08-CV-B

UNIVERSITY OF OREGON
School of Law

July 8, 2008

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Dear Mr. McCabe,

Enclosed, please find a copy of an article I wrote a few years ago entitled, "*Pleadings in the Age of Settlement.*"

I send it to you with the modest hope that you will give it (or at least its Introduction) a skim. I know that legal scholarship is not always tailored to the very practical and applied world in which your committee does its work. My aim in writing this piece was to be clear and direct (while still having enough footnotes to humor the law students who use such things as a proxy for scholarly quality).

I have been teaching both Civil Procedure and Dispute Resolution for many years now, often during the same semester. In each of these years, I have found myself asking one class, "How do modern pleadings rules require disputants to define the problem(s) facing them?" and asking the next class, "How does modern negotiation theory suggest that disputants ought to define the problem(s) facing them?" My thesis in this article is that modern pleading system starts legal disputes off in a way that makes it *harder* for disputants to find wise and efficient resolutions—even though most legal disputes end with private settlement. I point out that pleadings-defined problems fail, in at least six different ways, to meet the best practices suggested by modern negotiation literature. This article makes this disconnect explicit, suggests a possible step toward alleviating some of the problems, and places the proposed solution in the historical context of evolving pleadings rules.

In the wake of the Supreme Court's recent pleadings decisions, there is some chance that your committee will be called upon to consider revisions to pleadings standards. My proposal does not hinge on one or another view of the appropriate degree of specificity a complaint ought to contain. Instead, it asks whether something ought to precede the complaint altogether.

I hope that you find this of interest. I would welcome any thoughts or comments.

Sincerely,

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Article

*727 PLEADINGS IN THE AGE OF SETTLEMENT

Michael Moffitt [FNa1][FNa1]

*728 INTRODUCTION

Legal disputes begin with pleadings. Most legal disputes end with settlement. [FN1][FN1] One might assume, therefore, that pleadings create conditions conducive to the private resolution of disputes--that pleadings help in some way to facilitate disputants' negotiations. Instead, the opposite appears to be true. Modern pleadings start legal disputes off in a way that makes it *more* difficult to find wise and efficient settlement.

Modern pleadings [FN2][FN2] principally contain only information that goes directly to an element of a legal claim or defense. The rules of pleading prohibit the inclusion of other information. Based on the principle of notice-giving, pleadings rules demand that plaintiffs provide only a "short and plain statement ... showing that [they] are entitled to relief" under some legal theory. [FN3][FN3] Defendants, similarly, are limited to stating defenses "in short and plain terms," and must respond to each of the plaintiff's individual averments with an admission, a denial, or a denial for want of information. [FN4][FN4] Pleadings do not contain perceptions; they contain assertions framed as absolute statements of historical truth. Pleadings do not contain emotions and aspirations; they contain only the language of entitlement. Problems, if one is to trust most pleadings, boil down to, "Do you owe me money?"

In an age when courts regularly encourage parties to resolve disputes extra-judicially, this system of pleading is flawed. A careful examination of the theories underlying modern pleadings and the dispute resolution literature shows a fundamental disconnect between what pleadings require and what negotiation theory suggests is helpful to parties at the outset of a dispute. A basic premise of much of the negotiation and mediation literature suggests that problems are resolved with greatest efficiency and satisfaction when problems are defined broadly, when disputants are able to move beyond backward-looking assertions of entitlement, and when disputants are able to address the full range of considerations motivating them in the dispute. The first step in a pleading-initiated sequence is to define the dispute in binary, backward-looking terms, limiting the scope of "the problem" significantly. Parties must then take a second step, however, if they hope to discover efficient settlement opportunities for *729 most disputes. In settlement talks, they must try to broaden the scope of the dispute and the information relevant to it, essentially trying to undo the effects of the first step. Setting up the adjudicative system such that problem definition is a function assigned to pleadings, therefore, flies in the face of our contemporary understanding of beneficial bargaining practices.

Imagine a different sequence. Imagine a civil procedure system within which parties initially define the contours of the problem to be resolved through direct conversation, rather than through formal exchanges of documents. Imagine that the shape and scope of problems under consideration were not restricted by stylized rules of pleadings. And imagine that all of this could happen without disrupting the fundamental cadence of modern litigation.

A simple revision to pleadings rules--adding a pre-pleading conference requirement--would deliver this fundamental

change in the litigation and settlement processes. Such a change would be consistent with the historical evolution of pleadings. Over the centuries, pleadings have adapted and shifted form and function to address the particular needs of the court system. A pre-pleading conference requirement, such as the one I propose in this Article, would pose no constitutional or functional problems. Instead, pre-pleading conferences hold the promise of creating conditions for more efficient and wiser resolution of disputes within the confines of existing litigation structures.

Based on this analysis, this Article argues that modern pleading rules are out of date. In Part I of this Article, I survey the current functions of pleadings within modern litigation. I argue that the traditionally accepted vision of modern pleadings as only providing "notice" is descriptively and conceptually inaccurate. Pleadings serve both to provide notice and to define the problem or problems the disputants face. I suggest that these tasks, while linked, are conceptually different and deserve separate attention. In Part II, I contrast the theory of modern pleading with modern negotiation literature. Pleadings define problems in a way that stands in stark contrast with researchers' best current understanding of problem-solving practices. In Part III, I propose an amendment to the Federal Rules of Civil Procedure ("FRCP") that would strip pleadings of one aspect of their current notice-giving function. The vehicle I propose for accomplishing this separation of functions is the pre-pleading conference. In Part IV, I place this proposed amendment in historical context, arguing that the time has come for a pre-pleading conference requirement.

I. THE DUAL FUNCTIONS OF MODERN PLEADING

A. Pleadings Currently Provide Notice

The modern system of pleading is often described as "notice pleading," signaling the importance of the notice function in modern pleading practice. The Supreme Court, for example, has repeatedly referred to the purpose of pleading only in terms of "notice-giving." [FN5][FN5] This characterization also finds support in many of the leading treatises and scholarly texts describing modern civil procedure. [FN6][FN6]

***730** Characterizing pleadings' functions in terms of notice, however, has important limitations that were recognized at the time of the drafting of the modern pleading rules. Charles Clark, the chief architect of the Federal Rules' pleadings provisions, cautioned that the term "notice" holds no precise meaning. [FN7][FN7] Reflecting Clark's distrust of a pleading system explicitly premised on notice, the federal pleading rules themselves include no reference to notice. Almost fifty years after the advent of the modern system, the elasticity of the label "notice pleading" led Richard Marcus to describe the label as "a chimera." [FN8][FN8] If "notice" means clarity and certainty regarding the legal bases for claims, then the modern system certainly fails to provide notice. Parties are regularly permitted to change legal theories during the course of litigation--even at trial. A party can recover on the basis of a legal theory he or she never advanced at the pleading stage. To say that modern pleading provides full notice about the legal elements of a claim is true only in a subset of cases. [FN9][FN9] Similarly, if "notice" means clarity and certainty about the factual allegations underlying the claims or defenses in question, the modern system again fails to provide notice. The current pleading system is not

designed to lock parties into factual allegations early in the litigation process. Factual development, similarly, is largely reserved to the discovery process. [FN10][FN10] Pleadings may provide parties with the general outlines of the circumstances underlying claims or defenses, but no more than that is required. Nevertheless, the undeniable tendency is to refer to modern pleading as aimed solely at providing "notice."

Although courts and scholarly treatments tend to treat the "notice" function of pleadings as a single function, modern pleading in fact provides notice to three distinct sets of actors in the legal system: the disputants, the court, and the public. These three categories of notice recipients each have important interests in acquiring notice of legal actions. Their interests, however, are not identical. In Part III of this Article, therefore, I suggest that a single procedure need not satisfy the notice requirements of all three groups of notice recipients.

*731 1. Notice to Parties

Pleadings [FN11][FN11] have provided some measure of notice to opposing parties ever since the development of written pleadings at common law. The writs and forms of action at common law were of such a formal construction that a defendant, on receipt of a declaration (the precursor to the modern complaint), would know precisely the legal elements the plaintiff intended to prove. Pleadings in the common-law system, however, provided less reliably detailed factual information to opposing parties. In some cases, a common-law pleading consisted primarily of a formulaic recitation of the elements of the form of action. A defendant might know, for example, that the plaintiff brought an action in general assumpsit without knowing any of the alleged facts on which the plaintiff would rely to demonstrate liability. [FN12][FN12] "[T]he common law declaration did give a defendant fairly accurate notice of the substantive legal theory and the procedural incidents which might be used against him; it sometimes gave him such notice of the facts which might be shown at trial." [FN13][FN13]

*732 The transition to code pleading in the nineteenth century did not remove notice from the purview of pleading. Code pleading did provide considerably greater guidance to opposing parties regarding the factual circumstances underlying a claim or defense than had the common-law system. In some sense, however, pleading under the code system turned notice to parties on its head when compared with the notice afforded at common law. Common-law notice to parties provided detailed information regarding the underlying legal theories but potentially scant information about specific facts. Code pleading, on the other hand, emphasized factual notice and put less emphasis on the legal theories underlying the claim or defense. [FN14][FN14] In some jurisdictions, this code-pleading theory was contradicted by the eventual development of the "theory of the pleadings" doctrine, which returned pleading practice to a more restrictive legal focus. [FN15][FN15] For the most part, however, notice to opposing parties under the code-pleading system emphasized notice regarding facts above notice regarding legal theories.

Modern pleading also provides a certain degree of notice to opposing parties regarding the circumstances giving rise to claims or defenses. The framers of the Federal Rules of Civil Procedure carefully avoided using terms like "facts" or

"causes of action," out of fear of the formalist, definitional confusion such terms had generated in the code-pleading system. [FN16][FN16] In advertising the new, modern pleading system, proponents touted that even a teenager could state a claim in a way that would survive dismissal on the pleadings. [FN17][FN17]

Precisely because modern pleadings aim to create non-technical initial exchanges, pleadings do little to provide certainty or clarity about the legal bases underlying a claim or defense. Just as one would not expect a teenager to know what legal theories are most relevant to the dispute in question, courts do not require complaints to set out causes of action with legal precision. [FN18][FN18] Complaints in the modern system of pleading, therefore, do comparatively little to *require* that defendants be apprised of the precise legal claims they will face. Nevertheless, modern pleadings provide most defendants, in most circumstances, with all of the information they genuinely need to understand the legal and factual scope of the litigation at hand. Even if a complaint alleging that the defendant ran over the plaintiff pedestrian does not include factual particulars or ***733** references to specific legal theories, the defendant is likely to know well the contours of the upcoming legal fight. Similarly, the realities of modern pleading encourage lawyers to draft pleadings precisely to correspond to the elements of each potential cause of action or legal theory. [FN19][FN19] Functionally, therefore, while the rules do not require pleading causes of action, a look at many complaints suggests otherwise. This may be the result of practice inertia, the looming shadow of Rule 12(b)(6) motions, or a general sense that it is a useful exercise to craft pleadings to correspond with the eventual elements of claim or defense. Whatever the reason, most defendants receiving a recitation of circumstances carefully crafted to satisfy the strictures of Rule 12(b)(6) have more than adequate notice for purposes of preparing initial responses and of planning discovery practice. The modern system of pleading, therefore, continues to provide some degree of notice to parties regarding the circumstances underlying the claims or defenses of the other side.

Parties' entitlement to notice derives from both constitutional and practical considerations. It is axiomatic to due process that a person is entitled to notice when his or her interests are directly jeopardized in a legal proceeding. The *Mullane* standard holds that a party filing a claim for relief must take steps "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action ...." [FN20][FN20] Implied in the *Mullane* standard, and fleshed out in subsequent cases, is the understanding that notice is largely meaningless if the notice does not include information sufficient to inform the notice recipient of at least the broad parameters of the circumstances in dispute. [FN21][FN21] To receive notice merely that I have been sued in a certain court, without any other information, serves very little purpose beyond perhaps enabling me to assess the court's personal jurisdiction over me. Effective notice to parties permits each disputant to contemplate and choose litigation strategies, settlement strategies, or both.

2. Notice to Courts

Pleadings have provided notice to courts since at least the advent of written pleadings. At common law, a plaintiff's declaration, coupled with the selected form of action, determined the court's competency over the subject matter of the dispute. [FN22][FN22] A particular writ, issued by the King's Chancery and directed to the sheriff, specified not only the competence of the court, but also much of the procedural detail regarding the ***734** adjudicative process.

[FN23][FN23] As writs evolved, the delineation between various writs became less clear. Nevertheless, a declaration at common law provided a court with adequate information on which to assess its jurisdictional authority and to establish procedures for the adjudicative process. [FN24][FN24]

The advent of the code-pleading system, with its rejection of forms of action and distinctions between actions at law and suits in equity, affected the nature of notice to courts. Courts were no longer able to rely simply on the writ system or on forms of action, causing courts to engage in more detailed examination of the complaint to assess subject matter jurisdiction. A complaint drafted under the theoretical breadth of code pleading stated a grievance in non-technical language, without any requirement that the pleader provide specific information regarding the law on which the pleader intended to rely. For courts of limited subject matter jurisdiction, therefore, the court was forced to read through the facts and assess the legal basis (or bases) on which the plaintiff might rely. Code pleading made "the whole law of the land" at the plaintiff's disposal, but it did not, and could not, expand the court's subject matter jurisdiction. [FN25][FN25] A court, therefore, based its subject matter jurisdiction determination on the factual allegations in the complaint.

Modern pleading continues to provide some measure of notice to courts. Historically, courts relied on notice provided by pleadings to assist in two related preliminary functions: assessing jurisdiction and channeling cases into appropriate administrative mechanisms. In modern systems, the administrative filtering of cases often is conducted without reference to the formal pleadings. [FN26][FN26] Instead, simple civil cover sheets (with boxes for the plaintiff or plaintiff's counsel to check) usually provide the information that a clerk requires for appropriate case allocation.

Courts in the modern system continue to rely on pleadings, however, to determine whether jurisdiction is proper. In the federal courts, for example, the contents of the plaintiff's complaint form the basis of a court's determination regarding the existence ***735** of subject matter jurisdiction. Rule 8(a)(1) requires a plaintiff to allege the jurisdictional basis of the court. [FN27][FN27] The liberal nature of modern pleading, however, means that neither the factual bases nor the legal bases of a case can always be precisely known at the outset of the litigation. Gone are notions of forms of action, and gone are the requirements of specific allegations of fact sufficient to constitute a cause of action. Courts, therefore, rely on pleadings to provide notice that a jurisdictionally adequate action has been brought before the court.

3. Notice to the Public

An often unacknowledged, but important, function of modern pleading is that in most circumstances, pleadings serve to signal to the public that a lawsuit has begun. In most circumstances, court proceedings (and the documentary exchanges that precede and follow them) are open to public observation. [FN28][FN28] At the outset of litigation, however, nothing exists beyond the pleadings to inform the public of the nature of the dispute in question.

Public observation of the court system protects a number of democratic virtues. The public learns about the evolving

boundaries of the law by observing courts. [FN29][FN29] The public monitors and has an opportunity to check the behavior of the judicial branch through a process of open observation. [FN30][FN30] Markets may function more efficiently ***736** because the investment community has at least an opportunity to assess outstanding claims against corporate defendants. [FN31][FN31] Through examination, the public assesses the efficient and fair operation of its most expensive, publicly subsidized dispute resolution mechanism. [FN32][FN32] None of these benefits accrues unless the public becomes aware that a dispute exists within the judicial system. In the modern system of civil procedure, the only vehicle by which the public learns of the existence of a dispute is the filing of publicly accessible pleadings.

B. Pleadings Currently Define Problems

Beyond notice, pleadings serve an additional, unacknowledged function in the modern adjudicative system: pleadings define the problem or problems to be resolved. Pleadings represent the first official contact between the disputants regarding the circumstances giving rise to the legal complaint. It would hardly be surprising if carefully prepared, written, signed, and sworn pleadings had an impact on the disputants' perceptions about the nature of their disagreement with each other. The process of crafting a pleading invites disputants and their counsel to conceive of the problem in particular terms. The dispute is a "contract claim" or an "antitrust problem" or a "civil rights complaint." Receiving the other side's pleadings similarly shapes the way that a disputant internally defines the problem to be resolved. The pleadings that disputants draft and receive have an important effect on disputants' views of the problems they face.

If the functions and effects of pleading were reserved merely to the litigation process, perhaps no significant difference would exist between pleadings as issue-***737** narrowing devices and pleadings as problem-defining devices. From the perspective of adjudication, legal issues--typically elements of claims or defenses--give shape to the legal "problem" to be resolved. For adjudicative bodies, [FN33][FN33] no important distinction exists between "problems" and legal issues or claims.

In modern practice, however, trials are not the normal mechanism for resolving legal disputes. [FN34][FN34] Settlement is by far the most common mechanism by which disputes are resolved, [FN35][FN35] and mechanisms designed to promote settlement are increasingly common at all levels of the judiciary and in virtually all jurisdictions. [FN36][FN36] Pleadings are more commonly a precursor to bargaining and settlement than they are a precursor to trial. Pleadings play a central role in defining the problem that the parties will ultimately seek to address in advance of adjudication.

II. THE PROBLEM WITH PLEADING-DEFINED PROBLEMS

Put most bluntly, pleadings define problems poorly. Pleadings define problems in ways that make wise and efficient

settlement *less* likely, even though settlement is the dominant mechanism of resolving legal complaints. The process of drafting and receiving initial pleadings invites disputants to frame disputes as binary clashes, to conceive of past events in absolute terms, to base solutions solely on entitlements stemming from prior events, and to filter out as irrelevant a vast body of information related to the circumstances underlying the dispute. Legal problems, if one is to trust pleadings, are resolvable only through the payment of money or the issuance of an *738 injunction. Framing problems this way not only makes settlement more difficult to achieve, it makes settlement less likely to be efficient and wise.

Over the past several decades, cross-disciplinary research on negotiation and problem solving has increased dramatically. [FN37][FN37] Based on this research, we have an improved understanding of the factors that shape negotiators' perceptions, behaviors, and outcomes. In the subparts below, I contrast the way negotiation theory and pleadings theory treat six important aspects of problem definition: What information do the parties include in describing the problem? How much context is required to understand the dispute? What purposes or intentions did the parties have? What emotional and non-rational considerations should be included in the problem's description? What solution or solutions do the parties see as possible or desirable? What vision does each party have of the future? Negotiation theory and pleading theory answer each of these questions quite differently.

A. Negotiation Theory vs. Pleading Theory

1. Relevant Information

Negotiation theory suggests that problems are best defined in broad, inclusive terms that incorporate multiple perspectives. Underlying this recommendation is research demonstrating that parties tend to filter information inappropriately in constructing descriptions of past events. Though each of us perceives a vast body of observable data, we can process only a limited amount of the information we perceive. The world is too complex for individuals to assess critically all of what they see, hear, and feel. The process by which our brains decide what to focus on (and what to ignore) is neither random nor helpful in some respects. [FN38][FN38] For example, most people tend to filter *739 out information that is inconsistent with their expectations. [FN39][FN39] Furthermore, people tend to use the same "search patterns" as they sort through information, yielding a skewed sample from which to draw conclusions. [FN40][FN40] Even if disputants observe and recall the same information, they may take different meaning from it. [FN41][FN41] To the extent that disputants have crafted different stories about what happened, it is predictable that they would arrive at different conclusions about what ought to be done going forward. Because of these dynamics, modern problem-solving theory suggests that parties should engage in a process of seeking more information about past events before moving to decide what to do about them. In this search, scholars particularly advise parties to seek *disconfirming* data-- perspectives and information that would tend to lead to conclusions other than those already held. [FN42][FN42] This manner of describing prior events is both more robust and more prone to accuracy because it results from multiple, tested perspectives.

Pleadings describe prior events in binary, absolute terms. On the face of well-drafted pleadings, one finds no evidence of ambiguous perceptions. Instead, pleadings are typically structured to include an unambiguous allegation of each element of a claim or defense. [FN43][FN43] If a party simply believes that the balance of the evidence will show a fact to be more likely true than false, he or she drafts a pleading as though it were undeniably true. Even if a party merely does not currently know whether an assertion is true, so long as the assertion is conceivably demonstrable following further discovery, the pleading speaks as though it were already an established fact. [FN44][FN44] In short, pleadings suggest that the pleader has complete access to the truth about what happened *and* that the truth absolves the pleader of any legal responsibility. The problem to be solved, ***740** according to the highly filtered and stylized rules of modern pleadings, [FN45][FN45] is determining which of the two parties holds access to the truth.

2. Systems

Negotiation theory suggests that most problems of significance are best understood as taking place in complex systems. A systems-based approach to analyzing problems stands in stark contrast with simplistic, incident-based descriptions. According to systems theories, human interactions are rarely the product of single determinants. Instead, actors and actions are part of a larger, interdependent context. [FN46][FN46] Collecting information to support a robust view of the systems involved, however, presents challenges. One of the primary difficulties stems from the melding of two potentially conflicting tasks: figuring out the relevant actors' conduct and figuring out whether their actions are defensible when measured against relevant standards of behavior. In simple terms, "Who did what?" and "Who is to blame?" When the inquiry includes the evaluative component, each actor has an overwhelming incentive to skew the descriptions of what happened and what he or she did. Even when the task is nominally descriptive ("tell me what you did"), if the descriptions take place in the shadow of subsequent evaluation ("and then I'll tell you whether you are blameworthy"), our confidence in the description diminishes. Judgmental assessment, therefore, tends to work at odds with the goal of collecting the range of information necessary to understand complex systems. The image of a systems-based analysis does not strip individuals of responsibility. A systems-based inquiry into the dynamics simply asks the question differently.

One popularized view of systems thinking describes problem definition in part as a search to understand the relevant "contribution" systems. [FN47][FN47] Such an inquiry separates the descriptive component ("Would this result have happened had this person acted differently?") from the evaluative component ("Was this behavior condemnable?"). An accurate view of what happened includes a contribution system in which many actors took steps or made decisions that led to the result now being examined. Some--and perhaps all--of those actors' decisions and actions are not only understandable, but also defensible against the relevant norm or norms of behavior. The search to ***741** understand a contribution system produces a better understanding of the past in part because it does not cloud the descriptive question with the judgment of the evaluative question. Negotiation theorists tell us that this exercise better positions problem solvers to examine the range of possible forward-looking options. [FN48][FN48]

Pleadings invite disputants to describe only a small portion of the experiences, perceptions, and information that

underlie the dispute. Rule 8(a)(2) charges the drafter of a complaint with including only "a short and plain statement of the claim showing that the pleader is entitled to relief." [FN49][FN49] Drafting an answer is even more narrowly constrained, with pleaders invited only to describe "in short and plain terms [their] defenses to each claim asserted." [FN50][FN50] Typical answers include only conclusory statements of affirmative defenses, along with formulaic admissions, denials, or denials for want of information. Pleadings generally leave no room for the possibility that the pleader engaged in behavior that contributed to the alleged injury. Instead, each side submits pleadings that paint the opponent in an unqualifiedly negative light and attribute complete causal effect to the other side's behavior. A party who includes information beyond the bare minimum described in Rule 8 risks sanction for failure to comply with the requirements that the pleading contain "short and plain" allegations. [FN51][FN51] Indeed, some characterize this information filtering as one of the principal services a lawyer can provide to a client. [FN52][FN52] Sorting the legally relevant from the legally irrelevant is critical at some stage in the litigation, and pleadings require that this filtering take place at the outset.

3. Intentions

Negotiation theory advises problem solvers to navigate carefully the troublesome relationship between intentions and impacts. [FN53][FN53] Intentions (what someone hoped would happen) and impacts (what someone felt or experienced as a result of the actions in question) are deeply relevant to many problem-solving efforts. [FN54][FN54] Parties tend to make unfortunate attributional errors by conflating individuals' intentions with the range of impacts their actions had on others. [FN55][FN55] No single party can hold a uniquely accurate view ***742** of both intent and impact. I can speak with expertise about the effects I felt following your actions. I cannot speak with authority, however, about the intentions you held as you took those actions. The same is true for you. From these basic observations comes the problem-solving advice that productive communication is enhanced when each party speaks about his or her intentions and experiences, while avoiding unqualified attributions of intent on the other side. [FN56][FN56] Furthermore, the negotiation literature suggests that one must acknowledge the gap in one's ability to guess about the impacts one's actions may have had on others. [FN57][FN57] I may know that I had good intentions in my dealings with you. The nature of my intentions, however, does not speak to whether my actions caused pain. [FN58][FN58] Similarly, that you felt pain does not speak to my intentions. An accurate view of the past--and one that best situates us to arrive at a negotiated solution--denies neither my perspective on my intentions nor your experience of my actions' effects.

A related phenomenon presenting challenges to problem solvers is the oversimplification of intentions. In rare cases, we are single-minded in our focus, being guided by only one simple motivation. In many circumstances, however, our intentions are ambiguous or even mixed. A boss sits down to write the annual performance review of one of her employees. As she writes it, what are her intentions? At some level, the boss might say simply, "I want to be fair and accurate." Add in the consideration that this boss finds the employee unpleasant to work with, that the boss fears a confrontation with the employee, and that the boss is trying to bring stability to a department that has had considerable turnover recently. What are the boss's intentions as she writes the review? Recognizing the possibility of mixed intentions, according to problem-solving theory, can be an important piece of the process of resolution. Many of us play the role of hero in our own minds when replaying (or recrafting) a historical account. Few of us, however, have such

distorted self-images that we attribute to ourselves only the purest and most selfless motives at all times. No simplistic version of the event (heroic or otherwise) necessarily captures the more complex circumstances underlying the boss's decision. Efforts at reaching long-term solutions to problems, the literature tells us, may depend on understanding this more complex set of intentions. [FN59][FN59]

Parties' purposes are of only limited relevance in pleadings. Pleadings related to a cause of action with a *mens rea* requirement will include intent-related allegations For example, a complaint may accuse a defendant of "intentionally" or "willfully" having done that which is alleged. Such allegations tend to conflate the questions of the defendant's intentions with respect to the action and the defendant's intention with ***743** respect to the action's impacts. Moreover, when pleadings do address parties' intentions, they virtually never suggest any ambivalence in purpose. [FN60][FN60] A complaint alleging that an employer intentionally wronged an employee speaks only to the forbidden intention the plaintiff accuses the employer of holding. An answer, then, must either admit the intent, or more likely, deny the allegation. The result is that the pleadings combine to suggest that the employer had either one intention (the forbidden one) or zero intentions. In contrast to negotiation theory, pleadings treat intent as a binary matter--when they treat intent at all.

4. Emotions

Modern problem-solving theory encourages parties to recognize and explore emotions and other non-rational aspects of prior events. To understand many problems fully, one needs to understand not only the observable behaviors of each contributing actor, but also each actor's individual experience of the circumstances. A considerable body of negotiation literature now addresses fundamentally non-rational aspects of problem solving, such as emotions. [FN61][FN61] According to this literature, it is not only that we *can't* filter emotion out of conversations about problems, but also that we *shouldn't* filter it out. Emotion is part of the experience, and its place in problem definition makes for more accurate descriptions of the past. [FN62][FN62]

Pleadings filter emotions and other non-rational aspects from the definition of problems. In very rare circumstances, an element of a claim may depend on an allegation regarding the non-rational condition of a party. For example, in making a claim for emotional distress, a complaint must include an allegation that the plaintiff had the requisite emotional response to the trauma alleged. [FN63][FN63] Even in those circumstances, however, the allegations focus primarily on the question of the harm suffered, not on the emotions the plaintiff experienced. Pleadings limit the range of ***744** emotions a party can discuss without fear of a motion to strike. [FN64][FN64] One might find a complaint alleging emotions like fear [FN65][FN65] or humiliation. [FN66][FN66] A complaint would not likely include, however, discussion of a party feeling ashamed, proud, nervous, confused, hopeful, or any number of other emotions that form a part of the genuine human experience of being in a dispute.

5. Solution Sets

At its core, modern problem-solving theory does not assume that all negotiated agreements are efficient. [FN67][FN67] In some cases, negotiators destroy value-- making the deal worse for both parties by their actions, by their neglect, or by their delay. [FN68][FN68] In other circumstances, negotiators structure deal terms that create greater total utility for the disputants than would be possible in a traditional, zero-sum, simple exchange. [FN69][FN69] Achieving efficient bargaining results, however, requires the disputants to understand a range of information related to the disputants' current and future preferences. The negotiation literature includes a nearly ubiquitous suggestion that problem solvers and negotiators ought to seek to understand the relevant parties' interests, rather than accept their initial positions as indicative of the scope of the problem. [FN70][FN70] Scholars ***745** articulate the distinction between an interest and a position differently. [FN71][FN71] At the heart of this dichotomy, however, is an understanding that a range of incentives and purposes motivate each disputant. This range of influences leads a disputant to identify a possible agreement that would acceptably address his or her concerns or motives. The specific possible agreement to which the disputant expresses a willingness to commit is a position. The range of influences and motivating factors underlying that position are the disputant's interests. For example, "I want $10 million" would be a position. "I want to be secure in my retirement. I want to get your company's attention. I want to be treated fairly. I want to set a good precedent." Any of these might be one of the relevant interests underlying the disputant's position.

One simple opportunity to maximize value in a solution is to capitalize on shared interests--that is, concerns that both disputants have that can be satisfied in noncompetitive ways. [FN72][FN72] ("You care about our daughter and so do I. What if we agree to set aside this part of the money for her education?") To craft a wise solution, according to the literature, one must understand each disputant's set of interests--understand how each of them would rate the attractiveness of various possible future outcomes.

Pleadings rules stringently filter out information regarding the complex set of preferences most disputants hold, thereby narrowing the scope of possible outcomes. In drafting a complaint in most jurisdictions, a pleader must include "a demand for judgment for the relief the pleader seeks." [FN73][FN73] In rough terms, this demand equates to the pleader's position. The range of possible remedies a court can enter as judgment is limited. Beyond the context of consent decrees, most remedies beyond monetary and injunctive relief lie beyond the power of the court. Furthermore, a court's discretion is considerably bounded in most forms of injunctive relief. Plaintiffs drafting complaints therefore frame the relief they seek in terms of simple monetary payments or enforceable injunctions. In most cases, the problem is defined in a way that focuses exclusively on a one-time payment of money. Because nothing outside of the *ad damnum* clause or the demand for judgment in a pleading typically speaks of the future, pleadings limit the intuitive set of possible avenues to satisfy the disputants' interests.

6. Vision of the Future

The negotiation literature also suggests a specific exploration of the ways in which the disputants differ in their

perceptions about the future. While traditional zero-sum models of bargaining assume that disputants have only opposed interests, problem-solving theory suggests that disputants' interests may be shared, opposing, or simply *746 different. The last category presents considerable opportunities for value creation. [FN74][FN74] For example, if parties hold different predictions about what will happen in the future, they can structure an agreement that each will favor over a simple solution. [FN75][FN75] ("You're afraid that additional injuries will manifest themselves later, and I'm confident they won't. Let's do a contingent deal.") Similarly, disputants can agree to allocate greater risk to the party who prefers to tolerate future uncertainty, in exchange for a premium. [FN76][FN76] In deals with multiple variables or terms, disputants often will disagree about the relative importance of each item under consideration, presenting an opportunity to craft attractive trades. [FN77][FN77] ("If you care that much about a confidentiality clause, fine, I'll give it to you, if you'll give me the interest rate I want.") In certain circumstances, disputants' differences regarding plans and resources may present opportunities for value-maximizing agreements. [FN78][FN78] ("My distribution system is better than yours, but your production facility is better than mine. This suggests a joint venture involving the product with the disputed patent.") Disputants are able to create value in some kinds of deals precisely because they disagree about prospects in the future. Arriving at an efficient negotiated solution--one that could not be made better for one side without being made worse for another [FN79][FN79]--requires considerable information about the parties' visions of the future.

In most contexts, pleadings theory does not invite parties to address their visions of the future. The demand for judgment, of course, indicates the pleader's immediate desire. The plaintiff would like to see payment or an injunction, and the defendant would not. On the face of a pleading, however, one would see no indication of *why*, in the forward-looking sense. A plaintiff does not describe what he will do with the money, if it is awarded to him. Nor does a defendant's answer describe the impacts an adverse judgment would have on her. Neither party's pleading talks about the prospect of fractionating the problem. Pleadings do not include visions of any ongoing relationship between the parties. [FN80][FN80] Pleadings omit both parties' predictions about *747 conditions in the future. Pleadings, instead, define problems in terms of two narrow questions: What specific relief do you seek, and what do you believe entitles you to it?

B. Pleadings' Effects on Bargaining

The best practices of negotiation counsel disputants away from virtually every one of the effects of pleadings. For example, problem-solving theorists advise jointly constructing a multi-factored, complex vision of the past. Pleadings demand the opposite. Emotional and non-rational aspects of bargaining take center stage in much negotiation literature. Pleadings suggest scrubbing problems of all such considerations. Theorists argue that complex, systematic problems are best addressed when every affected party gains a fuller understanding of the contribution systems at play, so that a long-term solution can be crafted. Pleadings focus the inquiry on blame allocation, with "contribution" treated as merely a matter of proportional blame. Negotiation advice consistently recommends maintaining a focus on the future, rather than on the past. Pleadings speak only of the past, with the exception of assertions of entitlement going forward. Classic negotiation theory advises considering underlying interests, ongoing relationships, and multiple possible options, as a means of jointly creating an efficient resolution to the problem. [FN81][FN81] Pleadings limit considerations according to legal relevancy, making integrative adjudicated outcomes virtually impossible. A negotiation specialist charged with

designing a difficult-to-resolve problem could scarcely do better than to impose the problem-definition conditions created by pleadings.

Problems defined according to the terms of pleadings make the prospect of efficient resolution daunting. Few problems outside of adjudication are defined according to an absolute vision of the past, a narrowly constructed view of entitlements going forward, no remedies beyond immediate payment or injunction, and a conscious disregard of legally irrelevant factors. Problems defined according to pleadings create an incentive for sub-efficient bargaining behavior. Inherent in the problem definition is the suggestion that in order to resolve the problem, the disputants must resolve backward-looking issues of fact--a task at which interested parties are rarely skilled. Furthermore, the limited bargaining set invites each disputant to try to influence the other's perception of its non-settlement alternatives. Each party will spend much of its time trying to convince the other that its trial prospects are unattractive ("Your case is a loser.") or that the costs of trial will be higher than expected (threats of scorched earth litigation). Many negotiation theorists have suggested that all negotiators experience a tension between the search for value-creating deal terms and the perceived need to gain ***748** a favorable distribution of the available value. [FN82][FN82] It is no surprise, therefore, that when the problem definition clouds, or even precludes, integrative solutions, negotiators will tend heavily toward distributively focused bargaining behavior.

It is no solution simply to suggest that disputants contemplating settlement *should* ignore the unhelpful aspects of pleading. [FN83][FN83] Particularly early in the life of a legal dispute, many disputants would be incapable of ignoring the only official documents related to the dispute. In an abrupt moment, a problem shifts from "you treat me badly at work" to "you violated my civil rights." It goes from "our business deal isn't working" to "you breached our contract." It goes from "I am not getting the results I wanted" to "you committed malpractice." To imagine that the problem would easily go back to the prior definition ignores the potentially very powerful emotional experience of both drafting and receiving such pleadings. Furthermore, it ignores the complicating roles lawyers play in the litigation process. For very good reasons, attorneys must craft a definition of the problem that fits within the construct of legal causes of action. Failure to do so invites dismissal of a claim or defense. Again though, once a lawyer indicates that the behavior of the boss constitutes a violation of civil rights, it seems quite likely that the employee will mentally define the problem in those terms going forward. Once a complaining party is told that the behavior in question constituted a breach of a contractual term, of a fiduciary duty, or of a standard of care, a party is unlikely to abandon this mental image of the problem. Similarly, the disputant on the receiving end of such an accusation also likely changes his or her internal definition of the problem. In important ways, pleadings shape disputants' perceptions of their problems.

In effect, the current pleading system, as part of the larger civil procedure system, puts disputants through the hardest possible problem-defining sequence. At the very outset, we force disputants to reduce their conception of the problem to narrow, legalistic terms. We then immediately encourage them to settle the problem they have just defined. Some mediators and negotiators accept the pleadings-defined problems and view their task merely as engaging in the distributive bargaining demanded by the problem. For them, the negotiation process involves little more than haggling about the appropriate amount of monetary payment. [FN84][FN84] Other mediators and negotiators endeavor to counteract the pleadings-based definition of the problem, in order to find more value-maximizing, efficient outcomes.

They try to explore parties' perceptions, parties' interests, and multiple settlement options. Their efforts, however, face considerable hurdles once questions of legal entitlements, risks, and opportunities are thrust so ***749** prominently into the consciousness of the disputants. Pleadings make wise and efficient resolution of most problems harder.

III. PRE-PLEADING CONFERENCES: NOTICE TO PARTIES WITHOUT PLEADINGS

The blame for the negative effects of pleading on problem-solving lies not with the content of pleadings, but with the timing of pleadings. The contents of pleadings--short and plain statements of the legal claims and defenses present in the dispute--are essential to several aspects of modern litigation. Beyond the wide-open versions of adjudication present in certain small claims courts and on certain television shows' versions of trials, [FN85][FN85] it is difficult to conceive of an adjudicative system that would not require the disputants to articulate their claims and defenses prior to trial. This articulation function of pleadings is not problematic. What is problematic is the fact that pleadings affect disputants' conceptions of their problem at the *outset* of the life of the dispute.

The timing of pleadings is a direct result of the fact that the modern system of civil procedure assigns the notice-giving function to pleadings. Notice to the parties necessarily precedes any other activity, and since pleadings are the vehicle through which notice is achieved under the current system, pleadings necessarily precede everything else. However, the assumption that pleadings must serve the notice-giving function is open to challenge.

A. A Proposed Revision to Rule 8

Parties to a dispute need notice for constitutional, strategic, and logistical reasons. [FN86][FN86] None of these reasons, however, requires notice to parties to come in the form of pleadings. For example, if Federal Rule of Civil Procedure 8 were amended in the following way, litigants in federal court would have notice prior to the filing of any pleading:

8(x) Pre-Pleading Conference

(1) Every pleading shall include

(a) a statement to the court that the pleader has met and discussed the subject matter of the dispute with the party or parties in a position to oppose the pleading, or

(b) a statement to the court that the pleader was unable to meet and discuss the subject matter of the dispute with the party or parties opposing the pleading because the party or parties opposing the pleading were unwilling to meet, or

(c) a motion to the court seeking permission to file a pleading without satisfying the requirements of

subsection (a). A court shall grant permission to file under this subsection for good cause.

(2) If, after notice and a reasonable opportunity to respond, the court determines that a party opposing a pleading was unwilling to meet with the pleader for ***750** purposes of discussing the subject matter of the dispute, the court may impose an appropriate sanction upon the attorneys, law firms, or parties who were unwilling to meet.

An amendment to Rule 8 such as this would create notice to parties *without* the involvement of pleadings. In almost every case, a discussion about the subject matter of the dispute would alert the parties to the nature of the dispute in question If I tell you that I want compensation because you ran me over on the street, you understand all that you need to know about the shape of a future legal dispute for purposes of the initial phases of modern civil procedure. Similarly, if I assert that you breached our contract, you are unlikely to need additional notice in order to understand what our legal fight will be about. Even in circumstances in which the rules demand heightened pleading--for example, fraud--the notice-giving purpose would be accomplished with a simple discussion of the subject matter. For reasons of avoiding sham claims, protecting reputations, and protecting against actions in which the facts are learned post-discovery, the strictures of Rule 9 can easily continue to function. [FN87][FN87] For the reasons described above in Part II, problems framed in pre-pleading discussions have a greater chance of avoiding the pitfalls of pleadings-defined problems.

Requiring extra-judicial communication between the parties is logistically workable and consistent with other structures of modern civil procedure. At other stages of litigation, modern procedure already requires considerable interaction between the disputants. The entire discovery system is party-driven, involving only very occasional intervention by the court. [FN88][FN88] Even in sanctions contexts, Rule 11 requires a litigant to give notice to the other side *before* filing a motion with the court, in order to give the other side an opportunity to correct the situation extra-judicially. [FN89][FN89] Requiring litigants to enter discussions with each other is not new; what is new is the prospect of having them do it before pleadings shape the nature of their discussions.

B. The Functioning of Pre-Pleading Conferences

In the typical case under the proposal described above, a plaintiff seeking to commence a lawsuit would include a statement in his or her complaint that it had met with the defendant(s) and discussed the subject matter of the dispute. The rule does not require a good faith effort to settle the dispute. [FN90][FN90] Nor does it even require that the ***751** discussions address settlement. The proposed rule requires only that conversation about the subject matter of the dispute happen before the plaintiff can invoke the court's dispute resolution mechanism. In some circumstances, it is likely that the pre-pleading conference would result in settlement. In those circumstances when settlement does not result, the plaintiff may proceed with litigation as usual, filing a complaint and moving forward with his or her allegations.

In a typical case under proposed Rule 8(x), a defendant would either have known of the prospect of a dispute before being contacted by the plaintiff, or would learn of the dispute by reason of the plaintiff's overture to meet to discuss the subject matter in question. In either event, the defendant quickly comes to understand the plaintiff's perspective on the problem and has an opportunity to respond appropriately. In some cases, the defendant will surely seek to settle the claim.

In others, the defendant will see no merit in the claim or no legitimacy in the relief demanded, and will refuse to settle. In that event, the litigation proceeds as usual.

Some requirement or sanction must exist to assure that a prospective defendant will not refuse to meet to discuss the subject matter of the dispute. The proposed Rule 8(x) addresses this concern by allowing a plaintiff to inform a court of a defendant's refusal to confer, granting the court leeway to craft an appropriate sanction. [FN91][FN91] A plaintiff would not be barred from suing merely because the person the plaintiff seeks to sue refused to meet with the plaintiff. Defendants in most circumstances would likely participate willingly even without significant threat of sanction. Because fee-shifting is not the norm in most circumstances under the so-called "American Rule," a prospective defendant has no real prospect of recovering legal fees he or she expends even in a successful defense. The opportunity to avoid litigation expenses entirely--including the research required to draft an answer in compliance with Rule 11--is one defendants would be likely to embrace in most circumstances. Even without the incentives described above, a defendant would necessarily want to meet with the plaintiff to discuss the subject matter of the dispute under the terms of proposed Rule 8(x) because the rule applies to "every pleading." Under the terms of Rule 7, pleadings include both the complaint and the answer. Therefore, under proposed Rule 8(x), a defendant seeking to avoid default would also have to certify that it had met and discussed the subject matter of the dispute with the plaintiff. The same pre-pleading conference would satisfy the requirement for both of them. Thus, the rule creates a strong incentive for each party to participate.

***752** In certain circumstances, a pre-pleading conference would be an unworkable or unwise requirement. For example, sound public policy would dictate that a plaintiff who had obtained a protective order against an abusive former partner could file a complaint without being required to confer with the abuser. Similarly, exigent circumstances may make pre-pleading conferences impracticable. A complaint seeking temporary injunctive relief, for example, might sit beyond the reach of the pre-pleading conference requirement. The proposed Rule 8(x)(1)(c) addresses these possibilities by permitting a party to file without a pre-pleading conference when it can demonstrate good cause to the court.

One area of litigation practice 8(x) would likely affect considerably is the inclination of many plaintiffs to commence their actions on the eve of the expiration of the relevant statute of limitations. Statutes of limitation typically refer to the date by which a suit must be "commenced." Some variation exists among jurisdictions about what constitutes "commencement" of a suit-- whether it is the filing of the complaint or the service of process. [FN92][FN92] In no construction of a statute of limitations, however, is a plaintiff's obligation satisfied by merely conferring with the defendant. Nothing in the proposed Rule 8(x) would change this. [FN93][FN93] Therefore, a plaintiff would necessarily have to begin the process of requesting a conference with the defendant far enough in advance of the expiration of the statute of limitations so that the conference (and possible subsequent filing of a complaint) could be accomplished before the statute of limitations runs. I suspect (and hope) that courts would look unfavorably on a motion from a plaintiff seeking to avoid the pre-pleading conference requirement on the grounds that the statute of limitations is about to run. If legislatures are uncomfortable with the prospect of functionally shortening the period within which a suit must be commenced, the easy statutory fix is a modest extension of the statute of limitations. [FN94][FN94] The small amount of time in question will not likely result in any change in primary behavior--only a change in the typical pre-litigation calendar.

A requirement of pre-pleading communication between the disputants poses no constitutional problems. Equal protection and due process may demand that litigants have access to courts, but nothing about pre-pleading conferences would deny a litigant the right to have a court hear a legal claim. A pre-pleading conference requirement is a burden on prospective litigants. Court systems may, however, burden litigants without *753 causing constitutional harm. Filing fees, for example, are both burdensome and entirely consistent with constitutional protections. [FN95][FN95] People of sufficient means must sacrifice money to access the court, and those without means must sacrifice the time to file a petition to proceed *in forma pauperis*. [FN96][FN96] Neither of these sacrifices, however, rises to the level of a constitutional concern. Similarly, a pre-pleading conference requirement would create no unconstitutional barrier to the courts.

A pre-pleading communication requirement also creates no genuine strategic problems for litigants. Detailed litigation planning does not take place at the outset of a dispute's entry into the modern civil procedure system. If speedy civil trials were a present reality, perhaps, a party might need to make important decisions about adjudicative posture at the outset of the dispute. In modern procedure, however, a trial is virtually never imminent at the time when pleadings are exchanged. Instead, parties often need only to make strategic decisions about discovery-related matters. The lengthy and broad discovery process affords considerable opportunity to develop and revise litigation plans. Even if parties needed to conduct litigation planning at the stage immediately after receiving pleadings, the nature of modern pleading would inhibit detailed planning. Rule 15(b) grants considerable latitude regarding the amendment of pleadings--even as late as during the trial itself. [FN97][FN97] Furthermore, under the terms of Rule 54(c), a party in whose favor a judgment is entered is entitled to whatever relief is appropriate, "even if the party has not demanded such relief in the party's pleadings." [FN98][FN98] Modern pleadings, therefore, do not present any current significant opportunity for pre-trial planning. Nothing in the proposed amendment would disrupt this in any meaningful way.

C. Impact on Notice to Courts

Courts require notice principally in order to test jurisdictional sufficiency. [FN99][FN99] Without jurisdiction over a matter, courts are constitutionally powerless to act. A corollary to this observation is that courts do not need to assess jurisdiction until they are called upon to do something. Courts are not proactive bodies. They do not render decision in *754 the absence of a dispute, and they do not go in search of disputants unprovoked. [FN100][FN100] Disputants decide whether and when to call courts into action. The court's ability to heed the call to action depends on its jurisdiction.

Pleadings are the vehicles courts use to make jurisdictional determinations. The operating presumption is that a federal court has no subject matter jurisdiction. [FN101][FN101] A party invoking the court's jurisdiction has the burden of alleging facts showing the existence of jurisdiction. [FN102][FN102] A federal court even has the obligation to test the sufficiency of its subject matter jurisdiction sua sponte. [FN103][FN103] Courts look to pleadings when they assess

the jurisdictional sufficiency of the particular case before them.

Nothing in proposed Rule 8(x) changes the role of pleadings with respect to jurisdiction. For example, a court would continue to look at the plaintiff's complaint for evidence of subject matter jurisdiction. The pre-pleading conference requirement poses no jurisdictional problem because the court is not called upon to do anything in advance of pleadings. The first opportunity for a court to take any action [FN104][FN104] does not arise until the complaint sits before the court. The pre-pleading conference, therefore, has no impact on the court's legitimate need for notice.

D. Impact on Notice to the Public

As described above in Part I.A.3, pleadings provide important notice to the public that an action is pending before the court. That the public has a need for notice about ***755** disputes that appear in the court system, however, does not necessarily mean that the public has a need for notice of disputes that are *not* before the court. If my neighbor and I have a disagreement about whether our shared mailboxes need to be replaced, it is not clear that the rest of the neighborhood has a right to know about it. [FN105][FN105] If my neighbor and I choose to resolve the matter by flipping a coin, arm wrestling, or crafting a compromise agreement while sharing a few beers, both the dispute and the resolution lie beyond the public sphere. However, if I sue my neighbor over the mailbox dispute, then the neighborhood (and the rest of the community paying for and affected by the court hearing the dispute) may legitimately claim a need to know about it.

Certain kinds of disputants may demand a greater degree of transparency regarding disputes and resolution. For example, imagine that the mailbox dispute above was not between my neighbor and me, but was instead between me and the local city council. My demand for a zoning variance may reasonably take place in the public spotlight, even though I have not yet engaged courts in the dispute. The reason for this publicity, however, is not the mere fact that a dispute exists. Instead, publicity is demanded because one of the actors is governmental. The city council, like the court, is a governmental body. For the reasons described in Part I.A.3, the public benefits from observing its government in action.

Some critics of private ordering and settlement have suggested that privacy in settlements harms the public. [FN106][FN106] Among the serious concerns voiced by these critics is a fear that the public may remain ignorant of trends that affect public health. [FN107][FN107] Secret ***756** settlements might prevent a product liability claimant, for example, from finding out if he or she is the only person ever to have a problem with this device. The public might respond to an allegation differently, depending on whether this is the only case of malfunction or the thousandth case. The argument contends that to permit secret settlements would be to permit corporations, in particular, to mask admissions of practices that may adversely affect public health. In response to these concerns, some jurisdictions have adopted bans on confidential settlements affecting public health. [FN108][FN108] The existence or absence of a ban on secret settlements, however, is separate from the question of settlements through pre-pleading conferences. If a jurisdiction makes such settlements discoverable, the settlements are discoverable regardless of whether they were instigated by a complaint, a pre-pleading conference, or a simple phone call.

A different critique of civil settlements focuses on the fact of settlement, rather than on the form, timing, or privacy of the settlement. Some have argued that settlements are undesirable because they prevent the public from learning about the boundaries of the law. [FN109][FN109] According to this argument, courts serve the dual function of resolving disputes and articulating the law. By promoting settlement, we deny courts the ability to make a public declaration of the law relevant to a given factual circumstance. Implicit in this argument is the assumption that we currently face an insufficiency of judicial pronouncements regarding the law. In my view, the dramatic growth of federal and state reporters and the increasing availability of unreported decisions suggest otherwise. However, even if it were true that the public would benefit from a condition in which more cases proceeded to final adjudication on their legal merits, the purest form of the anti-settlement argument raises important questions. At an abstract level, how should we value the societal interest in legal clarity against the private interests of efficient resolution? [FN110][FN110] And specifically with regard to this Article's proposal, of those cases that would settle as a result of a pre-pleading conference, how many would have otherwise proceeded through the litigation system far enough to produce a useful legal precedent? Settlements are a reality of modern litigation, and nothing suggests that private disputants willingly seek to subsidize a public project of law articulation. I doubt that requiring a pre-pleading conference would rob the public of value of legal clarity. Instead, an examination of the scholarly work related to settlement suggests that a pre-pleading conference may contribute to the public good by promoting not only speedier, but also more efficient resolutions based on effective problem-solving principles.

*757 IV. THE EVOLVING FORMS AND FUNCTIONS OF PLEADINGS

At least four functions have figured prominently in the history of pleadings: narrowing the issues in dispute, developing the facts underlying the dispute, filtering out meritless claims or defenses, and providing notice to the disputants and to the court about the nature of the claims or defenses. [FN111][FN111] Each of these functions is important within an adjudicative system aimed at producing justice efficiently. Without a mechanism for narrowing the issues in dispute, a legal system and the disputants would strain under the weight of the nearly infinite number of potential grievances and legal theories conceivably stemming from parties' interactions. Factual development is important to avoid an adjudicative system that inappropriately rewards ambush and surprise. [FN112][FN112] Without a mechanism for filtering meritless claims and defenses, a court system and disputants would wastefully and indiscriminately allocate resources to the resolution of meritless disputes. Finally, notice is not only fundamental to courts but also to disputants. Courts require notice for the purpose of assessing jurisdictional sufficiency and adopting administrative measures appropriate to the particular dispute. Notice to parties, essential to due process, [FN113][FN113] allows disputants to understand the claims or defenses, to make smart choices about settlement opportunities, and to prepare litigation strategies.

The number and nature of functions assigned to pleadings over the years has evolved with experience. Judith Resnik has described procedural development as "a series of attempts to solve the problems created by the preceding generation's procedural reforms." [FN114][FN114] Each of the four functions described above once fell to pleadings. Therefore,

at some point the designers of the civil litigation system imagined that pleadings were the best mechanism for accomplishing each of the functions. Over time, the civil procedure system has stripped pleadings of each of the first three functions: issue narrowing, factual development, and claim filtering Of course, these functions remain important in the litigation process. However, other devices within the civil litigation system, such as summary judgment and the liberalized discovery system, now accomplish these aims. As a result of these changes, modern pleading now purports to serve the only remaining function: notice.

***758** Predictably, the change in the function of pleadings has corresponded with a change in their form. At common law, pleadings included a range of highly formalized exchanges--including declarations, pleas, replications, rejoinders, surrejoinders, rebutters, and surrebutters--all while keeping in mind demurrers, confessions, and avoidances. [FN115][FN115] These forms were deemed necessary to accomplish the functions assigned to pleadings at common law. The Code system saw a shift in pleadings' functions, and correspondingly, the complaint, demurrer, and answer attained prominence. The modern pleading system includes only claims (in the form of complaints or claims raised through one of the joinder devices) and responses (in the form of answers or responses to additional claims). [FN116][FN116] Pleadings are not permanently fixed in their current form. An examination of the history of civil litigation since the common-law era shows that pleadings evolve based on the courts' needs.

A. Pleadings No Longer Narrow Issues

Issue narrowing was a prominent function of pleadings at common law. Common-law pleading at its origin was oral. [FN117][FN117] "[L]itigants stood opposite each other at the bar of the court, and the plaintiff stated his case by his own mouth or that of the pleader." [FN118][FN118] The ensuing colloquy between the court and disputants served to narrow the issues under dispute, with each party's statements to the court eventually registered in the roll of the court. [FN119][FN119] The introduction of written declarations at common law ***759** increased the degree to which courts and disputants relied on pleadings to narrow the legal issues in dispute. Common-law plaintiffs commenced a suit by obtaining an original writ from the Chancery, forcing plaintiffs to choose a particular form of action before even initial pleadings were filed. [FN120][FN120] The writ under which a plaintiff sued established a number of procedural incidents. [FN121][FN121] Depending on the writ employed, a court might (or might not) permit body attachment to compel the defendant's appearance. Some writs specified trial by jury, while others retained older forms of trial such as wager of law or ordeal. [FN122][FN122] Such administrative contingencies made it essential for the plaintiff to establish the precise issues in dispute at the outset of the case. Furthermore, substantive law developed for each writ separately, being reduced to "crisp, concise formulas." [FN123][FN123] The only legal theories relevant to the action, therefore, were those specifically tied to the writ. [FN124][FN124] A defendant in an action in trespass would need only to defend against legal claims in trespass--even if other legal bases might apply to the facts at hand. [FN125][FN125]

***760** Beyond the issue narrowing accomplished through initial pleadings, the common-law system further narrowed the legal issues in dispute through a process of iterated pleading. "To each pleading ... the adversary had either to demur or to plead until a single issue of law or of fact was framed." [FN126][FN126] For courts, the administrative

convenience of having to determine only a single issue is obvious. "As questions of law were decided by the court, and matters of fact referred to other kinds of investigation, it was, in the first place, necessary to settle whether the question in the cause or issue was a matter of law or fact." [FN127][FN127] Even in cases ultimately tried before a jury, common-law courts generally continued to insist that issues be narrowed until a *single* issue remained. [FN128][FN128] This practice "came to be justified in part by the notion that a lay tribunal without special skill should have the controversy thus simplified for them lest the matter get beyond the depth of their competence." [FN129][FN129] Courts at common law relied heavily, therefore, on the exchange of pleadings to help narrow the issues in dispute.

The common-law method of narrowing issues produced injustices in a number of ways. With the limitation of writs and the forms of action, a plaintiff at common law often was narrowly restricted by the contents of his or her declaration. [FN130][FN130] Furthermore, because the iterated pleadings process required the narrowing of issues until only one trial-worthy issue remained, a pleader had to stake the outcome of a case on a strategic decision regarding the issue most appropriate for trial. [FN131][FN131] "Any system ... which compels litigants to stake the outcome of litigation on the accuracy of a forecast that its merits will properly turn on the resolution of a single issue specifically designated in ***761** advance, will be bound to cause many a miscarriage of justice." [FN132][FN132] Some courts "attempted to ameliorate the hardship by a series of halfway measures, compromises, and fictions that produced a system lacking both the simplicity of the older dispensation and the elasticity needed for the unfettered examination of a complex controversy." [FN133][FN133] Nevertheless, the inadequacies of the common-law pleading system created fertile ground for reform. Latter-day commentators have described the "special instances, inexplicable exceptions, arbitrary rules, and untraversable fictions" of common-law pleading as "one of the most complex and snare-ridden creations ever devised by man." [FN134][FN134]

The injustices of the common-law pleading system ultimately drove many of the procedural reforms that became known as the code system. [FN135][FN135] At the heart of the code system were the abolition of the distinction between actions at law and suits in equity and the elimination of the use of forms of action. [FN136][FN136] The drafters of the code system "sought to set up instead a system wherein a plaintiff would state the facts of his grievance in simple, non-technical language and the court would be free to administer whatever substantive law it found applicable to those facts without regard to any distinctions between the forms of action or between law and equity." [FN137][FN137] Gone were the formal declaration and the specification of particular legal theories. In their place were to be simple factual allegations with the entire universe of potential legal theories and issues at the disposal of the courts and the litigants. At its outset, therefore, code pleading did not even purport to serve the function of issue narrowing in the way that common-law pleading had narrowed issues.

This simple vision of the code-pleading system, however, soon became "encrusted with gloss" [FN138][FN138] in many jurisdictions. Some courts began to demand more of the code-pleading system than mere factual development. [FN139][FN139] The "theory of the pleadings" ***762** doctrine represents perhaps the most conspicuous example of a retreat from the original aspirations of code pleading. Under this doctrine, a court determined from the complaint what "specific cause of action [the plaintiff] counted and relied upon ...." [FN140][FN140] Plaintiffs were not then permitted to vary from this theory of pleadings. "[I]f the allegations did not support recovery *under that particular legal theory*,

the demurrer would be sustained *even though* the allegations were sufficient to support recovery under a different legal theory." [FN141][FN141] Entirely the opposite of the initial purposes of the code reformers with respect to the issue narrowing function, code pleading eventually repeated many of the injustices of the formulary system in common-law pleading.

The modern system of pleading, ushered in by the adoption of the Federal Rules of Civil Procedure in 1938, again stripped pleadings of the issue-narrowing function. The drafters of Rule 8 specifically chose not to include the words "cause of action," signaling an intention to move away from the requirement that pleadings serve to narrow the legal issues underlying the dispute. [FN142][FN142] The modern adjudicative process easily accommodates disputes involving multiple issues. As a result, much less need exists for iterative pleadings (or some other device) to narrow the issues in dispute. Evidence that the modern civil procedure system is dismissive of the need for pleadings to isolate one or more specific issues can be found in a number of modern pleading developments. For example, courts now tolerate considerable variance between the issues formulated by the pleadings and those ultimately presented at trial. [FN143][FN143] Pleadings, under the modern system, have been largely stripped of their issue narrowing function.

***763** Issue narrowing remains important to the litigation system, of course, for all of the reasons described above. Modern courts simply rely on other devices and procedures for accomplishing this purpose. The discovery, summary adjudication, and pretrial phases of litigation now represent the most important opportunities for disputants and the court to identify, frame, and dispose of issues in dispute. Modern pleading is able to take its current shape because other procedural devices serve to narrow issues.

B. Pleadings No Longer Develop Facts

At common law, pleadings sometimes developed the facts underlying a dispute. Within the oral traditions at the outset of the common-law system, pleadings consisted essentially of the conversations between litigants and the court. These statements included factual as well as legal allegations, and "[w]hat emerged was often a simple and direct statement of fact." [FN144][FN144] As common-law pleading became increasingly reliant on written allegations and responses, pleadings practice became more focused on the narrow identification of a single issue in dispute. Courts had a reason to know at the outset whether the dispute would ultimately turn on a question of law or a question of fact. Only factual questions demanded certain forms of trial. As formalism within the common-law system increased, courts even had a reason to know precisely what sort of factual issue would be in dispute, as different kinds of factual disputes required different methods of trial. [FN145][FN145] Despite the opportunity common-law pleadings practice theoretically offered for factual development, most common-law pleading became so encrusted with formalism and legal fiction that underlying facts became almost unintelligible. For example, in actions brought under ejectment, "there can be no pretence that any attempt was made to allege the actual facts constituting the cause of action; the declaration and accompanying proceedings were a mass of fictions which had become ridiculous," [FN146][FN146] producing pleadings in which "not even the parties plaintiff or defendant were real persons." [FN147][FN147] Therefore, by the middle of the nineteenth century, common-law pleading often produced very little factual information about a dispute.

Code pleading dispensed with the common-law pleading system's reliance on forms of action and legal formalism in favor of a focus on factual development. At its adoption, in fact, some described the code system as "fact pleading." The drafters of the code-pleading system relied, in part, on the more relaxed pleading found within equity practice at common law. In chancery practice, pleaders were freed from legal forms and were able to seek remedy under any legal theory (or theories!) the court deemed appropriate. [FN148][FN148] Similarly, under the code system, a complaint needed only to contain a "statement of facts constituting the cause of action, in ordinary and concise language ... in such a manner as to enable a person of common understanding to know ***764** what is intended." [FN149][FN149] At the time of their adoption, it was said that "even a child could write a letter to the court telling of its case." [FN150][FN150]

Code pleading had an ideal of "fact pleading," but in many jurisdictions, pleading practice within the code system produced injustices much like those in the common-law system. As described above, the development of the "theory of the pleadings" doctrine in some jurisdictions required a plaintiff to plead in such a way to permit the court to "decide with certainty what the specific cause of action counted and relied upon [in a complaint] is, and, having decided that, it must next determine whether the complaint contains a sufficient statement of such cause, and if it does not, the demurrer must be sustained." [FN151][FN151] Even in those jurisdictions that did not endorse the rigid theory of the pleadings doctrine, considerable ambiguity developed regarding the requirement of "a statement of facts constituting a cause of action." As courts wrestled with the ambiguities, pleaders became more adept at accusing one another of having pled something inappropriately or of having failed to plead something necessary. Under the code system, for example, it was inappropriate to plead "conclusions of law," just as it was improper to plead "evidence." [FN152][FN152] Drawing the distinction between conclusions of law, statements of facts, and evidence became increasingly difficult to predict. The stakes, however, were considerable. Failure to plead properly under the code system invited a demurrer from the opposing party. Code pleading in some cases developed facts in considerable detail. Failure to articulate them in precisely the manner the court expected; however, was fatal. For example, in *Kramer v. Kansas City Power & Light*, [FN153][FN153] an employee alleged that he had been injured from a fall from a pole. The poles had spikes driven into them to aid the linemen in climbing the pole, and the plaintiff alleged that the "defendant negligently caused said step to be driven and placed in said pole not far enough to make it reasonably safe." [FN154][FN154] The court struck the complaint, holding the allegation to be a legal conclusion, insisting that the plaintiff should have alleged that the defendant had left a gap "in excess of 4 1/2 inches" between the pole and the inside of the flange of the step. [FN155][FN155] Pleading practice under the code system, therefore, continued to dispose of many cases on grounds other than the ultimate legal merits of the underlying claim. While the ideal of code pleading was aimed at factual development, the reality of code pleading came to include less helpful practices.

The modern system of pleading removes factual development from the domain of pleading almost entirely. The drafters of the Federal Rules of Civil Procedure abandoned the troublesome terminology of "statements of fact," [FN156][FN156] instead requiring only that pleaders provide a "short and plain statement of the claim, showing that the pleader is entitled to relief." [FN157][FN157] By including Rules 12(b)(6) and Rule 12(e), the drafters ***765** of the FRCP did not entirely abandon the notion that courts ought to examine the factual information contained in a complaint. Under the modern system, however, no substantial pleading practice exists to develop the factual issues in dispute.

[FN158][FN158] The back-and-forth iterative pleading that was central to common-law pleading has been entirely abandoned. In a typical case involving a single plaintiff, a single defendant, and no additional parties or claims, pleadings are limited to a complaint and an answer. [FN159][FN159] A factual allegation in a complaint may be admitted or denied (and thereby placed at issue in the litigation), but no subsequent pleadings exchanges produce greater clarity around the facts underlying the dispute. Pleadings, therefore, under the modern system no longer operate with the explicit purpose of developing facts. [FN160][FN160] Factual development has become largely the province of the considerably liberalized and expanded discovery practice in modern civil procedure. [FN161][FN161]

C. Pleadings No Longer Filter Out Meritless Claims or Defenses

The pleadings process under the common-law system helped courts to filter meritless claims or defenses, thus avoiding unnecessary trials. Following the development of written pleadings, common-law courts more commonly disposed of ***766** cases on the basis of pleadings rather than on the basis of trials. [FN162][FN162] The theory underlying the formality of common-law pleading was nominally merits-based claim filtering. If a party was unable even to articulate a recognized claim or defense, then no reason existed to proceed with trial. A plaintiff's declaration, therefore, had to contain all of the appropriate elements to satisfy the writ under which the plaintiff had chosen to sue. Failure to do so left the plaintiff vulnerable to demurrer. Similarly, if a defendant interposed an irrelevant defense (such as pleading that he owes no debt in response to an action in trespass), the plaintiff would win on demurrer. The same was true when "the defendant pleaded a sham issue, such as that he had no money, [or] that he was a Son of Liberty and therefore ought not to be sued." [FN163][FN163] Pleadings at common law undoubtedly served to filter some cases in which one party's claim or defense was unsustainable as a matter of law.

What common-law pleading gained through technical accuracy, however, it often did at the expense of justice.

> Over time, it became necessary to use highly stylized verbal formulations to present even simple grievances. These expressions--known as 'color'--often had little relation to the underlying facts of the particular case. They certainly told the defendant little or nothing about the plaintiff's claims, and the defendant would remain in the dark until trial because discovery was limited or nonexistent. Nevertheless, the defendant could take comfort in the prospect that the plaintiff could ultimately lose because his lawyer bungled the pleading war. [FN164][FN164]

If a plaintiff selected the wrong writ initially, his or her writ would be abated. [FN165][FN165] Lacking capacity to amend complaints or renew legal claims under a different theory, plaintiffs often suffered defeat for purely technical reasons. Similarly, if a defendant selected the wrong form of denial, particularly in the case of general denials, the plaintiff could obtain judgment by demurrer. [FN166][FN166] Common-law pleading, therefore, frequently filtered cases prior to trial, though it commonly did so on bases other than the merits of the case.

An overly simplistic historical account of the advent of the code system suggests that, in response to these injustices and inefficiencies, David Dudley Field sat down to draft a new system of civil procedure out of whole cloth. In fact,

critics of the common-*767 law system were vocal by as early as the sixteenth century. [FN167][FN167] In the colonies, complaints about the tyranny of the pleading system abounded by the time of the American Revolution. "Dissatisfaction with the expense and technicality of common-law procedure culminated during Shays' Rebellion." [FN168][FN168] By this time, many judicial systems had also begun hesitantly to adopt reforms aimed at increasing the degree to which cases were resolved on the merits. However, the adoption of the code system of pleading brought the most significant change to the process by which courts assessed the merits of claims and defenses prior to trial.

Under the code system, demurrers continued to provide an important opportunity to filter out meritless claims and defenses. If a plaintiff alleged facts that failed to give rise to a cause of action, courts would dismiss the actions on demurrer, thereby avoiding unnecessary trials. As mentioned earlier, the code system abandoned the previous formulary system in favor of the concept of pleading facts constituting a cause of action. The code system, however, "invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper)." [FN169][FN169] Where a plaintiff had pled a conclusion, courts would disregard that provision of the complaint entirely. The complaint then stood vulnerable to a demurrer for insufficiency. [FN170][FN170] "[S]ome courts were induced to pursue the will-o'-the-wisp of a valid analytic distinction between fact and legal conclusion." [FN171][FN171] As a result, courts in the code system increasingly used pleadings to filter cases on the basis of formality, rather than actual merit.

Some jurisdictions continue to operate under pleading rules based on the code system. In these jurisdictions, distinguishing factual allegations from legal conclusions remains a snare-ridden landscape. For example, in *Moore v. Willis*, [FN172][FN172] the Supreme Court of Oregon upheld the dismissal of an action on the grounds that the plaintiff failed properly to allege a necessary component of a negligence claim under Oregon's code-based procedural system. The plaintiff in *Moore* alleged that the defendants, had served a pair of tavern patrons alcohol, knowing that the patrons were both already drunk and that one was underage. The plaintiff further alleged that these patrons became violent and killed the plaintiff's decedent. In upholding a motion for judgment on the pleadings, the court noted that no action for negligence could succeed against the taverns unless the plaintiff demonstrated that the defendants could foresee the harm resulting from their conduct. The court held that it was improper for a plaintiff to allege baldly that the defendants "should have known" that the patrons would become violent. *768 Under the code system, such an assertion is an unacceptable allegation of a legal conclusion about the defendants' duties. [FN173][FN173] The court then said that the pleading should have included a factual allegation about what the defendant taverns knew. The court rejected the idea that it might assume anything about the frequency of violent behavior among those who have over-imbibed, holding that "the plaintiff must allege that intoxicated and underage drinkers frequently become violent. Because the plaintiff failed to do so, the complaint does not state a claim for relief." [FN174][FN174] Had the plaintiff in *Moore* pled the case properly, one can only speculate about the nature of the contest that would have ensued if the defendants had attempted to challenge the assertion that drunks sometimes get violent. The code pleading system continues to filter cases on the basis of formal distinctions between factual and legal allegations.

The modern pleading system, embodied by the Federal Rules of Civil Procedure, has only minimal responsibility for filtering out claims and defenses. Motions under Rule 12(b)(6) theoretically provide a filtering mechanism somewhat

akin to that of the demurrer under prior systems. On rare occasions, a plaintiff will fail to include statements in a complaint sufficient to demonstrate entitlement to relief. However, dismissals under Rule 12(b)(6) are typically without prejudice, leaving the plaintiff to refile a complaint once the pleading deficiency is cured. Furthermore, motions to dismiss under Rule 12(b)(6) are rarely granted. [FN175][FN175] The liberal underpinnings of the Federal Rules system, [FN176][FN176] including relaxed pleading standards, has meant that few plaintiffs' claims are filtered during the pleadings stage of litigation. [FN177][FN177] Similarly, defendants' pleadings only rarely can include fatally defective material. For example, ***769** even if a defendant admits an allegation or fails to raise an affirmative defense, he or she often will have an opportunity to amend his or her answer. [FN178][FN178] Pleadings, therefore, serve only a minor role in the case-filtering process under the modern system of procedure. [FN179][FN179]

Instead of relying on pleadings, the modern procedure system combines discovery and pre-trial practice to discern those claims or defenses that do not justify a trial. [FN180][FN180] Discovery in the modern system reveals more information than previous, pleadings-driven mechanisms. Armed with the products of wide open discovery, parties can use summary judgment motions to dispose of cases in which no genuine issue of material fact exists. The combination of discovery and summary adjudication constitutes the primary mechanism by which modern courts weed out cases unworthy of trial.

D. Pleadings Need Not Provide Notice to Parties

Of the four functions historically associated with pleadings, modern pleadings focus currently only on notice giving. The current civil procedure system assigns the remaining functions to other devices thought better suited to perform the tasks of issue narrowing, factual development, and claim filtering. That pleadings have only one function to perform, however, does not mean necessarily that they perform that function well enough to merit retaining the function.

As I describe in Part I above, pleadings' notice-giving function should properly be understood as three separate functions. Three different audiences (the courts, the public, and the disputants) require notice about the content of legal disputes, but nothing requires that these three audiences receive notice in the same form or through the same device. Pleadings, therefore, perform three separate notice-giving functions. Added to these is a fourth, largely unrecognized function of pleadings within the modern civil procedure system: problem definition for the disputants. In this sense, a more accurate description of modern pleading is that it performs four functions: providing notice to the courts, providing notice to the public, providing notice to the disputants, and defining the problem for the disputants.

For the reasons described in Part II, pleadings do a disappointing job of performing the last of these functions--problem definition. Consistent with the historical evolution of pleadings, therefore, it is reasonable to ask whether some other device might better perform that task. For example, could an unstructured meeting between the parties do a better job of giving shape to the problem facing them? In many cases, the answer is likely yes. Stripping pleadings of the problem-definition task, however, is not surgically clean because problem definition and notice to

disputants are inextricably *770 linked Put another way, one cannot easily give notice to disputants without also shaping disputants' conception of the problem.

One can, however, conceive of an alternative method of accomplishing notice to the disputants--for example, a device like the pre-pleading conference. By changing the mechanism for providing disputants with notice, we can allow pleadings to retain their notice-giving responsibilities with respect to the courts and to the public. At the same time, by stripping pleadings of the responsibility of providing notice to parties, we pave the way for a better problem-definition device within modern civil procedure.

CONCLUSION

Historically, the forms and functions of pleadings have evolved to meet changing needs in the civil procedure system. At various points in time, pleadings served to narrow the issues in dispute, to develop the facts underlying the dispute, and to assess the validity of claims or defenses. With experience, as it became clear that pleadings might serve these functions less well than possible alternative mechanisms, the procedural system stripped pleadings of these functions. As a result of their change in function, pleadings also changed form. The nature of pleading practice, therefore, changes as procedural systems change their demands on pleadings.

In the modern civil procedure system, pleadings serve at least two functions. Pleadings provide notice to disputants, to the courts, and to the public about the nature of the claims or defenses brought before the court. Pleadings also shape the way that disputants conceive of the problem or problems at hand. At some point in the past, perhaps, pleadings affected only the litigation process. Today, however, settlement and various forms of settlement conversations play a prominent role in the life of virtually every lawsuit. In an era in which private resolution is the dominant method of dispute resolution, we must examine pleadings' effects on settlement dynamics.

Modern negotiation scholarship paints a picture of ideal problem definition that stands in stark contrast with the way pleadings define problems. Pleadings dismiss or ignore aspects of problems that contemporary negotiation literature suggests are critical. Furthermore, pleadings simplify much of the remaining information in ways that appear to limit and distort disputants' choices. Put most simply, pleadings narrow the range of information included in a problem's definition, while the best current advice to problem solvers suggests precisely the opposite definitional boundaries. Disputants face a greater challenge finding efficient, value-maximizing solutions to pleadings-defined problems than they would with problems defined outside of the pleadings structure.

Given the prominence of settlement in modern civil procedure, the pleadings system should change. To dampen pleadings' troublesome effects on problem definition, pleadings should cease to be the vehicle by which parties receive notice. This Article has suggested one way to accomplish notice without pleadings: the pre-pleading conference. Such

a requirement would at least increase the chances that parties will initially conceive of problems in terms consistent with the practices aimed at producing efficient resolution. Admittedly, to strip pleadings of notice-giving and problem-definition functions would leave very little role for pleadings as we know them. Perhaps this role diminution is a sign of progress. As other devices within the civil *771 litigation process have evolved to serve the range of functions once assigned to pleadings, perhaps the formalized pleading system will fall entirely by the wayside. [FN181][FN181] Alternatively, stripping notice from pleadings may be the first step in the re-emergence of the importance of pleadings in the litigation process. Under the current system, pleadings' timing and form prevent them from serving functions historically assigned to them, such as factual development, issue narrowing, and claim filtering. Perhaps some modified form of pleadings can again serve one or more of these valuable functions in the adjudicative process. In this age of settlement, however, pleadings should not impair the parties' ability to discover wise and efficient solutions to problems.

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[FN1]. *See, e.g.*, ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 12 (2001) (citing a decline in trial rates from 20% in 1938 to 3% in 1995); Ross E. Cheit & Jacob E. Gersen, *When Businesses Sue Each Other: An Empirical Study of State Court Litigation*, 25 LAW & SOC. INQUIRY 789, 797 (2000) (showing that fewer than 3% of state court cases involving at least one business reached the beginning of trial in 1987-88). Some cases that do not reach trial are judicially resolved on motion. Still, the vast majority of cases filed in court are resolved through voluntary settlement. *See* Marc S. Galanter & Mia L. Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REVV. 1339, 1339-42 (1994).

[FN2]. I use the term "modern pleading" to refer to the practices established by the Federal Rules of Civil Procedure. *See generally* FED. R. CIV. P. 8-10. Though many refer to the federal system under the functional descriptor "notice pleading," this label is imperfect. *See infra* notes 5-32 and accompanying text. The "modern pleading" nomenclature parallels the label adopted by Charles Clark, the principal architect of the Federal Rules of Civil Procedure related to pleadings. *See* CHARLES E. CLARK, CASES ON MODERN PLEADING 23 (1952); Charles Alan Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 910 (1953) (arguing for the label "modern pleading").

[FN3]. FED. R. CIV. P. 8(a).

[FN4]. FED. R. CIV. P. 8(b).

[FN5]. Hickman v. Taylor, 329 U.S. 495, 500 (1947); *see also* Swierkiewicz v. Sorema, 534 U.S. 506, 511 (2002) ("a

notice pleading system"); Leatherman v. Tarrant County Narcotics Intell. & Coordination Unit, 507 U.S. 163, 168 (1993) ("the liberal system of 'notice pleading' set up by the Federal Rules"); Conley v. Gibson, 355 U.S. 41, 47 (1957) ("simplified 'notice pleading'").

[FN6]. *See, e.g.*, 1 JAMES WM. MOORE & KEVIN SHIREY, MOORE'S FEDERAL RULES PAMPHLET § 8.3 cmt. 2, at 126 (2003) ("Rule 8(a)(2) should be interpreted in light of the overall purpose of the pleading rules, which is ... to provide notice of the grievance, and the general factual background on which it is based.").

[FN7]. *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

> Some people love to say that all the rules require is fair notice, that pleading under the rules is only notice pleading. No member of the Advisory Committee [which drafted the Rules], so far as I know, has ever said that, and of course that isn't the real theory .... I think [the expression "notice pleading"] is something like the Golden Rule, which is a nice hopeful thing; but I can't find that it means much of anything and it isn't anything that we can use with any precision.

Id.

[FN8]. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 451 (1986).

[FN9]. For more on the role of pleadings in issue narrowing, see *infra* Part IV.A.

[FN10]. Part IV.B *infra* describes different procedural devices used to develop facts.

[FN11]. For purposes of this Article, I do not intend to restrict unnecessarily the notion of "pleadings" to one definition. Charles Clark suggested the following broad definition of pleadings: "that branch of legal science which deals with the principles governing the formal written statements made to the court by the parties to a suit of their respective claims and defenses as to the suit." CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 1 (2d ed. 1947). Henry John Stephen suggested an even more concise definition of pleadings, calling them simply, "the contending statements." HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 1 (Samuel Tyler ed., W.H. Morrison 1882). I will, therefore, speak of pleadings under the common-law systems, under the Code system, and under the modern system without continually repeating the observation that these pleadings often differed substantially in form.

[FN12]. *See* Fleming James, Jr., *The Objective and Function of the Complaint: Common Law--Codes--Federal Rules*, 14 VAND. L. REVV. 899, 907 (1961).

> In general assumpsit, although the obligation was imposed by law, the defendant was always said to have undertaken the obligation by a promise. In trover the plaintiff was said to have casually lost and the defendant to have found the articles which defendant was charged with converting, although the action would lie when there was neither losing nor finding .... If a plaintiff pleaded a simple capsule formula of liability [in an action in general assumpsit] he might recover even though he proved quite different facts, so long as they had the same legal effect as the stereotyped facts within the formula.

Id.

[FN13]. *Id.* at 908. For a fascinating account of one case in which fourteenth-century common-law courts rejected a writ for failure to provide adequate factual notice to the defendant, see ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 210-11 (1986) (discussing Y.B. 3 Edw. 2, Tri. 27b (1310), *reprinted in* 20 SELDEN SOCIETY 194, 196 (1905)). In that case, a plaintiff had alleged simply that the defendant had "arraigned of divers articles," and then sought judgment on the writ. The court responded by writing, "[t]he law wills that no one be taken by surprise in the King's court. But, if you had your way, this lady [defendant] would answer in court for what she has not been warned to answer by writ. Therefore she shall be warned by writ of the articles of which she is to answer, and this is the law of the land." *Id.* at 211.

[FN14]. *See* CLARK, *supra* note 11, at 54 ("Under the common-law system the pleadings were expected to formulate the issue to be tried. The original code ideal was that the pleadings should disclose the material facts of the case.").

[FN15]. Under the "theory of the pleadings" doctrine, a plaintiff was required to articulate the specific legal theory underlying his or her claim. If the articulated theory did not support a recovery under the allegations, the claim would be dismissed--even if recovery under another legal theory were possible. For more on the development of the "theory of the pleadings" doctrine, see *infra* notes 139-141 and accompanying text.

[FN16]. *See* CLARK, *supra* note 11, at 242.

[FN17]. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 75 (2d ed. 1982) ("[I]t has been said that a sixteen year old boy could plead under [the federal] rules."). Interestingly, a similar measure was applied to the code system of pleading. *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 555 (2002). I have never seen any assertions regarding the ease with which one might draft an answer, though presumably, the same aspiration would exist.

[FN18]. *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1001 (2003) ("A complaint does not have to identify a correct legal theory."); *see also infra* notes 142-44.

[FN19]. *See, e.g.*, 5 WRIGHT & MILLER, *supra* note 17, § 1219, at 192 (describing incentives for attorneys to include clear legal theory in pleadings)

[FN20]. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[FN21]. *See, e g., In re* King, 290 B.R. 641, 649 (Bankr. C.D. Ill. 2003).

> [T]o comport with [*Mullane*] due process requirements, notice must be reasonably calculated to bring to the party's attention the nature and substance of the pending determination, i.e., the extent of the adverse effect on the party's rights (the qualitative aspect), and it must afford a reasonable time in which to respond (the quantitative aspect).

Id.

[FN22]. *See* R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 16 (2d ed. 1988); James, *supra* note 12, at 906.

[FN23]. *See* G.R. RUDD, THE ENGLISH LEGAL SYSTEM 19 (1962); VAN CAENEGEM, *supra* note 22, at 29 ("Original writs specified the nature of the complaint, the names of the parties, the object of the plea and other elements concerning summons, empanelling of juries and so on.").

[FN24]. *See* CLARK, *supra* note 11, at 14; James, *supra* note 12, at 906.

[FN25]. Crary v. Goodman, 12 N.Y. 266, 268 (1855).

> [S]ince the enactment of the Code [system] ... the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defence against the plaintiff's claim; but whether, according to the whole law of the land, applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for.

Id.

[FN26]. Administrative filtering in modern court systems sometimes occurs on the basis of subject matter. For example, state courts regularly assign specific types of cases to courts hearing only cases involving that subject matter (e.g., family law matters). Other court systems may administratively divide cases based on the amount in controversy (creating a division, for example, to deal only with small claims). Still other administrative filtering takes place upon consideration of the judge to whom the case is assigned. For example, some cases are automatically assigned to magistrate judges, and others are subject to reassignment for reasons of consolidation.

[FN27]. *See* FED. R. CIV. P. 8(a)(1) ("a short and plain statement of the grounds upon which the court's jurisdiction depends"). The jurisdictional allegation generally need not, however, include a specific statutory reference. *See* Schlesinger v. Councilman, 420 U.S. 738, 744 n 9 (1975) (allowing complaint to stand despite failure to allege statutory basis for jurisdiction or satisfy jurisdictional amount in controversy requirement then in effect for federal question cases); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.03 cmt. 1 (3d ed. 1997) (citing relevant cases).

[FN28]. The presumption against closing judicial proceedings to the public is strong. *See, e.g.*, Waller v. Georgia, 467 U.S. 39 (1984) (citing Sixth Amendment protections); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1179 (6th Cir. 1983) (citing First Amendment and common-law protections).

[FN29]. If litigants settle their disputes, courts have no opportunity to make pronouncements regarding the legal issues underlying the dispute. It is this privacy that has drawn some of the heaviest criticism by those who argue against encouraging the settlement. For a helpful overview of the shape of the debate regarding settlements, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (perhaps the most cited polemic against the trend toward private resolution of disputes); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (arguing that settlement can only be judged in context, rather than as a universal public good or public bad); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REVV. 881 (2004) (arguing that neither settlement nor litigation has a unique claim to morally legitimate articulations of social norms); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994) (arguing that settlement and other procedural changes have reduced the interpretive opportunities for appellate courts).

[FN30]. This opportunity is more directly available in systems with an elected judiciary, of course. Even in the context of the life-appointed federal bench, however, public observation is seen as important. United States v. Amodeo, 71 F.3d 1044, 1048 (1995) ("Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control."). Public observation may also increase the reliability of testimony before the judiciary. *In re* Cendant Corp., 260 F.3d 183, 192 (2001) (quoting Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988)) (the court suggested that publicity increases "'testimonial trustworthiness ... [and decreases] possibilities for injustice, incompetence, perjury, and fraud[]'").

[FN31]. Some reporting requirements also exist for publicly traded companies, with respect to potential liabilities stemming from pending litigation. The scope and frequency of these reports, however, provide the investment community with less information than does access to court documents and court proceedings.

[FN32]. The expense of maintaining a judicial system may be less prominently obvious in the modern system, in which litigants' fees pay only a tiny fraction of the costs of maintaining the courts. Compare this with the common-law system in which litigants for centuries had to pay for the adjudicative structure:

> Even before the Normans came the wheels of justice had to be oiled by gifts to the King, without forgetting

> the queen who expected her percentage, and for many centuries afterwards the parties paid the men who had to judge them, like the students paid the professors who had to examine them and did so, we confidently hope, freely and objectively.

VAN CAENEGEM, *supra* note 22, at 104. On occasion, popular observation and dissatisfaction with the functioning of the court system produces demand for procedural change. For an interesting historical account of reform efforts aimed at delay reduction, see George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989). The State of Oregon has an old statute on its books prohibiting a trial judge from receiving a salary if the judge has any motions pending for longer than 90 days. OR. REV. STAT. § 1.050 (2003). I can find no evidence of the statute ever being enforced, but it would represent a curious yet remarkable effort to curtail judicial delay.

[FN33]. Courts represent the most common vision of an adjudicative body. In modern procedure, however, arbitral hearings are commonplace. In such settings, as in courts, the definitions of problems tend also to be synonymous with the legal issue in dispute.

[FN34]. *E.g.*, SWARD, *supra* note 1, at 12. Ellen Sward notes:

> In the two years before promulgation of the Federal Rules, approximately 20% of federal civil cases ended in trials .... By 1995, only 3.2% of civil cases ended in trials .... These figures are mirrored in the states, where a 1992 study showed that juries decided about 2% of tort, contract, and real property cases in the state courts of the country's seventy-five most populous counties.

Id.

[FN35]. Precise numbers tracing settlements are not possible. Most assessments estimate that at least two-thirds of lawsuits are resolved through private settlement. *See, e.g.*, Galanter & Cahill, *supra* note 1, at 1339-42; Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Grey,* 70 JUDICATURE 161, 161-65 (1986) (discovering variation in settlement rates among different types of lawsuits, but still concluding that settlement is more common than trial of judicial disposition).

[FN36]. *See, e.g.*, SWARD, *supra* note 1, at 334-37. Referral to alternative dispute resolution ("ADR") is by no means universal in court systems. *See, e.g.*, Wayne D. Brazil, *Continuing the Conversation About the Current Status and Future of ADR: A View from the Courts*, 2000 J. DISP. RESOLL. 11, 12 (2000) (estimating that more than half of civil cases receive no ADR services); Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiation*, 13 OHIO ST. J. ON DISP. RESOLL. 831, 831-33 (2003).

[FN37]. Modern negotiation theory, like all interdisciplinary endeavors, stands on the foundation of centuries of scholarship. Negotiation and problem-solving theories have occupied their current basic shape for much of the past

century. For a useful summary of the intellectual foundations of modern negotiation literature, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOLL. 1 (2000). In more recent years, many disciplines and professional schools have devoted increasing resources to the exploration of effective negotiation and problem solving. *E.g.*, American Bar Association Section on Dispute Resolution, *Survey of Law School ADR Programs* (2003), *available at* http:// www.law.uoregon.edu/aba/search.php (providing a searchable database of dispute resolution offerings at every accredited law school); Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 956 (2000) (describing ADR offerings in professional schools beyond law schools). The *Florida Law Review* published an interesting symposium issue detailing the expansion of ADR curricula in law schools. *See* Robert B. Moberly, *Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges*, 50 FLA. L. REV. 583 (1998).

[FN38]. For very helpful background on the analytical underpinnings and research application of these principles, see CHRIS ARGYRIS ET AL., ACTION SCIENCE: CONCEPTS, METHODS, AND SKILLS FOR RESEARCH AND INTERVENTION 56-59, 246-48 (1985) (describing the "ladder of inference"). For more on the application of Argyris's research to problem-solving and negotiation theory, see Michael Moffitt and Scott R. Peppet, *Action Science and Negotiation*, 87 MARQ. L. REVV. 649 (2004).

[FN39]. MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 62-63 (1992). This process of filtering is even more complicated than presented here. For a helpful overview of the effects of "naïve realism" on meaning-making, see Lee Ross & Donna Shetowski, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081 (2003).

[FN40]. *See* BAZERMAN & NEALE, *supra* note 39, at 45.

[FN41]. *See* CHRIS ARGYRIS, KNOWLEDGE FOR ACTION 57 (1993); CHRIS ARGYRIS, REASONING, LEARNING, AND ACTION 41-50 (1982). This effect is compounded when observers hold some stake in the meaning-making associated with the reconstruction of the past. A party is even more likely to yield a skewed interpretation of prior events when its interests are at stake in the assessment. *See* LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR 125 (1998).

[FN42]. The scientific literature is filled with descriptions of the need to develop hypotheses that are disconfirmable through the collection of data. In their popularized summary of this research, Stone, Patton, and Heen, referring to the foundational ideas of Argyris and others, advise problem solvers to "explore the other side's story." *See* DOUG STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 25-40 (1999).

[FN43]. Technically, of course, a plaintiff need not plead each element of his or her claim in the complaint. The complaint need only demonstrate that the pleader is entitled to relief. Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 513-15 (2002)

[FN44]. *See* FED. R. CIV. P. 11(b)(3) (stating that a pleading may set forth allegations that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"); 2 MOORE ET AL., *supra* note 27, at § 8.04 ("Courts have read the policy underlying Rule 8, together with Rule 11, to permit claimants to aver facts that they believe to be true, but lack evidentiary support at the time of the pleading.").

[FN45]. To be sure, modern pleading is less stylized than common-law pleading. However, our pleading system remains unintuitive. I conduct an exercise each year with my first year Civil Procedure students in which they must draft a complaint for a Supreme Court case they just read. Most of the complaints they draft would be dismissed even under the modern federal civil procedure standards. If bright, motivated students--all of whom have had more legal training as first-year law students than the average citizen--cannot even successfully *commence* a legal action, our pleading system cannot rightfully be named simple.

[FN46]. Ludwig von Bertalanffy is usually credited with conceiving of general systems theory--an outgrowth of his background in biology. For a summary of systems theories and their application to the law, see Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479 (1997). Systems-based theories have also found prominence in disciplines as diverse as physics, family therapy, robotics, and economics. *See also* ROBERT H. MNOOKIN, ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 5-6 (2000) (describing the lawyer-client systems involved in legal disputes).

[FN47]. *E g.*, STONE ET AL., *supra* note 42, at 58-82.

[FN48]. *E.g.*, *id.* at 60.

[FN49]. FED. R. CIV. P. 8(a)(2).

[FN50]. FED. R. CIV. P. 8(b).

[FN51]. FED. R. CIV. P. 8(a)(2). For useful surveys of cases in which pleadings have been dismissed for reasons of prolixity, see 27 FED. PROC. LAW. ED. § 62:53 (1996); Fairman, *supra* note 18, at 1009-11.

[FN52]. For a critique of such an approach, see Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers. What the Dispute Paradigm Does and Does Not Tell Us*, MO. J. DISP. RESOLL. 25, 31-33 (1985).

[FN53]. For a useful, prescriptive summary of this research, see STONE ET AL., *supra* note 42, at 44-57.

[FN54]. This is true both in legal and non-legal resolution. Many legal questions hinge on the mental state of one or more of the relevant parties. In non-legal settings, I may care deeply about whether you intended for me to suffer the harm in question--and I may demand a very different remedy, depending on your intentions.

[FN55]. Attributional errors associated with intent are by no means the only psychological phenomenon clouding human judgment about complex circumstances. For example, the so-called "fundamental attribution error" suggests that people tend to overestimate the degree to which human factors influence an outcome, while simultaneously underestimating the effects of context and situation. *See generally* LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991).

[FN56]. *See, e.g.*, STONE ET AL., *supra* note 42, at 54 ("[S]ay what the other person did, tell them what its impact was on you, and explain your assumption about their intentions, taking care to label it as a hypothesis that you are checking rather than asserting to be true."). For more on the foundations of attributional theory, see ARGYRIS ET AL., *supra* note 38, at 356-59.

[FN57]. For a useful summary of the effects of attributions and inferential meaning-making, see Keith Allred, *Anger and Retaliation in Conflict: The Role of Attribution*, *in* THE HANDBOOK OF CONFLICT RESOLUTION 236-55 (Morton Deutsch & Peter Coleman eds. 2000).

[FN58]. *See* STONE ET AL., *supra* note 42, at 50 (demonstrating that one of the common traps is the assumption that good intentions somehow negate harmful impacts).

[FN59]. *See, e.g.*, *id.* at 51-52.

[FN60]. A partial exception to this is found in the mixed-motive aspects of discrimination law. *See, e.g.*, 42 U.S.C. § 2000e-2(m) (2004) ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[FN61]. Some early treatments of problem solving and negotiation tended either to ignore emotions or to view them as one more problem to be solved. *See, e.g.*, WILLIAM URY, GETTING PAST NO 11-12 (1991) (advising negotiators to overcome negative emotions). More recent scholarship, however, has demonstrated the significant role of emotions in the problem-solving process. *See, e.g.*, BAZERMAN & NEALE, *supra* note 39, at 116-25; STONE ET AL., *supra* note 42, at 85 ("Have your feelings (or they will have you)."); THOMPSON, *supra* note 41, at 191.

[FN62]. Some scholars have suggested that giving voice to non-rational aspects of problems will bolster members of traditionally disempowered groups. For example, some have argued that emotion filtering in purportedly rational dispute resolution processes tends to disadvantage women, who arguably tend to be more relationally focused in their resolution orientation. *See, e.g.*, Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991).

[FN63]. For a summary of the emotional response required to satisfy the elements of a legal claim for infliction of emotional distress, see Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress*, 21 HOFSTRA LAB. & EMPL. L.J. 109, 130-45 (2003).

[FN64]. Disputants, of course, will sometimes assert that they were not and are not feeling anything--that they have no emotions. Others will admit to one emotion only, typically a "loud" emotion such as anger. Most healthy humans experience a range of emotions in any interaction of importance, though we each may make different choices about what emotions to demonstrate or discuss. The most productive problem-solving conversations acknowledge the full range of emotions involved. *See, e.g.*, STONE ET AL., *supra* note 42, at 94-99.

[FN65]. *See, e.g.*, Consol. Rail Corp. v. Gottshall, 512 U.S. 532 (1994) (upholding liability based on the Federal Employers' Liability Act in an action alleging that certain work conditions created fear).

[FN66]. *See, e.g.*, Baird v. Rose, 192 F.3d 462, 472-73 (4th Cir. 1999) (upholding intentional infliction of emotional distress complaint alleging humiliation).

[FN67]. The prospect of non-zero-sum solutions is not a new discovery. Mary Parker Follett coined the term "integrative" near the beginning of the twentieth century. *See* MARY PARKER FOLLETT--PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S (Pauline Graham ed., 1995). Scholars who, in the mid-twentieth century, embraced a game theoretic approach to dispute resolution readily acknowledged the limits of simple games to describe the prospects of efficient deals. *See, e.g.*, THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 21 (1960) (distinguishing "distributional" aspects of bargaining from "the part of bargaining that consists of exploring for mutually profitable adjustments"). What is new is that these non-zero-sum descriptions of negotiation have enjoyed a prominent, rather than "alternative," position in negotiation literature over the past two decades.

[FN68]. *See, e.g.*, THOMPSON, *supra* note 41, at 49 (describing study of "lose-lose agreements"); Gerald B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 379-80 (1996) (describing the possibility of value-destroying deal terms in the context of a family law dispute).

[FN69]. *See, e g.*, BAZERMAN & NEALE, *supra* note 39, at 16-22 (describing "integrative" solutions and "the mythical fixed-pie"); THOMPSON, *supra* note 41, at 47-48 (surveying models of distributive and integrative negotiated outcomes).

[FN70]. By far the most commonly cited source for negotiation advice regarding interests is ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-55 (2d ed. 1991). *See also* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES 243-56 (1996); DAVID A. LAX & JIM K. SEBENIUS, THE MANAGER AS NEGOTIATOR 63-87 (1986); MNOOKIN ET AL., *supra* note 46, at 35-37.

[FN71]. For example, David Lax and Jim Sebenius argue that traditional conceptions of interests are insufficiently broad. In essence, they argue that simplistic treatment of interests reproduces many of the unhelpful effects of focusing on positions. *See* LAX & SEBENIUS, *supra* note 70, at 63-87. Leigh Thompson's definition of interests is simpler: "Positions are a negotiator's stated demands. Interests are a person's underlying goals." THOMPSON, *supra* note 41, at 55.

[FN72]. *See, e.g.*, LAX & SEBENIUS, *supra* note 70, at 106-11 (discussing "shared" or "common" interests); MNOOKIN ET AL., *supra* note 46, at 16 ("noncompetitive similarities").

[FN73]. FED. R. CIV. P. 8(a)(3).

[FN74]. *See, e.g.*, LAX & SEBENIUS, *supra* note 70, at 90 ("Gain from negotiation often exists because negotiators *differ* from one another.") (emphasis in original); RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 68 (2002) (warning negotiators to avoid the "fixed-sum error" of assuming that parties' interests are necessarily opposed).

[FN75]. *See, e.g.*, LAX & SEBENIUS, *supra* note 70, at 94-98 (discussing "probability differences"); MNOOKIN ET AL., *supra* note 46, at 14 ("different forecasts"); Max H. Bazerman & James J. Gillispie, *Betting on the Future: The Virtues of Contingent Contracts*, HARV. BUS. REV.., Sept.-Oct. 1999, at 155; Michael Moffitt, *Contingent Agreements: Agreeing to Disagree About the Future*, 87 MARQ. L. REVV. 691 (2004).

[FN76]. *See, e.g* , LAX & SEBENIUS, *supra* note 70, at 99-100.

[FN77]. *See, e.g* , *id.* at 92-94 (discussing "differences in relative valuation"); MNOOKIN ET AL., *supra* note 46, at 14 (same).

[FN78]. *See, e.g.*, LAX & SEBENIUS, *supra* note 70, at 102 (discussing "complementary capabilities").

[FN79]. The name commonly associated with this conception of efficiency is that of the economist Vilfredo Pareto. HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 139 (1982) ("[T]he Pareto Optimal Frontier ... is defined as the locus of achievable joint evaluations from which no joint gains are possible.").

[FN80]. In some narrow circumstances, pleadings may include parties' assertions about future interactions. For example, in some jurisdictions, divorce on grounds of irreconcilable differences demands that the parties attest to their *future* inability to get along, not just their prior marital problems. Similarly, in certain family law petitions regarding the best interests of the children, a pleader makes assertions about future interactions. A final example might be drawn from the employment context, in which a disputant makes demands regarding ongoing employment.

[FN81]. *See, e.g.*, FISHER ET AL., *supra* note 70, at 15-94; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 795 (1984) ("Although litigants typically ask for relief in the form of damages, this relief is actually a proxy for more basic needs or objectives. By attempting to uncover those underlying needs, the problem-solving model presents opportunities for discerning greater numbers of and better quality solutions.").

[FN82]. *See, e.g.*, LAX & SEBENIUS, *supra* note 70, at 29-45; MNOOKIN ET AL., *supra* note 46, at 11-43.

[FN83]. I am aware of no experimental data speaking to the degree to which disputants are capable of ignoring pleading materials. In practice, my suspicion is that pleadings' effects vary by dispute context. For example, I would imagine that large, institutional litigants are less affected by pleadings than first-time litigants. I also suspect that the nature of the lawyer-client relationship affects the degree to which the client's views are shaped by the pleadings. Considerable opportunities exist to test these assumptions.

[FN84]. This modestly overstated simplification tracks the "narrow" problem-definition orientation that Leonard Riskin

suggests many mediators hold. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REVV. 7, 18-23, 42-43 (1996).

[FN85]. Even on *The People's Court*, *Judge Judy*, *Judge Joe Brown*, and other similar television programs, the litigants must have provided at least enough information about the dispute to permit the ominous sounding voice-over announcer to give the viewers an enticing summary of the claim or defense as each litigant enters the courtroom angrily.

[FN86]. *See supra* notes 11-21 and accompanying text.

[FN87]. For more on the purposes of heightened pleading standards, see Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999); Fairman, *supra* note 17, at 563.

[FN88]. *See* FED. R. CIV. P. 26-37.

[FN89]. *See* FED. R. CIV. P. 11(c)(1)(A) (stating that a motion for sanctions under Rule 11 "shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion ... the challenged [assertion] is not withdrawn or appropriately corrected").

[FN90]. In this sense, the proposal in this article does not entirely parallel the recommendation of the 1991 President's Council on Competitiveness. That body suggested that "the right to sue should be conditioned on a showing that the parties have attempted, and failed, to resolve their dispute. The party alleging harm would be required to prove that it gave timely notice of the grievance prior to filing the suit, except where emergency or other circumstances require immediate resort to the courts without prior notice to the opposing party." REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS: AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 15-16 (1991). I am aware of no specific legislative initiative resulting from the Council's policy recommendation.

[FN91]. The mixed experiences of Rule 11 sanctions suggests that no easy predictions are possible regarding the minimum sanction threat required to ensure compliance. The list of possible sanctions is enormous in scope: awarding a modest attorney fee or fine, awarding attorneys' fees associated with drafting the complaint, permitting evidence of the refusal to meet into evidence, or even entry of default. The penalty for nonparticipation should not be so high as to produce incentives for prospective plaintiffs to flood defendants with demands-to-meet in the hopes of securing windfall profits in the form of sanctions. To combat such possibility, one might consider requiring the posting of a bond for plaintiffs making allegations under my proposed Rule 8(x)(2). My initial sense, however, is that the strictures of Rule 11 make such protective action unnecessary.

[FN92]. *See* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949) (holding that in federal courts--notwithstanding the provisions of Federal Rule of Civil Procedure 3--state law controls the question of when an action is "commenced" for purposes of state statutes of limitations).

[FN93]. Measuring the expiration of the statute of limitations by reference to filing or service has the obvious advantage of having formalized records of the date, created by non-parties. One can imagine the potential for fights about the date or dates of private meetings, what constitutes the commencement of a meeting, and so forth. Measuring a statute of limitations against existing procedural steps is less prone to inefficient ambiguity.

[FN94]. It is not intuitively clear to me that much policy difference exists between a twenty-four month and a twenty-eight month statute of limitations. If a legislature were convinced, however, that a plaintiff ought not to be required to commence litigation-related activity until just before two full years have passed, they can easily accomplish this by enacting a statute of limitations granting twenty-four months plus whatever time the legislature deems sufficient to conduct one pre-pleading conference.

[FN95]. *See* Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) ("Filing fees for civil suits have been challenged on constitutional grounds before, without success. United States v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L.Ed.2d 626 (1973), rejects a constitutional objection to the filing fee in bankruptcy litigation."); Allen v. Employment Dep't, 57 P.3d 903, 905 (Or. Ct. App. 2002) ("Because the challenged filing fee is prescribed by a statute that is publicly available to citizens and filing fees are assessed by the state court administrator without secrecy, the filing fee requirement comports with the constitutional mandate that justice be administered openly.").

[FN96]. *See* 28 U.S.C. § 1915 (2000) (federal *in forma pauperis* statute).

[FN97]. *See* FED. R. CIV. P. 15(b) ("Amendments to Conform to the Evidence").

[FN98]. FED. R. CIV. P. 54(c) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.").

[FN99]. At one point, when courts had to determine the methods of trial early in the life of the litigation, jurisdictional sufficiency was not the only consideration in requiring notice to courts. With the fading of trials by ordeal or compurgation, for example, notice to courts may be considerably less significant.

[FN100]. Critics of judicial opinions on all ends of the political spectrum have made a great deal about so-called "activist judges." *Compare, e.g.*, President George W. Bush, State of the Union Address to Congress and the Nation (Jan. 20, 2001), *in* N.Y. TIMES, Jan. 21, 2004 at A18 (asserting that "activist judges ... have begun redefining marriage by court order, without regard for the will of the people and their elected representatives"), *with* Sharon Buccino et al., *Hostile Environment: How Activist Judges Threaten Our Air, Water, Land* (July 2001) (arguing that conservative "activist judges" construe environmental laws in ways that strip federal statutes of their meaning). Even the most ardent critic, however, does not assert that judges are engaged in business development by finding disputes to bring before the court. Instead, the "activist" criticism is aimed at the legal theories that the targeted judges apply to disputes others have brought before them.

[FN101]. *See* Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895) ("when the inquiry involves the jurisdiction of a Federal court--the presumption in every stage" of the action is against the existence of jurisdiction).

[FN102]. *See* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) ("The prerequisites to the exercise of jurisdiction are specifically defined .... They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction."); 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522, at 61-65 (2d ed. 1984).

[FN103]. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804) (granting an appeal by a plaintiff who later demonstrated that the federal court lacked subject matter jurisdiction); 13 WRIGHT ET AL., *supra* note 102, § 3522, at 70 n.12.

[FN104]. The first conceivable action a court could take would likely stem from a prospective plaintiff's motion. In the current system, a motion to proceed *in forma pauperis* precedes the assessment of the complaint. Similarly, a motion to proceed under my proposed Rule 8(x)(a)(2) or (3) would be a court's initial opportunity to take an official action.

[FN105]. My neighbor and I may conduct our bargaining in the shadow of the law. *Cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing the impact that the legal system has on divorce negotiations outside the courtroom). That we each may be affected by the relevant legal endowments that each of us holds does *not* suggest that the public is implicated in the discussions. Transactional negotiators bargain under the shadow of the law as well, and no one would suggest that every conversation exploring the possibility of a sale or joint venture must take place under the public spotlight.

[FN106]. *See, e.g.*, David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REVV. 1217, 1227-28 (2003); Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 317-24 (1999); David

Luban, *Limiting Secret Settlements by Law*, 2 J. INST. STUDY LEGAL ETHICS 125 (1999); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUDY LEGAL ETHICS 115, 118-21 (1999). For a view defending individual litigants' privacy over perceived public interests, see Arthur R Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 HARV. L. REVV. 427, 463-77 (1991).

[FN107]. *See, e.g* , JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 252 (2002) ("ADR's individualistic processing might mean that patterns of inequalities are missed that might be picked up by class actions in the courts."). Another set of concerns related to ADR stems from a feminist critique of the impacts of private ordering in contexts of power imbalances and/or abusive relationships. *See, e.g., id.* at 252 (private dispute resolution "embodies the qualities of the private in that it is intimate, closed to outsiders, and confidential, reinscribing a problem like violence as a private, intimate matter that is best kept in the closet") (citation omitted); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

[FN108]. For a survey of some of the state statutes affecting the secrecy of settlements, see Zitrin, *supra* note 107, at 115 n.1.

[FN109]. *See, e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-87 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-26 (1995); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 656-60 (1994).

[FN110]. For a useful exposition of the complexities surrounding questions of settlement and their impacts on public and private actors, see Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

[FN111]. 5 WRIGHT & MILLER, *supra* note 17, § 1202, at 68. *See also* Fairman, *supra* note 17, at 551.

[FN112]. The drafters of the modern civil procedure system envisioned that discovery, rather than pleadings, would primarily serve this function. *See* United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958) ("Use of the discovery rules together with pretrial procedures make trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."); Tiedman v. Am. Pigment Corp., 253 F.2d 803, 808 (1958) ("[T]rial is not a sporting event, and discovery is founded upon the policy that the search for truth should be aided."); 20 CHARLES ALLEN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE DESKBOOK § 86 (2002) ("The sporting theory of justice was rejected.") (internal citations and quotation marks omitted); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 31 U. PA. L. REV. 2197, 2198 (1989) (discovery practice "would end trial by ambush and surprise").

[FN113]. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 313-14 (1950).

[FN114]. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).

[FN115]. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 466-67 (8th ed. 2001); STEPHEN, *supra* note 11, at 195; 5 WRIGHT & MILLER, *supra* note 17, § 1181, at 10 n.2 ("The common law recognized seven stages of pleading; the New York Code of 1848, three stages; the federal rules only recognizes [sic] two stages, unless the answer contains a counterclaim or a reply is ordered by the court.").

[FN116]. *See* FED. R. CIV. P. 7(a). The elimination of technical forms of pleadings predates the adoption of the Federal Rules of Civil Procedure. The Equity Rules of 1912, for example, were substantially similar to the eventual contents of FRCP 7. *See* 5 WRIGHT & MILLER, *supra* note 17, § 1181, at 10.

[FN117]. Henry John Stephen suggests that it might not be accurate to call early common-law exchanges "pleadings." Rather than refer to pleadings rules, he talks about "rules of statement" that later (in the reign of Edward I 1272-1307) developed into a formal system of pleading. HENRY JOHN STEPHEN, THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 37, 147-50 (Tyler ed. 1882) *reprinted in* COUND ET AL., *supra* note 115, at 463. "The change from oral to written pleadings cannot be dated precisely. The shift began in the late fourteenth century and extended into the second half of the sixteenth. Predictably the change increased the rigor and technicality of the pleading rules." COUND ET AL., *supra* note 115, at 464.

[FN118]. CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING 60 (1897); *see also* James, *supra* note 12, at 906.

[FN119]. *See* James, *supra* note 12, at 906; HEPBURN, *supra* note 118, at 60-61.

> When settled ... the plaintiff's statement of his case--his *narratio*, as it was called in Latin, his *conte*, in French, his *tale*, in the English of that day-- was often noted down upon the roll of the court in a clear and direct statement of fact, short indeed, but excellently good.

Id. (internal quotation marks omitted). Some commentators have suggested that the oral origins of pleadings contributed directly to their use as issue-narrowing devices.

> [T]his particularity of coming to issue took its rise in the practice of *oral* pleading. It seems a natural incident of that practice to compel the pleaders to short and terse allegations, applying to each other by way of answer, in

> somewhat of a logical form, and at length reducing the controversy to a precise point .... [T]he court and the pleaders would have to rely exclusively on their memory for retaining the tenor of the discussion; and the development of some precise question or issue would then be a very convenient practice, because it would prevent the necessity of reviewing the different statements, and leave no burthen on the memory but that of retaining the question itself so developed.

STEPHEN, *supra* note 11, at 256-57. The court's "roll" is a reference to the method of stitching together consecutive parchment membranes records as a means of recording court business. *See* HOGUE, *supra* note 13, at 180-81.

[FN120]. *See* COUND ET AL., *supra* note 115, at 465; HOGUE, *supra* note 13, at 166-67; VAN CAENEGEM, *supra* note 22, at 29; James, *supra* note 12, at 905 n.32.

[FN121]. *See* SWARD, *supra* note 1, at 105 ("[T]he form of action embodied in a writ ... defined a legal right and remedy and prescribed procedures for deciding the dispute, including the mode of proof.").

[FN122]. *See* James, *supra* note 12, at 906. For a useful summary of the history of unilateral ordeal, combat, and compurgation as trial methods, see VAN CAENEGEM, *supra* note 22, at 63-67.

[FN123]. HOGUE, *supra* note 13, at 16.

[FN124]. *See* FREDERIC WILLIAM MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 296, 298-99, 314-15, 332, 335, 342-47, 359-61 (1909), *reprinted in* COUND ET AL., *supra* note 115, at 474-78.

> '[A] form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms.

Id. at 475.

[FN125]. *See* James, *supra* note 12, at 905.

> Substantive law grew up separately for each form of action. There were no general theories of liability. If a defendant was proceeded against in trespass, he knew that only those legal rules which governed liability in trespass could successfully be urged against him; the question, in other words, would be not whether a defendant was liable under the law of the land but only whether he was so under the law of trespass.

Id.

[FN126]. James, *supra* note 12, at 902.

[FN127]. COUND ET AL., *supra* note 115, at 464 (emphasis omitted).

[FN128]. *See* CLARK, *supra* note 11, at 13 ("It was thought to be the glory of the system that the parties themselves would [through iterated pleading] in advance of trial single out and disclose the one material point as to which they were in dispute, thus eliminating all extraneous or agreed matter.").

[FN129]. James, *supra* note 12, at 903.

[FN130]. For a very useful summary of the injustices inherent in the common-law pleading approach to issue narrowing, *see* HEPBURN, *supra* note 118, at 43-66.

[FN131]. *See* SWARD, *supra* note 1, at 107 ("Under common law pleading rules, the goal was to identify a single issue of fact or law (not both), and the remedy was limited, usually, to money damages."). *See also* RUDD, *supra* note 23, at 18-19.

> Each form of action required precise and elaborate pleadings and formality in procedure. Failure to choose the correct form was fatal to the plaintiff's cause of action. This rigid formality is typical of all primitive legal systems and its injustices become so apparent in time that even the most conservative of lawyers admit that greater flexibility is essential.

Id.

[FN132]. James, *supra* note 12, at 903.

[FN133]. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 3.2, at 183 (5th ed. 2001).

[FN134]. COUND ET AL., *supra* note 115, at 467.

[FN135]. The Field Code represented the most visible reaction to the common-law system. However, one should not oversimplify and attribute the reforms entirely on the Field Code's influence. Well in advance of Field's contributions, discontent and reform efforts were taking place in many jurisdictions. *See, e.g* , William E. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97, 132-33 (1973).

[FN136]. *See* HEPBURN, *supra* note 118, at 92.

[FN137]. James, *supra* note 12, at 909 (emphasis omitted).

[FN138]. *Id.* at 910

[FN139]. An observer of procedure wrote in 1876 of courts' reactions to the adoption of the code system as follows:

> The statutory provisions are so clear, definite, and certain that no reasonable doubt as to their scope and meaning is possible. Although the purpose of the law-makers, and the theory of their legislation, are so plainly expressed, the courts have hesitated and halted in giving effect to this intent and in carrying out this design. The change made in the ancient order of things is so radical and sweeping that judges sometimes shrink from its contemplation, and seem to regard the statute as though it could not mean what its language declares.

JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE 44 (1876).

[FN140]. James, *supra* note 12, at 910 (quoting Supervisors of Kewaunee County v. Decker, 30 Wis. 624, 633 (1872)).

[FN141]. *Id.* (emphasis in original).

[FN142]. *See, e.g.*, CLARK, *supra* note 11, at 242 ("By omitting any reference to 'facts' the Federal Rules have avoided one of the most controversial points in code pleading."); James, *supra* note 12, at 918 ("The omissions [of the terms 'facts' and 'cause of action'] were quite deliberate. Those who chose the new language did not intend, however, to repudiate the original objectives of code pleading, but rather in large part to restore them.").

[FN143]. *See supra* notes 97-98 and accompanying text. Parties may even mislabel their causes of action without doing damage to their claims. *See, e.g.*, Labram v. Havel, 43 F.3d 918, 920 (4th Cir. 1995).

> Legal labels characterizing a claim cannot, standing alone, determine whether [a complaint] fails to meet [the] extremely modest standard [of pleading]. Even where such a label reflects a flat misapprehension by counsel respecting a claim's legal basis, dismissal on that ground alone is not warranted so long as any needed correction of legal theory will not prejudice the opposing party.
>
> *Id.* The real issue, of course, is not whether legal theories may be pleaded but whether the original theory may be discarded and recovery had on some other theory. The federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive

the true basis of the claim at the pleading stage ....

5 WRIGHT & MILLER, *supra* note 17, § 1219, at 192-94.
[FN144]. James, *supra* note 12, at 906.

[FN145]. In some cases, the parties themselves would "refer[] [the dispute of fact] to one of the various methods of trial then practiced." STEPHEN, *supra* note 11, at 147. Alternatively, factual disputes were sent to "such trial as the court should think proper." *Id.*

[FN146]. POMEROY, *supra* note 139, at 539.

[FN147]. James, *supra* note 12, at 907.

[FN148]. *See id.* at 909.

[FN149]. 1848 N.Y. Laws ch. 379, § 120.

[FN150]. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459 (1943).

[FN151]. Supervisors of Kewaunee County v. Decker, 30 Wis. 624, 633 (1872).

[FN152]. James, *supra* note 12, at 917.

[FN153]. 279 S.W. 43 (Mo. 1925).

[FN154]. *Id.* at 46.

[FN155]. *Id.* at 47.

[FN156]. *See, e.g.*, Marcus, *supra* note 8, at 433.

[FN157]. FED. R. CIV. P. 8(a)(2).

> The 'short and plain' statement requirement of Rule 8(a)(2) should be interpreted in light of the overall purpose of the pleading rules, which is not to flesh out the factual details of the case, but to provide notice of the grievance, and the general factual background on which it is based.

1 MOORE & SHIREY, *supra* note 6, § 8.3, at 126.

[FN158]. Motions under Rule 12(e), for example, "contemplate[] a major ambiguity or omission in a complaint which renders it unanswerable, and it is not for the purpose of preparing for trial." 27 FED. PROC., LAW. EDD. § 62:52 (1996). *See also* Daves v. Hawaiian Dredging Co., 114 F. Supp. 643 (D. Haw. 1953).

> [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted *i* and the crossed *t* and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.

Id. at 645.

[FN159]. *See* FED. R. CIV. P. 7(a) (pleadings include complaint and answer, and in certain circumstances involving joinder, a reply).

[FN160]. Recently, Christopher Fairman has argued that federal pleading practice does not match the stated ideals related to factual pleading. Instead, he demonstrates that federal courts apply a diverse set of rules regarding the requirement of factual content in pleadings, many of which find no support in the Federal Rules of Civil Procedure. *See generally* Fairman, *supra* note 18. *See also* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998).

[FN161]. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-13 (2002) ("The provisions for discovery are so flexible and summary judgment ... so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." (quoting 5 WRIGHT & MILLER, *supra* note 17, § 1202, at 76)); Elliot v. Perez, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring) ("sue now and discover later").

[FN162]. *See* Marcus, *supra* note 8, at 437 n.22.

[FN163]. Nelson, *supra* note 135, at 100 (citing also a series of cases in which John Adams asserted "colorful"--though

ultimately unsuccessful--defenses in his pleadings).

[FN164]. Marcus, *supra* note 8, at 437 (footnote omitted).

[FN165]. *See* Nelson, *supra* note 135.

> Writs were also abated when a plaintiff brought the wrong cause of action-- trespass, for example, instead of case, for obstructing the flow of water to a mill dam; case, instead of debt, on a bond; debet, instead of trespass, for a statutory penalty for cutting the plaintiff's trees; debt and detinet, a variety of debt, instead of detinet only, on an administrator's bond.

Id. at 100 (footnotes omitted).
[FN166]. *See id.*

[FN167]. Many early critics of the English common-law system pined for the perceived benefits of legal systems more directly premised on Roman Law. For example, in the mid-sixteenth-century Thomas Starkey wrote of "'the grete schame to our natyon the grete infamy and rote that remeynyth in vs, to be gouernyd by the lawys gyuen to vs of such a barbarouse natyon as the Normannys be.'" VAN CAENEGEM, *supra* note 22, at 105 (quoting Thomas Starkey, *A Dialogue between Cardinal Pole and Thomas Lupset*, *in* ENGLAND IN THE REIGN OF KING HENRY THE EIGHTH 194 (London, Early English Texts Society 1871)). Despite these criticisms, of course, the common-law system thrived in England and later in its colonies.

[FN168]. *See* Nelson, *supra* note 136, at 111.

[FN169]. Marcus, *supra* note 8, at 438.

[FN170]. *See* James, *supra* note 12, at 916.

[FN171]. *Id.* at 917.

[FN172]. 767 P.2d 62, 63 (Or. 1988).

[FN173]. *See id.* at 64 ("Whether a defendant should have known something is a judgment about a particular set of

circumstances rather than a fact from which conclusions are drawn.").

[FN174]. *Id.* at 65.

[FN175]. *See* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 7-8 (1984) (The 12(b)(6) motion "is a wonderful tool on paper, but have you ever looked at the batting average of rule 12(b)(6) motions? I think it was last effectively used during the McKinley administration."). The irony--surely intentional--in Miller's comment is that McKinley's term in office preceded the adoption of the Federal Rules of Civil Procedure by several decades.

[FN176]. Charles Clark's opinion in *Dioguardi* is a good illustration of this liberal philosophy. *See* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (referring to a motion under Rule 12(b) as a "mere formal motion"). Interestingly, among Clark's arguments for the delay in claim filtering was a functional one. *See* Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 53 (1957).

> And so to my colleagues [on the bench] as they reach for an order of dismissal rather than for a pre-trial conference, I feel I must say "Don't!" You will get there more expeditiously if instead of pausing to beautify the pleadings you turn to pre-trial and the steps saving of actual trial it represents.

Id. at 53.

[FN177]. *See* Marcus, *supra* note 160, at 1754 ("As Professor Wright himself has pointed out, shortly after [the *Conley v. Gibson*] decision an empirical study showed that pleading motions led to final termination in only about 2% of all cases, and more recent work by the Federal Judicial Center suggest figures in the 3% to 6% range.") (citations omitted).

[FN178]. *See, e.g.*, Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 762-63 (11th Cir. 1995) (defendant bank allowed to raise statute of limitations claim even though its answer admitted that all preconditions to suit had been satisfied); 2 MOORE ET AL., *supra* note 27, § 8.07[3] at 8-37 to 8-41 (amendment to add affirmative defenses).

[FN179]. For an argument that modern pleading can serve a merit-based filtering function, see Marcus, *supra* note 8, at 454-71.

[FN180]. Reflecting the restricted view of pleadings' functions, one court recently referred to complaints as "just the starting point." Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998).

[FN181]. Charles Clark, principal architect of the pleadings sections of the Federal Rules of Civil Procedure, originally proposed dispensing with formalized pleadings entirely *See* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917 (1976).

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