to this confusion, Professor Joel Eichengrun proposed “remedying the remedy.”¹¹⁴ Witnessing the accounting remedy’s loss of most of its utility and meaning under contemporary procedure rules, Professor Eichengrun called for the remedy to be re-conceived around what he viewed as its sole remaining core of utility—the fact that it provides for an award of profits where a party has unjustly benefited from the use of a trust fund.¹¹⁵ Indeed, Professor Eichengrun called for opening this narrower remedy up to litigants outside of the fiduciary realm.¹¹⁶

There are, however, problems with this approach. To begin with, the core of the accounting remedy as reconceived by Professor Eichengrun—the fact that it provides an avenue for obtaining an award of profits—is neither unique nor sufficiently free-standing to justify retaining the concept of accounting as an independent remedy. The remedial benefits of “accounting for profits” identified by Professor Eichengrun should be available to a litigant through the ordinary avenues of the law of restitution and unjust enrichment.¹¹⁷ Moreover, in light of the availability of

estate to act in a certain way if, and only if, you promise not to call it an “injunction.” See *Patterson v. Ellerbee*, 603 S.E.2d 308, 311 (Ga. Ct. App. 2004) (Barnes, J., dissenting) (recognizing Georgia’s constitutional grant of exclusive equity jurisdiction to the superior courts); GA. CODE ANN. § 15-9-127 (2005) (“Probate courts . . . shall have concurrent jurisdiction with superior courts with regard to the proceedings for . . . [d]eclaratory judgments involving fiduciaries.”); *id.* § 15-9-120 (limiting applicability of the article to counties with population in excess of 96,000); *id.* § 9-4-4 (defining the scope of the declaratory judgment as including orders “direct[ing] the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity”).

¹¹³ See, e.g., *Thompson v. Coughlin*, 997 P.2d 191, 196 (Or. 2000) (finding that plaintiff’s access to discovery obviated the need for an accounting and that the parties were, accordingly, entitled to a jury trial).

¹¹⁴ See Eichengrun, *supra* note 2.

¹¹⁵ See *id.* at 485:

The true accounting yields a restitutionary award of a defendant’s profits; the “accounting” to settle complex or mutual accounts functionally grants a non-jury trial; and a now obsolete remedy also called an “accounting” compelled discovery in cases of disputed accounts. . . . Finally, a theoretical consideration of the accounting suggests that the remedy be expanded to include the situation where a non-fiduciary has profited from the wrongful use of another’s property.

¹¹⁶ See *id.*

¹¹⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (Tentative Draft No. 4, 2005) (awarding restitution in cases of breach of fiduciary duty); James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55 (2007) (describing much of the terminology associated with restitutionary remedies as “gibberish” arising from the traditional conception of restitution as “parasitic” on other substantive law and asserting as the core remedial premise of the law of restitution the principle that “a party who unjustifiably enriches himself at the expense of another owes a duty to pay a sum of money that will disgorge the enrichment”). But see DOBBS, *supra* note 1, § 4.3(5) (following Eichengrun in identifying accounting for profits as a conceptually distinct restitutionary remedy).

discovery and, in complex cases, auditors, the procedurally distinct aspects of the accounting remedy—for example, the shifting of the burden of proof to the defendant with respect to set-offs and the availability of non-jury trials—seem less than compelling as reasons to retain the remedy as a distinct conceptual entity.¹¹⁸ Furthermore, the burden-shifting advanced by Professor Eichengrun as a primary advantage of the accounting remedy is not necessarily limited to accounting cases.¹¹⁹

Another reason Professor Eichengrun's proposal has failed to attract adherents may be that lawyers, by training, fear semantic confusion much less than they fear the possibility of rights being left without a remedy. Accordingly, there may be a tendency to allow remedies to linger past their "sell by" date.¹²⁰ Still, the continuing existence of accounting as a separate statutory remedy may generate confusion among lawyers who are not legal historians. Confusion costs clients money.

It could be, however, that some of this confusion derives from the fact that, from the practitioner's standpoint, an accounting may be all that one wants, at least initially. Imagine an attorney with a trust client who came into her office concerned about a trustee's refusal to provide information, but with no clear evidence of foul play. In the author's own experience, private fiduciaries often withhold information, not necessarily because they have committed some offense, but because they either do not like to be second-guessed by their beneficiary, they do not like to admit that their accounts are not neatly in order, or they simply do not want to go to the trouble of complying with a request for information about the trust. Nevertheless, if a fiduciary refuses to surrender documents, the lawyer ultimately is forced to bring a breach of duty claim in order to get discovery.¹²¹

Of course, it is possible in a fiduciary case simply to bring a suit for accounting. But this makes little sense, both because the remedy as traditionally conceived has been more or less emptied of meaning by contemporary discovery rules,¹²² and also because the rules as currently

¹¹⁸ For a discussion of these procedural aspects, see Eichengrun, *supra* note 2, at 477–81.

¹¹⁹ See, e.g., *Cochran v. Ogletree*, 536 S.E.2d 194, 196–97 (Ga. Ct. App. 2000) (holding burden of proof placed on defendant to establish set-off in case of unjust enrichment for "money had and received").

¹²⁰ See *Schwab v. Philip Morris USA*, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2006) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)); see also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 123–24 (1982) (describing and justifying the inherent conservatism of attorneys as a "retentionist bias").

¹²¹ Some states have experimented with allowing pre-litigation discovery. See, e.g., OHIO R. CIV. P. 34(D). However, pre-litigation discovery is allowable under the Federal Rules only in the form of a deposition, and only where the court finds that a pre-litigation deposition is necessary to "prevent a failure or delay of justice." FED. R. CIV. P. 27. Moreover, even those states allowing pre-litigation discovery of documents require a finding of necessity and do not sanction pre-litigation discovery as a mechanism for ascertaining whether a claim exists. See OHIO R. CIV. P. 34(D)(3)(b) (West Supp. 2007) (requiring a finding that the plaintiff is "otherwise unable to bring the contemplated action").

¹²² For an example of the practical consequences of discovery stripping equitable accounting of its

designed favor bringing claims together and may punish people for failing to bring related claims.¹²³ So, the default option becomes a suit for breach of trust *and* an accounting.

The plaintiff's attorney can console herself with the fact that failure to account to a beneficiary is itself a breach of fiduciary duty and may also be sufficient to support a good-faith claim of breach of fiduciary duty by mismanagement of funds or under some other theory.¹²⁴ However, there are two problems with this approach on the practical (as opposed to the conceptual) level. First, any efficiency which may derive from requiring litigants to bring all of their claims together may be lost when it results in bringing the entire mechanism of a civil action to bear on disputes that may only be a simple failure of communication. Second, the claim that a fiduciary's failure to comply with pre-litigation demands for documents is itself a basis for a *damages* claim of breach of fiduciary duty, however conceptually neat it may appear on the surface, is something of a legal fiction with a real cost in terms of public perceptions of the litigation process as plaintiffs are forced to bring a hypothetical claim in order to find out whether they have a stronger one.

Accordingly, although the accounting remedy as viewed through the lens of substantive reform is a relic that could be simply done away with, its persistence suggests the possibility of procedural reform such as an alternative discovery process conceived in remedial terms. Imagine a special statutory proceeding for accounting in which certain plaintiffs with a basis for entitlement to an accounting could come forth in a separate action and demand a formal, judicially managed accounting of the fund. The defendant would either dispute the entitlement or produce an accounting, with the assistance of a neutral, court-appointed auditor where appropriate. Upon acceptance of the accounting by the court as sufficient and complete, the parties would then have an opportunity to request additional discovery and exchange a demand for relief and response. Such demand could be premised on any available legal theory and "tried" in an evidentiary hearing before the court, sitting without a jury. Or the plaintiff could file a new civil action in common form without fear of *res judicata* except as to the issues actually decided in the accounting case.

original purpose, see *Thompson v. Coughlin*, 997 P.2d 191, 196 (Or. 2000) (finding that discovery had allowed the plaintiff to establish an amount certain for damages, thus obviating the need for an accounting in equity, with the consequence that the case could proceed at law subject to a jury trial demand).

¹²³ See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982):

When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

¹²⁴ GEORGE T. BOGERT, TRUSTS § 141 (6th ed. 1987) ("Duty to Furnish Information to the Beneficiary"). This duty, though broad, is subject to a reasonableness limitation. *Id.*

The benefit of this procedure is that it would allow the plaintiff to come forward and demand what she actually wants—access to the books to determine whether she has a claim—without having to premise this access on vague and poorly substantiated claims. Moreover, it would tailor discovery to the circumstances by focusing the initial stage of discovery on obtaining an audit of the funds in question, or the equivalent. Once that is established, the parties could pursue any trial preparation discovery that they needed, such as the deposition of experts, with a court-approved audit in hand. From a defendant's point of view, it would allow litigants to engage in a fishing expedition only after an initial showing of entitlement, such as an affidavit establishing a right to the accounting.

This procedure could be limited to the cases in which an equitable accounting has traditionally been available: trust cases, partnership disputes, financial litigation involving complex, mutual accounts, et cetera. Indeed, given the continuing availability of ordinary discovery to litigants willing and able to state a good faith claim of breach of fiduciary duty, this procedure may seldom be used. On the other hand, the remedial understanding of discovery on which this proposal is premised might turn out to have a wider application. The next part takes a broader look at discovery and its origins in equity procedure.

IV. REVIVING THE BILL OF DISCOVERY

The debate regarding substance-specific reform of civil procedure began with a general discussion about the pitfalls of trans-substantive procedure's attempt to capture all of the nuances of civil practice in one conception of the civil action.¹²⁵ However, the discussion quickly evolved into a more nuanced argument regarding the influence of equity procedure on rules reform, focusing on modern discovery practice.¹²⁶ At least one commentator, Stephen Subrin, identified this "conquest" of equity over common law procedure as the source of pretty much everything that is wrong with contemporary civil litigation, from delay of outcomes to the death of the trial, with the primary evil being liberal discovery rules.¹²⁷ As an alternative, Subrin called for "selective substance-specific procedure" reform through the establishment of default discovery limits specific to broad substantive categories of lawsuits,¹²⁸ such as products liability or professional negligence.

¹²⁵ See Cover, *supra* note 10, at 732–33:

It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.

¹²⁶ See Subrin, *How Equity Conquered*, *supra* note 12, at 919, 1001.

¹²⁷ *Id.* at 910–12, 983.

¹²⁸ See Subrin, *Fudge Points*, *supra* note 10, at 28.

In assessing this argument, we should begin by discussing what is meant by “equity jurisprudence.” The classic tale of the origins of equity jurisprudence is that it arose to ameliorate injustices arising from too strict an application of common law rules, most notably procedural rules. This is a conception of equity’s origins with its roots in Aristotle’s discussion, in *Nichomachean Ethics*, of “epieikeia” as a force moderating the strict demands of the law, “a rectification of legal justice.”¹²⁹ As recounted recently by Thomas Main, the story goes something like this:

The Chancellor unrolled a vast body of legal principle that we know as “equity” to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the common law, there was no “plain, adequate and complete” remedy otherwise available. . . . Intervention was premised on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community’s technical rules, but also of “magisterial good sense, unhampered by rule.”¹³⁰

In this conception, flexibility and common sense are identified as the essential aspects of equity. However, much of the history of equity jurisprudence as it was actually practiced has been identified as a fall from grace—an abandonment of these principles by judges facing temptation in the form of precedent and rule-making and finding themselves unable to resist.¹³¹

It is interesting to note that earlier historians of equity jurisprudence were quite critical of this explanation, viewing it as an origins myth that tells us more about the ideological justifications for equity than it does about the actual circumstances of its origins.¹³² For example, Joseph Story essentially rejects the notion that equity arose as a general corrective action against the rigidity in the classical common law, arguing instead that equity arose from the need for specific, unprovided-for remedies:

¹²⁹ 5 ARISTOTLE, *THE NICHOMACHEAN ETHICS* Ch. 10 (J.A.K. Thomson trans., Penguin Books further rev. ed. 2004) (1953).

¹³⁰ Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 441–42 (2003).

¹³¹ See, e.g., PETER CHARLES HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA*, 11–18 (1990); see also Fiona R. Burns, *The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion*, 21 U. QUEENSLAND L.J. 198 (2001) (arguing against this view in part, noting that the nineteenth-century Court of Chancery in England was in some ways increasingly burdened by the transition from a discretionary to a precedential model of jurisprudence but nonetheless managed to create new substantive equitable doctrines such as breach of confidence and the equitable covenant).

¹³² See, e.g., WILLIAM BLACKSTONE, 3 COMMENTARIES *429–30 (2002):

EQUITY then, in it’s [sic] true and genuine meaning, is the [s]oul and [s]pirit of all law: *po[s]itive* law is con[s]trued, and *rational* law is made, by it. In this, equity is [s]ynonymous to ju[s]tice; in that, to the true [s]en[s]e and [s]ound interpretation of the rule. But the very terms of a court of *equity* and a court of *law*, as contra[s]ted to each other, are apt to confound and mi[s]lead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illu[s]tration to be met with, which now draws a line between the two juri[s]dictions, by [s]etting law and equity in oppo[s]ition to each other, will be found either totally erroneous, or erroneous to a certain degree.

Many persons, and especially foreigners, have often expressed surprise that distinct courts should in England and America be established for the administration of equity, instead of the whole administration of municipal justice being confided to one and the same class of courts without any discrimination between law and equity. But this surprise is founded almost wholly upon an erroneous view of the nature of Equity Jurisprudence. It arises from confounding the general sense of equity, which is equivalent to universal or natural justice, *ex aequo et bono*, with its technical sense, which is descriptive of the exercise of jurisdiction over peculiar rights and remedies.¹³³

In other words, taking his lead from Blackstone, Story argued for a view of equity jurisdiction as a simple function of certain remedies being allowed in one set of courts as distinct from others, due to circumstances unique to the Anglo-American history, and not as an attempt to embody abstract principles about the administration of justice.¹³⁴

It is impossible to read Story's account without catching a whiff of special pleading since he provides ample evidence, from sources both ancient and contemporary to him, that the association of "equity" in the legal sense with "equity" in the philosophical sense is more than just the result of confusion among classically educated foreigners.¹³⁵ Still, it is useful to understand that equity has sometimes been viewed as something best defined not in the abstract, but in a more particular sense as a collection of remedies. For the present purpose, it is worth noting that this is how equity jurisprudence was defined by perhaps the most influential treatise author of the period when the merger of law and equity began in this country with the adoption of the Field Code.¹³⁶

In Story's version of the history of equity, the key factor behind the origin and expansion of equity was not the availability of in personam

¹³³ STORY, *supra* note 9, at 26–31 (internal citations omitted).

¹³⁴ See *id.* at 20 ("Equity Jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity"); see also *id.* at 11 ("It is said [Blackstone] remarks 'that it is the business of a Court of Equity in England to abate the rigor of the common law. But no such power is contended for.'" (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES 430)). Note that some commentators have been highly critical of Blackstone's conception of equity. See, e.g., 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 54 (Spencer W. Symons ed., 5th ed. 1941) ("This is one example among many of Blackstone's utter inability to comprehend the real spirit and workings of the English law."); see also Sir W. S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1 (1929).

¹³⁵ See STORY, *supra* note 9, at 1–22. Story's special pleading here is in defense of his organic conception of the law as the product of a specific, complex history—a fundamentally conservative vision of the law that led him to be critical of the contemporary codification movement. See GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 315–18 (2d prtg. 1970); JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 89–98 (1971).

¹³⁶ Main acknowledges this definition but ultimately rejects it as being, among other things, "circular." Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 345–46 (2005). Main sees a bright prospect for ADR taking on what he conceives to be equity's traditional role of providing a flexible alternative to litigation. See *id.* at 344–53 (discussing the history of equity and citing numerous nineteenth and early-twentieth century sources on the subject). For a contrary view, see Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004).

relief in the form of the injunction to compel conduct outside of the litigation itself—the primary factor in many more contemporary accounts of equity’s history¹³⁷—but the special power of the equity courts to compel discovery.¹³⁸ “Indeed,” he argues, “every bill in equity may be said to be in some sense a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill.”¹³⁹ This liberal approach to discovery was the inspiration for the approach taken in the Federal Rules of Civil Procedure when they made their debut in 1938.¹⁴⁰ It is also broadly understood that liberal discovery has always had a dark side, with critics of expanded discovery procedure identifying discovery, as opposed to increased formalism, as the source of the infamous delays and backlogged dockets associated with Chancery practice in nineteenth-century England.¹⁴¹ The fundamental problem is described in Dickens’ famous description of Chancery court, which makes reference to the evolution of formalism in the adoption of equity precedent—a common theme of contemporary critics¹⁴²—but focuses primarily on delay and expense:

On such an afternoon, some score of members of the High Court of Chancery bar ought to be—as here they are—mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be—as are they not?—ranged in a line, in a long matted well (but you might look in vain for Truth at the bottom of it), between the registrar’s red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters’ reports, mountains of costly nonsense, piled before them.¹⁴³

In a series of articles beginning in 1987, Professor Subrin elaborated on this dark side of equity procedure, finding the origin of contemporary procedure in equity to be the source of most, if not all, of the problems that contemporary critics perceive in the Federal Rules and its state counterparts—most notably, the delay and expense associated with unlimited, largely unsupervised discovery practice.¹⁴⁴ As an alternative, Professor Subrin proposed a partial retreat from the trans-substantive

¹³⁷ See, e.g., HOFFER, *supra* note 127, at 12–19 (identifying the origins of equity jurisprudence as arising from conflict surrounding the special authority of the Chancery courts to exercise the royal prerogative to compel attendance and enjoin conduct).

¹³⁸ See STORY, *supra* note 9, at 22–23.

¹³⁹ *Id.*

¹⁴⁰ Subrin, *How Equity Conquered*, *supra* note 12, at 943–75.

¹⁴¹ See *id.* at 977–84; see also *id.* at 1001 (“As Dickens and others had known for centuries, equity procedure is slow and cumbersome, and has a high potential for arbitrariness.”).

¹⁴² For a discussion of the role of precedent in the decline of Chancery practice, see Burns, *supra* note 127.

¹⁴³ CHARLES DICKENS, *BLEAK HOUSE* 2 (Oxford Univ. Press 1998) (1853).

¹⁴⁴ Subrin, *Fudge Points*, *supra* note 10, at 29–37.

premise of the Federal Rules in the form of default, substance-specific discovery limits to be established by consensus among stakeholders in the various fields of litigation that are the “most discovery-prone.”¹⁴⁵ Most cases, he argued, have very little need for discovery, and practitioners would likely be willing to exchange most of their current discovery entitlement for fixed trial dates at the outset of litigation.¹⁴⁶ Those cases that do require more extensive discovery should have it but would benefit from default rules limiting discovery to those documents and depositions identified by stakeholders as necessary to the specific type of case, with discovery outside of those limits available only with leave of court.¹⁴⁷

Subrin’s conception of “substance” differs markedly from what most people would anticipate because he is not really talking about substance in the sense of specific claims or causes of action, but in the sense of “types” of lawsuits, broadly conceived.¹⁴⁸ However, many critics renounced this proposal as if it called for a return to the common law pleading practice, arguing that this approach would encourage boundary disputes regarding classification of cases and punish litigants for technical pleading errors.¹⁴⁹ Moreover, the call for stakeholder consensus has been identified by Subrin’s critics as potentially more naive than the assumption of attorney cooperation in discovery on which the current rules are premised.¹⁵⁰

A different approach, which might be more palatable to some, would be to allow a partial return to the older understanding of managed discovery as a type of remedy—a substantive end rather than simply a procedural means to other ends—the attractions of which were explored in the previous part. However, a remedy-focused reform of discovery might be significantly different, and in some ways actually more traditional, than the subject-matter specific discovery limits proposed by Subrin. Instead, it would involve the creation of an alternative procedural creature modeled on the traditional bill of discovery.

Creating an alternative managed discovery procedure premised on an understanding that managed discovery is something substantively different from ordinary discovery might avoid some of the criticisms leveled at

¹⁴⁵ *Id.* at 47–49.

¹⁴⁶ *Id.* at 45–48.

¹⁴⁷ *Id.* at 47–49.

¹⁴⁸ *Id.* at 48 (identifying “categories of cases, such as, products liability, antitrust, securities fraud, section 1983, employment discrimination, and malpractice” as appropriate targets for substance-specific procedural reform).

¹⁴⁹ See, e.g., Carrington, *supra* note 11; Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238–47 (1989); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 822–25 (1993).

¹⁵⁰ See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,”* 64 LAW & CONTEMP. PROBS. 197, 237 (2001) (“It may be too difficult to effect set rules in cases such as discrimination or product liability, where the affected parties fear the distributional consequences of presumptive limits on or entitlements to discovery.”). For a discussion of the flaws in the assumptions underlying attorney cooperation in discovery, see John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 512–16 (2000).

Subrin's approach to substance as a process of identifying and attempting to create default rules for various "types" of litigation. The approach would be "substance-specific" in that it recognizes some forms of procedure as more appropriate to some types of cases than others, without requiring rule-makers or judges to decide what those types are. Instead, litigants would be encouraged to decide what they want. The approach is also substance-specific in that it understands discovery management as something that litigants want as a substantive end in itself. Approaching reform in this way might avoid, at least in part, the criticism that (a) substance-specific procedure creates fertile ground for boundary disputes; (b) it necessarily politicizes the reform process; and (c) it punishes litigants for simple pleading errors. A flexible approach substituting the concept of remedial managed discovery might also encourage a movement away from current defense-oriented approaches to discovery reform, which create barriers to entry and penalties for perceived "abuse."¹⁵¹

What would remedial discovery look like? Again, remedial discovery would be managed discovery. Unlike the ordinary discovery motion, which is essentially a plea for judicial intervention in a process intended to be conducted by the parties, remedial discovery would involve a petition for the appointment of a special master, not just to resolve specific disputes, but to take an active role in developing a discovery plan for the parties that is more than just a series of deadlines. This would ensure that the case not only moves forward, but that it moves forward with appropriately tailored discovery.

Of course, this is by no means the first call for management of discovery by special masters appointed to take the ever-increasing burden of case management. What makes this proposal somewhat different is the recognition of the "managed case" as a potentially distinct procedural entity with its own rules. This may sound like a fantasy, given stretched judicial resources and the futility of so many efforts to increase judicial management of discovery.¹⁵² A number of things are worth noting, however. For one thing, instead of attempting to increase case management in every case, litigants would be permitted to choose more intrusive and potentially limiting case management as an alternative manner of proceeding. They would gain something that many practitioners want in exchange for giving up some control over the process. This would be very different from simply referring all discovery disputes to a discovery master. Instead, it could co-exist with the current system as an alternative for cases where one or more of the parties recognize a genuine need for

¹⁵¹ See Stempel, *supra* note 146; see also Beckerman, *supra* note 146, at 517–18 (identifying problems associated with the expectation of cooperative discovery within the context of our adversarial litigation culture). But see Rubenstein, *supra* note 16, at 1884–92 (arguing that adversarial litigation systems have a special need for procedural equality).

¹⁵² See Stempel, *supra* note 146, at 241–45 (advocating for full-time discovery masters in the federal system but recognizing the forces that might limit their effectiveness).

case management. Moreover, the parties need not have access to the special master of right. The court could serve as gatekeeper, and would likely retain the power to sanction for genuine discovery abuse.

This procedure might also co-exist with the thin discovery option proposed by Professor Subrin, where litigants agree to strict discovery limits in exchange for a fast track to trial. This proposal recognizes the reality that sometimes what the parties want is their day in court, and they may be willing to give up their ordinary, broadly-defined discovery entitlement to get it. Again, this is substance-specific procedure in the broad sense of giving the parties access to procedural alternatives that they think are better suited to their case, without requiring them to establish entitlement by showing that their case conforms to any particular theory of action, inspired by the recognition that discovery can be viewed as something that people do or do not want in its own right.

The presence of these alternative approaches to discovery might lead to a transformation of ordinary motion practice respecting discovery by encouraging judges to view discovery motions less as a plea for case management and more as a motion for sanctions, which currently are seldom imposed in discovery disputes. In other words, creating the possibility of discovery management by a special master would encourage, but not necessarily require, judges to reconceive their role in ordinary discovery motion practice, primarily policing against abusive practices rather than resolving disputes about whether discovery requests are appropriately tailored to the claims. This approach would create alternatives without reconfiguring civil practice in its entirety. Although some will object to limits on discovery, it is important to note that limits are already being imposed in the federal system and in forms that are much less benign than a discovery plan imposed by a special master.¹⁵³

CONCLUSION

The existence of categories of litigation that are politically charged, with clearly defined classes of litigants standing to “win” or “lose” in the reform process, need not lead to the conclusion that any departure from the trans-substantive premise of the rules would inevitably lead to favoritism in the rule-making process. If we look at substance-specific procedure reform outside of the “political cockpit,” we find that it is already happening, and is not necessarily frightening. Instead of containerizing reform in politically contested categories, non-exclusive procedural alternatives modeled after the special statutory procedures that already exist in state law can provide a way to tailor procedure to the needs of litigants without the risks associated with wholesale substance-specific reform.

¹⁵³ See Stempel, *supra* note 146 (discussing recent attempts to reform civil discovery to remedy perceived abuses).