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REMARKS

Judicial Fact-Finding and the Trial Court Judge

SHIRA A. SCHEINDLIN*

First of all, I want to thank the *University of Miami Law Review* for creating this Symposium and inviting me to speak, which gave me the opportunity to think very hard about something I had not thought about systematically. It is a treat to be able to do that. We judges are so busy managing our caseload that we do not often have time to step back, think, and write on a subject. I am also grateful to you for inviting me because I like to be anywhere that Judge Jack B. Weinstein is at. If he is here, then I am delighted to be here.

I turn now to the subject at hand: When do judges find facts? We must not do any fact-finding when deciding summary judgment motions or motions to dismiss. So, when do we do it?

One instance is nonjury trials. Why are there nonjury trials? Sometimes parties waive their right to a jury. The parties may need detailed findings of fact and conclusions of law. They want someone to sit down and look hard at the facts, discuss them, and analyze them. Parties may want to create precedent—they want that judicial opinion on the books. For those reasons, sometimes the parties waive their right to a jury in order to obtain an opinion from a judge.

When else do we have nonjury trials? When the parties think a matter is too hard for the jury, they say, “this is too complex,” “this is a patent case,” “this is scientific, no jury will ever understand this, we better have a nonjury trial,” and I chuckle and say to myself, “I don’t know if I can understand it either, but they said I could, so I am going to have to try.” This may be a little bit of heresy, but sometimes the lawyers may be right. When I hear statistical or scientific testimony in some cases, I am glad that eight citizens were spared the task of trying to understand what I have had to learn. There was a famous story of a

* United States District Judge for the Southern District of New York. Judge Scheindlin originally delivered these remarks during Panel IV, entitled *Judges and the Facts*, at the *University of Miami Law Review’s* 2014 Symposium, *Leading from Below*. See *2014 Symposium*, U. MIAMI L. REV., <http://lawreview.law.miami.edu/2014-symposium/> (last visited Nov. 15, 2014). These remarks have been edited for publication.

patent jury trial in California, where the jury sat for a year on one lengthy case. When they reached the verdict, they were asked, “How did you do it?” The response: “Oh, we didn’t understand any of the scientific evidence. We just knew which expert we liked better.”

Judges also find facts in pretrial proceedings and some post-trial proceedings. The most common pretrial proceedings are suppression hearings.¹ Another pretrial proceeding is the *Markman* hearing, which is used to construe claims in patent cases.² Sentencing hearings in criminal cases also often require extensive fact-finding. For example, in a fraud case, judges must calculate the loss amount—this can be very fact-intensive. Sometimes sentencing hearings last for days. Defendants may also request a *Fatico* hearing to resolve a disputed issue of fact.³

Fact-finding also occurs when a party seeks only equitable relief, such as injunctive relief; or seeks an equitable remedy, such as disgorgement; or when there is an equitable defense, such as laches. Thus, even though there may be a jury trial on the legal claims, the judge will have to address the equitable claims and defenses following the jury’s verdict.

I next turn to how a record is created to allow for judicial fact-finding. The first question is how is evidence gathered? Before I answer this question, I note that access to full and robust discovery from the adversary and from nonparties creates the record that can support a claim or defense and lead to real change—if you do not have that robust discovery, there is no record. Without the ability to obtain full discovery, the “private attorney general” concept⁴ of citizens enforcing public rights in diverse areas such as antitrust, employment, securities, and civil rights—and that is what we have in this country—would die.

Thus, the permissible scope of discovery is critical. Broad discov-

1. See, e.g., JEFFERSON L. INGRAM, CRIMINAL EVIDENCE § 4.2 (2014) (naming the motion to suppress illegally seized evidence as “[o]ne of the most common pretrial motions”); ROGER LEROY MILLER & MARY MEINZINGER, PARALEGAL TODAY: THE LEGAL TEAM AT WORK 415 (2013) (“One of the most common and effective motions made by defense attorneys is the motion to suppress”); *Getting Ready for a Criminal Trial: Pretrial Motions*, LAWYERS, <http://criminal.lawyers.com/criminal-law-basics/getting-ready-for-a-criminal-trial-pretrial-motions.html> (last visited Oct. 24, 2014) (calling the motion to suppress the most used pretrial motion).

2. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996) (holding that construing a patent’s terms and scope is “‘a question of law, to be determined by the court,’” while it is up to a jury to decide whether that patent was infringed upon) (quoting *Winans v. Denmead*, 56 U.S. 330, 338 (1853)).

3. See, e.g., *United States v. Lee*, 653 F.3d 170, 174 (2d Cir. 2011) (holding that “[a]s long as [a] defendant disputes the accuracy of a factual assertion . . . in good faith,” the defendant has a right to a *Fatico* hearing).

4. See, e.g., *Brandenburger v. Thompson*, 494 F.2d 885, 888–89 (9th Cir. 1974) (holding that a plaintiff should be entitled to attorneys’ fees because the plaintiff met the requirements of the “‘private attorney general’ doctrine . . . [by] further[ing] the interests of a significant class of persons by . . . effectuating a strong congressional policy”).

ery has always been the bedrock of our system of civil litigation. In recent years, there has been a real push by large organizations to cut back on the scope of discovery.⁵ Rule 26(b)(1) of the Federal Rules of Civil Procedure, which governs the scope of discovery,⁶ was revised in 2000 to eliminate discovery as to the subject matter of the litigation, except upon a showing of good cause.⁷ Presumptively, discovery became limited to claims and defenses, and a party could only get discovery as to the subject matter of the litigation upon a showing of good cause.

But that was not the end. A proposed amendment to Rule 26 seeks to further limit the scope of discovery in two ways: (1) it eliminates any possibility of discovery regarding the subject matter of the case even on a showing of good cause; but, more importantly, (2) instead of defining what is discoverable as that which is relevant, it is now going to be defined as that which is relevant *and* proportional, in effect creating a new definition of scope to be defined by a detailed five-factor test.⁸ And the burden to show that the discovery sought is both relevant and proportional will be on the requesting party—most often the plaintiff.⁹ Thus, the bar plaintiffs must reach to obtain the evidence, which becomes the record on which judges do fact-finding, is raised even higher.

Our rulemakers have made other proposals to cut back on discovery, some of which have now been rejected: presumptively reducing the number of depositions in a case from ten to five;¹⁰ cutting the number of

5. See Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 812 (1981) (“[M]uch of the battle for limitations [on discovery] appears to have been carried on by attorneys who represent affluent clients, often corporations . . .”).

6. FED. R. CIV. P. 26(b)(1).

7. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendments; see also Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 178, 191–92 (2013).

8. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 289–90 (2013) [hereinafter PROPOSED RULES] (defining the proposed scope of discovery under Rule 26(b)(1) as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit”).

9. Cf. LAWYERS FOR CIVIL JUSTICE, AN IMPERATIVE TO ACT: THE PUBLIC COMMENTS DEMONSTRATE THE NEED TO REFORM THE DISCOVERY RULES TO ACHIEVE A MEANINGFUL REDUCTION IN THE COSTS AND BURDENS OF DISCOVERY 4 (2014), available at http://www.lfcj.com/uploads/3/8/0/5/38050985/frcp_lcj_supplementary_public_comment_2.3.14.pdf (arguing that including a proportionality requirement actually will not shift the burden entirely to the requesting party as many others have argued).

10. PROPOSED RULES, *supra* note 8, at 300.

hours of a deposition from seven to six;¹¹ reducing interrogatories from twenty-five to fifteen;¹² limiting requests for admission to a particular number;¹³ and a new reference to cost shifting, which can be added to protective orders, requiring the requesting party to pay for the discovery it needs.¹⁴ I am sure you can see what I see: this is a big signal to limit discovery, which will then contract the record.

Congress has also gotten into the act. It passed legislation, the Private Securities Litigation Reform Act (“PSLRA”) in 1995,¹⁵ which stayed all discovery in securities cases pending courts’ determinations of the inevitable motion to dismiss.¹⁶ No one gets any discovery until the court has decided the motion. And a lot of judges and a lot of courts said, “Well, we don’t have to do it if it is not a PSLRA case, but it is a good idea, so let’s stay discovery in *all* cases until the motion to dismiss is decided.” I think the vast majority of judges on my court are now staying discovery pending the outcome of the motion to dismiss, which is a little silly because then they grant leave to amend, and then plaintiffs amend the complaint, and then the court denies the motion to dismiss, and then a year is lost and the expense of litigation increases.

I turn now to the sources of discovery. How do parties obtain the evidence that makes the record? Well, I cannot *not* talk about e-discovery.

E-discovery has changed the nature of pretrial discovery. It is often attacked—again by large organizations—as *so* expensive that American businesses cannot compete in international markets. But there is no empirical support for this argument¹⁷—it sounds good, but nobody has proved it. In fact, while the computer era has made much more data available, it has also made it much cheaper to store, to retrieve, and to review that data. Thus, facts that would once have taken years to assemble can now be assembled in a matter of days or weeks. And data can be analyzed with advanced analytic tools that show trends and patterns—trends and patterns that often could not have been discerned in the era of paper records. In some of the big systemic cases I will discuss, this ability to find the trends and patterns through advanced analytics is going to produce a new kind of record.

11. *Id.* at 301.

12. *Id.* at 305.

13. *Id.* at 310.

14. *Id.* at 293.

15. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

16. *Id.* § 101(b), 109 Stat. at 741.

17. See Milberg LLP & Hausfeld LLP, *E-Discovery Today: The Fault Lies Not in Our Rules . . .*, 4 FED. CTS. L. REV., no. 2, Feb. 2011, at 1, 20–23 (discussing how and why the current rules of procedure effectively prevent e-discovery from becoming overly burdensome).

Another concern I have is how is the record cabined? That is, what can the judge consider? I have always had this question. Can the judge do independent research? Can the judge go on the computer and find what the judge wants to find? Can the judge consult with a court-appointed expert without the parties being aware of the conversation between the judge and the expert? Can the judge speak with other judges? Can Judge John Gleeson go to Judge Jack Weinstein's chambers and talk to him about the facts of a case?¹⁸ If it is not on the record, can they do that? Can the judge use the Internet? Should the judge use Wikipedia?¹⁹ There are so many questions about how we cabin the record.

And what about appellate review? We do not want the appellate judges to go outside the record we send them. They are supposed to review only the record that arrives to them on their desk. If they go out and find things that are not part of that record, and the parties don't know it, and there is no notice, that is wrong.

This is critical because of the standard of appellate review. For fact-finding, which is what this panel is about, the review is supposed to be "clearly erroneous"²⁰—that the trial judge made a clear error in her finding of fact. If it is a matter of law, they do it all over again; that is called "de novo" review.²¹ Of course, it is sometimes hard to define the distinction between a question of law and a question of fact, and then there is that strange beast called a mixed question of law and fact, which I have always found to be tricky. The key, as all trial judges know, is to make as many fact-findings as possible with appellate review in mind, because the standard of review of our fact-findings is supposed to be very deferential. Think about why that is: *we* heard the witnesses, *we* determined credibility, *they* were not there. That is the reasoning behind it. How can they tell me, "I disagree with your credibility finding. Of course the cop was telling the truth; you said he wasn't." That cannot be right—they did not hear that testimony.

18. Cf. Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1346 (2000) (discussing the evils of *ex parte* communication between a judge and parties to a case: "Without both sides present to balance the presentation of information, a judge may have a misleading impression of the factual context underlying a proceeding[, and] the judge may have an inaccurate or incomplete version of the facts.").

19. David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet In Evaluating and Deciding a Case?*, 16 PROF. LAW., no. 2, 2005, at 2, 14–17 (discussing the benefits and drawbacks of judges using the Internet as a resource).

20. FED. R. CIV. P. 52(a)(6).

21. See, e.g., *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable."); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) ("When we review a district court's decision *de novo*, we take note of it, and study the reasoning on which it is based. However, our review is independent and plenary . . .").

All of which leads me to say, it is much better to be a trial judge than an appellate judge. Why is that? The trial judge is the one who establishes and fixes the record. The appellate court can only respond to that record but cannot change that record and cannot expand that record. The trial judge shapes the case. Her findings of fact should be close to final. She is proactive—and I do not mean judicial activism. I mean, she frames the theory of the decision, and she compiles the support. So change is definitely from the bottom up. This goes to the theme of this Symposium, *Leading from Below*, which couldn't be more true. We take the first cut, and we shape the case; they can only review our work, and they cannot start all over again. So, of course, trial judges have the best job of all.

Now I want to turn to the different kinds of evidence that come before us. What is “historical evidence”? Some of it is evidence that we take judicial notice of. There is no real argument that today is Saturday, February 15.²² We can take notice of that. And then there should be a statement of undisputed facts—facts on which the parties agree. There are also percipient witnesses; they tell what happened, and we decide credibility. Next, there are documents. And these days, of course, there is electronic evidence. There are issues of authenticity with respect both to documents and to electronic evidence, and there are also issues of hearsay. I cannot cover either here. But let us assume that these documents and electronic evidence are in the record.

Electronic evidence is going to change litigation. It is contemporaneous and is essentially indisputable. There once were disputes as to who said what to whom and when. But nobody talks now. Today people text, they email, they post on their social media sites, and it is fixed—it is immutable. Therefore, there is no need to decide credibility; I have the actual text. A Facebook picture is incontestable. A GPS tracking device showing where someone was at a particular time is incontestable. We will not have alibi defenses anymore. With metadata, which shows when a phone call was made, or from where an email or text originated, the ‘from whom’ and ‘to whom’ is fixed. The world of evidence is changing.

Now we have to turn to statistical evidence. The principle governing statistical evidence that I discuss below came from an article by Professor D. James Greiner titled *Causal Inference in Civil Rights Liti-*

22. The *University of Miami Law Review* 2014 Symposium, *Leading from Below*, was held on February 14 and 15, 2014. *2014 Symposium*, U. MIAMI L. REV., <http://lawreview.law.miami.edu/2014-symposium/> (last visited Dec. 15, 2014).

gation.²³ I particularly liked his statement that “ideal data [is] never available.”²⁴ He is right. It is never perfect; it is never going to be perfect. He talked about hired experts who want to reach a predictable result. He talked about the variables that the experts use. The choice of variables can change the outcome. He talked about the benchmark—what are you comparing something to? He talked about asking the right questions. Anybody who has ever written a questionnaire knows the result depends on the way you frame the questionnaire. Then there is the quality of the data—how good is the underlying data? The statistics that grow out of the data can only be as good as the underlying data itself.

Which leads me to the case of *Floyd v. City of New York*, the stop-and-frisk case.²⁵ I will quote from my own public opinions. They are all there to be found. That case illustrates many of the points I just talked about with respect to statistics.

First of all, this case involved 4.4 million police stops and whether those stops were based on reasonable suspicion.²⁶ Now you cannot try 4.4 million individual stops. I tried eighteen and it took nine weeks; 4.4 million would be well past my lifetime and well past the lifetime of the entire federal judiciary. It cannot be done, so you have to use statistics. The order in the predecessor stop-and-frisk case, *Daniels v. City of New York*, required the use of a form that the police would fill out on every stop, called a UF-250.²⁷ Part of the settlement in *Daniels* required the police to record why they were stopping people and what they were stopping them for.²⁸ And it was the UF-250 database that the various experts—the competing experts—relied on to make their statistical analysis of the 4.4 million stops.²⁹ But think about the *quality* of that data. As I wrote in the final *Floyd* opinion, there are problems with that data.

What are those problems? First, some officers do not prepare the UF-250 with respect to every stop, so it is surely incomplete in terms of recording every stop.³⁰ Second, that form only records the perception of one side to that stop.³¹ It is just the police officer’s view of what happened; it is not the view of the citizen who was stopped. So you have a one-sided form. Third, many of the categories that the officers can check

23. D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533 (2008).

24. *Id.* at 589.

25. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

26. *Id.* at 556.

27. 138 F. Supp. 2d 562, 563 n.2 (S.D.N.Y. 2001).

28. Stipulation of Settlement at 8, *Daniels v. City of New York*, No. 99-cv-01695 (S.D.N.Y. Sept. 24, 2003).

29. *See Floyd*, 959 F. Supp. 2d at 576–89.

30. *Id.* at 578.

31. *Id.*

on that form are vague or subjective.³² One of those categories is “Furtive Movements.”³³ What is a furtive movement? Whatever it is, it is surely subjective—what may appear furtive to one observer may not appear furtive to another. Another one is “High Crime Area”³⁴—what is the high crime area? The entire borough of Queens, as one of the police officers testified in *Floyd*: “Oh, that whole borough is a high crime area.” Or, “Fits Description.”³⁵ Exactly what description was given? Probably, it was “black male.” That was the entire description: black male. Is that enough? Ten to fifteen percent of our population fits that description.³⁶ Fourth, the form really does not do enough: there is not enough on the form to know whether any one stop was truly based on a reasonable suspicion. So there is the problem. The data itself was flawed. But both sides had to use it.

The next problem is the benchmark. How did the parties define the benchmark and what is a benchmark? The definition is “[a] standard, or point of reference, against which [certain] statistics can be compared, assessed, measured, or judged.”³⁷ In *Floyd*, the question the experts had to address was what would the racial distribution of the stopped pedestrians have been if the officers’ stop decision had been racially unbiased?³⁸ That was the question that the researchers sought to answer.

The plaintiffs’ expert used “both population and reported crime as benchmarks for understanding the racial distribution of police-citizen contacts.”³⁹ He said: “‘Since police often target resources to the places where crime rates and risks are highest, and where populations are highest, some measure of population that is conditioned on crime rates is an optimal candidate for inclusion as a benchmark.’”⁴⁰ The defendant’s expert used a completely different benchmark, and that benchmark consisted of the rates at which various races appeared in suspect descriptions from crime victims, known as the “suspect race description

32. *See id.* (expressing concern about the checkboxes on the form, specifically mentioning the checkboxes for “Furtive Movements,” “Fits Description,” and “High Crime Area”).

33. *Id.*

34. *Id.*

35. *Id.*

36. U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2010), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (In 2010, “14 percent of all people in the United States identified as black, either alone, or in combination with one or more other races.”).

37. *Floyd*, 959 F. Supp. 2d at 583 (first alteration in original) (quoting *Glossary of Statistical Terms: Benchmark*, ORG. FOR ECON. COOPERATION & DEV. (July 23, 2007), <http://stats.oecd.org/glossary/detail.asp?ID=7228>).

38. *Id.* at 584–85.

39. *Id.* at 583 (quoting Report of Jeffrey Fagan, Ph.D., at 17, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-01034)).

40. *Id.* (quoting Report of Jeffrey Fagan, Ph.D., at 16–17, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-01034)).

data.’”⁴¹ “The City’s experts assumed that if the officers’ stop decisions were racially unbiased, then the racial distribution of [those who were] stopped . . . would be the same as the racial distribution of criminal suspects in that area.”⁴² Both experts controlled for many characteristics of a precinct or other geographic unit—they controlled for racial composition, crime rate, patrol strength, and socioeconomic considerations, such as age or employment. But it was the choice of benchmark that made all the difference in the conclusions they reached. Each of these experts employed multiple regression analyses, and although they did not use identical variables, they were very similar.

I concluded that the defendant’s benchmark was flawed because “there was no basis [to] assum[e] that the racial distribution of [the] stopped [group should] resemble the racial distribution of the local criminal population.”⁴³ After all, the stopped population were not criminals, as it turned out. Over ninety percent of them were not summoned and were not arrested.⁴⁴ Thus, it appeared to me that the stops should reflect the racial composition of the neighborhood’s population rather than the racial composition of the criminal suspect population even while taking into account local crime rates.

When cross-examined, the City’s expert defended his benchmark, in substance, by saying, “Well, how do we know that those stopped were actually innocent or were not about to commit a crime?”⁴⁵ This showed that the expert believed, with no basis in fact, that those suspects were likely criminals. He believed this at the *start* of doing his statistical analysis. This shows that if a researcher has already concluded that an officer’s decision as to whether to make a stop is not affected by conscious or unconscious racial bias, then that researcher will look for—and find—a credible, race-neutral explanation for the fact that minorities were stopped out of proportion to their share of the population. But because objectively there should be no difference in behavior between law-abiding minorities and law-abiding whites, the remaining explanation is that law-abiding minorities *appear* to be more suspicious-looking or criminal-looking than whites because that is the racial make-up of the *criminal* population. The only explanation for the close correlation between the racial composition of the crime-suspect data, which was 87% minority, and the racial composition of the stopped population,

41. *Id.* at 584 (quoting Report of Dennis C. Smith, Ph.D., and Robert M. Purtell, Ph.D., in Response to the Second Supplemental Report of Jeffrey Fagan, Ph.D., at 19, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-01034)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 585.

which was 83% minority, is that they resembled the criminal population.⁴⁶ I concluded that that is racial profiling.⁴⁷

I close this part about statistics with a quote from Judge Patrick Higginbotham of the Fifth Circuit:

In countless areas of the law weighty legal conclusions frequently rest on methodologies that would make scientists blush. The use of such blunt instruments [as regression analyses] in examining complex phenomena and corresponding reliance on inference owes not so much to a lack of technical sophistication among judges, although that is often true, but to an awareness that greater certitude frequently may be purchased only at the expense of other values.⁴⁸

Now, a couple of brief concluding remarks. What is the role of trial judges as gatekeepers? Do we have to allow these experts in at all? Courts are required to conduct a *Daubert* analysis.⁴⁹ That requires trial judges to analyze whether the expert really has something relevant to say that he or she is qualified to say and has used an appropriate methodology to reach a conclusion.⁵⁰ Then there is the question of whether a judge should use an independent expert who owes no loyalty to either party.

Finally, what are the settlement considerations in the context of fact-finding? When is the optimum time to make a settlement effort? I have always believed that parties cannot settle a case until they have had sufficient discovery to have some idea of what the fact record is. Once they know the facts, both the strong and the weak, they can get together and resolve most cases. But doing it too early, I think, is counterproductive.

In conclusion, judicial fact-finding is a common and important duty of a trial judge. Finding the facts based on a record presented by the parties is not easy. But it is necessary and more often than not critical to the outcome of a case. It is a topic that has been overlooked and deserves further study.

Thank you again for giving me this opportunity.

46. *Id.* at 584.

47. *Id.* at 588.

48. *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 860 (5th Cir. 1993) (en banc).

49. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93(1993).

50. *Id.*