

ESSAY

TRIAL BY PREVIEW

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It has been an obsession of modern civil procedure to design ways to reveal more before trial about what will happen during trial. Litigants today, as a matter of course, are made to preview the evidence they will use. This practice is celebrated because standard theory says it should induce the parties to settle; why incur the expenses of trial, if everyone knows what will happen? Rarely noted, however, is one complication: The impact of previewing the evidence is intertwined with how well the parties know their future audience—that is, the judge or the jury who will be the finder of fact at trial. Both theory and policy have focused narrowly on previewing the evidence, while barely noticing the complementary effect of previewing the audience. How this interplay might affect leading theories of settlement has yet to be articulated. This Essay begins to fill the gap.

This Essay also presents preliminary empirical findings from a policy experiment in the federal courts, arising from recent reforms in civil procedure. These data suggest that the current use of evidentiary previews may be driving a wedge between trials by jury and trials by judge. Trials are “vanishing” indeed—but not all trials vanish alike. Preview policies may be accelerating a decline in bench trials more than in jury trials. New policy concerns emerge from both the data and the theoretical analysis, and this Essay explores how an awareness of asymmetric preview effects might inform current debates about procedural values and policy design.

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La Bohème, . . . even as it leaves little impression on the minds of the audience, will leave no great trace upon the history of our lyric theater.¹

—a critic’s review after the 1896 premiere

INTRODUCTION

Who will testify? What objections will be raised? Which exhibits will come to light? In federal civil cases today, much of this information must be revealed *before* trial.² Its unveiling on the eve of trial, moreover, is not the only chance for an early glimpse. The major “checkpoints” of civil procedure³—motions to dismiss,⁴ class certification,⁵ summary judgment⁶—have come to focus more intently on the merits of the case, forcing litigants to disclose more of their evidence, arguments, and strategy.⁷

1. Charles Osborne, *The Complete Operas of Puccini: A Critical Guide* 87 (1981) (quoting Carlo Bersezio writing in *La Stampa*).

2. See Fed. R. Civ. P. 26(a)(3) (“Pretrial Disclosures”). The adoption of this disclosure rule is the policy experiment studied empirically in Part II, *infra*.

3. Not to mention more specialized checkpoints—preliminary injunction hearings, *Daubert* hearings, and *Markman* hearings—which may overlap with merits assessments or preview the materials to be adjudicated at trial.

4. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (discussing *Twombly* standard to survive motion to dismiss requiring “complaint . . . contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’” meaning “plaintiff [must] plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))).

5. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (acknowledging “rigorous analysis” required during class certification “will entail some overlap with the merits of the plaintiff’s underlying claim”).

6. See *Scott v. Harris*, 550 U.S. 372, 380–81, 386 (2007) (ordering summary judgment for defendant based on Justices’ own viewing of video of car chase). The shift toward merits-like analysis of the evidence at summary judgment can be fairly traced to the famed “trilogy” of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1041–44 (2003) [hereinafter Miller, *Pretrial Rush*] (discussing importance of aforementioned “1986 trilogy” of summary judgment cases).

7. See Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 DePaul L. Rev. 647, 649 (2011) (identifying “signal judicial checkpoints” to be “summary judgment at the conclusion of pretrial discovery; rulings on the admissibility of crucial expert testimony (often, in connection with a summary judgment motion); the

Whether by chance or design, modern civil procedure has increasingly made known before trial what will likely happen *at* trial.

A primary benefit of such previews of the trial materials is widely perceived (without irony) to be in diverting the parties from ever getting to trial.⁸ By sharpening the parties' forecasts of the trial outcome, the story goes, evidentiary previews can induce them to settle: Why spend time and money going through with the trial if everyone knows what will happen anyway? The more clearly the parties foresee the verdict, the less likely a verdict will be needed.⁹

This logic is familiar but incomplete. After all, the facts do not just find themselves. A specific jury, or a specific judge in a bench trial, will assess the trial materials, render the verdict, and decide the outcome. For parties weighing whether to settle or to go to trial, there is informational value not only in previewing the evidence and arguments being prepared for trial, but also in previewing how the future *audience* for these materials will react to them. Each type of preview enhances the impact of the other: An early peek at the evidence is more useful when the parties also have before them the actual factfinder who will be weighing it at trial. Likewise, the chance to observe the factfinder's reaction before trial is more useful when more of each side's case is already on the table. Previewing the case and previewing the audience are complements.

This point is not lost on practitioners and judges, of course. Some judges welcome the chance to signal their views about the evidence,

determination whether to certify litigation to proceed as a class action; and . . . dismissal on the pleadings before discovery has commenced"). See generally Geoffrey P. Miller, Preliminary Judgments, 2010 U. Ill. L. Rev. 165 [hereinafter Miller, Preliminary Judgments] (distinguishing among these checkpoints and detailing what tends to be revealed at each).

8. Even twenty years ago it was argued, "A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, [it] is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions . . . pretrial settlement is almost always cheaper, faster, and better than trial." Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 320 (1991). As another commentator more recently observed that "many scholars, judges, and lawyers have advocated for less formal judicial intervention designed to replicate aspects of the adjudicative process and promote settlements that reflect the merits." Jonathan T. Molot, Litigation Finance: A Market Solution to a Procedural Problem, 99 Geo. L.J. 65, 78 (2010). This view of trial as failure has motivated strong replies from those who see a risk to process values in such a systemic aversion to trials. See, e.g., Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 1003 (2000) (explaining "[j]udges have . . . not only made plain the many facets of the role of judge (judge as settler, judge as negotiator, judge as manager, judge as dealmaker) but also have so deconstructed judging that it is at risk of being undermined as a . . . legally viable concept").

9. The pioneering academic papers widely credited with developing this insight are John P. Gould, The Economics of Legal Conflicts, 2 J. Legal Stud. 279 (1973), Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973), and William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1971).

while others are wary of the potential.¹⁰ And it is common advice for trial lawyers to observe the factfinder's reactions to pretrial materials whenever possible.¹¹ The scholarly literature, however, has yet to articulate how an appreciation of this interplay can inform the leading theories of the trial-or-settlement decision. And in the policymaking arena, despite longstanding attention to evidentiary previews as a way to promote settlement,¹² the complementary role of previewing the audience has tended to escape emphasis.¹³

This Essay starts the conversation. It opens in Part I with theory and motivation, arguing that the effects of current (and proposed) preview policies are likely to differ along a fundamental divide—between trials by jury and trials by judge. This asymmetry means that the use of such policies can drive a wedge between these two categories, causing more “vanishing” of bench trials than of jury trials.¹⁴

10. See Edward Brunet, *Judicial Mediation and Signaling*, 3 Nev. L.J. 232, 232–33 (2003) (describing set of practices including “signaling by the assigned trial judge at a Rule 16 pre-trial conference, . . . similar evaluative comments made by the trial court when denying a motion for summary judgment, . . . court-annexed mediation before a judge, and settlement conferences”); see also *id.* at 233 (noting “[j]udicial mediation comes in a variety of forms and occurs at a variety of times, from very early in the case, soon after filing, to the plenary trial itself”); *infra* Part I (discussing varieties of judicial hints and signals); *infra* Part III.C.3 (discussing judges’ role in settlement talks).

11. For example:

[O]ne familiar defense-side adage speaks of the value of making a motion for summary judgment, even when one is confident it will be denied, so as to compel the court to engage itself with the case and, in the course of its denial order, to hint at or even to signal its tentative view of the merits—all as a source of information about [probability of winning] p and [award amount] A for settlement purposes.

Nagareda, *supra* note 7, at 689. Further aspects of such conventional wisdom among practicing litigators—not least concerning the use of mock juries, summary jury trials, and policies allowing jurors to suggest questions to be asked at trial—are discussed later in this Essay. See *infra* Part III.D.

12. Justice Brennan was promoting the use of pretrial disclosures as a way of encouraging settlement as early as the 1950s. See Justice William J. Brennan, Jr., *Introductory Remarks*, in *Proceedings of the Seminar on Protracted Cases for United States Judges* (Aug. 25–30, 1958), 23 F.R.D. 319, 376, 379 (explaining disclosure “puts people in a frame of mind to settle”).

13. The exception proving the rule is the D.C. Circuit’s practice of announcing early the identities of the panel of judges, with the express aim of inducing the parties to settle. This example is discussed in Part III.C.2, *infra*. See Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. Rev. 55, 58 (noting D.C. Circuit’s aim of promoting settlement by announcing panel for given appeal well in advance—within sixty days of filing). Another exception might be summary jury trials or minitrials, but it appears these devices are hardly ever used. See *infra* notes 178–186 and accompanying text (discussing summary jury trials).

14. The term “vanishing trial” was coined in the seminal article by Galanter. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) [hereinafter Galanter, *Vanishing Trial*]. For a sampling of the vast literature that has followed, see *infra* note 135.

The story begins with a simple and intuitive contrast between what the parties are able to learn about the judge's views, as opposed to the jury's, during pretrial litigation.¹⁵ Before a case reaches a *bench* trial, evidentiary previews allow a judge to signal her views based on those materials—call it a “judicial preview”¹⁶—and these signals are especially telling to the parties because this judge will eventually be the final factfinder.¹⁷ Even if the judge does not express her reactions to the evidence, the parties may be able to make good predictions based on her pattern of decisions, not least her pretrial rulings in the present case.

But before a case reaches a *jury* trial, the factfinder remains unknown, as the jury has yet to be chosen. The judge's pretrial signals may be of little help to the parties in forecasting what the future jurors will think—just as a professional critic's review of a show may be a poor predictor for how the public will like it.

How does this asymmetry factor into decisions about whether to go to trial? Enter the two leading theories of the trial-or-settlement choice. In the standard account, the sharing of evidence should cause convergence in the parties' forecasts of the outcome—possibly leading them to settle and avoid trial.¹⁸ Challenging this account, behavioral economists

15. The sharp distinction drawn here is for exposition's sake; the more blurred realities are noted in Part I and are central to the policy analyses in Part III.

16. It is a “judicial preview” in a dual sense: The judge is exposed to the future trial materials, and the parties are exposed to the judge's reactions.

17. The judge may even do so with an eye towards promoting settlement. See Miller, Preliminary Judgments, *supra* note 7, at 202 (“Judges often provide litigants with cogent information about the value of their cases at pretrial conferences. . . . [M]any courts play a forceful role in settlement conferences [that might] . . . include providing the parties with clear indications of the judge's views about the case and also specific recommendations for settlement.” (citations omitted)); Judith Resnik, Procedure as Contract, 80 *Notre Dame L. Rev.* 593, 613 (2005) (discussing development of pretrial conference as express opportunity for judges to encourage settlement).

18. The vast literature elaborating on the notion that convergence tends to lead to settlement includes those studies which follow (and even some of those which challenge) the canonical “Priest-Klein” understanding of the choice to settle or to go to trial. See, e.g., Daniel Kessler, Thomas Meites & Geoffrey Miller, Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 *J. Legal Stud.* 233, 257 (1996) (finding plaintiff win rate is closer to fifty percent in cases that conform more closely to assumptions underlying simple divergent expectations model); Steven Shavell, Any Frequency of Plaintiff Victory at Trial Is Possible, 25 *J. Legal Stud.* 493, 501 (1996) (challenging Priest and Klein model's proposition that there is fifty percent probability plaintiffs prevail at trial); Peter Siegelman & John J. Donohue III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis, 24 *J. Legal Stud.* 427, 460–61 (1995) (supporting Priest and Klein predictions that relatively weak cases should be more likely to settle and that party with greater stake in litigation will have higher win rate in adjudication disputes, but explaining settlement process does not produce complete selection); Joel Waldfogel, Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation, 41 *J.L. & Econ.* 451, 474 (1998) [hereinafter Waldfogel, Reconciling] (presenting evidence that relationship between cases tried and cases where plaintiffs win at trial is consistent with divergent expectations theory, not

have run experiments showing that information sharing can backfire. Given the same new facts, each side might believe self-servingly that its own case is even stronger than before.¹⁹ Evidentiary previews could thus thwart settlement and lead to *more* trials.

The asymmetry between bench and jury cases cuts across this debate. In the standard account, one might expect evidentiary previews to be especially informative in a bench case—thanks in part to the potential for a judicial preview. The result would be more convergence and hence fewer trials, with a greater effect on bench trials. In the competing behavioral account, however, one might expect evidentiary previews to feed the parties' self-serving biases. A gap between bench and jury cases might then emerge for two reasons: First, there may be more room for such bias when the future audience is yet unknown (as in a jury case).²⁰ Second, no signals from the absent jury are available before trial to debias the parties. The expected result would be wider divergence and hence more jury trials. The use of previews should have an asymmetric impact, then, under either of the two theories. To set it in today's context of vanishing trials, previews may be expected to accelerate the decline of bench trials more than that of jury trials.²¹

This asymmetric vanishing of trials, it turns out, is observable. Part II reports data from a policy experiment in the federal courts: In 1993, a new rule of civil procedure was introduced, requiring the sort of eve-of-trial previews mentioned above.²² Most federal district courts imple-

asymmetric information theory); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 *J. Pol. Econ.* 229, 240–48 (1995) [hereinafter Waldfogel, *Selection*] (presenting evidence for selection hypothesis in estimated relationships between trial rates and plaintiff win rates at trial across case types and judges). The original Priest-Klein contribution is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984).

19. See *infra* Part I.C (describing view that parties interpret additional information in self-serving ways and that party expectations therefore diverge rather than converge).

20. In brief, the reason is that more bias is possible when the newly gained information is susceptible to a wider range of interpretations. What counts is not just the precision of the previewed materials themselves, but also the precision with which the parties can guess how the audience at trial will react to those materials. Therefore, even when given the same information, parties have more room to be overly optimistic about what it means for their prospects when they do not yet face their future audience than when they do. See *infra* Part I.C.2.

21. In the standard account, the reason for this difference is more of a fall in bench trials than in jury trials. In the behavioral story, the reason is less of a rise in bench trials than in jury trials.

22. Fed. R. Civ. P. 26(a)(3); see also Amendments to Federal Rules of Civil Procedure and Forms, 146 *F.R.D.* 401, 403–04, 610–12 (1993) (noting adoption). The rule requires each party to disclose the witnesses it “expects to present” at trial as well as those witnesses a party decides to call because “the need arises.” Fed. R. Civ. P. 26(a)(3)(A). Each side must say which documents and exhibits it “expects to offer,” and which it “may offer if the need arises.” Fed. R. Civ. P. 26(a)(3)(C). Parties must also identify the excerpts of certain depositions that they expect to present, and disclose certain objections, such as objections to the admissibility of exhibits. See Fed. R. Civ. P. 26(a)(3). Exceptions to these disclosures

mented this rule within a few years.²³ Yet a small handful opted out of the rule. These opt-out districts were forced to “catch up” as late adopters in 2000, when uniformity was imposed by the rulemakers.²⁴ The mandatory imposition of Rule 26(a)(3) in these districts is the policy shock examined here.²⁵ To capture differential effects between bench and jury cases, this study focuses on an intuitive relative measure, the ratio of completed bench trials to completed jury trials. It also reports the separate effects on the rate of bench trials and on the rate of jury trials. To my knowledge, this is the first study to document the impact of the eve-of-trial preview rule.

The asymmetry is apparent in the data: The districts forced to adopt the rule showed greater declines in bench trials relative to jury trials, a pattern not seen in the comparison districts. As a double check, two distinct regional groupings of districts are considered, one centered in California and another in New England. The asymmetric effects can be discerned in each geographic group, both in graphs of raw data and when quantified as simple estimates. It should be emphasized, however, that because civil trials are now so infrequent in the federal courts, the available sample sizes are very small. As a result, the data reported here

exist for material that is solely used for impeachment. See *id.* These disclosures, which occur shortly before trial, should not be confused with “initial disclosures” under Rule 26(a)(1).

23. The variation among districts in adoption and implementation of the rule is detailed in Part II.A, *infra*. See generally Donna Stienstra, Fed. Judicial Ctr., *Implementation of Disclosure in United States District Courts, with Specific Attention to Courts’ Responses to Selected Amendments to Federal Rule of Civil Procedure 26* (1998), available at [http://www.fjc.gov/public/pdf.nsf/lookup/FRCP2698.pdf/\\$File/FRCP2698.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FRCP2698.pdf/$File/FRCP2698.pdf) (on file with the *Columbia Law Review*).

24. See Fed. R. Civ. P. 26 advisory committee’s note to 2000 amendment (“[T]he 1993 amendments permitted local rules directing that disclosure would not be required or altering its operation. . . . A striking array of local regimes in fact emerged. . . . Many lawyers have experienced difficulty in coping with divergent disclosure and other practices. . . . These amendments restore national uniformity to disclosure practice.”).

25. The canonical reference for the social science approach of using a “catch-up” policy shock within a difference-in-differences study design is Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 *Am. Econ. Rev.* 622 (1994) (applying triple-differences technique to study effect on labor market of federal laws mandating comprehensive insurance coverage for childbirth). A difference-in-differences study is (in essence) a before-and-after study that also uses a comparison group; it compares how outcomes changed in the policy-treated population against how outcomes changed in an untreated population. An elegant example of its use in the legal literature is Christine Jolls & J.J. Prescott, *Disaggregating Employment Protection: The Case of Disability Discrimination* (Harvard Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 106, 2005), available at <http://ssrn.com/abstract=580741> (on file with the *Columbia Law Review*) (using variations in state disability regimes before Americans with Disabilities Act to estimate impact of individual provisions of law).

are noisy.²⁶ Nonetheless, these preliminary findings may serve as a spur for further data gathering, analysis, and theoretical reflection.²⁷

The normative concerns potentially at stake also provide motivation. As Part III explains, audience-driven preview effects can deepen a tradeoff between the procedural values of seeking “accuracy” and avoiding “idiosyncrasy” in the resolution of cases. This tension, moreover, may be aggravated by the mismatch between private and social aims in litigation. Preview policies can also either exacerbate or compensate for imbalances between more and less sophisticated litigants, and which effect dominates may depend on how judges respond to previews.

Part III also explores more practical policy design questions. How can civil procedure manage the previewing of the judge—or even the jury? Procedural choices that affect the force of judicial previews include whether multiple judges are rotated through a given case, when the identity of the trial judge is announced, and what role judges are allowed to play in mediating settlement. And even if previewing the actual jury may not be possible, policy choices that may affect the predictability of a jury’s reactions include the use of summary jury trials, the geographic breadth of the jury pool, and the degree of parties’ control over forum choice. Less obvious, but no less important, is the role of the parties’ expectations about what they will learn about their actual jury *during* trial; this anticipation might well influence the parties’ decisions *before* trial. If so, then certain trial procedures also become relevant, including the mechanics of voir dire, as well as recent reforms allowing jurors themselves to propose questions to be asked in the course of trial.²⁸ Notably, existing variations in such policies and practices may be well suited for empirical research. The Conclusion points to these and other paths for further inquiry.

26. More on the limitations and advantages of this study’s data and design is offered in Part II, *infra*. One advantage of the present approach is worth noting here: An alternative explanation of the data would need to say why outcomes in the treatment groups departed from those in the control groups at the time of the policy change, and asymmetrically, as between jury and bench cases. Hence generic explanations, such as broad trends or across-the-board reforms, tend not to be satisfying alternatives.

27. Notably, this study’s design is not intended to assess the effects of switching between a jury or judge as factfinder, or of assigning a given case to one or the other; rather, this study assesses the differential impact of introducing a previews policy in the two categories of cases. Further research directed at the former question would be especially complementary to the present approach.

28. The Roger Clemens trial may be the most familiar recent use of the juror questions device. See Mark A. Drummond, *How About a Free Shadow Jury? Inside the Juror’s Mind*, *Litig. News*, Winter 2013, at 16, 16 (reporting on attorney experiences with juror questions in Clemens trial).

I. A THEORY OF PREVIEWS

Okay. I'm just going to talk out loud for a minute, but I'm not—I am not previewing how I'm going to rule because I need to hear the evidence, but I think the clients ought to hear this.

I am, frankly, quite puzzled as to why this case is going to trial. And maybe it's the patent infringement issue, maybe that's what it is. But it doesn't look to me like it's a trial that's going to result in a significant amount of money recovered on either side. I could be completely wrong about that.²⁹

Imagine the course of a lawsuit in which each party is forced to preview its trial strategy for the other side. As the trial date approaches, not only must the parties “tip their hands,” but they must also say how they will play them, revealing which witnesses they will call, which exhibits they will use, and what objections they will raise. In some cases, this disclosure amounts to handing over a storyboard of the narratives they will tell at trial.³⁰

Now imagine further that the judge can signal what she thinks of these previewed narratives before trial begins.³¹ She may let her reactions

29. Transcript of Final Pretrial Conference at 60, *Soilworks, LLC v. Midwest Indus. Supply, Inc.*, 575 F. Supp. 2d 1118 (D. Ariz. 2008) (No. CV 06-02141-PHX-DGC) (remarks of trial judge David G. Campbell to parties). The judge later exhorts:

What I am going to do between now and the end of January is I'm going to require you all to sit down and try to settle—settle the case, with the clients in the room. . . . Because you now know more than you will ever know till we get to trial about what this case looks like. I think you've probably learned a lot from each side today about just what the evidence isn't.

Id. at 62.

30. Again, these are precisely the disclosures now required in the federal system under Federal Rule of Civil Procedure 26(a)(3) and empirically studied in Part II, *infra*. To belabor what may be obvious: These eve-of-trial listings occur against a backdrop of completed discovery. As a result, the parties already know much of the content of the listed items (including witness testimony, as captured in depositions); the value of these lists is in revealing what content the other side plans to use at trial. But it should be emphasized that other “checkpoints” in litigation can also serve a similar previewing function. See *supra* notes 3–7 and accompanying text (surveying examples of merits-like investigations at various stages, including summary judgment); see also, e.g., Kevin J. Culligan & Diana I. Valet, [Some of the] Things that Count in Patent Cases, *in* Patent Basics for the Non-Specialist 2008, at 91, 99 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Ser. No. 931, 2008) (identifying *Markman* hearing in patent trials as “something akin to mini-trial[]” that “may be full-blown evidentiary hearing[]” and “often establishes the tone of the case, even if it is not dispositive of all of the issues”); Victor E. Schwartz & Cary Silverman, The Draining of *Daubert* and the Recidivism of Junk Science in Federal and State Courts, 35 Hofstra L. Rev. 217, 259 (2006) (noting *Daubert* hearing “also provides litigants with a preview of the strength of their opponents’ cases, which may encourage settlement or support a motion to dismiss a weak case on summary judgment”).

31. One practitioner’s guide explained the value of bringing the client to observe such judicial hints:

be known while running the final pretrial conference as a “rehearsal for trial.”³² Or, she may hint in more subtle ways, as practitioners know.³³ Based on the previews, for instance, she may urge the parties to stipulate to facts that she thinks are too obvious (or inconsequential) to take up time at trial.³⁴ Or she may not need to hint at all. The parties’ predictions about how she will react to the materials may be sharpened just by knowing who she is; much may already be known about her inclinations, her reputation, or even her history with the present case.³⁵

The parties thus receive not only previews of the stories to be told at trial, but also a preview of the *audience* for those stories.³⁶ These are

Attending the pretrial conference and seeing the court’s reaction to the various undisputed and disputed issues of fact and law in the case may provide the client with an “inside look” that is necessary to fully evaluate settlement options and to see firsthand how the facts, themes, and theories of the case present to an impartial arbiter.

James J. Marcellino & Brian W. Robinson, Pretrial Preparation, *in* Massachusetts Superior Court Civil Practice Manual § 11.2 (Paul A. Chernoff ed., 2d ed. 2008).

32. Comm. on Court Admin. & Case Mgmt., The Judicial Conference of the U.S., Civil Litigation Management Manual 99–100 (2d ed. 2010) [hereinafter Civil Litigation Management Manual], available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D.pdf/\\$file/CivLit2D.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D.pdf/$file/CivLit2D.pdf) (noting some judges “treat [the final pretrial conference] as little more than a scheduling event” but others “use it as a thorough rehearsal for the trial”). By contrast, this same handbook for judges warns against such a rehearsal-like preview at the summary judgment stage. *Id.* at 57 (“Beware of overbroad motions for summary judgment that are designed to make the opponent rehearse the case before trial.”).

33. See Thomas A. Mauet, Bench Trials, *Litigation*, Summer 2002, at 13, 15. This practice guide for litigating bench trials advises lawyers to pay close attention to the judge’s pretrial signals:

[T]he judge’s notion of what the judge wants to hear and see trumps the lawyers’ notions of what the judge should hear and see. . . . Some judges will tell you what they see as the key factual and legal issues and what they want to hear and see to resolve those disputes.

Id. at 14–15.

34. Or more subtly, if she has indicated how she might rule on the objections, the parties might read substantive clues into her evidentiary rulings. For a colorful example, consider one judge’s telling reaction during a final pretrial conference, in a colloquy about excluding a proposed expert: “[H]ow does his proposed conclusion require any expertise? In other words, isn’t it common sense that body armor, which must be replaced biannually, isn’t economically feasible?” Transcript of Final Pretrial Conference at 7, *First Choice Armor & Equip., Inc. v. Toyobo Am., Inc.*, 839 F. Supp. 2d 407 (D. Mass. 2012) (No. 09-cv-11380).

35. See, e.g., Mauet, *supra* note 33, at 14 (“Ask other members of your firm and lawyer friends about their experiences with the judge in your kind of case. Watch the judge during a bench trial or during a contested motion hearing for clues on how the judge acts, thinks, and makes decisions.”). Such data about the ultimate factfinder would not be possible to gather in a jury trial.

36. Commentators and practitioners alike have noted this possibility. See, e.g., Steven Wolowitz, Techniques for Expediting and Streamlining Litigation, *in* Commercial Litigation in New York State Courts § 60:42 (Robert L. Haig ed., 3d ed. 2010) (noting in bench trials judges may give indications of their views of case during pretrial); Molot, *supra* note 8, at 78 (“Rather than intervening through formal motion practice, a judge

complements: The more that is revealed in the parties' evidentiary previews, the more telling the judge's reactions will be. Likewise, the presence of the judge and the parties' knowledge about her predispositions make previewing the trial materials more informative. Enhanced learning of this complementary sort can boost each party's ability to forecast the outcome of a trial.³⁷

But what if the factfinding role at trial falls to a jury, rather than a judge? Then the story is rather different. As the jury will not be chosen until trial begins, no hints from the future audience can be observed before the trial. There may be a preview of the judge, but what is really needed (and is lacking) is a preview of the jury.³⁸ Future jurors may see the evidence very differently than the judge, and one potential jury may see things very differently than another.³⁹ Before trial, much still rests on how jury selection will play out. Little more than rough demographics may be known, and each side may remain optimistic about getting "its" jury.⁴⁰ Because previewing the audience is not possible in a jury case, the kind of enhanced learning that can be gained in a bench case is lost.⁴¹

The bench-versus-jury contrast as presented thus far is rather stylized, of course. A more realistic rendering would describe these differences as matters of degree. A jury pool might be extremely predictable in some jurisdictions or for certain kinds of cases.⁴² And some judges and their views might remain something of a mystery (perhaps intentionally) before trial. Alternatively, signals from a judge before trial might be informative even in a jury case; judges can influence jurors' thinking, such as by limiting what evidence they see, and judges can sometimes override jury verdicts or remit damage awards. For ease of exposition,

may promote settlements in line with the merits—and indeed pressure the parties to settle—simply by providing his views of the merits and his predictions for trial at a judicial settlement conference.”).

37. It is possible that these two types of previews might also feed back into each other in other ways; for instance, judicial previews may lead the parties to adjust their intended narratives.

38. Litigators have long made use of mock juries as an approximation. See *infra* notes 173–176 (explaining value of mock juries).

39. See, e.g., Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 *Tex. L. Rev.* 571, 583–89 (2012) (surveying studies documenting wide variation in injury valuation among juries).

40. Although the parties will play a role in choosing the jurors, uncertainty remains because the two sides may be pulling in opposite directions. For a fuller analysis of the parties' sense of uncertainty about their future jury, see *infra* Part III.D.2.

41. These days, civil litigators know even less about juries, given how few civil jury trials any of them ever do in their career. I thank Judge Gerard Lynch for this insight.

42. Most familiar to the popular imagination may be the fabled “Bronx jury.” See, e.g., Arthur S. Hayes, *Inner-City Jurors Tend to Rebuff Prosecutors and to Back Plaintiffs*, *Wall St. J.*, Mar. 24, 1992, at A1 (reporting “Bronx juries, the data show, find the defendant liable in a lopsided 72% of civil cases, compared with a national average of 57%”); see also *infra* note 171 and accompanying text (discussing venues with folkloric status in assigning punitive damages).

this Essay will often speak of the bench-versus-jury distinction as binary, but the logic of the analysis applies also to the more realistic scenario of differences in degree.⁴³ In general, the informational gains from a “judicial preview” should be greater in bench cases than in jury cases—the simplest reason being that, in a bench case, the judge who is present at the time of the previews will also be the factfinder at the actual trial.

A. *Competing Effects*

The contrast drawn between bench and jury cases thus far is simple and intuitive. More complicated—and as yet unarticulated in the literature—is how the contrast might translate into differential impacts on parties’ choices about whether to settle or go to trial.

Two competing theories of the trial-or-settlement decision must be considered. The following analysis cuts across the debate, introducing the bench-versus-jury contrast to both the standard theory and the leading countertheory. The standard theory (call it the “convergence story”) is the familiar economic model, in which an increase in information sharing leads to convergence in the parties’ forecasts about the outcome—and hence to a greater chance of settlement. The countertheory (call it the “divergence story”) is a critique proposed by behavioral economists, based on psychological experiments showing how increasing the available information can cause *divergence* in beliefs—and hence a greater chance of trial. This Part takes each in turn.

B. *The Convergence Story*

No doubt parties who would eventually settle at trial might do so earlier if they were made to “show their cards” sooner. But can previews prompt not only earlier settlement, but also *more* settlement? Why would other cases—ones that would not settle during trial, even after strategies and audience reactions are known—nonetheless settle *before* trial, based on similar information?

In the standard economic account, the answer is that before trial costs have started to be spent, there is more to be saved by settling. The following subsection elaborates on this intuition, using a simple illustration in which parties can learn from new information gained before and during trial.⁴⁴ For the sake of focus, this exposition abstracts away

43. Indeed, policy tools for regulating these degrees, and for further blurring the boundary, are suggested in Part III, *infra*.

44. This illustration builds on the standard model of settlement by adding both the possibility of learning during trial itself and the interplay between the previewed materials and the presence of the audience. Other models of pretrial learning abound in the literature, but do not include these features. The possibility of learning trial strategy at earlier points in litigation is discussed in Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 *Yale L.J.* 73, 110–11 (1990). A canonical model for learning during litigation is presented, in the context of discovery, by Robert D.

from other factors that are undeniably important in the choice to settle or to go to trial, among them the role of emotions and ego, risk aversion, and reputational concerns.⁴⁵

1. *More Information, Fewer Trials.* — Imagine parties to a lawsuit on the eve of trial (call them the Plaintiff and the Defendant), looking ahead and deciding whether to settle. For settlement to occur, the Plaintiff must be willing to accept what the Defendant is willing to offer. The minimum the Plaintiff is willing to accept to end the litigation right away is its expected winnings, minus the trial costs it would have to spend to get to that judgment. Any less and it would do better by going to trial.⁴⁶ Likewise, the Defendant is willing to offer no more than its expected payout, plus any further costs it would save by avoiding trial.⁴⁷ Any more and it would do better by going to trial.⁴⁸

Settlement occurs at amounts between the Plaintiff's minimum ask and the Defendant's maximum bid. Such a "zone of settlement" is more likely to exist when the parties' forecasts are similar.⁴⁹ The logic is familiar: Why should each side pay to go through with trial when every-

Cooter & Daniel L. Rubinfeld, An Economic Model of Discovery, 23 J. Legal Stud. 435 (1994); see also Bruce L. Hay, Civil Discovery: Its Effects and Optimal Scope, 23 J. Legal Stud. 481 (1994) (taking Cooter-Rubinfeld model as "point of departure"); Andrew Teruo Hayashi, The Effect of Mandatory Disclosure, in *Essays in Behavioral Law and Economics* 48, 60–69 (Fall 2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the *Columbia Law Review*) (adapting Cooter-Rubinfeld model).

45. Although risk aversion is bracketed in this Essay's analysis, especially intriguing questions might be raised by its consideration: Would self-serving bias, in the behavioral economists' story, tend to reduce *perceived* uncertainty and hence the impact of risk aversion? Does risk aversion relate in different ways to the two distinct conceptions of "jury uncertainty" analyzed in Part III.D?

46. We can denote this threshold as $P_p J - c$, where P_p is the Plaintiff's subjective estimate of the probability of a favorable verdict; J is the amount of the judgment that would be paid by the Defendant to the Plaintiff; and c is the cost of trial (which for convenience is assumed here to be the same for both sides). For ease, the exposition throughout will speak in terms of uncertainty about the probability of the Plaintiff winning, and the parties will be assumed to share the same estimate of the judgment amount. But a very similar analysis would apply if the parties differed as to the amount rather than the probability, as what matters for settlement is the divergence in the expected value of the case.

47. The Defendant's maximum offer is thus $P_d J + c$.

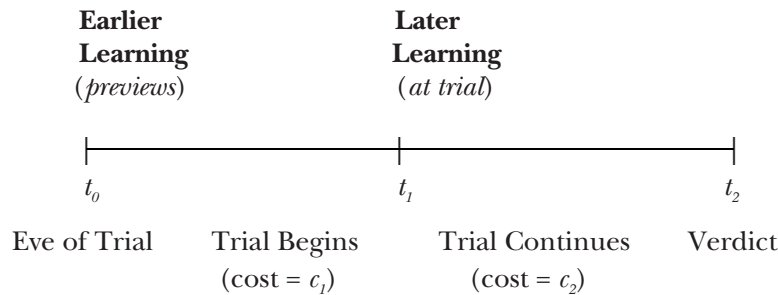
48. This logic has entered the conventional wisdom. As one Supreme Court opinion observed, "Most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package." *Evans v. Jeff D.*, 475 U.S. 717, 734 (1986). This is also the standard assumption in the theory literature. See, e.g., Kessler et al., *supra* note 18; Priest & Klein, *supra* note 18; Shavell, *supra* note 18; Waldfogel, *Reconciling*, *supra* note 18; Waldfogel, *Selection*, *supra* note 18.

49. The zone exists if $P_p J - c < P_d J + c$. Notice that if the parties hold the same beliefs about what will happen ($P_p = P_d$), they will settle. Doing so will save them a total of $2c$ in trial costs (a surplus they will split through bargaining). Even if their beliefs are different, but are close enough, then the promise of the shared surplus will overcome the gap in expectations: They settle if $P_p - P_d < 2c/J$. Otherwise they do not.

one knows what will happen.⁵⁰ If the parties' forecasts are far enough apart, they will not settle but go to trial.⁵¹ What can narrow the gap, however, is sharing information about the case. In the standard account, if both parties update their forecasts based on the same new information, their forecasts will converge—potentially inducing settlement.

To this familiar story we can introduce the possibility of previews. Previews can affect outcomes by altering the timing of the learning. Consider the abstract timeline shown in the diagram below. Imagine that during trial (at time t_1), the parties may learn something about the strength of the case. For instance, they may detect good or bad reactions from the jury to each side's presentations. Based on this signal, they may update their forecasts of the outcome—and if there is enough convergence, they may settle.⁵²

Now imagine that the parties can learn the same information on the eve of trial, at t_0 . This earlier learning is possible thanks to a preview at t_0 .



In this stylized illustration, there can be cases that would not have settled during trial, and yet would settle on the eve of trial.⁵³ The reason

50. It is worth a reminder that the key criterion is that the parties' beliefs be close to each other—not that they be close to the true P . The parties could be way off the mark in their predictions, but they will settle as long as their forecasts are similar enough. And even if one of them is precisely correct, there is no settlement unless the other side's forecast is close enough.

51. Despite anticipating the costs of continuing on to trial, each side expects to do better by going through with it. To illustrate using a numerical scenario (call this Scenario A): Suppose that the Plaintiff expects to win with a probability of $3/4$, but the Defendant thinks the probability is only $1/4$. If trial costs $c = 30$, and the judgment $J = 200$, then the Plaintiff will accept nothing under $3/4 (200) - 30 = 120$. But the Defendant will offer no more than $1/4 (200) + 30 = 80$. Here, $P_p J - c > P_d J + c$. There is no room for a deal.

52. The Plaintiff updates from P_p to P_p^* and the Defendant from P_d to P_d^* . This learning occurs at time t_1 , after the parties have each spent c_1 out of the total trial costs $c = c_1 + c_2$. At this point, they can decide whether to settle. In theory they will settle at this point if $P_p^* J - c_2 < P_d^* J + c_2$. If the parties do not settle, they complete the trial, spend the remaining c_2 , and reach the verdict at time t_2 .

53. Consider again Scenario A, supra note 51: If on the eve of trial the parties receive information suggesting that $P = 1/2$, and they weigh this equally with their prior information, the gap in their forecasts closes from $P_p = 3/4$ versus $P_d = 1/4$, to $P_p = 5/8$ versus $P_d = 3/8$. The gap thus halves, from $1/2$ to $1/4$; and likewise with the gap in

is the familiar intuition that there is more to be saved by settling (or “settlement surplus”) before any trial costs have been spent. Thus parties who will have no zone of agreement left after trial begins might yet have some room to settle on the eve of trial.⁵⁴ The extra savings from avoiding the first part of trial, c_1 for each side, create this possibility.⁵⁵

2. *Enhanced Learning in Bench Cases.* — Learning the same information at an earlier point can thus make all the difference for settlement. If the parties believe that what they are learning on the eve of trial is closely similar to what they will come to learn at trial, then there may be little or no reason to pay more to get to t_1 , as little or nothing new will be learned at that point. The more predictive value the early information has, the greater the impact on settlement.

But bench cases and jury cases differ in this regard, as we have already seen. First, the extra informational gains from a “judicial preview” are more likely in bench cases than in jury cases. Moreover, aside from having the “right” audience present at the time of the previews, enhanced learning also depends on having the “right” materials—the sort that will matter to the eventual audience—revealed in the previews. On this dimension, too, bench cases may have the advantage. Lawyerly conventional wisdom suggests that juries respond more to emotional appeal and rhetoric than judges do.⁵⁶ The truth of this generalization matters less than whether many lawyers believe it.⁵⁷ It appears they do, and they choose jury trials when their storytelling cen-

expected judgment, from 100 to 50. Just as if they learned this information during trial, the Plaintiff expects to win $5/8 (200) = 125$ at trial and the Defendant expects to pay $3/8 (200) = 75$. If they learned this information during trial, and if $2(c_2) < 50$, they would not settle at that point. By contrast, on the eve of trial, settlement is more attractive than it would be at trial. Facing combined costs of $2(c_1 + c_2) = 60$, and with a gap in estimates of 50, the parties do perceive a zone of agreement. Given the extra savings from avoiding the first part of trial, the Plaintiff is willing to accept less than before, $125 - 30 = 95$, and the Defendant is willing to offer more, $75 + 30 = 105$. They will settle for an amount between 95 and 105.

54. The reverse is not true; any case that will not settle on the eve of trial at t_0 (when the surplus is greater) also will not settle during trial at t_1 (when the surplus is less).

55. There is no settlement zone after trial starts if $P_p^* J - c_2 > P_d^* J + c_2$, but there can be a settlement zone before the initial trial costs are spent, if $P_p^* J - (c_1 + c_2) < P_d^* J + (c_1 + c_2)$.

56. Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1149 (1992) [hereinafter Clermont & Eisenberg, Trial by Jury or Judge] (citing longstanding perceptions of juries as more desirable for cases “rest[ing] on emotional or sympathy issues” and less able to handle complicated legal issues); see also Jerry M. Custis, Litigation Management Handbook § 8.32 (2011) (noting “juries [are] likely to favor . . . emotional appeals to right versus wrong rather than strict application of the law”).

57. Cf. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 31 (2008) (describing “nature of what [lawyers] typically think of as ‘jury argument’ [as] a blatant appeal to sympathy or other emotions, as opposed to a logical application of the law to the facts”).

ters on the demeanor of witnesses or the sympathetic look of a plaintiff.⁵⁸ But this is not the sort of information that tends to be revealed by previews “on paper.” By contrast, what judges are thought to look to in a bench trial may be a closer match to what previews reveal. A judge may be more likely to be focused on documentary evidence⁵⁹ or the content of testimony (and not the way it is given);⁶⁰ bench cases may also involve more complex evidence, as the parties choosing a bench trial may be ones who think judges are more competent than juries in handling such materials.⁶¹

With less informational value gained from previews in jury cases than in bench cases, there will likely be less convergence in the parties’ forecasts—and, as a result, fewer settlements induced. In the standard convergence story, all else equal, the introduction of previews should have a greater effect of promoting settlements in bench cases than in jury cases.

C. *The Divergence Story*

Today, the leading countertheory to the convergence story is one developed by behavioral economists and grounded in findings from psychological experiments. This view is that individuals tend to interpret information in “self-serving” ways. As a result, there is no guarantee that gaining new information means greater accuracy (or convergence) in the parties’ predictions. To the contrary, presented with new facts, each side may come to see its own case as even stronger than before.⁶² The sharing

58. See generally Clermont & Eisenberg, *Trial by Jury or Judge*, supra note 56, at 1126, 1149–51 (surmising litigants choose whether to request jury trial based on stereotypical view of juries as responding to such factors); Amy Tindell, *Toward a More Reliable Fact-Finder in Patent Litigation*, 13 *Marq. Intell. Prop. L. Rev.* 309, 323–24 (2009) (finding one reason parties choose jury trials for patent cases is belief juries will base decisions on sympathy for one party).

59. See Press Release, N.Y. Cnty. Lawyers’ Ass’n, *First-of-Its-Kind CLE Program on Using Affidavits in Lieu of Direct Testimony at Trial* on September 20 (Aug. 11, 2011), available at http://nysd.uscourts.gov/file/news/cle_program_info (on file with the *Columbia Law Review*) (noting “use of affidavits in lieu of direct testimony” has become “prevalent in federal courts” for bench trials).

60. Indeed, during trial a judge may also be more likely to accept testimony on paper or in deposition form, rather than take live testimony in court, if she herself is the factfinder.

61. See Custis, supra note 56, § 8.32 (stating conventional wisdom that juries are better for simple cases and judges for more complex cases); James J. Gobert & Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* § 1.23 (2d ed. 1990) (“[A] party might decide to waive a jury . . . where the attorney plans to present evidence . . . which may be difficult to comprehend. A judge is less likely than a jury to be confused by complex evidence.”). But see Philippe Signore, *On the Role of Juries in Patent Litigation*, 83 *J. Pat. & Trademark Off. Soc’y* 791, 824 (2001) (noting party may prefer jury in complex case if only hope in case is to confuse jury and even out odds of winning).

62. Here is an especially clear articulation of this bias: “Whenever there is room for disagreement about a matter to be decided by two or more parties—and of course there

of more information before trial can thus cause the parties' expectations to diverge, rather than converge.

1. *More Information, More Trials?* — This upshot may seem strange. Yet the theory finds support in experiments based on litigation and bargaining scenarios, and field research suggests that actual litigators are hardly immune from overconfident predictions.⁶³ The foundational studies are a pair of experiments by Linda Babcock, Colin Camerer, Samuel Issacharoff, and George Loewenstein, showing that students role-playing plaintiffs and defendants tended to interpret case materials as favoring their own side; when given more such materials, their expectations diverged, and they settled less often.⁶⁴ This divergence did not occur, however, with experimental subjects who were *not* told their role (as plaintiff or defendant) until after reading the case materials.⁶⁵

2. *Enhanced Bias in Jury Cases.* — A key variable in this divergence story must be noted. As demonstrated in a recent experiment, self-serving bias has greater effect when the newly gained information allows

often is in litigation as well as elsewhere—individuals will tend to interpret information in a direction that serves their own interests.” Christine Jolls, Behavioral Law and Economics, *in* Behavioral Economics and Its Applications 115, 123 (Peter Diamond & Hannu Vartiainen eds., 2007).

63. See generally Jane Goodman-Delahunty et al., Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes, 16 Psychol. Pub. Pol'y & L. 133 (2010) (showing overconfidence about own litigation outcomes in sample of over 400 litigators from across United States). For an early demonstration of self-serving bias in interpreting legal policy information (about the death penalty), see Charles G. Lord, Lee Ross & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. Personality & Soc. Psychol. 2098 (1979). Other recent experimental work on self-serving bias, based on legal scenarios, includes Tess Wilkinson-Ryan & Jonathan Baron, The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce, 37 J. Legal Stud. 315 (2008). Other biases affecting settlement have also received careful attention. See, e.g., Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 Mich. L. Rev. 107 (1994) (hypothesizing psychological effects impact how litigants perceive, understand, and respond to settlement offers).

64. See generally George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, Self-Serving Assessments of Fairness and Pretrial Bargaining, 22 J. Legal Stud. 135 (1993).

65. See generally Linda Babcock, George Loewenstein, Samuel Issacharoff & Colin Camerer, Biased Judgments of Fairness in Bargaining, 85 Am. Econ. Rev. 1337 (1995). Remarkably, informing parties about self-serving bias “had no impact either on the magnitude of the bias or on settlement”; rather, each side “expected their bargaining counterpart to exhibit the bias but seemed to think that they themselves were immune.” Linda Babcock, George Loewenstein & Samuel Issacharoff, Creating Convergence: Debiasing Biased Litigants, 22 Law & Soc. Inquiry 913, 921 (1997); see also Linda Babcock & George Loewenstein, Explaining Bargaining Impasse: The Role of Self-Serving Biases, 11 J. Econ. Persp. 109, 115 (1997) (“When they learned about the bias, subjects apparently assumed that the other person would succumb to it, but did not think it applied to themselves.”).

for a wider range of interpretations.⁶⁶ And in the present analysis, there may be a wider range of possibilities imaginable for how an unknown future jury (as compared to the known judge in a bench case) will interpret the trial materials being previewed.⁶⁷ One factor may be over-optimism about “getting the jury you want,” one that will interpret things your way. An attorney may be overconfident about influencing the jury selection process, for instance, which has yet to occur.⁶⁸ (In this context, one might also imagine how the marketing of jury consultants might worsen such excess optimism.) The unknowability of the future audience may thus be a complement that sustains or even enhances each side’s bias in interpreting newly disclosed information.⁶⁹

By contrast, it may be more predictable in a bench case what the previewed materials mean for the outcome of the case.⁷⁰ This is especially true if a signal about the merits is forthcoming from the judge: Nothing quite cures overoptimism like a judge remarking, on the eve of trial, that

66. The key to whether information exchange creates convergence or divergence of expectations, we show, is whether the interpretation of the information that is exchanged is straightforward or ambiguous. When the implications of the information are obvious and are not amenable to alternative interpretations, then the sharing of information will tend to produce convergence of expectations and facilitate settlement. However, when there is even a moderate degree of ambiguity about how information should be interpreted, each party will tend to interpret the information in a self-serving fashion, and a sharing of information will often result in a divergence of expectations.

George Loewenstein & Don A. Moore, *When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining*, 33 *J. Legal Stud.* 37, 38 (2004).

67. In a jury case, uncertainty about the future audience produces a range of possible interpretations corresponding to what differing juries might find. For simplicity, suppose that there are two such possible interpretations: a “high” probability of a Plaintiff win, $(P_j + x)$, and a “low” probability, $(P_j - x)$, where x is positive. We can represent the effect of self-serving bias by assuming that the Plaintiff will perceive the “high” probability as the meaning of the preview and the Defendant will perceive the “low” probability. Each party updates its expectations based on a different interpretation (the one more favorable to itself). Because these interpretations are separated by this expectations gap, the parties’ expectations will converge less in the jury case than if they were both updating based on a single shared interpretation, as is assumed in the bench case. If the gap is large enough, the parties’ expectations will become more divergent; this occurs if $(P_j + x) - (P_j - x) > P_p - P_d$. This characterization of bias follows that of Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 *J.L. Econ. & Org.* 490 (2005).

68. On overconfidence among attorneys with regard to trial outcomes, see *supra* note 63 and accompanying text.

69. Note that unknowability does not imply uncertainty: Each side could have a self-assured yet also self-servingly biased belief about what the future jury will think of the case. (Relatedly, although risk aversion is bracketed in the present analysis, it is worth noting that risk aversion relates to a given party’s uncertainty, and not necessarily to a divergence between the two parties’ beliefs.)

70. We can represent this clear meaning, in a bench case, as a single new estimate of the probability of a verdict favoring the Plaintiff, P_b . Note that the jury and the judge have very different views, so that the jury’s range is not centered on P_b .

in her view the case is a loser.⁷¹ The greater influence of such judicial previews when the judge will be the factfinder (rather than when a jury will be) plays out in the behavioral story as a stronger suppression of pre-view-induced divergence.

One further question remains. Why would previews cause *less* settlement (and thus more trial), rather than merely delayed settlement? If the identity and the reactions of the jury become clear during the course of trial, wouldn't the case come to settle eventually? The answer lies again in the loss of settlement surplus as the case progresses. Consider the cases that, absent previews, would have settled before trial (at t_0), but not during trial (at t_1).⁷² With previews, some of these cases may no longer settle at t_0 , due to the divergence effect.⁷³ By the time the jury's reactions become known at trial, however, it will have become too late for settling to be worthwhile. Thus by revealing information at an earlier point, when its meaning is more subject to biased interpretations, previews can ruin the last best chance for settling.

D. Predictions of the Combined Theories

This Part has noted how each of the two competing theories, in separate ways, predicts an asymmetry between bench cases and jury cases in terms of the impact of previews on settlement. In the convergence story, it is because enhanced learning is more likely in the bench cases. In the divergence story, it is because enhanced bias is more likely in the jury cases. The following table summarizes these predictions about the effect of previews on the decision about whether to go to trial.⁷⁴

71. Consider again the judge's remarks in the epigraph, *supra* text accompanying note 29, and, more generally, the discussion above concerning judicial hints and signals, *supra* notes 31–35 and accompanying text. Of course, such judicial commentary can occasionally be found in opinions on “checkpoint” motions, such as motions for summary judgment. See, e.g., *Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2012 WL 691551, at *1 (S.D.N.Y. Mar. 5, 2012) (offering “brief comments . . . to the parties” including observations “the Court remains skeptical that the Trustee can ultimately rebut the defendants’ showing of good faith, let alone impute bad faith to all the defendants,” and “too much of what the parties characterized as bombshells proved to be nothing but bombast”).

72. This is possible when $P_p J - (c_1 + c_2) < P_d J + (c_1 + c_2)$, but $P_p^* J - c_2 > P_d^* J + c_2$.

73. In this characterization of bias, this occurs if $(P_j + x) J - (c_1 + c_2) > (P_j - x) J + (c_1 + c_2)$.

74. Again, it is worth noting that the binary between bench cases and jury cases is stylized for exposition's sake. Notably, the table reflects that it is of course possible for previews to generate some self-serving bias (and divergence) in a bench case, or some learning (and convergence) in a jury case.

	Convergence story (Standard theory)	Divergence story (Behavioral theory)
Bench cases	<i>Enhanced learning</i> <i>More convergence</i> <i>Fewer trials</i>	<i>Some bias</i>
Jury cases	<i>Some learning</i>	<i>Enhanced bias</i> <i>More divergence</i> <i>More trials</i>

Assessing such predictions using real-world data is necessarily a daunting task, given the complexities of litigants' motivations and the influence of other factors in litigation. It is especially so when competing theories make contrary predictions; if both theories have some truth, then their combined effect may be a wash. Yet the search for empirical clues is eased by the following observation: As the table shows, these two theories both predict a *relative* fall (that is, more of a fall or less of a rise) in bench trials as compared to jury trials. That is, both predict a similar asymmetry in the impact of previews; this asymmetry can thus serve as a useful diagnostic, whether one or the other theory (or both) is at work. Making use of this diagnostic, the next Part reports data from a recent policy experiment in the federal courts suggesting that current preview policies do influence whether cases settle or go to trial.

II. AN EXPERIMENT IN THE COURTS

The federal courts were in disarray during the 1990s over civil procedure reforms meant to magnify the "previewing" of case materials. Controversy about a new disclosure regime embodied in the 1993 Rules amendments had led some district courts to opt out entirely from the governing provisions.⁷⁵ Many others opted fully into the regime, putting all the new disclosure rules into effect.⁷⁶ Still other districts fell in between, crafting their own variations.⁷⁷

75. See Stienstra, *supra* note 23, at 4–6.

76. See *id.* at 6.

77. See *id.* at 4.

Remarkably, such district-by-district customization was actually allowed by the 1993 amendments themselves.⁷⁸ One reason was to preserve the districts' leeway in experimenting with case management devices.⁷⁹ But certainly the rulemakers knew that in some districts resistance to the imposition of these provisions would be fierce. Much of the commentary was highly critical.⁸⁰ There was even a rare dissent in the Supreme Court in promulgating these rules.⁸¹

By 2000, the rulemakers had decided that enough disarray was enough. A new round of amendments now demanded uniform adherence to the disclosure rules across all federal districts.⁸² They eliminated the option to customize: no more opting out, no more local rules deviating from the federal rules, no more contrary standing orders by individual judges. Districts which had opted out (or devised their own policy variations) after the 1993 amendments now had to catch up under the 2000 amendments.

A. *The Preview Rule: A Natural Experiment*

Among the disclosures newly required are eve-of-trial previews of the sort imagined in the theoretical analysis above. Rule 26(a)(3) requires parties to disclose to all other parties and to the court, generally one month before trial, a list of the witnesses, depositions, and exhibits that

78. Fed. R. Civ. P. 26(a)(1) (1993) (amended 2000) ("Except to the extent otherwise stipulated or directed by order or local rule . . ."). The commentary on this opt-out provision is vast. For contemporary reactions, see, e.g., Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 *Mercer L. Rev.* 757, 757 (1995) (characterizing contemporary proliferation of "local rules" as putting "central accomplishment of uniform federal rules . . . in serious jeopardy"); Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 *Tex. L. Rev.* 753, 781 n.72 (1995) (criticizing "balkanization of procedure" enabled by opt-out provision); Lauren Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 *Rev. Litig.* 49, 51 (1994) (finding "startling the explicit rejection of the uniformity principle in the text of a civil rule regulating lawyers' work").

79. See Fed. R. Civ. P. 26 advisory committee's note to 2000 amendment ("The inclusion of the 'opt out' provision reflected the strong opposition to initial disclosure felt in some districts, and permitted experimentation with differing disclosure rules. . . . It was hoped that developing experience under a variety of disclosure systems would support eventual refinement of a uniform national disclosure practice.").

80. See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *Stan. L. Rev.* 1393, 1444 (1994) (explaining after reforms "[n]o federal litigator can be confident about what the discovery rules require or permit in any particular federal court"); Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 *Rev. Litig.* 1, 11 (1994) (noting reforms "were far too academic and gave too little regard to privileges that the practicing bar and many citizens thought important"); see also *supra* note 78 (describing other contemporary reactions).

81. Amendments to Federal Rules of Civil Procedure, 146 *F.R.D.* 401, 507 (1993) (Scalia, J., joined by Souter & Thomas, JJ., dissenting).

82. See Fed. R. Civ. P. 26 advisory committee's note to 2000 amendment ("These amendments restore national uniformity to disclosure practice.").

they intend to present at trial.⁸³ It also requires them to disclose certain objections that they may raise.⁸⁴ These requirements are enforced by the threat of waiver.⁸⁵

The staggered adoption of this rule among the federal districts presents a rare chance to assess the impact of such previews. The unusual phasing-in creates a natural experiment: What happened in the late-adopting districts can be compared to what happened in the early-adopting districts. Specifically, the late-adopting districts were forced into a policy change in 2000 (against their express choice to opt out). But the early-adopting districts faced no such change in 2000, having already begun to comply several years earlier. In the standard terminology of such a difference-in-differences study design, the late adopters can be viewed as the policy-treated (or “treatment”) group, and the early adopters as the untreated “comparison” group.

1. *The Storyboard Revealed.* — Several features of this preview rule are worth special emphasis, as they add to the previews’ credibility and also make this policy change especially advantageous for study. First, what is revealed by these disclosures differs in nature from what is revealed during discovery. Under this rule, each party must preview for the court and for the other side the evidence it expects to use at trial—to identify witnesses as well as documents, exhibits, transcripts, media, and specific parts of depositions.⁸⁶ Moreover, each party is to label separately which of this evidence it is likely to present at trial, as distinguished from what evidence it plans to hold in reserve, to bring in as needed.⁸⁷ (Litigators sometimes refer to these as their “will call” and “may call” lists,

83. This is not to be confused with “mandatory initial disclosures” under 26(a)(1), which occur not on the eve of trial but rather at the very beginning of a lawsuit. Fed. R. Civ. P. 26(a)(1). That rule is intended to guide the discovery process yet to occur, not to preview what each side will present (or object to) at trial.

84. Fed. R. Civ. P. 26(a)(3).

85. *Id.*; Fed. R. Civ. P. 37.

86. See Fed. R. Civ. P. 26(a)(3)(A)(i)–(iii):

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

87. See *id.*

respectively.⁸⁸) Furthermore, based on the other side's disclosures, each side is then required to preview certain objections it might raise at trial to (what it now knows to be) the evidence the other side expects to present.⁸⁹

Thus the rule requires parties to reveal a kind of higher-order information: not the raw evidence in the case, but rather which pieces of it will likely be used at trial, and how. The value of such revelations comes not from rehashing what discovery has uncovered, but rather from narrowing it down. The parties must identify their potential use of each witness and piece of evidence—whether it is part of their main case, or something they are saving as a possible response to what the other side will do.

What these previews deliver is akin to a storyboard of the narrative each side will be offering at trial: Of the masses of evidence collected and shared, which pieces will be strung together to make the case? To hear litigators explain it, "Seeing the other side's list helps to crystallize what the other side's presentation will focus on."⁹⁰ As the commentary has noticed, requiring disclosures of this sort may seem unusual within the tradition of an adversarial system, as it closely toes (if not oversteps) the familiar bounds of "mental impressions" or litigation tactics that normally would be protected from discovery and permissibly withheld from the other side.⁹¹

2. *Judicial Engagement.* — The audience for these previews includes not only the parties, but also the judge. This increases the previews' impact and sets them apart from discovery and other earlier disclosures. Discovery does not involve the judge unless and until something goes wrong, and as a general matter, other similar disclosures may not be filed

88. See, e.g., 20 Charles Alan Wright & Mary Kay Kane, *Federal Practice and Procedure* § 86 (2d ed. 2011).

89. See Fed R. Civ. P. 26(a)(3)(B):

Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

90. James W. Quinn and David J. Lender, *Countdown to Trial, Litigation*, Spring 2011, at 34, 36.

91. See 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2026 (3d ed. 2010) (noting rule calls "for revelation of material that might be regarded in important senses as based on counsel's opinion work product").

with the court.⁹² By contrast, the eve-of-trial previews under Rule 26(a)(3) are also presented to the court,⁹³ and they may well be a focus of discussion at the final pretrial conference.⁹⁴

Knowing that the disclosures must be filed with the court means less room for inadequate compliance. The parties cannot simply agree among themselves to ignore or downplay this requirement. Conversely, this preview scheme is also not something the parties could easily choose to do voluntarily. The fact that the court will receive and review the filings in the first place adds credibility to both the basic and the higher-order information revealed. “This is our trial strategy” is harder for one side to communicate credibly to the other side in the absence of court involvement. It takes a judge to enforce the later exclusion of withheld evidence or waivers of objections.

Judicial involvement also helps protect against overdisclosure. No doubt some parties would seek to dilute the precision of disclosures by listing every witness imaginable, but in the case of these eve-of-trial previews, there are built-in incentives to provide focus, not fog. The dominant reason is the presence of the judge: Parties know that these disclosures will likely be reviewed by the judge, especially if the other side makes anticipatory objections. Overdisclosing could lead to disfavor from the judge; it will be transparent as a tactic (at least by trial time), and the judge herself may have used the disclosures in scheduling and preparing for the trial.⁹⁵

Most important is what the judges actually do with these previews. The judge will take note of the potential objections that the rule requires parties to announce; the judge may even begin to rule on these objections (if contingently) before trial. The judge may also instruct the parties as to which issues are to be focused on during trial and which other facts should be left uncontested. The judge may further hold a “rehearsal for the trial,” in effect, based on the previews.⁹⁶ As noted in previous sections, these forms of judicial involvement can yield useful

92. See Fed. R. Civ. P. 5(d) (“But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing.”).

93. See Fed. R. Civ. P. 26(a)(3) (“[A] party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment.”).

94. See Civil Litigation Management Manual, *supra* note 32, at 100–06 (advising judges on preparing for and conducting final pretrial conference, including engaging with parties’ proposals of exhibits, witnesses, and objections, and explaining “final pretrial conference presents one last opportunity to discuss settlement with counsel and the parties, who may now realize for the first time the actual burdens going forward”).

95. A further reason not to overdisclose is that what a party lists can constrain what that same party can itself object to; each side may be barred from objecting to witnesses or materials (listed by the other side) which it too has listed.

96. Civil Litigation Management Manual, *supra* note 32, at 100.

clues or even direct answers for the parties about the likely outcome of trial.

3. *Late-Stage Previews.* — The higher-order information that these previews provide tends to be less available at earlier stages. On the eve of trial, what will be contested is well known; issue formation is virtually complete. The raw evidentiary materials have been pored over, and the parties have at least started to craft their trial strategies. Even if earlier exchanges of information might have occurred (for instance, in mediation or through discovery), these previews on the eve of trial are likely to deliver meta-information that would not have been known or revealed before. And then there is a pragmatic boost to the fullness of disclosure: At this late stage, there are fewer excuses for failing to anticipate what one “expects to” use at trial or what one might object to; the parties cannot expect quite as easily to dodge waivers of undisclosed evidence or objections.

4. *Choosing to Opt Out.* — Notably, the option in 1993 for individual districts to customize (or opt out of) the new rules was apparently intended for another rule about another type of disclosure—“initial disclosures” at the start of a lawsuit, meant to guide discovery, not trial.⁹⁷ It is far from clear that the rulemakers meant for customization to be an option for the eve-of-trial preview rule as well. The enabling language, “[e]xcept to the extent otherwise stipulated or directed by order or local rule,” only appeared in Rule 26(a)(1), the initial disclosure provision, and not in Rule 26(a)(3), the preview rule examined here.⁹⁸ Nonetheless, a small number of districts creatively interpreted this option as covering the latter as well.⁹⁹ One might view their choice to opt out of the preview rule as reflecting an objection to the new requirement, rather than simple inertia or a bias in favor of the status quo (indeed, some adopted variations on other disclosure rules, while opting out of this one¹⁰⁰). It also suggests the degree of imposition on these opt-out

97. This is apparent in the way the 1993 rule was written. See Fed. R. Civ. P. 26(a)(1) (1993) (amended 2000) (including opt-out provision in Rule 26(a)(1) on initial disclosures); see also Fed. R. Civ. P. 26 advisory committee’s note to 2000 amendment (describing opt-out provision as directed at “initial disclosures” under Rule 26(a)(1), not pretrial disclosures under Rule 26(a)(3)).

98. Fed. R. Civ. P. 26(a)(1) (1993) (amended 2000). Prior work has addressed the impact of adoption of this other disclosure rule, also making use of variation in the timing of adoption across jurisdictions. See Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 *Pace L. Rev.* 203, 242–64 (2000) (using variation in 26(a)(1) in study concluding “mandatory disclosure neither expedites the litigation process nor promotes the trial rate”); see also Hayashi, *supra* note 44, at 49–50 (also making use of variation in 26(a)(1) initial disclosure rule). These studies do not address the 26(a)(3) previews studied here, which differ in nature, timing, and purpose.

99. See Stienstra, *supra* note 23, at 10–28 (listing districts that opted out of Rule 26(a)(1) and (3)).

100. As noted below, for instance, the Central District of California adopted a modified version of Rule 26(a)(1), while opting out of Rule 26(a)(3). See *id.* at 10.

districts in 2000, when national uniformity was imposed and they were forced to catch up.

B. Detecting the Preview Effect

This study's empirical strategy compares (1) the early adopters, those district courts that adopted the new preview rule during the first phase of reform, against (2) the late adopters, those districts that were forced to adopt the rule in late 2000, after initially opting out. It begins by focusing on one particularly "clean" and well-matched pair of districts in California. Then it expands the analysis to include other regional comparisons.

Civil lawsuits in the broad private law categories of contracts, property, and torts form the sample for this analysis. This sample is well diversified in subject matter and thus should be less vulnerable to shocks in any one area of law.¹⁰¹ The topics range widely, from product liability to copyright to banking and commerce. Cases in which the U.S. government is a party are omitted because governmental litigation is often subject to atypical approaches to settlement.¹⁰² Roughly speaking, the sample used here corresponds to lawsuits typical in the common imagination: an individual suing a hospital for medical malpractice, or insurers suing each other regarding an industrial accident, or a creative artist suing for copyright violations.

1. *Data and Limitations.* — This study uses administrative data from the U.S. federal courts, as collected and publicly distributed by the Administrative Office of the U.S. Courts (AO). The study window is from 1996 to 2005, five years on either side of the policy change in 2000.¹⁰³ These AO data are a standard resource for researchers studying the federal justice system. The problems with these datasets are well documented,¹⁰⁴ and this study takes care to avoid those pitfalls. Some shortcomings are unavoidable, however. Most notably, there is no reliable

101. Categories especially vulnerable to time shocks (asbestos and other class actions, securities litigation, and foreclosures or condemnations) are omitted.

102. The anomalous nature of the federal government as a party in a case (for purposes of studying settlement decisions) is documented and used as part of the empirical strategy in Theodore Eisenberg & Henry Farber, *The Government as Litigant: Further Tests of the Case Selection Model*, 5 *Am. L. & Econ. Rev.* 94 (2003).

103. The early adopters implemented the rule by 1996. The "statistical years" in which these data are organized, and which this study follows, run from October to September (so that "2000" runs from October 1999 to September 2000).

104. See, e.g., Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 *Notre Dame L. Rev.* 1455, 1467–88 (2003) (noting various inaccuracies in AO dataset); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 *J. Empirical Legal Stud.* 705, 706–10 (2004) (noting difficulty of characterizing case dispositions as either settlement or nontrial adjudication, due to inconsistent coding in AO database, among other problems).

measure of settlements in the AO data, as an audit study by Gillian Hadfield has shown.¹⁰⁵

Fortunately, what *is* reliable in the AO data is the set of variables identifying whether a case reached a verdict in a bench or jury trial.¹⁰⁶ This variable, of course, is useful as a measure of the number of cases completing trial without settling. Moreover, it is broken down by bench verdicts versus jury verdicts. And this outcome measure is especially sensible in the present context as a way of capturing changes in parties' choices about whether to settle or go to trial: Given that the rule change in this policy experiment is one that affects the parties very shortly before trial, *after* motion practice is generally finished, there is less of a worry that observed changes in this outcome variable reflect changes in pretrial adjudication being prompted by the previews—and more confidence that it is measuring changes in the parties' choices on the eve of trial.

One difficulty, however, with studying civil cases during this time period is the strong and general declining trend in civil trials across the federal courts—that is, the “vanishing trial” phenomenon.¹⁰⁷ The percentage of filed civil cases that reach a trial of any kind is under five percent throughout the period; these trial rates start off low, and fall even lower.¹⁰⁸ This poses a serious limitation: Due to the infrequent occurrence of trials, the outcome measures in this study are quite noisy. This noise in turn makes the underlying parameters harder to estimate with precision. This problem is compounded by the small number of districts suitable for use in the analysis.

In short, there are not many districts to work with, and the data are noisy within each district. To an extent, the design of the analysis can help to improve precision, given these external limitations. For instance, the use of fixed effects can control for time-specific factors, such as shared trends or the impact of uniform policy changes.¹⁰⁹ Other background factors can be implicitly accounted for by running separate analyses for the different regional groupings of districts, by forming the

105. Hadfield, *supra* note 104, at 716–17.

106. Hadfield explains:

Counting trials as those in which a judgment was reached during or after a bench or jury trial ostensibly corresponds with the disposition coding ‘jury verdict,’ ‘court trial,’ or ‘directed verdict,’ and would appear to avoid the problem of counting as a ‘trial’ any contested evidentiary hearing. This will be of interest if we want to assess the rate at which cases are finally adjudicated by a trial.

Id. at 712.

107. See generally Galanter, *Vanishing Trial*, *supra* note 14 (coining term “vanishing trial”); see also *infra* note 135 and accompanying text (describing phenomenon).

108. See Galanter, *Vanishing Trial*, *supra* note 14, at 461 (noting from 1985 to 2004 cases “disposed of by trial” had fallen from 4.7% to 1.8%).

109. “Fixed effects” here refers to the inclusion of dummy variables for the year of the data point.

comparison groupings with care, by focusing only on a well-chosen set of case categories, and by focusing on a time period closely surrounding the policy discontinuity. Nonetheless, this study is limited to reporting essentially comparisons of means.

Finally, a point that may be self-evident but bears emphasis: These data are used to assess average effects of adopting the preview rule, and not the effect of the use of previews in any individual case. It is not assumed, of course, that such previews are influential in every case,¹¹⁰ nor that every case reaching the eve of trial in any given district involved the use of evidentiary previews after the policy change.¹¹¹ Cases vary, and if previews were unrevealing in some cases in the sample, or if some cases did not adhere to the rule, then the data presented here would be in a sense diluted—that is, these measures would understate the “true” impact of previews in those cases where they *are* used and *do* reveal new information.¹¹²

2. *Observing the Asymmetry.* — An intuitive and straightforward measure is used to capture differential changes (if any) between bench cases and jury cases: the ratio of bench verdicts to jury verdicts. This outcome is measured in a given district in a given year. Table 1 in the Appendix presents, in the right column, the summary statistics for this basic measure.¹¹³

One main advantage of using this relative measure is worth emphasizing. Because the standard and behavioral stories predict opposite effects on the choice to go through with trial, simple measures of trial rates may mask the policy’s impact: The net of strong competing effects of similar sizes may be observationally indistinguishable from weak effects.¹¹⁴ (Note that the simple trial rates are also presented below,

110. Among other reasons, as previously noted, similar previewing may already have occurred at earlier “checkpoints” in litigation. And quite obviously, cases also vary in how much they turn on legal, as opposed to factual, questions; in the nature and extent of the previewed materials; in the degree of judicial engagement with those materials; in the costs of going to trial; and in numerous other ways related to the potential influence of the preview rule.

111. To be clear, there is no implicit assumption that the comparison districts were using previews in every case; in this difference-in-differences framework, the assumption is instead that the comparison districts did not change their use of previews at the time of the mandatory catching-up by the policy-treated districts. The parallel assumption as to the policy-treated districts is that they increased their use of evidentiary previews as a result of the mandatory rule, and not that they had never used any form of previewing before the policy change or that they began using previews in every case after the policy change.

112. Alternatively, one might see these factors as making it less plausible that the presented data *overstate* the impact in such cases. The same goes for the possibility that the treated districts were already using some forms of previewing before the policy change.

113. See *infra* Table 1. All numbered tables and charts are contained in the Appendix.

114. That is, measuring changes in trial rates due to the policy change will show only the net effect of the competing forces. The policy may have a large effect through both

nonetheless.) By contrast, as Part I explains, the two effects contribute to the bench-jury *asymmetry* in the same direction, rather than tending to cancel out.¹¹⁵ The relative measure can thus serve as a diagnostic for whether the preview rule is affecting settlement behavior, even if both of the opposing theories carry some truth and are thus exerting competing effects. (In addition, this relative measure also offers a more technical advantage: Even though the numbers of both bench trials and jury trials are falling over time, their ratio is in a sense a “normalized” measure, roughly invariant to the overall decline.¹¹⁶)

Yet some limitations of the sample cannot be avoided. Trials have become somewhat rare events in the federal courts, and their number even in the larger districts is very small (as seen in the summary statistics in Table 1). The outcome measures are noisy, whether in the form of simple trial rates or a relative measure. Aggregating larger groups of districts is one workaround, though it sacrifices the attractiveness of certain natural comparisons (such as districts within a circuit). Detailed below are comparisons representing a range of options along this matching-versus-size tradeoff.

3. *The Cleanest Comparison.* — Amid the messy variety of the customizations among the districts after the 1993 reforms, one well-matched pair of districts is available for study that offers an especially “clean” test. The judicial district encompassing Los Angeles, the Central District of California (CDCA), opted out of the preview rule.¹¹⁷ Its adjacent neighbor, the Northern District of California (NDCA), encompassing San Francisco, was an early adopter of the rule.¹¹⁸ They are both urban districts; they are of course in the same state as well as the same regional circuit (the Ninth Circuit); and they had similar caseloads per judge at the time of the study.¹¹⁹

A further feature makes them a uniquely useful pairing to study. Focusing on them minimizes a possible complication. Recall that the new regime introduced in 1993 also included the “initial disclosure” rule. The content of this rule changed between the 1993 and the 2000 phases of reforms, but as it happens, the customized variant that both CDCA and NDCA chose for themselves (after opting out of the 1993 version) was a close approximation of the national version that came to be uniformly

the standard and the behavioral stories, but if these competing effects are roughly equal, the empirically observed effect may appear to be zero.

115. See *supra* Part I.D (summarizing asymmetry).

116. As a within-district ratio, the measure is also scale-invariant (as are trial rates) to the size of the districts being considered.

117. Stienstra, *supra* note 23, at 10.

118. *Id.* at 11.

119. See Ninth Circuit United States Courts 2002 Annual Report 71–72 (2002), available at <http://www.ce9.uscourts.gov/publications/AnnualReport2002.pdf> (on file with the *Columbia Law Review*) (reporting caseload measure of 534 per judgeship for CDCA and of 504 for NDCA).

required in 2000.¹²⁰ As a result, in 2000, when nearly all other districts faced a significant change of some kind in their “initial disclosure” policies (whether they had opted in or out in 1993),¹²¹ both CDCA and NDCA largely escaped this extra policy shock.

4. *Further Comparisons.* — Broadening the study sample to include other districts is useful as a check on this central comparison. Several geographic groupings of other late-adopting and early-adopting districts are described below; they aim to balance the need for greater sample size with the need for comparability. Chart 1, in the Appendix, lists the districts that form each of the selected groupings. (The tables are also organized to correspond to this chart.) There are two sets of natural groupings: The first extends the comparison between CDCA and NDCA to include other neighboring districts. A second natural grouping is found in the New England area, where three districts (Maine, Rhode Island, and the Northern District of New York) were late adopters affected by the “catch-up” mandate in 2000.

a. *California.* — Aside from CDCA, there is another late-adopter district in California: the Eastern District (EDCA), which contains Sacramento.¹²² Adding EDCA to the “treated” group increases the sample size. But doing so also entails some drawbacks: EDCA does not have the advantage that CDCA and NDCA have of having anticipated the 2000 version of the “initial disclosure” rule. It also had a somewhat higher per-judge caseload than the other two. Moreover, as it is a small district, its statistics on outcomes are noisier.¹²³ (Such are the tradeoffs of expanding the sample.)

Taking the “treated” group to be CDCA and EDCA combined, a very natural comparison group would be the two remaining California districts, the NDCA and the Southern District (SDCA), which encompasses San Diego. Although this California-only comparison is intuitive, it too has a potential difficulty: SDCA was a pilot district for a number of related experimental reforms during the 1990s.¹²⁴ For this reason, it may not be an ideal comparator. A useful substitute is the District of Oregon

120. In particular, after 1993 they each chose to use a modification of the Rule 26(a)(1) mandatory initial disclosures requirement, limiting its application so that parties would not be required to disclose adverse information. See Stienstra, *supra* note 23, at 10–11. This limitation became the national rule through the 2000 amendments to Rule 26. Fed. R. Civ. P. 26(a)(1)(B).

121. That is to say, most districts that implemented Rule 26(a)(1) mandatory initial disclosures after 1993 had to scale back when the 2000 amendments came into effect. Not so for CDCA and NDCA, however, as they had already modified the rule in a similarly scaled-back way.

122. See Stienstra, *supra* note 23, at 10.

123. This is not a problem for including it along with CDCA to form a larger “treated” group, but it is not useful as a stand-alone “treated” district.

124. Plan of the Judges of the Federal District Court for the Southern District of California, 1991 WL 525124 (Oct. 7, 1991) (implementing requirements of Civil Justice Reform Act of 1990).

(OR), which is an adjacent neighbor of both the treated districts.¹²⁵ Including OR eliminates the advantage of being a California-only comparison, but at least the comparison remains within the Ninth Circuit. This cluster of four districts, comparing CDCA and EDCA against NDCA and OR, also happens to be an appealing match in that OR mirrors EDCA the same way NDCA mirrors CDCA: Like EDCA, OR opted out of the “initial disclosure” rule after 1993.¹²⁶ If adding EDCA introduces the worry of complications from this other rule change, then in a crude sense this worry is counterbalanced by including OR on the other side.

b. *New England.* — Maine (ME) and Rhode Island (RI) are two other late-adopting districts that have a natural comparison group: the other New England-area districts.¹²⁷ Also in the region is the Northern District of New York (NDNY), which is adjacent to Massachusetts and Vermont; it too is a late-adopting district. These districts are all much smaller than those in the primary California comparison; they have far fewer trials and therefore much noisier outcome measures. Though their sample sizes (even when combined) are small, one might see them as supplying a double check of sorts—that is, as evidence that the California comparisons are not an isolated anomaly.

The more limited version of the New England comparison considers only the other states that are also in the First Circuit: Massachusetts (MA) and New Hampshire (NH). This has the disadvantage of being smaller, but also the advantage of being in the same circuit and thus arguably better matched. A larger grouping considers all the area states taken together, adding three from the Second Circuit: NDNY, a late adopter, along with Connecticut (CT) and Vermont (VT), early adopters.

C. *Basic Findings*

The changes in the asymmetry between bench and jury cases, as captured by the ratio of bench verdicts to jury verdicts, can be seen in Figures 1 through 4.¹²⁸ Each point in the figures represents the ratio of bench verdicts to jury verdicts in civil private lawsuits, in either the treatment or comparison group. In all figures, the vertical line represents a break between 2000 and 2001. The “catch-up” occurred in December 2000 (which is just after the end of “statistical year 2000” in the data). Because the new rule applies to cases filed on or after its effective date, cases are counted based on their year of filing. Note, however, that at the judge’s discretion the rule could be applied to cases that were underway

125. See Stienstra, *supra* note 23, at 23.

126. See *id.*

127. See *id.* at 17, 24.

128. These figures are found at the end of this Part.

on the effective date but had been filed earlier.¹²⁹ For this reason, there may be some cases filed before the “line” that were also made subject to the rule. It is also plausible that some judges dragged in implementing a rule they had initially rejected. Thus one might expect the policy break to be somewhat blurred.

1. *The Asymmetric Impact.* — The change in the frequency of bench trials relative to jury trials, after the policy change, is evident in these graphs. Figures 1 and 2 show the comparison between the treatment and control groups in the narrow California pairing (larger groupings show similar patterns). Figures 3 and 4 show the same for the limited New England grouping (larger groupings show similar patterns). A drop in the outcome measure after 2000 is apparent in the treated groups, both in absolute terms and relative to the comparison groups. By contrast, the same measure in the comparison groups seems either flat or slightly rising. A basic quantification of these visual comparisons is offered in Table 2.¹³⁰

How do these observations relate to the theoretical stories explained in Part I? Recall the standard story’s prediction that previews should cause more of a fall in bench trials than in jury trials.¹³¹ In the behavioral story, previews should cause less of a rise in bench trials than in jury trials. The prediction they share is a relative fall in bench trials as compared to jury trials.¹³² This is also the pattern seen in the data for both regional groups. The observed relative change in bench trials versus jury trials is consistent with the asymmetry prediction emerging from both theories of settlement as refined in Part I. In other words, the data suggest that the adoption of the preview rule by a district court can affect litigants’ choices about whether to settle or to go to trial.

2. *Bench or Jury?* — It remains to be seen whether this relative change is driven by a fall in bench trial numbers or a rise in jury trial numbers (or both). The answer may be taken as an indicator of whether—on net—the standard or behavioral effects appear to have greater force in each set of cases. Notably, however, because opposing effects are hypothesized to be in play, signs of a net rise or net fall should not be taken to mean that only one competing theory is “right.” With this in mind, the estimates in Table 3 indicate that adoption of the preview rule corresponded to a net fall in bench trials. The estimates also hint at a net rise in jury trials, but these jury trial measures are too imprecise to be taken as informative on their own. Altogether, these estimates support the convergence effect in the standard account, while saying little about the divergence effect in the behavioral account.

129. See Stienstra, *supra* note 23, at 26 (noting local rules or orders “may specify whether the federal rules apply only to newly filed cases or also to pending cases”).

130. Table 2 is presented and the quantification explained in the Appendix, *infra*.

131. See *supra* Part I.B.

132. See *supra* Part I.B.

3. *Motivating Further Inquiry.* — This appears to be the first study to examine the impact of imposing eve-of-trial previews under Federal Rule of Civil Procedure 26(a)(3). A causal interpretation of the impact of adopting the preview rule can be supported by this study's natural experiment design. It is worth repeating, however, that this study's design does *not* aim to identify the effect of switching between bench and jury trials or of assigning a given case to one or the other.¹³³ Yet the observed asymmetry may motivate complementary future research focusing on causal interpretation of the jury-versus-bench difference. This is sure to be difficult using observational data, because parties are usually given the choice of a bench or jury trial. Moreover, as noted above, there are many obvious reasons why bench cases and jury cases might generally differ. But the use of controlled experiments, similar to those which undergird the behavioral economists' countertheory described in Part I,¹³⁴ may be an alternative approach. Reaching beyond the bench-versus-jury dichotomy, future experiments or study designs should also aim to test the effect of varying *forms* and *degrees* of previewing the audience. Notably, the "accidental" policies described in the following Part might offer sources of policy variation that can be useful for further empirical study.

133. As Part I notes, the parties in each case choose whether it will go to a jury, by making a jury demand at the start of litigation. In 2000, parties had only 10 days to demand a jury trial. Fed. R. Civ. P. 38(b) (amended 2009). One advantage of this study's focus on Rule 26(a)(3) previews is that, by the eve of trial, the status of a case as a bench case or jury case has long been decided. It is difficult to switch between bench and jury late in litigation. See Fed. R. Civ. P. 38(d) ("The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury."); 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2334 (3d ed. 2008) (noting judicial resistance in federal courts to late-in-litigation switching from bench to jury trial). This fact reduces the possible endogeneity concern that the observed changes are due to parties switching between bench and jury status on the eve of trial. There does remain the theoretical possibility that some parties, at the pleadings stage, may make a jury demand decision based on whether Rule 26(a)(3) previews might someday occur on the eve of trial. Such behavior should be quite rare, given how distant (and statistically improbable) the prospect of trial is likely to seem to parties at the very start of litigation, and also given the more salient reasons for choosing a judge or a jury as the factfinder. See *supra* Part I.B.2.

134. See *supra* notes 63–66 and accompanying text.

FIGURE 1. — CALIFORNIA “TREATED” DISTRICT (CLEANEST MATCH)

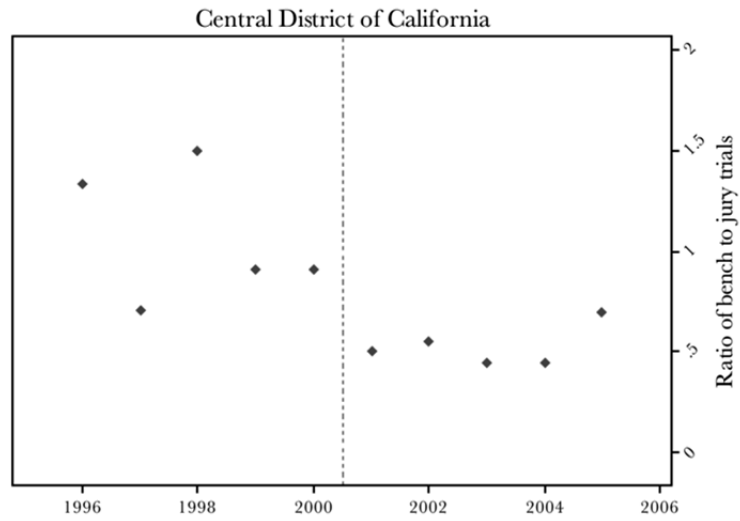


FIGURE 2. — CALIFORNIA “COMPARISON” DISTRICT (CLEANEST MATCH)

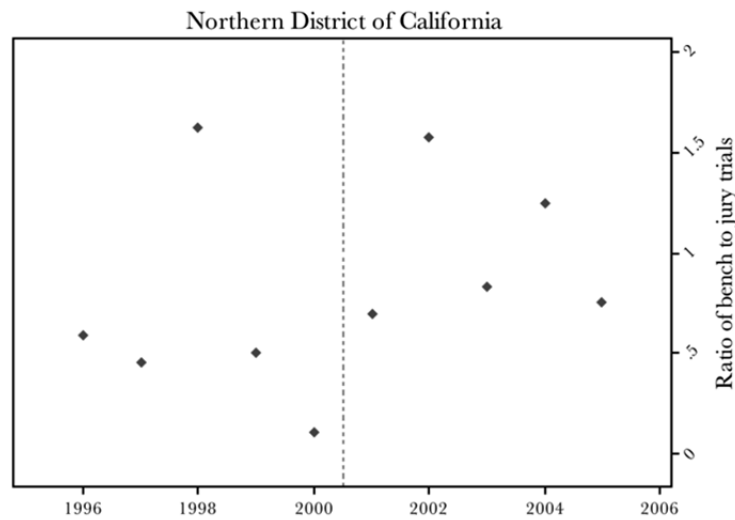


FIGURE 3. — NEW ENGLAND “TREATED” DISTRICTS (FIRST CIRCUIT)

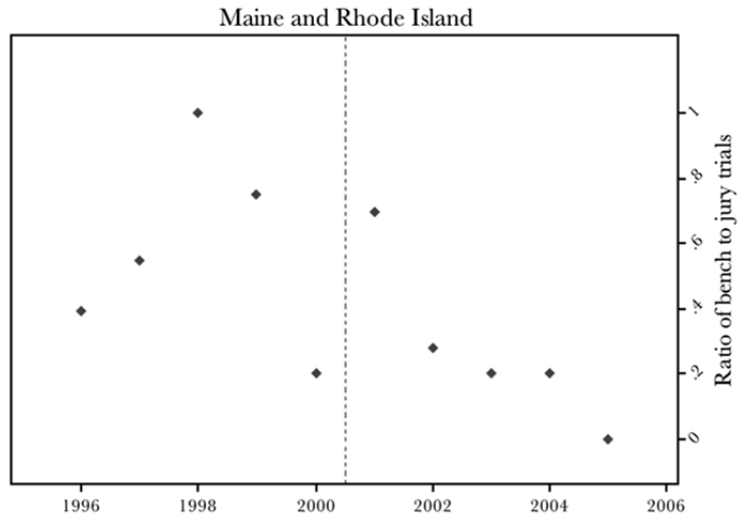
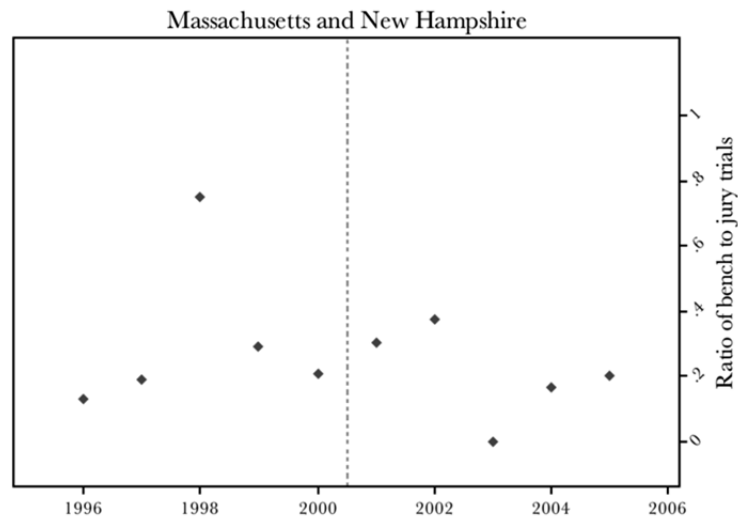


FIGURE 4. — NEW ENGLAND “COMPARISON” DISTRICTS (FIRST CIRCUIT)



III. POLICY CONCERNS: OPENING THOUGHTS

This Essay's core idea—that previewing evidence before trial may have more informational impact when the factfinder is already present in the case—engages a range of current policy concerns, including the continuing alarm about “vanishing trials”;¹³⁵ the desire to guide settlement choices through civil procedure;¹³⁶ and persistent worries about judicial idiosyncrasy, bias, and discretion. These are familiar and enduring issues. While surveying the extensive arguments made about any of these concerns is beyond the scope of this Essay, it is worth a few words here to explore how an appreciation of preview effects might influence our thinking in these areas in subtle and not always intuitive ways.

This Part begins by addressing some of the normative values in play, introducing two tensions amplified by preview policies: first, a tradeoff between seeking “accuracy” and avoiding “idiosyncrasy” in settlement

135. Marc Galanter first examined the “vanishing trial” phenomenon in his seminal article, *The Vanishing Trial*. Galanter, *Vanishing Trial*, supra note 14, at 460 (presenting empirical evidence indicating absolute number of trials has declined sharply). For a sampling of further work by leading scholars, see Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Legal Stud. 591, 592 (2004) (presenting evidence providing “reasonable basis to conclude that the rate of case termination by summary judgment in federal civil cases nationwide increased substantially in the period between 1960 and 2000”); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119, 120 (2002) (summarizing empirical findings for six phases of trial); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years of War*, 57 Stan. L. Rev. 1255, 1256 (2005) (noting “long-term decline in the portion of cases that terminate in trial” and “a steep drop in the absolute number of trials during the past twenty years”); Hadfield, supra note 104 (performing audit study of AO dataset to correct misperceptions of vanishing trial phenomenon); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. Empirical Legal Stud. 783, 785 (2004) (comparing competing explanations); Kent Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935, 1936–37 (1997) (presenting data suggesting “number of civil jury trials is . . . becoming insignificant”). The issue has also reached the broader media and the trade press. See, e.g., Am. Coll. of Trial Lawyers, *The “Vanishing Trial”: The College, the Profession, the Civil Justice System 1* (2004) (examining implications for trial lawyers); Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, *Litigation*, Winter 2004, at 2, 2 (describing Marc Galanter’s work and mentioning “blizzard” of publicity covering vanishing trial phenomenon); Nathan Koppel, *Trial-less Lawyers: As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates’ Courtroom Skills*, *Wall St. J.* (Dec. 1, 2005), <http://online.wsj.com/article/SB113340490977810989.html> (on file with the *Columbia Law Review*) (describing large firms’ attempts to provide courtroom experience for associates in wake of declining numbers of trials).

136. See, e.g., J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 1713, 1717 (2012) (examining “maladaptiveness” of Federal Rules of Civil Procedure to increased incidence of settlement outcomes); Miller, *Preliminary Judgments*, supra note 7, at 167 (proposing “preliminary judgment” as mechanism for settlement reform); Nagareda, supra note 7, at 650 (examining “distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial”).

outcomes; and second, a dilemma of sorts facing policymakers who seek to level the litigating field between more and less sophisticated parties. These tensions arise from the audience-driven nature of the preview effects articulated in Part I. The analysis then turns to the practical realities of the accelerated—and asymmetric—“vanishing” of trials, as documented in Part II. It imagines how rulemakers of different persuasions might respond to the wedge that previews may drive between bench cases and jury cases.

Finally, this Part concludes with an exploratory survey of how civil procedure might manage the degree of “previewing the judge” and “previewing the jury”: How can the judge or even the jury be made more (or less) of a known quantity before trial? Existing procedural devices already serve these functions, in fact—if in an accidental, unintentional way. A sensitivity to audience-driven preview effects and their potential asymmetry can motivate and inform the more conscious use of such policies.

A. *Procedural Values*

It occurred to us that this false assumption [that knowing an appellate panel’s composition can help predict the outcome] might lead some parties to settle their claims to avoid certain panels. We were happy to accommodate those who might thus settle their cases and thereby reduce our caseload.¹³⁷

—Judge Harry Edwards

By revealing information *both* about the evidence *and* about a specific factfinder’s inclinations, could preview policies be inducing settlements at the expense of more neutral outcomes? Moreover, could previews worsen imbalances among parties—sophisticated versus naïve, repeat players versus one-timers, richer versus poorer? These questions of procedural values are taken in turn.

1. *The Shadow of Idiosyncrasy.* — At first blush, it may seem that previews should improve the accuracy of the civil justice system, for the simple reason that previews make more information available by the time the parties settle. (Here, the term “accuracy” refers to the conventional meaning that the settlement outcome reflects the true merits of the case.) And this accuracy gain would seem to apply both when settlement is prompted by the previews and when the parties would have settled anyway but are doing so in a more informed way.

137. Letter from Harry T. Edwards, Chief Judge, U.S. Court of Appeals for the D.C. Circuit, to J. Robert Brown, Jr., Professor, Univ. of Denver Sturm Coll. of Law (Sept. 24, 1998), quoted in J. Robert Brown, Jr. & Allison Herren Lee, Neutral Assignment of Judges at the Court of Appeals, 78 *Tex. L. Rev.* 1037, 1109 n.421 (2000). Judge Edwards is explaining one advantage of the D.C. Circuit’s practice of early panel announcement. See Jordan, *supra* note 13, at 60 (discussing effects of early panel announcements on settlement).

In fact, one might speculate that allowing the use of previews should tend to improve public perceptions of a civil justice system—increasing its legitimacy—precisely because settlement outcomes would be seen as being better informed and thus more accurate. Settlement terms would turn less on the external bargaining asymmetries, for instance, and more on the merits. Such accuracy gains could even be seen as a counterweight to the legitimacy losses that some observers would perceive in a decline in trial-going rates.

But that may be too simplistic. There is a tradeoff, one that should trouble even those who generally favor settlement. Consider why previewing the case materials and previewing the factfinder are complements in the first place: Different judges may vary in how they assess the same body of evidence or how they decide the same case. This is why it is valuable to the parties, in bench cases, to have a “judicial preview” (a signal of what the previewed evidence means to *this* factfinder). But there is also a downside: The use of preview policies can amplify the influence of such individual variation among judges—call it “idiosyncrasy”—on settlement outcomes.¹³⁸

Parties settle not in the shadow of the “true facts” about the case, after all, but in the shadow of the expected verdict.¹³⁹ And they know that this verdict will depend both on the factual materials and on how this specific factfinder will interpret them. When judicial previews are possible, the enhanced learning that results may induce settling—but partly because the parties are gaining insight into how *this* judge thinks. And as Judge Edwards’s ambivalence in the epigraph above suggests,¹⁴⁰ a policy of pushing settlement by exploiting perceptions about judicial idiosyncrasy may not be a widely palatable approach.

To put the question bluntly: Should the parties have more information or should they have “purer” (but less) information? Using previews allows parties to make their settlement decisions based on a sharper sense of how the case will come out at trial, but this sharper sense might be taking into account the idiosyncratic views of the judge (or jury). The alternative is for them to settle (or not) based on a fuzzier sense of the outcome, but at least this fuzzier sense will be less influenced by idiosyncrasy.

A closer analysis begins by distinguishing among three groups of

138. I should emphasize that by “idiosyncrasy” I mean individual variation, and not outlier status or unusual views.

139. “True facts” is a memorable phrase borrowed from *Hickman v. Taylor*, 329 U.S. 495, 506 (1947) (“[T]he Federal Rules of Civil Procedure are designed to enable the parties to discover the true facts and to compel their disclosure whenever they may be found.”).

140. See *supra* note 137 and accompanying text. The ambivalence is evident in Judge Edwards’s need to sidestep the troubling aspect of such a settlement promotion strategy by making clear he thinks it is a “false assumption” that judicial identity partially determines (and thus is useful for predicting) case outcomes.

cases affected by previews: First, previews may cause some cases to settle that otherwise would have gone through trial; second, previews may cause other cases to settle earlier than they otherwise would; third, there are cases that will settle at the same stage of litigation as they would have done in the absence of previews.

It is easy to be overly complacent about the first group of cases. The potential for judicial idiosyncrasy to influence settlement might not seem terribly troubling for cases that would otherwise have completed trial. In these cases, the choice is between verdicts influenced by idiosyncrasy versus settlements influenced by idiosyncrasy; what is really lost in shifting the distortion forward in time? Yet accuracy may still suffer in these cases, in the obvious way—if trial serves enough of a truth-seeking function to draw out further merits-related facts or interpretation (including impeachment of bad information) that would not have been apparent from previews alone.

The risk of information loss is not limited, however, to cases otherwise headed to trial. Consider the second group of cases: those that would have settled anyway, but instead settle earlier thanks to previews. Acceleration of settlement can thwart accuracy by cutting off further learning about the “true facts” of the case. As with the first group of cases, previews may *supplant* facts with idiosyncrasy, if parties settle sooner because they already have enough of a guess of what *this* particular judge will find (even though there is more factual information left to be uncovered).

Next consider the third group of cases: those that settle, but no earlier than they otherwise would. Even for these cases, distortion is still possible—not in settlement timing, but in settlement terms. In the absence of previews, some of these cases might otherwise have settled on terms based on a more “neutral” guess of the outcome. But once they gain some insight about their specific factfinder’s reactions to the trial materials (thanks to the previews), the parties can incorporate this factfinder specific information in setting settlement terms. It is possible that these idiosyncrasy-influenced terms might not reflect the merits of the case as closely as would a less informed, more neutral guess. If so, even though there is no information loss due to accelerated settlement for this third group of cases, an accuracy-idiosyncrasy tradeoff still exists.

In sum, the prospect of *more* settlements is not the only relevant effect. Previews can also magnify idiosyncrasy’s influence even in a case bound to settle anyway. Previews pierce the veil of neutrality for these cases, too. They can thus alter the terms of settlements, even if the aggregate number of settlements is unchanged. The fact that “most cases already settle” does not mean there is less cause for concern—but possibly more.

What might moderate the tradeoff are two conditions. First, of course, the tradeoff depends on how much room there is for judicial

idiosyncrasy to matter in a given case. For the sort of case in which all judges likely judge alike, there should be little worry.¹⁴¹ But many kinds of cases are not like that. Parties do care which forum is chosen and which jurors are seated; society frets over which judges are appointed. Not every decision will be identical to the average decision. There may be an objective core in a given case, but also a component subject to judicial idiosyncrasy. The possibility remains in many cases that previews might project these idiosyncrasies onto settlements.

Second, if the actual factfinder is not yet known at the time of settlement (think jury cases), then there should be less worry about idiosyncrasy affecting a settlement's likelihood or its terms via preview effects. This may seem obvious in the case of jury cases, but it is also relevant to bench cases. In particular, it should be a key consideration in the design and use of potential procedural tools for regulating how much the parties can "preview the judge" before a bench trial; a number of these devices will be explored in Part III.C.

One more word about the tradeoff is in order: Society's interests and private interests might not align when it comes to the choice between accuracy and idiosyncrasy. One reason is that society might benefit from accuracy in ways that are not internalized by the parties, who may understandably seek a quicker resolution rather than a more accurate one. Consider, for instance, that some parties may be able to insure or otherwise hedge against accuracy distortions; if so, their main concern in any given case would be to minimize litigation costs, including by settling in the shadow of judicial idiosyncrasy. Society has interests in accuracy—including the potential "shadow" cast by settlement outcomes on future cases¹⁴² as well as more general concerns about publicity or legitimacy¹⁴³—that may not be assumed to be protected by the choices of private parties.

2. *Imbalances Between Parties.* — What if one party in a case is less capable of making sense of judicial clues? The sophisticated, well-resourced, or repeat player—that is, the "insider"—may be expected to have an advantage when it comes to anticipating what it means to have a certain judge in the case. Consider this further implication: If the impact of previewing trial materials depends in part on knowing the audience for them, could such previews also magnify the effects of variations among parties knowing how specific judges think?

141. For instance: cases that are utterly routine, bound by inflexible rules, or simply impossible for one side to win.

142. See Glover, *supra* note 136, at 1745–50 (describing "shadow of settlement" enabled by modern databases of settlement outcomes).

143. As to publicity, think of cases concerning health or safety in which early settlements (or settlements instead of trial) may prevent useful information from coming to public light. As to legitimacy, one might expect it to be promoted by perceptions of accuracy—that is, by a belief that settlements tend to reflect true merits.

The complementarity between knowing the evidence and knowing the audience, as articulated in Part I, also links the effects of *not* knowing one or the other. The irony is that, while evidentiary previews might help “level the field” as to informational asymmetries about the facts of a case, they might also implicitly amplify any inequality in parties’ knowledge about the judge.

A further dimension of choice concerning “judicial previews” comes to the fore in this analysis: how explicitly the judge articulates signals about her views of the case as previewed. Thus far, in theorizing about the effects of previews in bench cases, we have not relied on any sharp distinction between the parties’ guessing what this judge will think of the disclosed materials (based on her past rulings or her known inclinations) and the parties’ hearing it directly from the judge. Yet the distinction matters if some parties are better at such guesswork than others are.

To level the field along this axis, then, it may be necessary to direct policymaking and judicial attention to the question of how expressly judges signal their views. Many considerations attend this choice,¹⁴⁴ but the possibility of audience-driven preview effects adds one more to the mix. At least, the potential to worsen inequalities should be kept in mind in assessing those procedural tools (raised later in this Essay) that regulate how much the parties can “preview the judge.”¹⁴⁵

B. *The Asymmetric Vanishing of Trials*

Not all trials “vanish” alike—even in response to the same policy shock. An asymmetry is evident in the policy experiment studied in Part II: Imposing the preview rule may have accelerated a decline in bench trials relative to jury trials. Such an asymmetry suggests the potential for “decoupling”—making use of policies that can affect one set of cases but not another. How a policymaker may want to design or apply such policies depends of course on her views about the desirability of settlements generally and of the observed asymmetric vanishing of trials in particular, including whether she is more concerned about jury trials or bench trials. But whatever her views may be, she should consider how, in light of the dual theories articulated in Part I, preview policies for bench and jury cases might be decoupled.

The most vocal laments about the decline of civil trials seem to be focused on the vanishing *jury* trial (with little concern about bench trials, vanishing or not).¹⁴⁶ These judges and scholars favor the robust use of

144. See, for instance, the debates over the judicial role in settlements, as considered later in this Essay, *infra* Part III.C.1.

145. See *infra* Part III.C.

146. See, e.g., Mark W. Bennett, Margaret H. Downie & Larry C. Zervos, Judges’ Views on Vanishing Civil Trials, 88 *Judicature* 306, 308 (2005) (describing “decline of civil trial by jury in federal court [as] tragic” and “loss of this stunning experiment in direct popular rule . . . [as] catastrophic for the nation” (internal quotation marks omitted));

the civil jury, perhaps seeing the jury trial as a source of legitimacy or resilience for the justice system. These observers might view the findings in Part II as somewhat reassuring: The newly mandated previews, while diverting bench cases away from trial, did not seem to cause much if any decline in jury trials. This naturally decoupling policy appears to be shielding the cases of greater concern. But here is an instance in which theory matters, and more research into the strength of the competing mechanisms may be critical to normative assessment: If the asymmetry is being driven in part by an enhanced self-serving bias due to previews, then one must ask whether the seeming preservation of jury trials should be celebrated, given the distortionary mechanism that may be its cause.¹⁴⁷

In contrast to those policymakers who are partial to jury trials, others might see the need for an *artificial* decoupling policy. Consider a policymaker who is worried by vanishing trials both in bench cases and in jury cases. Or imagine one who is actually more concerned about vanishing *bench* trials—perhaps seeing them as a better form of adjudication, or as supplying raw material for the creation of case law,¹⁴⁸ or as a source of publicity for socially useful information.¹⁴⁹ These observers, whose main worry might then be the amplified impact of previews in bench cases, might seek to design or adjust preview policies to compensate *against* the naturally occurring asymmetry between jury cases and bench cases. Such measures might take the form of more tightly limiting what is previewed in bench cases than in jury cases (at least as a default, subject to case-by-case adjustments). The preview rules could be altered, for instance, to require less pretrial disclosure, to limit the types of materials that need to be disclosed, or to limit the judge's exposure to the disclosed materials—similar to exchanges of materials during discovery, which generally are not filed with the court.¹⁵⁰ Radical though this sort of discriminatory rule might seem, it is analogous to those current rules of evidence that have a greater impact in jury cases (and purposefully so), such as those meant to

Miller, Pretrial Rush, *supra* note 6, at 1134 (arguing judicial efficiency should not justify limiting access to trial and jury adjudication); William G. Young, A Lament for What Was Once and Yet Can Be, 32 B.C. Int'l & Comp. L. Rev. 305, 309 (2009) (expressing concern over decline of jury trial); William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 92 (2006) (arguing juries are "purest form of democracy known to humankind").

147. Whether the premise is true, however, is not answered by the results in Part II; the data neither rule out divergence effects predicted by the behavioral story, nor provide solid evidence of them. One might speculate, but only speculate, that such divergence effects are occurring in some cases but are on average neutralized by convergence effects.

148. Such an observer might think that bench trials, resulting in judicial opinions with a fuller statement of facts and reasoning than jury trials, might both be more appeal-friendly and also lend themselves to use by an appeals court in setting precedent.

149. Think of cases involving safety or health risks, for instance.

150. See Fed. R. Civ. P. 5(d) (requiring certain papers be filed after service but listing disclosure and discovery requests and responses that "must not be filed until they are used in the proceeding or the court orders filing").

shield juries from inflammatory evidence.¹⁵¹

Finally, what about those policymakers who *favor* settlement—those who approve of the vanishing of trials? The analysis for them would be in a sense a straightforward reversal of the positions above. But one point is especially notable. If the effects proposed by the behavioralists' divergence story are shown to exist, then from this policy perspective it may be seen as doubly advantageous to limit previews in *jury* cases: first, because doing so would avoid fueling self-serving biases among litigants; and second, because the result would be more settlement. This possibility raises, again, the need for further evaluation of the strengths of the competing theorized effects.

From any of these policymaking perspectives, the basic lesson is the same: The choice of whether to permit previews, and of what kind and degree, can be made to depend on whether the case is heading to a judge or a jury as the finder of fact.¹⁵² Beyond the design of evidentiary preview policies, however, a broader set of tools may also have some use. After all, the informational complementarities at stake depend both on previewing the evidence and on previewing the audience. The following sections describe procedural devices that might be used directly to influence the latter—to dial up or down the parties' exposure to the fact-finder in their case, whether judge or jury.

C. *Previewing the Judge*

How can procedure or practice affect what the parties know about their judge—or even about their future jury—before trial? How can the complementary effects of judicial previews be managed through procedural tools? Are analogous “jury preview” tools possible? Of course, what can be known about the future finder of fact does not break cleanly along the bench versus jury divide. Yet the dichotomy matters in the context of policymaking because the tools for making the future audience more (or less) well known before trial do tend to differ between bench cases and jury cases.

Such policy levers already exist, in fact. They are not imaginary devices but procedures that have long been in use. Wittingly or not, then, we have already been making implicit policy choices about the infor-

151. See, e.g., Fed. R. Evid. 403; Fed. R. Evid. 404(b). In fact, some courts have ruled that Rule 403 applies only to jury cases, and not to bench cases. See *United States v. Preston*, 706 F.3d 1106, 1117–18 (9th Cir. 2013) (“Rule 403 is inapplicable to bench trials.” (citing *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994); *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994))). More generally, of course, such evidentiary rules require a judge to confront the very evidence that she may then decide should be kept away from the jury.

152. More generally, perhaps such policy choices could be made with an eye to how much the parties are likely to know about their trial audience, whether judge or jury.

mational value of previews. Let us start with those existing devices that determine how much the parties can “preview the judge.”

1. *Judge Rotation.* — First, jurisdictions vary widely in whether or not a single judge will see the case through. Some use a master calendar system, with “motion judges” handling cases throughout litigation until they are scheduled for trial; only then is the trial judge assigned.¹⁵³ Motion judges may even be rotated within a given case.¹⁵⁴ This scheme makes it difficult to get to know (or even to know the identity of) the judge who will eventually preside at trial. Parties cannot rely on motion judges’ pretrial decisions as indicative of their prospects at trial, because there is no guarantee any of the motion judges making pretrial decisions will end up making decisions at the trial phase.

By contrast, other courts use an individual calendar system, assigning a judge at the beginning of a case who will take it “from start to finish.”¹⁵⁵ Federal courts operate on this model of “case management,” in which a single judge handles a case from its inception and is actively involved in managing the case from an early stage¹⁵⁶ (though judicial rotation of a sort may occur if a case bounces between a district judge and a magistrate judge or special master). A review of Minnesota state courts documents the advantages one might expect of assigning a single judge, finding that the use of the individual calendar system in one county enabled judges to be “better informed about each case and better able to achieve early resolution of the cases.”¹⁵⁷ Presumably, such a start-to-finish judge is also

153. See, e.g., Master Calendar, Superior Court of Cal., County of Sacramento, <http://www.saccourt.ca.gov/general/virtual-courthouse/downtown/master-calendar.aspx> (on file with the *Columbia Law Review*) (last visited Mar. 28, 2013) (describing use of master calendar system to assign cases to judicial officers). The Louisiana Supreme Court has urged randomized case assignment at a later point expressly to avoid exploitation of the calendaring system in a “judge-shopping game.” Adam M. Samaha, Randomization in Adjudication, 51 *Wm. & Mary L. Rev.* 1, 46 (2009). Some of the busiest New York courts even wait to assign a case to a trial judge until after jury selection has been completed. Ann Pfau, N.Y. State Judicial Inst., Comprehensive Civil Justice Program 2005: Study and Recommendations 40 (2005).

154. This is the case in Massachusetts state courts. See Peter M. Lauriat, Superior Court Rule 9A Is Working, 39 *Bos. B.J.* 24, 25 n.3 (1995) (noting Massachusetts Bar Association’s recommendation to adopt rotation system for motion judges).

155. For instance, Hawaii state courts recently moved to an individual calendar system from a master calendar system, and now assign cases to a judge immediately. This means an individual judge handles the case “from start to finish,” eliminating the need for motion judges. Ed Kemper, Judge Chang on the New Individual Calendar System, 4 *Haw. B.J.* 5, 5 (2000).

156. See Richard L. Marcus, Slouching Toward Discretion, 78 *Notre Dame L. Rev.* 1561, 1587–89 (2003) (describing development of case management approach). The federal courts began this development in the early 1980s based on the practices of metropolitan courts in the late 1960s. See *id.* at 1587 (“Given responsibility from start to finish, judges in these [city courts] began to call the lawyers in for conferences early in the case to plan the handling of the case.”).

157. Robert J. Sheran & Douglas K. Amdahl, Minnesota Judicial System: Twenty-Five Years of Radical Change, 26 *Hamline L. Rev.* 219, 242 (2003) (emphasis omitted).

more likely to become a known quantity to the parties during the pretrial phase.

2. *Judge Announcement.* — Second, jurisdictions vary in how early during a case parties are told who their trial judge will be. The contrasting policies for panel announcement in the federal appeals courts are the most familiar instance. The D.C. Circuit famously (and uniquely, among its peers) makes a point of announcing the three-judge panel assigned to a given appeal very early, close in time to the filing of the notice of appeal.¹⁵⁸ As noted, one express aim is to promote settlement by letting the parties know who their audience will eventually be.

As observed above, however, such audience-driven settlement effects entail the cost of accepting a greater influence of judicial idiosyncrasy on the likelihood or the terms of a settlement. Moreover, this approach relies on “insider” knowledge about the judges in a jurisdiction; the result may be a further tipping of the balance in favor of repeat players or sophisticated parties, who may know more about a given judge’s inclinations and can better anticipate how this judge might respond to the trial materials.

3. *Judicial Role in Settlement.* — Third, courts also vary as to how much of a role the future trial judge is allowed to play in settlement negotiations before trial. A half-century ago, Judge Skelly Wright unabashedly told war stories about informing parties of what he thought to be the settlement value of a case.¹⁵⁹ Not everyone found the practice agreeable: Judge Charles Clark remarked that settlement negotiations “are no part of proper pre-trial” as they bring the judge’s impartiality into question.¹⁶⁰ These differences of opinion have persisted. Today, views in the state courts vary.¹⁶¹ At least two state supreme courts have held that a trial judge involved in failed settlement talks may not preside over a subsequent bench trial without the parties’ consent.¹⁶² In federal courts,

158. See, e.g., Jordan, *supra* note 13, at 58 (noting D.C. Circuit’s aim of promoting settlement by announcing panel for given appeal well in advance—within sixty days of filing).

159. Honorable J. Skelly Wright, *The Pretrial Conference*, in *Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure* (July 5–9, 1960), 28 F.R.D. 37, 141, 145.

160. Honorable Charles E. Clark, *To an Understanding Use of Pre-Trial*, in *Proceedings of the Seminar on Procedures for Effective Judicial Administration* (July 10–12, 1961), 29 F.R.D. 191, 454, 455–56.

161. See Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. Disp. Resol. 335, 367 (finding confusion in law regarding judges’ roles in pretrial settlement).

162. See *Timm v. Timm*, 487 A.2d 191, 193 (Conn. 1985) (“When a judge engages in pretrial settlement discussion . . . he should automatically disqualify himself from presiding in the case . . .”); *Shields v. Thunem*, 716 P.2d 217, 219 (Mont. 1986) (noting growing trend of trial judges participating in pretrial settlement).

judges are not generally barred from involvement in settlement;¹⁶³ the practice of disqualification is largely unguided apart from the general ethical reminders in judicial manuals.

Notably, the divide between bench trials and jury trials has been considered in this policymaking area, but for a different reason than that emphasized here. The existing concern has been about the judge's impartiality later at *trial*; this is the familiar worry about the "managerial judge" who may develop views about the case, having been exposed to facts in the informal context of settlement,¹⁶⁴ making it hard to return to neutral at trial.¹⁶⁵ And this risk is said to be greater in bench cases. An advisory opinion of the Judicial Conference says that one factor in deciding how involved the judge should be is "a consideration of whether the case will be tried by judge or jury."¹⁶⁶ The worry is "whether the judge can set aside this knowledge [gained during settlement talks] in a case tried to the judge"; by contrast, "[e]thical concerns are less likely to arise when a judge handles settlement negotiations and then presides over a jury trial."¹⁶⁷ The premise, of course, is that judges have less influence over outcomes in jury cases.¹⁶⁸

A policy that implements this distinction would be a further illustration of a device for forcible or artificial "decoupling," as imagined

163. See Comm. on Codes of Conduct, Advisory Opinion No. 95: Judges Acting in a Settlement Capacity (2009), reprinted in 2B Guide to Judiciary Policy ch. 2, at 95-1, 95-3 [hereinafter Advisory Opinion No. 95], available at <http://www.uscourts.gov/uscourts/rulesandpolicies/conduct/Vol02B-Ch02.pdf> (on file with the *Columbia Law Review*) (last revised Mar. 21, 2013) ("[S]ettlement practices must be examined on a case-by-case basis to determine their ethical propriety.").

164. See, e.g., Daisy Hurst Floyd, Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement, 26 Ariz. St. L.J. 45, 55 (1994) (noting increase in judicial use of "caucusing" during settlement negotiations); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 426–31 (1982) [hereinafter Resnik, Managerial] (noting judges may gain information during pretrial conferences unfiltered by rules of evidence and possibly outside presence of opposing parties).

165. See Brunet, *supra* note 10, at 246–48 (describing perception of lack of neutrality following judge's effort to settle matters); Resnik, Managerial, *supra* note 164, at 433 ("[M]anagerial judges come into close contact with attorneys and, by virtue of that contact, hear opinion, innuendo, and rumor—all of which may affect their findings of fact and their rulings of law.").

166. Advisory Opinion No. 95, *supra* note 163, at 95-3; see also Robert J. Niemic, Donna Stienstra & Randall E. Ravitz, Guide to Judicial Management of Cases in ADR 78–79 (2001) (discussing advisory opinion emphasizing judges should be mindful of objectivity).

167. Advisory Opinion No. 95, *supra* note 163, at 95-2 to -3.

168. The same logic implies that there is less concern in cases in which the judge has no further dispositive motions to decide. As one manual for federal judges summarizes, "The safest stance, if you wish to host settlement discussions in your own cases, is to limit your participation to cases that will be tried to a jury and only those cases in which case-dispositive motions have been decided." Civil Litigation Management Manual, *supra* note 32, at 89.

above (even if its current motivation is something different).¹⁶⁹ By barring the settlement judge from presiding over a bench trial but not a jury trial, such a policy may tend to level the observed asymmetry in pre-view effects. Whether this leveling is desirable depends, again, on one's normative views about settlement versus trial, about the relative merits of bench trials and jury trials, and about the accuracy-idiosyncrasy tradeoff articulated above.

D. *Previewing the Jury?*

What about getting to know the *jury* before trial? This seems a very different, and more difficult, problem. How well the parties can get to know their judge can be boosted or suppressed through pretrial policies and practices, as explained above. But, at first blush, it may seem that the same cannot be done with a jury, as jurors are not usually chosen until trial begins. There is no way to identify which individuals will be sitting in the jury box, much less catch a glimpse of their reactions, before trial. For the most part, a future jury just cannot be made as well known as the judge; there is a jury-bench gap not only in the informational baseline (the trial judge is better known than the future jury), but also in the tools available for manipulating it (the future jury cannot easily be made more known).

Yet some alternatives do exist. First, procedure can influence how well the parties know the general profile of the jury pool in the jurisdiction. It can also influence what parties anticipate learning about their actual jury *after* trial begins. This anticipation of future learning during trial, as explained below, can alter settlement behavior even before trial.

1. *Approximation and Anticipation.* — Litigants are not entirely in the dark about their future jury. A general profile can be inferred from data about the jury pool.¹⁷⁰ Forum shopping happens, after all. Famously, certain venues have achieved folkloric status for their citizens' hostility toward patent infringers, say, or generosity in assigning punitive damages.¹⁷¹ Besides, an experienced litigator may know what will play

169. See *supra* notes 148–151 and accompanying text (discussing potential decoupling policies for policymakers wishing to mitigate vanishing of bench trials).

170. See, e.g., Hayes, *supra* note 42 (documenting empirical data and anecdotes). Compare *id.* (citing litigators claiming “[i]n Westchester, stingy civil jurors ‘think it’s coming from their pocketbooks’”), with Sam Roberts, *On Bronx Juries, Minority Groups Find Their Peers*, *N.Y. Times*, May 19, 1988, at B1 (comparing Bronx, Manhattan, and Westchester juries and quoting litigators as saying “[j]urors in the Bronx tend to be working people that have had to strive all their lives and when they see that someone else has been a victim of wrongdoing they tend to compensate them fully”).

171. See, e.g., Jeanne C. Fromer, *Patentography*, 85 *N.Y.U. L. Rev.* 1444, 1447 (2010) (mapping “geography of patent disputes”); Xuan-Thao Nguyen, Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform, 83 *Tul. L. Rev.* 111, 112–13 (2008) (“Many seem to blame the [Eastern District of Texas] for the wrongs of the patent litigation system.”); Jonathan D. Glater, *To the Trenches: The Tort War Is Raging On*, *N.Y. Times*,

well before a Bronx jury that wouldn't work for one in Manhattan.

But jury pool information is not equivalent to seeing the actual jurors' reactions to the evidence and arguments.¹⁷² A closer approximation, for parties who can afford them, is provided by jury consultants who put together "mock juries" and "focus groups." These are familiar tools,¹⁷³ allowing lawyers to try out their evidence and arguments on a practice audience drawn from the actual jury population.¹⁷⁴ Mock juries help litigators precisely by giving them—and their clients—a preview of how the audience will respond to the evidence and narrative presented in a case.¹⁷⁵ Advertising materials for jury consultants even suggest that they can be useful for calculating the range of damages, potentially helping to bring a case to settlement.¹⁷⁶

Because such tools favor well-heeled and more sophisticated parties over weaker ones, the policy question arises of how to manage this imbalance. One possible class of interventions is public provision, and one such existing device is the "summary jury trial," greater use of which is currently being promoted by judges and the bar.¹⁷⁷

June 22, 2008, at B1 (citing "counties, like Madison County in Illinois, that were perceived as hostile to corporate defendants").

172. See *supra* notes 38–41 and accompanying text (discussing difficulty of previewing jury's reactions and consequent informational loss).

173. See Tricia McDermott, *The Jury Consultants*, CBS News (Dec. 5, 2007, 3:22 PM), http://www.cbsnews.com/8301-18559_162-620794.html (on file with the *Columbia Law Review*) ("In the brave new world of high-stakes, high-profile trial preparation, the people running the show are not the lawyers, but rather jury consultants. . . . These days, it's hard to find a big case without experts in human behavior involved.").

174. See, e.g., Robert L. Haig & Steven P. Caley, *Deep-Pocket Perils: Defendants Rich in Resources Must Act to Overcome Bias*, A.B.A. J., Dec. 1994, at 59, 59 ("Videotaping the mock jury trial and deliberations will help reveal what jurors really think about the defendant and its case. This may be a sobering yet enlightening experience that can be put to good effect . . . in considering settlement possibilities.").

175. Of course, the expense of jury consultants could also eat away at the settlement surplus and lower the chances of settlement. There is a debate as to the efficacy of jury consultants in improving clients' prospects and bringing about settlement. See *Jury Selection*, Am. Judicature Soc'y, http://www.ajs.org/jc/juries/jc_whoserves_selection.asp (on file with the *Columbia Law Review*) (last visited Mar. 19, 2013) (summarizing debate over utility of "trial consultants").

176. See, e.g., *Mock Trial Jury Research*, Tsongas Litig. Counseling, <http://tsongas.com/services/mock-trial/> (on file with the *Columbia Law Review*) (last visited Mar. 19, 2013) (claiming mock jury trial "[p]rovides damage calculations and estimates . . . to assess settlement value"); see also *Jury Consulting*, DOAR Litig. Counseling, <http://doar.com/trial-consulting/jury-consulting/index.asp> (on file with the *Columbia Law Review*) (last visited Mar. 19, 2013) (asserting damages research using mock juries "may even help [litigators] advocate for an alternative solution to a trial").

177. See U.S. Dist. Court for the Middle Dist. of Pa., *Civil Jury Trial Bench/Bar Task Force Final Report 30* (2008) [hereinafter *Civil Jury Trial Report*], available at http://www.judgeyettekane.net/yahoo_site_admin/assets/docs/Civil_Jury_Trial_Task_Force_Report.96132437.pdf (recommending "expanding use of summary-jury trials in appropriate cases" given "[j]udicial officers who have presided over summary-jury trials have had positive experience with cases settling afterwards").

a. *Summary Jury Trials*. — In a sort of mock jury organized by the court itself, jurors are drawn from the actual jury pool and seated for an abbreviated trial.¹⁷⁸ This jury’s “verdict” is advisory and nonbinding;¹⁷⁹ it has no consequence beyond informing the parties of the likely outcome should the case actually go to trial. This device, endorsed in the Advisory Committee Notes to the Federal Rules of Civil Procedure,¹⁸⁰ has as its main purpose the promotion of settlement by using a lifelike preview.¹⁸¹ Regarding settlement discussions following the rendering of the summary jury trial verdict, one commentator has noted that “[w]ith the parties present and a preview of the case fresh in their minds, even the most unyielding litigants tend to settle.”¹⁸² As judges and practitioners recognize, the value of (approximately) previewing the jury in this way includes the “client education” effect: Having clients witness the audience reaction may well increase the likelihood of settlement.¹⁸³

Summary jury trials appear to be rarely used, however;¹⁸⁴ no doubt

178. Civil Litigation Management Manual, *supra* note 32, at 81 (describing summary jury trial as “abbreviated hearing in which counsel present summary evidence to a jury . . . selected from the court’s regular jury pool” and “presided over by a district or magistrate judge”).

179. See Molly McDonough, *Summary Time Blues*, A.B.A. J., Oct. 2004, at 18, 18 (“A jury from the court’s pool renders an advisory, nonbinding verdict.”).

180. Fed. R. Civ. P. 16 advisory committee’s note to 1993 amendments (“[T]he judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits.”).

181. Civil Jury Trial Report, *supra* note 177, at 15 n.20 (“In a summary jury trial, . . . the lawyers offer a truncated version of their cases and the jury deliberates to a non-binding verdict. The goal is to allow counsel and parties to see how a jury reacts to the case with the idea that such insight will facilitate settlement discussions.”).

182. McDonough, *supra* note 179, at 18; see also *id.* at 18–19 (discussing views of trial lawyer who “praises [summary jury trials’] effectiveness in rapidly settling cases” and recounting experience of New York state judge for whom only six cases out of 170 ordered to summary jury trial in five-year period eventually went to actual trial); Larry Ray, *Emerging Options in Dispute Resolution*, A.B.A. J., June 1989, at 66, 68 (“The [summary jury trial’s] advisory verdict helps the parties build a mutually acceptable settlement.”).

183. See McDonough, *supra* note 179, at 19 (relating judge’s experience that “[w]ith the principals present, . . . settlement is most likely if they’ve had a chance personally to witness the strengths and weaknesses of their positions and after they see a value attached to their exposure”).

184. See Civil Litigation Management Manual, *supra* note 32, at 82 n.8 (“In statistical year 2009, five cases, all in a single district, were referred to summary jury and summary bench trials out of the 28,078 cases referred to ADR in the fifty-one districts reporting their referrals to ADR. No cases were referred to mini-trials.”); McDonough, *supra* note 179, at 18 (“[D]espite a scattering of believers, few judges avail themselves of [summary jury trials].”). This low use seems not to have changed much over time. See Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts 5* (1996) (noting “[j]ust over half the courts report authorization or use of the summary jury trial” but “[t]he level of usage reported by most courts is . . . very low—generally around one or two cases a year”). For a critical view of summary jury trials, see generally Richard A.

the expense of running such a simulation is an obstacle. Parties may also be concerned about revealing their trial strategies through such a thorough rehearsal.¹⁸⁵ Another problem noted by practitioners appears to be that rehearsing arguments before such a mock jury might actually increase the parties' sense of uncertainty about a jury outcome, once they see how badly their evidence or arguments can be misunderstood by the lay jurors.¹⁸⁶

Such approximations are not the only way, however, to affect how the parties think about their future jury. Less direct measures can also exert some influence. The following policy choices have been driven mainly by other rationales, but their potential to temper or amplify audience-driven preview effects should also be taken into account.

b. *Designing the Jury Pool.* — Imagine trying to predict the reactions of a jury to be drawn from the greater Los Angeles metropolitan area. Now imagine one drawn only from Beverly Hills. Uncertainty about the future jurors and the predictability of their reactions to the future trial materials depend on how diverse the feeder population is. Broadening or narrowing the geographic and demographic range of a given jury population may thus be a useful policy lever for managing preview effects of both theoretical flavors—convergence under the standard story and divergence under the behavioral story.¹⁸⁷

c. *Forum and Venue Rules.* — The choice of forum or venue can be used by the parties to select a more predictable jury pool, whether to take advantage of predictably favorable tendencies or just to reduce risk. Civil procedure already regulates these choices, of course; the point here is to emphasize a further regulatory concern, which is how such choices interact with previews and thereby influence settlements. One important caveat is in order, however: The theories are ambiguous about the effect tightening forum or venue options has on settlement choices. Under the convergence story, having a more predictable finder of fact should promote settlement. But under the divergence theory, a perception of control over who sits on the jury might feed the self-serving bias of the

Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366 (1986).

185. See McDonough, *supra* note 179, at 18 (“[L]awyers who have criticized the process say they don’t feel comfortable laying their cards on the table during what could, if settlement goals fail, amount to a dry run before a real trial with real consequences.”).

186. Am. Coll. of Trial Lawyers, *supra* note 135, at 19. To elaborate, lawyers and clients can find watching mock jury deliberations terrifying because they learn “how completely their evidence has been misunderstood, how confused the jurors are as to both the facts and the law, . . . how lightly jurors reach decisions on matters of . . . importance, how freely they ignore the court’s instructions and . . . how willing they are to spend other people’s money.” *Id.*

187. A similar logic might apply to specialized juries, in contexts where they may be used.

litigants (here, the side choosing the forum), leading to less settlement. The question of the net effect in any given context is an empirical one.

d. *Voir Dire*. — What sorts of questions should the lawyers be allowed to ask during jury selection? What questions should the judge ask? How much leeway should the parties have in rejecting potential jurors? All of these policy design choices can affect the litigators' estimates (even well before jury selection begins) about who their future jury will be. Yet there is again a second effect: In theory, greater perceived control may worsen self-serving bias, even as it reduces uncertainty. If so, the settlement effects could go either way. Under policies that increase the parties' perceived (and perhaps true) control over the jury, the parties may expect this degree of control to narrow down the range of possible jurors, thereby making the outcome seem more predictable. But this sense of control might also fuel overoptimism on each side. This state of anticipating future control is a kind of "twilight zone," one might say—because it has not yet happened, it can "sharpen" both parties' predictions, but away from each other's. How these competing effects play out is another empirical question.

e. *Jurors' Own Questions*. — Should jurors be allowed to submit questions for the judge to ask a witness? This approach, now being actively promoted as a policy reform, is already in use in civil cases in a number of jurisdictions, including Arizona, Colorado, Illinois, and Indiana.¹⁸⁸ It has also been used in federal court, as well as in criminal cases—most famously, in the Roger Clemens trial.¹⁸⁹

This practice allows a "jury preview" in a very direct and obvious sense, although only after trial begins. As one judge notes, "Allowing jurors to submit written questions during the evidence phase of the trial gives the lawyers and the judge a window into the juror's thinking."¹⁹⁰ Another judge describes it as having "a free shadow jury"¹⁹¹—and better yet, "this shadow jury [consists of] your real jurors."¹⁹²

2. *Clarifying Uncertainty*. — The first three procedural tools—summary jury trials, jury pool design, and forum-shopping constraints—operate before trial, potentially making jury reactions more predictable, even without adding direct knowledge about the actual future jurors. By contrast, the fourth and fifth means—voir dire and jurors' questions—occur *at* trial, potentially increasing knowledge about the actual jurors.

188. See Drummond, *supra* note 28, at 16 (noting "[s]everal states, such as Indiana, Colorado, and Arizona, have mandated that courts allow jury questions for all jury trials" and Illinois has done so for civil cases).

189. See *id.* (describing juror questions in Clemens trial).

190. *Id.* (quoting Hon. James F. Holderman, Co-Chair, Special Comm. on Jury Innovation, ABA Section of Litig.).

191. *Id.* (quoting Russell Hardin Jr., Member, Trial Att'y Advisory Bd., ABA Section of Litig.).

192. *Id.*

Clearly, the first three can affect the parties' predictions before trial (and before actual jury selection) begins. But what about the latter two policies, which only affect what the parties can learn during trial? These might seem of little importance for decisions made *before* trial.¹⁹³

That's not necessarily so, as the choice to settle before trial can turn on how much the parties *anticipate* (before trial) that they will learn (during trial) about the jurors and their reactions. For this reason, the design of voir dire, as well as the potential for jurors to suggest questions for the witnesses, can in theory affect the parties' motivations for going to trial in the first place.

To see why, it is helpful to digress briefly to consider two meanings of a litigant's "jury uncertainty" and to make clear the distinction between them. The two differ in their consequences for the usefulness and the risks of previews. Speaking generically about jury uncertainty can obscure this contrast.

The first meaning of "jury uncertainty" is that little can be known about the jury before trial, although learning about the jury may be possible once trial begins. (The parties may see how jurors are reacting to the witnesses, for instance. Or the questions the jurors are submitting to the judge may suggest they are leaning in favor of one side. Or the parties may learn about the jurors' inclinations during voir dire.) This form of jury uncertainty can be reduced, but only during trial itself.

The second meaning of "jury uncertainty" is that little or nothing can be discerned about the jury, even after trial has begun. Either there will be no clues revealed at trial or, equivalently, they will be uninformative. (For instance, the trial materials may not be the sort that elicit visible juror reactions beyond boredom. Or the jurors will not be allowed to submit questions. Or the parties cannot learn much about the jurors during voir dire because the lawyers will not be permitted to ask probing questions.)

Being clear about these two distinct meanings yields a lesson for theory in the convergence story, and a lesson for policy in the divergence story. Consider first the convergence story, as articulated in Part I. Under the first meaning of jury uncertainty, settlement is delayed (or thwarted) because the parties perceive there to be a positive value to waiting. The parties in effect gamble that the future signals during trial will be more favorable than those attending the previews before trial.¹⁹⁴ But consider

193. This is not to downplay their potential to affect settlement *during* trial, a possibility central to the theoretical analysis presented in Part I.

194. An easy way to see this is to consider the other extreme in which there is no such jury uncertainty because what is learned from the preview is a perfect predictor of the trial information. This may be true, for instance, if the trial materials are absolutely clear in their meaning, and not dependent on the factfinder. In such a case, there is no value to waiting: The gamble of going to trial will not be worthwhile, because there is no chance of receiving different information at trial.

now the second meaning: If there will be no chance of learning anything new (and thus more favorable) at trial, then there is no gain to waiting.¹⁹⁵ In this scenario there is no possibility of any useful signals during trial, and thus no useful signals to be predicted based on the previews. In our first notion of jury uncertainty, then, the uncertainty actually creates the value in waiting. In our second notion of jury uncertainty, by contrast, the uncertainty limits the value of waiting.¹⁹⁶ The value of delay for the parties, in anticipation of further learning, depends not on how much uncertainty exists, but rather on how much of it can still be cleared up.

In the divergence story, the distinction has more practical stakes. Recall from Part I that one way previews can prevent settlement is by generating an expectations gap at a critical moment before trial, at the last real chance to settle.¹⁹⁷ As we have seen, this can occur even if jury uncertainty will be eliminated during trial (the first meaning). But previews can also prevent settlement if jury uncertainty persists during trial (the second meaning).¹⁹⁸ In either scenario, previews can ruin a chance at settlement before trial. What differs is the likelihood that such a lost opportunity will really be the last chance to settle. This seems far more likely if the jury remains an unknown quantity at trial (permitting self-serving bias) than if the jury becomes well known at trial (causing some convergence).¹⁹⁹

The policy upshot is that there is a greater reason to worry about the potential for previews to thwart settlement in those cases where little can

195. If there is a cost to starting the trial, as we have been assuming, the value of waiting is in fact negative. The parties may well be observed settling on the eve of trial rather than waiting—but they would not be doing so due to previews.

196. Despite this distinction between these two stories of jury uncertainty, it is worth noting the analogous mechanisms in the t_0 decision to wait for t_1 (in the first story) and the t_0 decision to go through with trial (in the second story). In each case, if there is no settlement at t_0 , it is because the parties are choosing to gamble on the future. The gamble is possible because no useful learning has yet narrowed down the likely range of possibilities. In the former case, this is because useful learning about the jury cannot occur before trial; in the latter, because it cannot happen at all.

197. In terms of the notation introduced in Part I.C: If in the absence of previews, $P_p J - (c_1 + c_2) < P_d J + (c_1 + c_2)$, but $P_p^* J - c_2 > P_d^* J + c_2$, then the parties would settle before trial but not during trial—even though there is some common learning and thus some convergence during trial. But if previews inject an expectations gap due to self-serving bias such that $(P_J + x) J - (c_1 + c_2) > (P_J - x) J + (c_1 + c_2)$, then they will ruin the chance at early settling.

198. If in the absence of previews, $P_p J - (c_1 + c_2) < P_d J + (c_1 + c_2)$, but $(P_J + x) J - c_2 > (P_J - x) J + c_2$, then the parties would settle before trial but not during trial (due in part to the self-serving bias gap created when information is revealed during trial). But if previews shift forward the creation of this divergence gap, such that $(P_J + x) J - (c_1 + c_2) > (P_J - x) J + (c_1 + c_2)$, then they will ruin the chance at early settling.

199. The implicit assumption is that $(P_J + x) J - c_2 > (P_J - x) J + c_2$ is more likely than $P_p^* J - c_2 > P_d^* J + c_2$. This seems highly plausible, as it supposes that the parties' expectations at trial are farther apart in the self-serving bias case than in the partial learning (partially converged) case.

be learned about the jury and its reactions, even at trial. And this circles back to the design of the rules for voir dire and for jurors' questions, which affect precisely these key variables: what litigants expect they can learn about the jurors, and hence how much uncertainty will remain *after* trial begins.

CONCLUSION

The play was a great success, but the audience was a failure.²⁰⁰

In litigation, as in any theater, the script matters and so does the audience—but what really counts is how they interact. Just as this is true at trial, so it is for settlement *before* trial. Parties settle not in the shadow of the evidence and arguments, but in the shadow of what the factfinder will think of those materials. The value to the parties of previewing the script, then, depends on whether they can also preview the audience.

Beginning with that basic idea, this Essay reconsiders the two leading theories of settlement. Playing them out in light of a stylized difference between trials by judge and trials by jury, the analyses of preview effects introduced here imply that each theory should predict an “asymmetric vanishing” of trials. A preliminary look at the data from the policy experiment created by the staggered adoption of Federal Rule of Civil Procedure 26(a)(3) suggests that litigant choices responded in ways consistent with the proposed asymmetry—resulting in an accelerated decline in bench trials relative to jury trials.

Whether these observations are seen as encouraging or troubling depends, of course, on one's normative priors about the comparative merits of settlements, jury trials, and bench trials. But theory also matters: As this Essay emphasizes, the potentially competing and sometimes subtle mechanisms by which preview policies may be affecting litigant choices should be considered alongside the data, informing normative assessments and the design of policy responses.

As this exploratory Essay is aimed at starting a conversation, directions for further research are worth noting. Factors such as uncertainty and risk aversion, the time shifting of litigation costs,²⁰¹ principal-agent

200. This favorite nugget is often attributed to Oscar Wilde, but may in fact have originated with George Bernard Shaw. See George Bernard Shaw, Review: Visiting the Halls, *World*, Oct. 19, 1892, reprinted in 2 *Bernard Shaw: The Diaries, 1885–1897*, at 861 (Stanley Weintraub ed., 1986) (“You were a perfect success: the audience was a dismal failure.”). For an analysis of the attribution, see *The Play Was a Great Success, but the Audience Was a Total Failure*, *Quote Investigator* (May 19, 2011), <http://quoteinvestigator.com/2011/05/19/play-success/> (on file with the *Columbia Law Review*) (explaining quote could be from Oscar Wilde, William Collier, Daniel Frohman, or George Bernard Shaw).

201. One might ask, for instance, whether the shifting of trial costs to pretrial is more significant in previews for bench trials or for jury trials.

concerns,²⁰² and the potential for strategic behavior may be brought into extensions of the theoretical starting points offered here. Empirical work should also find encouragement in this initial foray: Observational studies might focus on variation in judge rotation, judge announcement, juror questions, and other existing policies noted above;²⁰³ finer breakdowns among types of litigants or cases might be possible in other samples, such as in state courts;²⁰⁴ and experimental studies might target the jury-bench distinction. Not least, future work should address both the theory and empirics of preview effects at the other major “checkpoints” of civil procedure.²⁰⁵

Procedural values beyond those touched upon here are also surely worth considering; for instance, think of the participatory or expressive values of having one’s “day in court.” And the normative concerns raised in this Essay point naturally to further questions of procedural design: Should parties be allowed to opt out of preview policies, either during litigation or through *ex ante* contracting?²⁰⁶ Should the pervasiveness of previews today affect how much control parties have in choosing a jury or bench trial?²⁰⁷ Should it inform how much power a judge is given in influencing the jury, in overruling it,²⁰⁸ or in letting a case get to one in the first place?

202. How lawyer-client misalignment interacts with overoptimism about the strength of one’s case may be an especially rich area for study; consider for example the “client education” effect noted above. See *supra* note 183 and accompanying text.

203. This is not to exclude other practices that one might imagine to affect the force of previews, such as the choice of jury size or the use of specialized judges or juries.

204. Moreover, variation in state court practices may offer useful comparisons for researchers and may suggest other forms of preview policies worth studying. See *supra* notes 153–157 and accompanying text (discussing varying judge rotation systems among states).

205. See *supra* notes 3–7 and accompanying text (discussing “checkpoints” such as motions to dismiss, preliminary injunctions, class certification, *Markman* and *Daubert* hearings, and summary judgment). Relatedly, future work might investigate the potential for preview effects in other settings, such as in criminal justice, ADR, agencies, international or foreign tribunals, or arbitration.

206. Parties might also contract around the bench-jury option, such as through jury trial waivers. More generally, one might ask whether, when, and how easily parties should be allowed to switch adjudicators—not only between judge and jury, but also among judicial officers (including magistrate judges or special masters).

207. The civil jury trial guarantee in the Seventh Amendment is a constraint, but there are many ways in which the tools of civil procedure can (and already do) affect the extent of the real usage of the jury trial. One mundane example is the short time limit for demanding a jury before the right to a jury is waived. See Fed. R. Civ. P. 38 (specifying party must demand jury trial “no later than 14 days after the last pleading directed to the issue is served”). A more controversial example is summary judgment. See, e.g., Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 142–45 (2007) (arguing summary judgment violates Seventh Amendment because it subverts jury’s factfinding role).

208. How appellate review might alter preview effects is an analogous question: Just as a trial judge’s propensity to overrule the jury—such as through *remititur* or judgment

APPENDIX

Chart 1 lists the districts forming the treated and comparison groups in the policy experiment created by staggered adoption of Rule 26(a)(3). The selection of these districts is explained in Part II.B.3. Table 1 shows summary statistics for these groups in the period before the studied policy shock, that is, before the late-adopting districts were forced to catch up to the early adopters. The population of cases for all present analyses consists of the contracts, property, and torts cases described in Part II.B.

Table 2 quantifies extensions of the basic comparisons shown in Figures 1 through 4, using the estimates of β_i from this elementary difference-in-differences regression in OLS:

$$y_{it} = \beta_1 \cdot \text{treated} \cdot \text{post} + \beta_2 \cdot \text{treated} + X_i \cdot B_3 + \varepsilon_{it}$$

where y is the ratio of bench to jury trials, i indexes group of districts, X_i consists of fixed effects for year, and post indicates being in the post-treatment period. The resulting estimates suggest a drop in the ratio indicative of asymmetric policy impact, consistent with the figures.

Column (1) of Table 2 shows these estimates, assuming that the post-period begins in 2001. This corresponds to the line drawn in the graphs. But recall that the policy break is somewhat blurred because the rule gave judges the discretion to apply the new rule to cases that had already begun but not yet finished as of December 2000. To account for this possibility, I present an alternative set of estimates in Column (2) of Table 2. For these alternative estimates, the post-period begins one year earlier.

Table 3 reports estimates separately for trial rates in jury cases and in bench cases, using the same OLS framework. The dependent variable is the share of cases that reached a jury verdict or a bench verdict. For these trial rates, the denominator is the population of filed cases, excluding those coded as nonfinal dispositions (such as bankruptcy stays, transfers and remands to other tribunals, or statistical closure), appeals of magistrate judge rulings, and cases in which the defendant did not even appear. The unit of presentation is percentage points. The interpretation of these estimates is discussed in Part II.C.3.

notwithstanding the verdict—might amplify the effect of a “judicial preview,” would the same be true of lightened scrutiny on appeal?

CHART 1 — TREATMENT AND COMPARISON DISTRICTS

	Treated	Comparison
<i>California groups</i>		
Cleanest match	CDCA	NDCA
All California	CDCA, EDCA	NDCA, SDCA
California-Oregon	CDCA, EDCA	NDCA, OR
<i>New England groups</i>		
First Circuit only	ME, RI	MA, NH
All New England	ME, RI, NDNY	MA, NH, CT, VT

TABLE 1 — MEAN NUMBER OF BENCH TRIALS AND JURY TRIALS, 1996–2000

	Bench		Jury		Bench/Jury	
	<i>T</i>	<i>C</i>	<i>T</i>	<i>C</i>	<i>T</i>	<i>C</i>
<i>California groups</i>						
Cleanest match	11.2 [5.0]	6.5 [4.0]	14.4 [4.1]	8.5 [4.1]	.79 [.37]	.83 [.50]
All California	13.0 [5.6]	8.9 [4.9]	18.3 [6.8]	10.9 [5.8]	.75 [.36]	.91 [.47]
California-Oregon	13.0 [5.6]	10.5 [4.7]	18.3 [6.8]	18.1 [6.4]	.75 [.36]	.61 [.28]
<i>New England groups</i>						
First Circuit only	5.5 [4.0]	5.5 [4.4]	12.1 [6.7]	20.8 [11.6]	.43 [.31]	.26 [.20]
All New England	7.1 [4.6]	10.6 [7.3]	18.2 [9.2]	32.4 [15.7]	.36 [.22]	.31 [.18]

Notes: This table presents, under “Bench” and “Jury,” the mean number of cases reaching a bench verdict or a jury verdict, respectively, in each group of districts (as listed in Chart 1, *supra*). The final two columns show the corresponding ratios. *T* denotes treated group and *C* denotes comparison group. The case population consists of the contracts, torts, and property cases described in Part II.B. Standard errors are in brackets.

TABLE 2 — THE EFFECT OF EVE-OF-TRIAL PREVIEWS ON THE NUMBER OF BENCH TRIALS RELATIVE TO JURY TRIALS

	(1)	(2)
<i>California groups</i>		
Cleanest match	-.91 [.25]	-.60 [.32]
All California	-1.03 [.26]	-.80 [.36]
California-Oregon	-.79 [.22]	-.71 [.25]
<i>New England groups</i>		
First Circuit only	-.20 [.13]	-.28 [.10]
All New England	-.15 [.07]	-.15 [.07]

Notes: This table presents coefficients on the *treated x post* interaction in a difference-in-differences regression. The dependent variable is the ratio of the number of cases reaching a bench verdict to the number of cases reaching a jury verdict, in the districts forming the treatment or control group. In Column (1), *post* begins in the year 2001. In Column (2), *post* begins in the year 2000. The case population consists of the contracts, torts, and property cases described in Part II.B. The estimates are OLS. Time-fixed effects are included. Robust standard errors are in brackets. $N = 2$ pooled groups \cdot 10 years = 20.

TABLE 3 — THE EFFECT OF EVE-OF-TRIAL PREVIEWS
ON BENCH AND JURY TRIAL RATES

	Bench Trials	Jury Trials
<i>California groups</i>		
Cleanest match	-.76 [.38]	.28 [.41]
All California	-.61 [.33]	.54 [.43]
California-Oregon	-.56 [.33]	.68 [.37]
<i>New England groups</i>		
First Circuit only	-1.06 [.47]	.22 [1.19]
All New England	-.81 [.18]	-.45 [.76]

Notes: This table presents coefficients on the *treated x post* interaction in a difference-in-differences regression. The dependent variable is the percentage (in percentage points) of cases that reach a bench verdict (in the left column) or a jury verdict (in the right column), in the districts forming the treatment or control group. For each test, *post* begins in the year 2001. The case population consists of the contracts, torts, and property cases described in Part II.B. The estimates are OLS. Time-fixed effects are included. Robust standard errors are in brackets. $N = 2$ pooled groups \cdot 10 years = 20.

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