IMPROVING RULE 1: A MASTER RULE FOR THE FEDERAL RULES

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INTRODUCTION

Over the past three decades, many courts and commentators have expressed concern about federal civil litigation. One hears frequent complaints about the high costs of discovery, strategic abuse of the litigation process, huge case backlogs, litigation delays, and frivolous suits. The Institute for the Advancement of the American Legal System and the American College of Trial Lawyers recently conducted a survey that revealed broad agreement in the practicing bar that key features of the current system are not working well.[1] Many lawyers and commentators believe that the Federal Rules of Civil Procedure should be reformed, but there is little agreement as to what exactly should be done.[2]

This issue of the *Denver University Law Review* addresses the question of what to do. Other contributions analyze a number of Federal Rules at the core of current reform efforts, including Rule 8(a) (the pleading rule),[3] Rule 23 (the class action rule),[4] and Rule 26 (the basic discovery rule).[5] My Essay takes a different approach. It focuses on Rule 1, and in particular on a single sentence in Rule 1: "[The Federal Rules of Civil Procedure] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[6] This sentence, which "sets forth the basic philosophical principle for the construction of the rules," is critical to the operation of the Fed-

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1. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 1–3 (2009), http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf. The survey was given to ACTL Fellows, many of whom are highly distinguished trial lawyers.

2. Indeed, the Advisory Committee on Civil Rules has been extremely active since 1980 proposing amendments to the Federal Rules in an effort to address these litigation problems. Many of those amendments have gone into effect, but there is considerable disagreement about how effective they have been.

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

4. *Id.* 23.

5. *Id.* 26.

6. *Id.* 1. The current version of Rule 1 states in its entirety: "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.*

eral Rules as a whole.[7] The reason is simple. The Federal Rules are purposefully designed to delegate broad discretion to trial judges, and Rule 1 is meant to guide that discretion in socially-productive ways. Thus, Rule 1 is a master rule: it affects how all the other Rules are interpreted and applied.

Although Rule 1's principle of rule construction was a vital component of the original Federal Rule scheme—indeed, as I explain below, it was a cornerstone of early twentieth century procedural reform—I argue that it is misleading and counterproductive today. It embodies three related assumptions that make little sense for modern litigation and stand in the way of effective procedural design. The first assumption is that procedure can and should be tailored to the unique needs of individual cases. The second assumption is that procedural tailoring is best achieved with general, transsubstantive rules that rely heavily on trial judge discretion to construct "just, speedy, and inexpensive" procedures for each case. The third assumption is that the three values embodied in the phrase "just, speedy, and inexpensive" can be applied without tradeoffs or conflicts and without sacrificing substantive justice for speedier resolution or lower costs.

Part I of this Essay summarizes the history of Rule 1. It describes what the "just, speedy, and inexpensive" phrase meant to the original rule drafters in 1938, what it means today in light of current understandings of procedure, and how judges have applied it over the decades in between. In addition, Part I explains why the phrase made sense to the original rule drafters and why it offers little guidance today. Part II proposes an amendment to Rule 1 that better frames what the purpose of the Federal Rules should be. My hope is that this amendment will encourage explicit and careful deliberation about procedural design choices and guide the exercise of judicial discretion in more productive directions.

I. A BRIEF HISTORY

From a modern perspective, Rule 1's admonition to "secure the just, speedy, and inexpensive" determination of every lawsuit seems at best hopelessly vague and at worst downright misleading. It is vague because it says nothing about what makes a determination "just" or what to do when a just determination requires procedures that reduce speed or increase expense. It is misleading insofar as it suggests that all three goals can be achieved at the same time without making value choices or difficult tradeoffs.

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7. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1011, at 60 (3d ed. 2002); *see also In re* Paris Air Crash of Mar. 3, 1974, 69 F.R.D. 310, 318 (C.D. Cal. 1975) ("The most important rule of all is the last sentence of F.R.Civ.P. 1 . . . . It is this command that gives all the other rules life and meaning and timbre in the realist world of the trial court.").

For example, is the "justness" of an outcome a function of its accuracy alone, or does it also depend on symbolic effects, educative value, or even the fairness of the participation opportunities that parties receive? What is one to do when, as is quite common, achieving a just determination is in conflict with reducing delay and expense? Indeed, what is one to do when the values of speed and expense reduction themselves conflict—for example, when a judge purposefully delays the litigation to pressure settlement and thereby reduce litigation costs?

Despite its extreme vagueness from today's perspective, Rule 1's principle of construction made sense to the original Federal Rule drafters. Section A below briefly describes the beliefs about procedure that made sense of Rule 1 in 1938. Section B then recounts major changes in those beliefs over the past forty years and explains why the phrase "just, speedy, and inexpensive" is inadequate today.

A. Rule 1 from 1938 to 1970

When adopted in 1938, Rule 1 read as follows:

> Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.[8]

This Essay focuses on the second sentence of Rule 1. This sentence was based on analogous provisions in many state codes.[9] Its purpose was to make clear that the Federal Rules should be construed liberally, that procedural decisions based on technicalities should be avoided, and that trial judges should exercise the broad discretion given them by the Federal Rules "to the end that controversies may be speedily and finally determined according to the substantive rights of the parties."[10] To explain these points more clearly, it is useful to begin with some background on the early twentieth century procedural reform movement.

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8. FED. R. CIV. P. 1 (1938 adoption), *reprinted in* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1 app. 01 (3d. ed. 2009). Rule 1 has been amended four times since 1938. Two of these amendments affected the second sentence, which is the focus of this Essay. A 1993 amendment added the phrase "and administered," so the second sentence then read: "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *See infra* notes 60-66 and accompanying text. In 2007, the Rule was edited as part of the restyling project, which is supposed to leave the meaning of the Rules intact. For a list of all the amendments to Rule 1, see MOORE ET AL., *supra*, at § 1 app. 02–05.

9. *See* 1 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE § 1.13, at 67 (1st ed. 1938).

10. *Id.* § 1.13, at 68 (internal quotation marks omitted) (quoting ILL. REV. STAT. ch. 110, § 132 (1935)).

1. The Rule Drafters' Beliefs

The adoption of the Federal Rules of Civil Procedure in 1938 marked the culmination of a more than thirty-year campaign for procedural reform. The beginning of this campaign is usually traced to Roscoe Pound's famous 1906 address to the American Bar Association ("ABA"), *The Causes of Popular Dissatisfaction with the Administration of Justice*.[11] In his speech, Pound criticized, among other things, the excessive technicality and formality of the common law and code systems. His critique inspired a multi-decade lobbying effort in Congress spearheaded by the ABA, as well as numerous reform campaigns at the state level.[12] The federal efforts eventually produced the Rules Enabling Act in 1934 and the Federal Rules of Civil Procedure in 1938.[13]

Three sets of beliefs animated the early twentieth century reform movement and influenced the text of Rule 1. First, the reformers were confident that they understood the cause of the problems with the litigation system and what to do about them. The primary cause was the hyper-technicality of code and common law procedure. According to the critics, lawyers had become too enamored with the manipulation of technical rules and trial judges too insistent on strict compliance when nothing of substantive importance turned on it.[14] The solution was also clear: eliminate wasteful decisions based on technicalities and require trial judges to apply procedural rules with the sole aim of deciding cases on the substantive merits according to the facts and the evidence. Streamlining procedure in this way would produce just results (i.e., results based on the merits) and would do so more quickly and less expensively by eliminating wasteful and pointless technical decisions.[15]

The second set of beliefs had to do with the philosophical predisposition of the reformers. Many of them—and especially Charles Clark, the chief architect of the Federal Rules—were pragmatists and moderate legal realists.[16] As realists, they cared more about how the law actually

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11. *See generally* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906), *reprinted in* 35 F.R.D. 241 (1964).

12. For an account of the procedural reform movement in Massachusetts, see generally Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, *in* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692–1992, at 393 (Russell K. Osgood ed., 1992).

13. The most extensive account of this history is still Professor Stephen Burbank's article. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043–98 (1982).

14. Roscoe Pound famously referred to this technical preoccupation as "the sporting theory of justice." *See* Pound, *supra* note 11, at 404.

15. *See, e.g.*, Address of Chief Justice Hughes to the American Law Institute, *in* 21 A.B.A. J. 340, 341 (1935) ("It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances.").

16. *See, e.g.*, Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78–89 (1989) (explaining the pragmatic roots of the procedural reform movement and describing how Clark's realist and pragmatic beliefs affected his procedural choices).

worked in practice than how it cohered in theory. As pragmatists, they evaluated procedural rules by their practical consequences, and in particular, equated sound procedure with rules that worked well and commanded respect over time.[17] Code and common law procedure had failed this test. Technical preoccupation made no functional sense, and users of the court system complained sharply about the resulting cost and delay.[18] However, the reformers still believed in the core elements of the adversary system. Those elements—individual participation, party control, the examination and cross-examination of witnesses, and so on—met the pragmatic test for sound procedure by working reasonably well, commanding broad acceptance, and surviving over time.

The third set of beliefs had to do with the nature of procedure itself. Early twentieth-century reformers believed that procedure and substance were separate domains subject to different kinds of value. The only proper function of procedure was to serve as a means to the end of enforcing the substantive law.[19] For reformers, this meant that procedure was governed by instrumental values of good system design, such as simplicity, flexibility, and litigation efficiency (in the sense of eliminating obvious waste rather than minimizing social costs). These values were different than the values that informed the substantive law.[20] Indeed, it was common at the time to refer to procedure as a "machine" or a "tool," and to procedural design as an engineering task suitable for technical experts.[21] The goal of the reformers was to make a procedural machine that produced good substantive outcomes "without undue waste or friction or consumption of fuel."[22]

It is important to understand these points clearly. I do not mean that reformers ignored the obvious causal link between procedure and substance. They recognized that choice of procedure influenced outcome. That is, after all, why they cared so much about reforming the procedural system. What I mean is that the reformers believed in a *normative* dis-

17. For pragmatists, evaluation and description—"ought" and "is"—tend to merge. What is good is what works well, and what works well is determined by observing how an institution or system actually operates in practice. *See id.* at 86 n.288 (explaining, briefly, the pragmatic theory of truth).

18. *See* Bone, *supra* note 12, at 405–06 (noting concerns about criticism from the lay community in Massachusetts).

19. This was a commonly repeated refrain during the period. *See, e.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297–304 (1938). According to the critics, judges insisted on strict compliance with technicalities even when noncompliance could have absolutely no impact on substantive outcomes.

20. *See, e.g.*, Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 836–37 (1924) (noting that "convenience" is the main goal of procedure, whereas "policy" is the goal of the substantive law).

21. For a list of sources, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 895 n.35 (1999).

22. Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 394 (1910). Thus, just as engineers apply value-neutral scientific and engineering principles to design efficient machines, so procedural experts were supposed to apply substance-neutral process values to design efficient procedures.

tinction between procedure and substance. They believed that procedural rules were properly *justified* by values distinctive to procedure itself.

The assumption of a normative separation between procedure and substance underlies two other important goals for the Federal Rules. First, the rules were supposed to apply generally to all types of cases no matter what the substantive stakes. Today we refer to such a system as "transsubstantive."[23] Transsubstantivity made sense because of the belief that procedural design was independent of substantive value. Second, the Federal Rules were designed as general rules that delegated broad discretion to trial judges. Delegating discretion made sense because of the assumption that trial judges, as skilled procedure technicians, could tailor procedures to the specific needs of each individual case.

2. The Impact on Rule 1

All these beliefs are packed into Rule 1's principle of construction. First, notice that the critical sentence in Rule 1 is styled as a statement of interpretive method rather than general purpose. To be sure, it implies a purpose—"to secure the just, speedy, and inexpensive determination of every action"—but it does so in the context of declaring how the Rules should be construed. This is consistent with—and indeed signals—the idea that the Rules rely heavily on trial judge discretion and make wide room for interpretation.

It is also noteworthy that Rule 1's principle of construction is framed exclusively in terms of purpose. It says nothing about text, Advisory Committee intent, or Committee Notes as interpretive guides.[24] This choice reflects the fact that many Federal Rules were designed as open-ended standards. Rather than constrain trial judges, the original Federal Rules mostly operated to expand litigation opportunities and trial judge management options. For example, technical impediments to litigation were removed, pleading-stage dismissals cut back, discovery options expanded, and novel management tools, such as the pretrial conference, given to trial judges.

It made sense too that the drafters would frame Rule 1's principle in terms of securing "just, speedy, and inexpensive" determinations. As discussed above, reformers at the time believed there was a right answer

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23. *See* Robert M. Covert, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

24. In recent years, some judges have made a point of emphasizing the importance of giving priority to a Rule's text and have cautioned against using Rule 1 as an interpretive guide when the text is clear on its face (even if the text is restrictive in a way that arguably offends the "just, speedy, and inexpensive" principle). *See, e.g.*,Varhol v. Nat'l R.R. Passenger Corp., 909 F.2d 1557, 1574 (7th Cir. 1990) (Manion, J., concurring) (stating that Rule 1 should not be used "as a warrant to bend the other rules any time an arguably harsh result may offend our sense of 'justice'"); *cf.* Cipollone v. Liggett Group, Inc., 822 F.2d 335, 342–43 (3d Cir. 1987) (approving the district judge's argument that Rule 1 cannot be used to include case management concerns in Rule 26(c)'s "good cause" requirement for a protective order when Rule 26(c) already makes the policy decision).

to the question of optimal procedural design, and they also believed that the right answer would emerge as trial judges used their expertise and experience to think pragmatically about what to do in particular cases. According to this view, judges did not engage in a controversial balancing of conflicting values. Instead they applied pragmatic reasoning to identify the optimal procedures for a case, and those optimal procedures secured "just, speedy, and inexpensive" determinations by definition.

That the drafters had a pretty good idea what optimal procedure looked like made the task considerably easier. An optimal system was constructed around the core elements of adversarial process freed from code and common law technicalities and designed to ferret out facts and evidence and manage litigation toward just decisions on the merits.[25] Because technicalities were wasteful, eliminating them necessarily reduced both delay and cost without adversely affecting the justness of outcomes. Indeed, promoting decisions on the substantive merits improved outcome quality by eliminating technical traps for the unwary. To be sure, the new Rules might have added some expense and delay, but these marginal effects were not likely to be large—or so the rule drafters must have assumed—and were in any event the inevitable result of a properly functioning procedural system and therefore well justified.[26]

During the decades following adoption of the Federal Rules, judges employed Rule 1 in a manner consistent with this account. They used the Rule to excuse technical defects and facilitate substantive decisions.[27] For example, the United States Supreme Court invoked Rule 1 to avoid piecemeal appeals in one case[28] and to disapprove a narrow and overly technical interpretation of issues on appeal in another case.[29] Lower courts used Rule 1 to support liberal interpretations of the discovery rules[30] and to excuse strict compliance with the Federal Rules when there

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25. For example, in the first edition of his well-known treatise on federal procedure, James William Moore equated Rule 1's interpretive principle with Rule 61's harmless error principle. 1 MOORE & FRIEDMAN, *supra* note 9, § 1.13, at 68–69. Rule 61 in its original form provided: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *Id.* § 1.13, at 69.

26. For example, broader discovery under the Federal Rules might delay litigation and increase expense. However, the drafters did not envision the extremely broad discovery associated with complex litigation today. Moreover, they may well have assumed that expanding discovery would reduce cost and delay indirectly by facilitating settlement.

27. *See* 1 MOORE & FRIEDMAN, *supra* note 9, § 1.13, at 34–35 (Supp. 1947) (collecting case decisions citing and relying on Rule 1).

28. City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257–58 (1949).

29. Foman v. Davis, 371 U.S. 178, 181–82 (1962). I was only able to find three Supreme Court opinions between 1938 and 1978 that relied on the language of Rule 1. Besides *City of Morgantown* and *Foman*, the Court decided *Ettelson v. Metro. Life Ins. Co.*, 317 U.S. 188 (1942), which rejected an argument against appealability based on Rule 1. *Id.* at 190–91. *Ettelson*, however, appears to have been substantially undermined, if not overruled, by the later decision in *City of Morgantown*.

30. *See, e.g.*, S. Ry. Co. v. Lanham, 403 F.2d 119, 131 (5th Cir. 1968) (relying on Rule 1's directive in ordering production of work product where doing so materially advanced the "just, speedy, and inexpensive" determination of the action); Tighe v. Shandel, 46 F.R.D. 622, 624 (W.D.

was no significant prejudice to any party's substantive right.[31] And they invoked Rule 1 to justify construing pleadings liberally in the face of motions to dismiss.[32]

Moreover, in all the opinions I have read, judges tended to apply "just, speedy, and inexpensive" as a unitary norm equivalent to something like simple and liberal procedure. They exhibited little, if any, awareness that the three values in the phrase might conflict. It was only when reform moved beyond eliminating wasteful technicality—or when what was once thought wasteful was reconceived as having some benefit—that the latent value conflicts embedded in the critical phrase became manifest.

B. Rule 1 from 1970 to the Present

Over the past four decades, Rule 1 has lost much of its original guiding force. Moreover, it is used much more frequently today than in the past to justify restrictive interpretations of the Federal Rules. To understand these changes, one must first understand how the litigation environment and beliefs about procedure have changed since 1938.[33]

1. Contemporary Beliefs in a Changed Litigation World

Since the mid-1960s, the volume and scale of litigation have increased markedly. Many factors are responsible for this trend, including the proliferation of new statutory, common law, and constitutional

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Pa. 1968) (using Rule 1 to support liberal construction of the scope of discovery); Franks v. Nat'l Dairy Prods. Corp., 41 F.R.D. 234, 235–36 (W.D. Tex. 1966) (citing Rule 1 as support for principle that Rule 34 should be interpreted "to give the broadest sweep for production, inspection and copying of documents or objects in the possession or control of another party"); Hawaiian Airlines, Ltd. v. Trans-Pac. Airlines, Ltd., 8 F.R.D. 449, 451 (D. Haw. 1948) (arguing that Rule 1 supports a liberal interpretation of the discovery rules); McCrate v. Morgan Packing Co., 26 F. Supp. 812, 813 (N.D. Ohio 1939) (using Rule 1 to justify rejecting a narrow interpretation of Rule 36 that would have limited it to admissions related only to documents, and permitting requests directed to factual propositions unrelated to documents); *cf.* Nat'l Bondholders Corp. v. McClintic, 99 F.2d 595, 599 (4th Cir. 1938) (relying on Rule 1 to support liberal interpretation and application of the discovery rules).

31. *See, e.g.*, Sporia v. Pa. Greyhound Lines, Inc., 143 F.2d 105, 106–07 (3d Cir. 1944) (dismissing what the court considers "highly technical reasons" opposed to severing and rearranging parties to a lawsuit); Ala. Great S. R.R. Co. v. Johnson, 140 F.2d 968, 972 (5th Cir. 1944) (condemning the trial judge's overly-technical approach to a challenge of a jury charge); Sofarelli Bros. v. Elgin, 129 F.2d 785, 787 (4th Cir. 1942) (excusing technical noncompliance with requirements for requesting jury trial). *But see* Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185, 187 (3d Cir. 1942) (holding that a stipulation to extend time to file a response to a venue motion is not effective without court approval as required by a reasonable interpretation of Rule 6, and noting that requiring court approval serves Rule 1's goals by preventing parties from unilaterally prolonging the time for trial to serve their own private interests).

32. *See, e.g.*, Knox v. Ingalls Shipbuilding Corp., 158 F.2d 973, 975 (5th Cir. 1947) ("Formerly, pleadings were construed strictly against the pleader, but now they are construed so as to secure the just, speedy, and inexpensive determination of every action.").

33. I have reviewed these developments elsewhere and will only summarize them here. For citations supporting the points in the text, see Bone, *supra* note 21, at 900–07. *See also* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 895–97 (2009).

claims; an increase in the number of cases involving complex factual issues; and the expanded use of aggregation devices such as the class action. More complex facts require more discovery and more time for trial. Larger suits produce larger stakes, and larger stakes encourage more intense strategic maneuvering and therefore create higher costs.

The structure of the legal profession has changed as well. In 1938, many lawyers were local practitioners with a strong interest in maintaining a good reputation with local judges and fellow lawyers.[34] Today there are many more large law firms with national and international practices. Without strong reputation stakes in local communities, these large firms are not as constrained by reputation-related incentives from engaging in costly strategic maneuvering.

Beliefs about procedure have also changed, partly in response to these changing litigation conditions. During the 1960s and 1970s, a combination of factors undermined the belief in a sharp normative divide between procedure and substance.[35] The new civil rights, environmental, and consumer protection movements relied extensively on litigation, and this highlighted the close connection between procedure and substantive policy.[36] For example, liberal standing rules, more expansive class action doctrines, and the flexible use of special masters were all justified on the ground that they were needed to enable remedies that effectively promoted the substantive values at stake in public law litigation.[37]

In addition, faith in technical expertise as the key to sound procedural design weakened substantially.[38] Critics even attacked the very possibility of value-neutral, scientifically-objective decisions.[39] They argued that procedure was political, just like the substantive law.[40]

All of these developments worked together to alter beliefs about how procedure should be made. With the demise of technical expertise and the growing awareness that substance and procedure were intimately linked, procedural rulemaking gradually came to be viewed in political terms. If choice of procedure affects the distribution of power in society by advantaging some at the expense of others, the critics argued, procedural lawmaking ought to be transparent and democratically accountable.[41] Congress responded by amending the Rules Enabling Act in 1988 to increase the transparency of the process and enhance public participa-

34. Bone, *supra* note 33, at 895–96.
35. Bone, *supra* note 21, at 902.
36. *Id.* at 900.
37. *See id.* at 900–01.
38. *Id.* at 902.
39. *See id.* at 900–01.
40. *Id.* at 889.
41. *See id.* at 902.

tion.[42] Today many rule amendments attract the attention of interest groups, and the Advisory Committee must often deal with intense disagreement and sharp conflict over rule proposals.[43]

Starting in the late 1970s, the changed litigation environment also prompted concerns about high litigation costs, long delays, and large backlogs in the federal courts.[44] By the 1980s, these concerns had ripened into cries of a litigation "crisis."[45] All aspects of the litigation system came under scrutiny, even the core elements of the adversarial process.[46] The resulting critique gave birth to the alternative dispute resolution movement, which grew during the 1980s to become a prominent feature of the contemporary litigation landscape.[47] Moreover, many federal judges became actively involved in the settlement process, nudging (some would say coercing) parties to settle.[48]

The result of all these developments is a very different view of federal civil procedure today as compared to the view held by the rule drafters and procedure reformers in 1938. Every aspect of civil procedure is open to criticism. Nothing is off limits or taken for granted, not even—and for ADR advocates, especially not—the basic features of the adversary system. All procedures bear a burden of justification, and justifications based on technical expertise and substance-neutral process values no longer carry much, if any, weight. Procedural choice necessarily involves controversial value choices and difficult tradeoffs among competing goals.

Consider the example of notice pleading, one of the major innovations of the original Federal Rules. The rule drafters defended liberal pleading on the ground that it saved the wasted cost of technical demurrers, avoided unjust dismissals of meritorious suits, and facilitated decisions on the substantive merits.[49] Similar arguments are used to defend liberal notice pleading today.[50] But many courts and commentators also focus on the negatives. By making it easy to sue, notice pleading invites frivolous suits, which in turn increase litigation costs, add to system delays, and produce unjustified settlements.[51] The optimal pleading rule therefore must balance benefits against harms and costs.

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42. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. § 2073(c) (2006)).

43. *See* Bone, *supra* note 21, at 903.

44. *Id.* at 901.

45. *See* Bone, *supra* note 33, at 896–97.

46. *See* Bone, *supra* note 21, at 900–01.

47. Congress adopted the Alternative Dispute Resolution Act in 1998, which requires each federal district court to offer at least one court-annexed ADR option. 28 U.S.C. § 651(b) (2006).

48. *See generally* Robert G. Bone, *Settlement in American Civil Adjudication: The Role of Procedural Law and the Courts*, 36 COMP. L. REV. 1 (2003).

49. Bone, *supra* note 33, at 895.

50. *See id.* at 901–04, 908.

51. *Id.* at 897, 901.

To take another example, consider discovery. The absence of meaningful discovery in code and common law procedure made no sense to the rule drafters.[52] They viewed broad discovery as necessary to facilitate good substantive decisions based on the factual and evidentiary merits[53] and, secondarily, to improve settlement prospects.[54] Today, however, critics of broad discovery worry about high costs and the risk of strategic abuse, and many of them advocate stricter discovery limits.[55] But limits can interfere with the ability of meritorious plaintiffs to obtain useful information, which in turn can produce suboptimal trial and settlement outcomes. Thus, limiting discovery reduces litigation expense and might discourage frivolous suits, but at the price of unjust outcomes in meritorious suits. Both the critics and the defenders of broad discovery must figure out how to balance these benefits against the harms and costs.

2. The Impact on Rule 1 Today

This is the challenge of modern procedure: how to determine what is optimal given controversial value choices and difficult cost-benefit tradeoffs. It is a challenge for the committees that make the Federal Rules and for the judges who must apply those Rules. In the face of this challenge, Rule 1's admonition that the Rules should be construed and administered to effect "just, speedy, and inexpensive" determinations seems vacuous. Without the beliefs that originally supported the Rule—including the substance-procedure divide, the assumption of an objectively ideal procedure, and pragmatic faith in technical expertise—Rule 1 provides little meaningful guidance. It can be used to justify strict or liberal interpretations depending on how a judge balances competing values.

In fact, there has been a noticeable shift over the past thirty years toward use of Rule 1 to support stricter interpretations of the Federal Rules. The United States Supreme Court was an early leader of this trend. In *Herbert v. Lando*,[56] the Court took note of "mushrooming litigation costs" and "concern about undue and uncontrolled discovery."[57] Recognizing the tendency to construe discovery rules broadly, the Court cautioned restraint, citing Rule 1: "[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action."[58] The Court concluded by reminding district judges of discovery's limits: "[T]he requirement of Rule 26(b)(1) that the material sought in discovery be 'relevant' should be firmly ap-

52. *See* Bone, *supra* note 16, at 101 n.345.
53. *See* Bone, *supra* note 33, at 895.
54. *See id.* at 896.
55. *See id.* at 889.
56. 441 U.S. 153 (1979).
57. *Id.* at 176.
58. *Id.* at 177.

plied, and the district courts should not neglect their power to restrict discovery . . . ."[59]

In 1993, moreover, Rule 1 was amended to highlight the importance of reducing cost and delay and to emphasize the value of active case management.[60] The words "and administered" were inserted after "construed" so the amended sentence read: "They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." The Advisory Committee Note explained that "[t]he purpose of this revision . . . is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay."[61]

This 1993 amendment was part of a package of amendments aimed at strengthening judicial case management and controlling litigation costs. In addition to Rule 1, Rule 16 was amended to strengthen the district judge's power to facilitate settlement,[62] and the discovery rules were amended to add initial disclosure,[63] limit depositions and interrogatories,[64] and require active judicial involvement in discovery planning.[65] In this broader context, the amendment to Rule 1 must have sent a clear message to trial judges that they should focus more attention on the "speedy" and "inexpensive" parts of Rule 1's principle and actively use their discretionary case management powers to reduce cost and delay. Federal judges appear to have heard the message and acted accordingly.[66]

The pattern of lower court decisions since 1980 is consistent with a trend toward stricter application of Rule 1. To be sure, the Rule is still invoked occasionally to support excusing technical noncompliance and controlling strategic abuse.[67] Since 1980, however, judges have used

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59. *Id.*; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citing Rule 1 to emphasize the importance of strengthening summary judgment as a tool to screen frivolous suits).

60. FED. R. CIV. P. 1 advisory committee's notes to 1993 amendment.

61. *Id.*

62. *Id.* 16 advisory committee's notes to 1993 amendment.

63. *Id.* 26 advisory committee's notes to 1993 amendment.

64. *Id.* 30 advisory committee's notes to 1993 amendment; *id.* 33 advisory committee's notes to 1993 amendment.

65. *Id.* 26 advisory committee's notes to 1993 amendment.

66. *See, e.g.*, Simon v. Philip Morris Inc., 200 F.R.D. 21, 26 (E.D.N.Y. 2001) (quoting Rule 1 with emphasis on "inexpensive" and citing the 1993 amendment as support for active case management to control costs); Active Prods. Corp. v. A.H. Choitz & Co., 163 F.R.D. 274, 278 (N.D. Ind. 1995) (citing 1993 Rule 1 amendment to support a restrictive case management order designed to make sure that the complex case did not dominate the court's docket and result in longer delays for other cases); Mareno v. Jet Aviation of Am., Inc., 155 F.R.D. 74, 76 (S.D.N.Y. 1994) (interpreting the 1993 amendment to Rule 1 as directing judges to use their management powers to prevent abuse, and observing that the amendment is "a counterweight to the downgrading of Rule 11 [in 1993] as a major weapon against litigation abuse").

67. *See, e.g.*, *Mareno*, 155 F.R.D. at 76 (applying Rule 1 to address an abusive motion for fees); Chambers v. Capital Cities/ABC, 851 F. Supp. 543, 546 (S.D.N.Y. 1994) (using Rule 1 to support dismissal of claims against non-corporate defendants joined only to gain a tactical advantage). It is possible, however, that federal judges are more willing today than they were in 1938 to characterize as abusive any conduct that adds to litigation cost and delay, although it is difficult to

Rule 1 to justify restricting discovery, screening frivolous suits more aggressively, promoting settlement more strongly, and managing cases more actively.[68] Sometimes these judges emphasize Rule 1's reference to "speedy" and "inexpensive," but sometimes they focus on achieving "just" determinations, arguing that a party's fear of excessive cost and delay can impede court access and produce unjust outcomes.[69]

Elizabeth Cabraser's recent survey of cases relying on Rule 1 shows renewed interest in the Rule in the past few decades.[70] Her search of LEXIS and WESTLAW databases through August 1, 2009, reveals a sharp increase in citations to Rule 1 starting in the 1980s—from a total of 15 citations between 1938 and 1980, to 61 citations between 1980 and 1990, to 138 citations between 1990 and 2000, and finally to 251 citations between 2000 and August 1, 2009.[71] She concludes that "Rule 1 is either enjoying a distinct revival, or has finally been discovered as a working component of the Federal Rules, rather than a mere precatory or aspirational preface to the 'real' Rules."[72]

My search of all Rule 1 citations in the LEXIS database confirms the spike Cabraser found around 1980.[73] I hasten to add, however, that

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tell. *See* Frederick v. Unum Life Ins. Co., 180 F.R.D. 384, 385–86 (D. Mont. 1998) (objecting to the degree of control exercised by defendant's in-house counsel over local counsel when defendant's published litigation guide, in the court's view, adopted an excessively adversarial approach to litigation strategy at odds with Rule 1). It is also worth noting that some judges advocate giving priority to the text of the Rules as written, even when doing so produces a result at odds with Rule 1's values. *See* cases cited *supra* note 24. This textualism is at least in tension with a broad and flexible approach to trial judge discretion—although without more research, it is not possible to tell how widespread and how new the textualist approach really is.

68. *See, e.g.*, Res. Assocs. Grant Writing & Evaluation Servs., LLC v. Maberry, No. CIV 08-0552 JB/LAM, 2009 WL 1312951, at *4 (D.N.M. Feb. 5, 2009) (citing *Herbert v. Lando*, 441 U.S. 153, 177 (1979), and Rule 1 to support discovery restrictions); Avnet, Inc. v. Gulf Ins. Co., No. CV-05-1953-PHX-LOA, 2006 U.S. Dist. LEXIS 2377, at *3 n.2 (D. Ariz. Jan. 23, 2006) (noting cost and delay and emphasizing that discovery is subject to Rule 1's standard); Haines v. Liggett Group, Inc., 814 F. Supp. 414, 423–24 (D.N.J. 1993) (denying plaintiff's counsel's motion to withdraw based on difficulty of financing litigation against tobacco companies' "war of attrition" and noting how this result is contrary to Rule 1 and how it might be limited with judicial discovery controls); *see also* Hungate v. United States, 626 F.2d 60, 62 (8th Cir. 1980) ("While the federal courts should remain sensitive to the liberal federal rules of pleading, they should remain equally sensitive to the mandate of Rule 1 to 'secure the just, speedy, and inexpensive determination of every action.' Meritless claims should be disposed of at the first appropriate opportunity."); *cf.* Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 897 (D. Mass. 1991) (interpreting Rule 8(f)'s directive to construe pleadings to do "substantial justice" to support stricter pleading to protect defendants from frivolous suits).

69. *See, e.g.*, Scheetz v. Bridgestone/Firestone, Inc., 152 F.R.D. 628, 630 n.2 (D. Mont. 1993) (noting the gap between "the promise" of Rule 1 and the reality of a litigation system too costly for many to use); *Haines*, 814 F. Supp. at 423–24 (noting that Rule 1 might be offended by abusive discovery practices that impose high costs in order to force capitulation); Foxley Cattle Co. v. Grain Dealers Mut. Ins. Co., 142 F.R.D. 677, 681 (S.D. Iowa 1992) (relying on Rule 1 to support the importance of avoiding prohibitive costs that impede court access).

70. Elizabeth J. Cabraser, *Uncovering Discovery*, 60 DUKE L.J. (forthcoming 2010) (manuscript at 3–5, on file with author).

71. *Id.* at 3.

72. *Id.* at 5.

73. I searched the LEXIS "Federal Court Cases, Combined" database using the search "'Rule 1' and 'just, speedy, and inexpensive.'" I also searched different time periods. The results confirm a huge spike after 1980. From 1/1/1938 to 1/1/1980, there are a total of 313 cases meeting the search

one should be careful about inferring too much from gross citation statistics. Not all of these citations are to cases that use Rule 1 restrictively.[74] Still, it seems reasonable to assume that many of the post-1980 cases involve restrictive applications. Liberal interpretation and application was mainstream practice before 1980 and would not have warranted special justification or a citation to Rule 1. It is likely that a judge would have felt moved to offer a justification citing the Rule only when he or she did something out of the ordinary; that is, interpret or apply a Federal Rule restrictively.

One thing is clear: As an interpretive standard, the phrase "just, speedy, and inexpensive" is seriously deficient. As the history of Rule 1 illustrates, a district judge with broad discretion can use the Rule to justify expansive and liberal interpretations of the Federal Rules, as was common between 1938 and 1980, or to support narrow and more restrictive interpretations, as has become more common since 1980. It all depends on the judge's values, beliefs about procedure, and perceptions of the nature and severity of litigation problems. A principle that is so malleable offers little guidance. We need a new principle, one that more clearly expresses the goals of procedure and the value tradeoffs that sound procedural design entails.

II. IMPROVING RULE 1

Stated simply, I propose that Rule 1's key sentence be revised to read: "They shall be construed and administered to distribute the risk of outcome error fairly and efficiently with due regard for party participation appropriate to the case, due process and other constitutional constraints, and practical limitations on a judge's ability to predict consequences accurately and assess system-wide effects." I also propose that the Advisory Committee Note to Rule 1 include explanations of each component as well as more specific guiding principles.

Before elaborating on this proposal, it is important to address one possible objection at the outset. Some might argue that there is no need for a standard to guide discretion; that trial judges can manage cases and make perfectly good decisions about procedure without the help of a guiding principle.

I have two responses to this objection. First, trial judges should not be left to make the critical normative choices on their own. Instead, those choices should be made, insofar as possible, by the committees involved

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requirements. From 1/1/1980 to 10/22/2009, there are a total of 754 cases. Put differently, the average number of cases from 1/1/1938 to 1/1/1980 is about 7.5 per year. From 1/1/1980 to 10/22/2009, the same average more than triples, climbing to about 26 per year.

74. Also, there are more cases in general and more published decisions today than there were in the 1940s, 1950s, and 1960s, so one would expect more cases citing Rule 1 even if the citation rate remained constant. However, the overall increase in case volume alone cannot explain the sharp spike in citations around 1980.

in the formal rulemaking process. A properly crafted Rule 1 advances this end by outlining the normative framework for rule interpretation in general.

Focusing on the rulemaking process has distinct advantages in view of contemporary beliefs about procedure. As discussed above, it is no longer tenable to claim that procedural design is a merely technical, value-neutral, and objective exercise. Procedure necessarily involves controversial value choices. Without guidance or constraint, one trial judge, for example, might be more willing than another to limit discovery because she believes the benefit of litigation cost savings outweighs the burden of less accurate decisions, given the substantive interests at stake. Or one judge might be more willing than another to aggregate cases because she assigns less weight to an individual litigant's right to a personal "day in court." This degree of trial judge subjectivity and decisional variance is highly undesirable. The formal rulemaking process is the proper vehicle for making normative judgments of this sort both because of its superior access to information and its greater public accountability.[75] Thus, the rulemaking committees should do what they can to address fundamental value tradeoffs and provide guidance to trial judges on how to balance competing values in specific cases.

My second response is that the objection incorrectly assumes that trial judges are able to tailor procedures to the needs of specific cases in an optimal way. Although the rule drafters believed as much, there are good reasons today to doubt that the assumption holds true, especially in the contemporary world of complex cases and intense strategic maneuvering. As I have explained elsewhere, bounded rationality, information access problems, and strategic interaction effects all limit the ability of trial judges to design case-specific procedures well.[76] Given these limitations, it is important that the Advisory Committee build principles into the Federal Rules that supply guidance and constraint.

For these reasons, we need a better standard than "just, speedy, and inexpensive." My proposal guides and constrains not by dictating precise results—that would be impractical and inadvisable given the inevitability and desirability of some case-specific discretion—but by orienting the thought process of trial judges, framing the type of analysis they should conduct, and identifying the factors that should be taken into account.

The interpretive standard I propose, like the "just, speedy, and inexpensive" standard it replaces, is expressed in terms of purpose: the Fed-

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75. *See* Bone, *supra* note 21, at 918–50.

76. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007); *see also* Ashcroft v. Iqbal, 129 S. Ct 1937, 1953 (2009) (referring to "[o]ur rejection [in *Twombly*] of the careful-case-management approach"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (expressing doubts about the ability of district judges to control discovery costs effectively through case management).

eral Rules should be construed and administered to further the purposes of civil procedure. My statement includes four components: (1) "to distribute the risk of outcome error fairly and efficiently;" (2) "with due regard for party participation appropriate to the case;" (3) "due process and other constitutional constraints;" and (4) "practical limitations on a judge's ability to predict consequences accurately and assess system-wide effects." The first component states the central purpose of procedure and the three other components qualify that general purpose. The following discussion addresses each in turn.

A. The Central Purpose of Procedure: "Distribute the risk of outcome error fairly and efficiently"

The first component of my standard assumes a relatively uncontroversial proposition, that whatever else of value civil adjudication creates, its primary goal is to produce outcomes that accurately reflect the parties' substantive entitlements.[77] By an "outcome," I mean all outcomes of adjudication, including decisions of legal issues, dismissals and summary judgments, final judgments after trial, and settlements. As I have explained elsewhere, there are good reasons to count settlements along with more formal products of the adjudicative process when evaluating outcome quality.[78]

Since perfect accuracy is impossible, the only sensible goal is to achieve optimal accuracy, or more precisely, an optimal risk of outcome error. Moreover, it cannot be optimal in a world of scarce resources to minimize error risk as much as is humanly possible. If this were the goal, most, if not all, social resources would be committed to procedure with little, if any, left for other public goods such as education, safe roadways, and public health.[79]

If zero error risk is impossible and minimally feasible error risk undesirable, it is not clear how optimality can be defined in absolute error risk terms. Moreover, defining it as a "reasonable" risk merely begs the question of what is reasonable. These observations suggest that the most sensible goal for procedure is distributional. On this view, an optimal error risk for a given case is that which results from distributing error risk optimally across different cases and litigants.

With this much of the analysis in place, it should be evident that adjudication is about much more than reaching an outcome acceptable to the parties (or their lawyers). Private dispute resolution is not the primary

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77. My use of the accuracy metric does not mean that I am committed to the proposition that there is only one right answer in a case. All it requires is that there be at least one wrong answer.

78. Bone, *supra* note 76, at 1981–85.

79. For example, it is always possible, in theory at least, to reduce the error risk by litigating the case one more time and awarding the average or modal outcome over all the repeated litigations. This result is a consequence of Condorcet's Theorem.

goal of procedure under any sensible account of American civil adjudication. Adjudication has a public purpose. It is meant to enforce the substantive law, and the substantive law is meant to further public goals such as deterring socially undesirable behavior and providing morally justified compensation. As a result, outcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit.[80]

An optimal error risk distribution is not necessarily an equal distribution. Substantive interests matter and substantive interests vary in importance. It makes no sense, for example, to provide the same procedures for lawsuits involving minor property damage as for lawsuits involving important constitutional rights, especially as our legal system does not treat these two substantive interests identically. Furthermore, in some cases the risk of error is distributed unequally across the party line because of the substantive interests at stake. For example, plaintiffs sometimes bear the pleading burden even when they have difficulty accessing the necessary information.[81] Moreover, the clear and convincing standard in civil cases allocates more risk to the plaintiff than the defendant. Accordingly, an optimal distribution of error risk—and thus of scarce process resources—should reflect the relative importance of the substantive interests at stake in different types of suits.[82]

An optimal distribution should also take account of the costs of procedure. Those costs include the expense of additional motions, hearings, and deliberations required to implement a procedural rule, as well as the lost opportunity cost of being unable to reduce the risk of error in other cases due to limited resources. In addition, a novel procedure frequently reduces one type of error only to increase another, so the costs of the procedure should include the new error costs that it creates. For example, stricter pleading standards screen frivolous suits thereby reducing false positive errors (i.e., frivolous suits that get past the pleading stage), but stricter standards also screen meritorious suits thereby increasing false negative errors (i.e., meritorious suits that are dismissed at the pleading

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80. As I explain elsewhere, this is true even for compensation justified on moral grounds. To be sure, parties with a right to compensation can consent to less than their substantive entitlement. However, consent is problematic when procedures are deficient. The legitimacy of consent as a basis for approving an outcome depends on the alternatives available to the consenting party. *See* Bone, *supra* note 76, at 1983–84.

81. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (placing the burden on the plaintiff in a case where the defendant has a First Amendment interest, even though the plaintiff was much less likely to have the necessary information).

82. I am not suggesting that all substantive interests differ in importance or that the distinctions among them can be graded in a refined way. The differences operate on a more general level, leaving most substantive interests with the same weight. In addition to the substantive right, the nature of the injury and the remedy can make a difference to the importance of the substantive interest at stake in a case. For example, it is fair to say that the law in general treats serious personal injury with more solicitude than it does property damage, and the choice reflects a judgment that it is more important to provide relief for the former than for the latter.

stage or not filed at all because of the fear of dismissal).[83] Similarly, expanding discovery opportunities reduces false negative errors by giving plaintiffs with valid suits access to the information necessary to properly vindicate their claims,[84] but it also increases false positive errors when plaintiffs with frivolous suits leverage the threat of broad discovery to pressure unjustified settlements.

The task of identifying an optimal error risk distribution is further complicated by the fact that there are two different metrics and no easy way to resolve conflicts between them. One metric is efficiency-based (or, more generally, utilitarian) and the other is rights-based (or concerned with fairness in some other way). This is not the place to explore these two metrics with care; I have discussed them in other writing.[85] Roughly, an efficiency metric aims to minimize total social costs aggregated over all cases. Those costs include expected false positive error costs, expected false negative error costs, and expected administrative (or process) costs.[86] By contrast, a rights-based metric focuses on protecting the rights of individual litigants rather than minimizing social costs in the aggregate. For example, if the substantive law protects moral rights, the procedures offered to adjudicate lawsuits involving those rights should take account of their moral weight. This can justify more robust procedures that achieve greater error risk reduction in these cases than in those not involving moral rights.[87] Thus, efficiency and rights-based metrics can conflict, and there is no obvious meta-principle to resolve the conflict.[88]

It should be plain from this brief account that distributing the risk of error fairly and efficiently is an extremely difficult task. It requires a global perspective capable of predicting and evaluating the effects of procedural choice on the risk of error in all cases. Moreover, it requires a normative analysis capable of accommodating the demands of efficiency and fairness when they conflict.

A reader might object at this point that no judge—or anyone else for that matter—could possibly perform such a complex analysis perfectly. This is certainly true. But it is not a good reason to avoid the task altogether. A judge must do the best she can. There is no other way to make

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83. *See* Bone, *supra* note 33, at 910–30.

84. Likewise, expanding discovery opportunities gives defendants access to the information necessary to vindicate valid defenses.

85. *See, e.g.*, Bone, *supra* note 33, at 910–15.

86. "Expected" cost is the particular cost discounted by the probability that it will materialize. For example, expected false positive error cost is the cost of a false positive error discounted by the probability a false positive error will materialize.

87. This point raises a very complex set of issues, however, and this is not the place to consider them with care.

88. For example, efficiency might support a very high error risk in certain low stakes cases, but imposing a high error risk greatly out of proportion to what other litigants receive might be considered unfair. Thus fairness limits what can be done in the name of efficiency.

good procedure. If I am correct that the goal is to distribute the risk of error fairly and efficiently, then a judge has no other choice than to aim for this goal whenever she exercises case-specific discretion.

However, this does not mean that judges must always undertake a complex analysis or that the difficulty of the task is irrelevant to what a judge should do. Some procedural choices are so routine and so unlikely to have substantial negative effects that it makes sense to apply rules of thumb. Moreover, in harder cases, the difficulty of the task should counsel restraint. For example, I have argued elsewhere that the complexity of normative analysis in procedure implies that the judge should have only a very limited role in settlement promotion.[89] More generally, when a judge has grave doubts about her ability to evaluate distributional effects, even approximately, she should seriously consider sticking with established practice—or at least not deviating too far from it—and leaving innovation to the formal rulemaking process or to Congress.

One thing is clear from this discussion: judges should *not* aim to get the right result in each individual case. Instead they should aim to balance the risk of error system-wide. For example, sometimes a procedure that marginally reduces the error risk in one case can interfere with the ability to achieve a reasonable result in other cases.[90] In a situation like this, it can be tempting to adopt the procedure for the case it benefits, but this should be done only if the system-wide effects are not too severe.

B. First Qualification: "With due regard for party participation appropriate to the case"

The previous section set out the central purpose of procedure—to distribute the risk of outcome error fairly and efficiently—and it explained why achieving this goal requires a global perspective, reliable empirical information, and serious deliberation about value tradeoffs. Yet the pursuit if this goal is subject to three important qualifications: the requirements of party participation, the demands of due process and other constitutional constraints, and the practical limitations on a judge's ability to predict consequences and assess system-wide effects. This section discusses the first qualification, and sections C and D below discuss the second and third.

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89. Bone, *supra* note 76, at 2011–15. Judicial involvement in settlement promotion can end up pressuring suboptimal settlements relative to the parties' substantive entitlements and the goals of the substantive law. If this becomes a systematic practice, it will increase the risk of outcome error and affect the error risk distribution. These effects should be taken into account when a judge considers whether to intervene, and the difficulty of predicting and evaluating the effects is likely to increase with the degree of intervention.

90. To illustrate, consider discovery. Allowing additional discovery is likely to prolong a lawsuit. If this is done for all similar cases of a particular type (as a fair distribution of the error risk would demand), the result will produce externalities for other cases, increase delay costs, and perhaps pressure suboptimal settlements.

The first qualification to the general goal instructs judges to temper their quest for an optimal error risk distribution with "due regard for party participation appropriate to the case."[91] It is important to recognize that fairly strong party participation is already embedded in the general goal. Because parties have strong incentives to investigate the law and the facts and to make compelling legal arguments, allowing broad party participation promotes accurate outcomes—or so the adversary system assumes.[92]

I add participation as a qualifier in order to take account of non-outcome-based participation values. Our procedural system appears to value a party's personal participation for reasons of dignity and legitimacy in addition to outcome quality.[93] Sometimes the participation required by non-outcome-based dignity and legitimacy values will conflict with optimal participation justified on outcome-based grounds. To illustrate, consider a large aggregation of cases. When the social costs of tolerating individual suits are very high, as is true for mass torts, achieving a fair and efficient error risk distribution can call for highly truncated participation opportunities falling significantly short of what a robust conception of non-outcome-based values would require.[94]

In these situations, a judge must balance outcome-based and non-outcome-based values. Like balancing fairness and efficiency to achieve an optimal error risk distribution, balancing non-outcome-based and outcome-based values is a difficult undertaking, especially as there is no obvious meta-principle to resolve conflicts. Nevertheless, judges must do the best they can. In fact, judges are actually doing this now, except not as transparently as they should and not with the kind of deliberation and publicly-articulated reasoning that the decision deserves. For example, when trial judges use their discretion to permit plaintiffs to sue multiple defendants by denying a motion to separate, they in effect compel those defendants to share the litigation stage and in so doing limit the amount of control each defendant can exercise. Also, when related cases are consolidated in multidistrict litigation and the MDL judge denies motions to

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91. Some readers might object to my making this a qualifier rather than part of the general goal. They might argue, for example, that participation is essential to the legitimacy of adjudication in a liberal democracy and therefore procedure cannot distribute the risk of outcome error "fairly" without guaranteeing each party a meaningful opportunity to participate (entirely apart from effects on outcome quality). *See generally* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275–89 (2004). I disagree with this argument, which is why I make non-outcome-based participation a qualifier. *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 264–85 (1992). But the rulemaking committees might choose instead to make participation part of the main goal rather than a qualifier.

92. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–84 (1978).

93. *See* Bone, *supra* note 91, at 264–85.

94. *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 628–50 (1993). Moreover, allowing more robust participation for non-outcome-based reasons can increase the risk of outcome error for cases filed later in the litigation queue and subject to the effects of delay.

remand in order to force collective settlement, participation is plainly sacrificed without meaningful party consent.[95] In making decisions like these, judges today are implicitly balancing outcome-based and non-outcome-based values. They should do so more openly and with more careful deliberation.

My call for greater transparency and deliberation is not driven by a belief that non-outcome-based participation is especially valuable in adjudication. In fact, I have argued elsewhere that the so-called right to a personal "day in court," which is said to protect robust individual control over litigation, is neither applied consistently by judges nor obviously justified in its broad form by a sensible account of American civil adjudication.[96] I favor transparency and deliberation instead as a way to develop a clearer shared understanding of the appropriate role of non-outcome-based values. My hope is that including the participation qualifier in Rule 1 will prompt judges to examine the issues more carefully and justify their decisions publicly. The result should be greater consistency and coherence across the litigation system and a better justified account of individual participation and its limits.

C. Second Qualification: "[With due regard for] due process and other constitutional constraints"

The second qualification to the general distributional goal speaks for itself. Obviously judges are bound by constitutional constraints, as are Congress and the committees involved in the formal rulemaking process. Even so, constitutional provisions like the Due Process Clause require interpretation, and constitutional interpretation depends in significant measure on the purposes procedure is supposed to serve. It follows that a procedure justified as furthering the goal of a fair and efficient error risk distribution subject to participation and practical constraints—and thus compatible with my proposed Rule 1—should not run afoul of the Constitution very often.[97]

D. Third Qualification: "[With due regard for] practical limitations on a judge's ability to predict consequences accurately and assess system-wide effects"

The third qualification focuses on practical limitations. Its inclusion serves as an important reminder that discretionary case management and case-specific procedural design are not always (or perhaps even often) desirable as a policy matter. I have discussed the problems with a discre-

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95. *See* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150–55 (D. Mass. 2006) (criticizing this practice).

96. *See* Bone, *supra* note 91, at 265–66, 286–88; *see also* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 337–40 (2008).

97. The Seventh Amendment right to jury trial might be an exception because of its constitutionally-mandated historical test. However, policy concerns are involved in that analysis as well.

tionary case-specific approach elsewhere[98] and will not repeat the details of that analysis here. Those problems include bounded rationality constraints, limitations on judicial access to information, and strategic interaction effects. In short, judges use many of the same decision heuristics most people use and those heuristics can lead to systematically biased results. Moreover, judges often make decisions about procedure early in a case—especially case management and settlement promotion decisions—when they lack access to critical case-specific information. Finally, the information access problem is exacerbated by the highly strategic environment of litigation. Parties have incentives to conceal information so the case appears different than it actually is. The judge might try to deter this strategy, but parties will anticipate the judge's attempt and do what they can to counter it.

The existence of these problems means that trial judges should exercise restraint when construing and administering the Federal Rules. They should not depart too far from established practice unless they are confident that the departure is clearly justified in the circumstances of the case. More radical procedural reforms should go through the formal rulemaking or legislative process before trial judges apply them to individual cases.[99] Both the rulemaking process and Congress have built-in mechanisms to gather and process empirical information, consider global effects, and provide opportunities for public input where appropriate.

CONCLUSION

Rule 1 might seem an odd choice for an article about Federal Rule reform. But Rule 1 is critically important. It sets out a principle that is supposed to guide interpretation and application of all the Federal Rules. Since many of these Rules are purposefully written in vague language, interpretation is the key to their application. And Rule 1 is the key to their interpretation.

Rule 1, therefore, is a master rule for the Federal Rules. As such, it is crucially important that it state a meaningful and sensible interpretive principle. The original, and still current, statement—"to secure the just, speedy, and inexpensive determination" of actions—made sense in 1938

98. Bone, *supra* note 76, at 1986–2001.

99. I have suggested a number of possible Federal Rule reforms in other writing. Examples include imposing mandatory (rather than the current presumptive) limits on discovery and specifying different limits for different categories of cases, adopting rules that match ADR and settlement promotion methods to different case types, and perhaps implementing stricter pleading standards selectively but with limited access to pre-dismissal discovery. *See id.* at 2003–15; Bone, *supra* note33, at 930–35. All these reforms should be accomplished through the formal rulemaking process and implemented as Federal Rules. This requires abandoning a commitment to transsubstantivity. But that is a good idea anyway since the principle of transsubstantivity makes no sense today and merely frustrates sensible procedural design. *See* Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Article on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010).

given the beliefs and goals of the early twentieth century procedural reform movement. However, it makes little sense today.

It is imperative that we amend Rule 1 to conform to our best understandings of what a procedural system is and what it should accomplish. I have defended one such proposal in this Essay. There are other possibilities. The important thing is to debate the alternatives so that we can settle on a statement of purpose that restores coherence and direction to the vital project of designing sensible procedures for civil adjudication.