The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits

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THE STRANGE CASE OF AMERICAN CIVIL PROCEDURE AND THE MISSING UNIFORM DISCOVERY TIME LIMITS

John Burritt McArthur*

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The author worked at Houston's Susman Godfrey from 1983 until the end of 1991 and practiced exclusively in civil litigation. He continues to practice law in the same areas. This Article shares his perceptions from his dozen-plus years of practice. He has received helpful comments on earlier drafts from many sources, most particularly from Mark Wawro, Judge Frank Evans, Jim Kronzer, Mara Luckmann, and Gary Smith. As is usual, Mark Wawro has made the most detailed comments; most of his suggestions made a lot of sense.

The following institutions and individuals supplied research materials: John Goerdt and the Federal Judicial Center; the National Center for the State Courts; Charles Evans, the court administrator for the Texas Supreme Court; Franci Edith Crane, Dave Cooney, Gary Ewell, Alice Flusser, Parker Folse, Jay Frahedas, Jan Riley, Rob Rowland, and Mark Wawro.
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I. INTRODUCTION

This Article addresses what may be the most persistent problem facing American courts: delay. Delay and backlogs are regular features of American justice. The problem has assumed enough visibility that critics have been able to use this procedural crisis as an excuse for substantive reforms that go far beyond merely speeding up case processing. A graphic illustration of the damage caused by the failure to solve the case processing problem appears in the *Contract with America*. After an introduction that repeatedly mentions court delay, a procedural problem, as a justification for reforms, the *Contract* proposes far-reaching restraints on substantive rights.1

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This Article urges American courts to address the problem of persistent delay by adopting the one pretrial reform they have thus far avoided: mandatory, uniform pretrial deadlines. It is a persistent puzzle why the Federal Rules of Civil Procedure ("Federal Rules") "fail to delineate the appropriate pace for litigation?" Systematic pretrial time limits are the narrowest and most direct remedy for the problem of delay. Yet reformers display a pronounced preference for much more draconian, but indirect and less effective, steps like rules limiting the number of discovery requests. This Article offers several reasons why courts instead should adopt firm and uniform pretrial deadlines: time limits are the most direct solution to the problem of delay; time limits impose the least burden on the rights of the parties, far less than capping the amount of discovery; and empirical studies have shown that time limits work.

Pressure for radical reform will continue to mount from the increase in state and federal dockets. Federal filings have trebled from 1960 to 1986. A recent federal study projects a four-fold increase from now to 2020. The National Center for State Courts predicted in 1994 that the dockets of many state courts, which manage several hundred times the caseflow of the federal courts, will continue to increase dramatically as well.

[hereinafter CONTRACT WITH AMERICA]. The assertion that delay and its companion, excessive cost, mark American courts appears three times in the first two pages of the chapter on legal reform, as the authors lay out their purported justification for reform. Id. at 143-44. See infra note 305 for an illustration of the rhetoric contained in the Contract with America.

2. Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. REV. 494, 496 (1986). In evaluating the Federal Rules, the General Accounting Office urged uniform, strict time limits as the major necessary reform. It found that "[a]lthough the Federal Rules of Civil Procedure do provide some time limits as to when certain pleadings and motions are due, they provide little overall guidance on the amount of time which should be allotted for various steps of the civil process." GENERAL ACCOUNTING OFFICE, BETTER MANAGEMENT CAN EASE FEDERAL CIVIL CASE BACKLOG 11 (GGD-91-2 1981) [hereinafter GAO REPORT].

3. See Marc Galanter, The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days, 1988 WIS. L. REV. 921, 924.


5. BRIAN J. OSTROM ET AL., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, at xi (National Center for State Courts 1994) [hereinafter STATE COURT 1992 ANNUAL REPORT]. A 1993 report, issued in 1995, reported that total criminal and civil filings across all courts fell for the first time in a decade. BRIAN J. OSTROM & NEAL B. KAUNDER, EXAMINING THE WORK OF STATE COURTS, 1993: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT at viii-ix (National Center for State Courts 1995) [hereinafter STATE COURT 1993 ANNUAL REPORT]. While this is slight cause for optimism and fits with the findings discussed in part II.B that changes in litigation rates have multiple and complex causes, the report continued to find that "[m]ost general jurisdiction trial courts failed to keep pace with the flow of civil and criminal cases over the past three years." Id.
Many courts have struggled ineffectively with the increased number of case filings. In Los Angeles, for example, the largest court system in the world and one that is representative of the American urban court system, cases took approximately six months to get to trial in 1946, thirty months in 1973, and fifty-nine months in the 1980s. Similar delay characterizes many other courts, particularly urban courts.

These are not statistics of which a system created to render justice to those needing legal protection should be proud. It should not be the legal system's hallmark that for every right there is a remedy, but that most of the remedy goes to lawyers. Or that our judicial system produces the highest possible level of justice, but that only a minority of the population can afford the price of admission. In many jurisdictions the act of seeking judicial protection is beyond the reach of most citizens. Slow dockets force many of the poorer litigants to give up.

Court crowding has produced some desperate responses. In the late

at ix. This one-year decline does not suggest that the problem of crowding will disappear anytime soon.

6. JAMES S. KAKALIK ET AL., AVERTING GRIDLOCK: STRATEGIES FOR REDUCING CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 11, 12 (1990); see also AMERICAN BAR ASSOCIATION ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY 7 (1984) [hereinafter ABA LITIGATION COST AND DELAY REPORT]. ("In some of our major metropolitan areas, where most litigation is pending, a civil case frequently takes five years or more to get to a jury trial."

7. As the delay reduction plan adopted by the Eastern District of Texas states in its opening sentences, "The expense of civil litigation today as a practical matter results in denial of access to the courts for a significant segment of our society.... A principal cause for the escalation of cost is the overuse and abuse of discovery." Local Court Rules of the United States District Court for the Eastern District of Texas, Civil Justice Expense And Delay Reduction Plan, in TEXAS RULES OF COURT, FEDERAL, 1996, at 393, 393 (Introduction) (West) [hereinafter Expense and Delay Reduction Plan].

8. A number of the critics observe that discovery abuse leads to increased costs that may transform the justice system into one for only the very rich. See John Barkai & Gene Kassebaum, The Impact of Discovery Limitations on Cost, Satisfaction, and Pace in Court-Annexed Arbitration, 11 U. HAW. L. REV. 81, 90 & n.59 (1989) (citing numerous scholarly articles on discovery with "abuse" in the title). More than a few cases warrant the fear and lament of Judge Newman, who believes that legal expenses should not exceed the amount of damage awards. Jon O. Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 YALE L.J. 1643, 1645 (1985).

The fact that delay crowds people out of the courts accounts for the paradoxical fact that improving judicial functioning does not necessarily reduce the number of cases or docket backlogs. Instead, one of the immediate effects can be to give new life to cases that were abandoned or settled when litigants had to wait years to go to trial. See George L. Priest, Private Litigants and the Court Congestion Problem, 69 B.U. L. REV. 527, 557 (1989); see also discussion infra note 131. Given this reality, conservatives who urge court reform as a means of reducing the total number of lawsuits may well be disappointed by the results of successful reforms. Even more plaintiffs may find vindication for their rights. Those who believe in justice, however, should be heartened by this prospect.
eighties, federal courts imposed a three-and-a-half month moratorium on all civil trials in order to process their backlog of criminal cases.\textsuperscript{9} That proposal was enjoined by a panel of federal appellate judges who noted that however severe court costs, annual spending on the federal courts was only about the same as buying two jet fighters and only one-sixtieth the cost of the space shuttle.\textsuperscript{10} Several states imposed civil trial moratoriums that did pass constitutional muster.\textsuperscript{11} The federal three-strikes sentencing law is sure to increase the federal criminal-case backlog and the delay of civil cases even more.\textsuperscript{12}

\begin{itemize}
  \item 9. See Armster v. United States Dist. Court, 792 F.2d 1423, 1425 (9th Cir. 1986).
  \item 10. Id. at 1429 & n.12. The Ninth Circuit decided that “the seventh amendment right to a civil jury trial is violated when, because of such a suspension, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive.” Id. at 1430. Its language was even more aggressive in spots: “There is no price tag on the continued existence of [a system of civil jury trials], or on any other constitutionally-provided right.” Id. at 1429. Like most absolute statements, this last statement cannot possibly be true. The Seventh Amendment also guarantees indigent defendants a right to court-appointed counsel, but there is a sharp price tag on that right, because they only get lawyers who will accept the low, court-appointed fees. Were there no price, they would all get F. Lee Bailey, or lawyers trained in the soon-to-follow F. Lee Bailey School of Optimal Criminal Defense Lawyers.
  \item 11. Vermont cleverly imposed a six-month civil trial moratorium, by decree of the state supreme court, but gave an administrative judge discretion to “permit the trial of any given case where justice requires,” even though “it is envisioned that nearly all civil jury cases will be delayed.” Directive No. 17 v. Vermont Supreme Court, 579 A.2d 1036, 1037 (Vt. 1990). Not surprisingly, in this odd world in which courts get to make the rules that govern their practices, the Vermont Supreme Court affirmed its directive when it had to decide the constitutionality of the decree. (This decision is perhaps the judicial equivalent of patting oneself on the back.) It read Armster as prohibiting only blanket moratoriums that continued for a “significant” period of time and not “when access to juries is delayed a relatively short period of time.” Id. at 1043.
  \item 12. There is little doubt but that the dismal prospects facing convicted defendants under existing mandatory sentencing laws have increased the cost of plea bargaining, increased the value of going to trial, and expanded the criminal backlog in the federal courts. Patrick E. Longan, The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials, 35 ARIZ. L. REV. 663, 675 (1993); see also infra note 36. This problem is only going to worsen as Republicans pass new legislation that federalizes new areas of the criminal law and imposes sharp mandatory sentences under the new three-strikes law.
  \item The effect of this new federal legislation on overall court congestion will be somewhat attenuated by the fact that the vast majority of cases move through the state court system, not the federal system, but the federal reforms are certain to become models for reform in many states. There is no reason to expect state court processes to be immune from the negative externalities that
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\textsuperscript{9} See Armster v. United States Dist. Court, 792 F.2d 1423, 1425 (9th Cir. 1986).
\textsuperscript{10} Id. at 1429 & n.12. The Ninth Circuit decided that “the seventh amendment right to a civil jury trial is violated when, because of such a suspension, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive.” Id. at 1430. Its language was even more aggressive in spots: “There is no price tag on the continued existence of [a system of civil jury trials], or on any other constitutionally-provided right.” Id. at 1429. Like most absolute statements, this last statement cannot possibly be true. The Seventh Amendment also guarantees indigent defendants a right to court-appointed counsel, but there is a sharp price tag on that right, because they only get lawyers who will accept the low, court-appointed fees. Were there no price, they would all get F. Lee Bailey, or lawyers trained in the soon-to-follow F. Lee Bailey School of Optimal Criminal Defense Lawyers.
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Delay has worsened in spite of many measures designed to curb litigation excess, including revisions to Rule 11, a beefed-up pretrial conference, limits on the amount of discovery, use of magistrates and special masters, and such alternative dispute resolution procedures as court-ordered arbitration. The measures are becoming more extreme. Passage of the first Republican court-reform bill, the securities class-action bill, illustrates a shift from procedural reforms that fall within the control of lawyers and judges to measures that will be imposed from outside the profession and that seem increasingly likely to restrict substantive rights, not just alter procedures.\(^\text{13}\)

This Article recommends pretrial time limits as the cure for delay because most case delays occur in discovery. It is well-known that few cases go to trial, most settle, and judges have very few days available for trying civil lawsuits.\(^\text{14}\) Even cases that do reach trial spend most of their existence in discovery, not trial.

Courts need to reorient the rules of civil procedure so that cases unfold within a uniform period that requires parties to complete all discovery within a nine-month (or a similarly short, but in all events fixed and uniform) pretrial schedule. Trial then should follow within the next three months. Courts can avoid intrusions into how parties conduct discovery and how much discovery should occur, if they enforce rigorous rules on how long discovery can take. This Article urges “the courts” to impose a standard discovery and trial schedule. Because the federal court system is our one national system and because state courts generally imitate federal reforms, the reforms will be most effective if adopted first at the federal level.

The shortened schedule must include a prompt trial date, to ensure that the parties get the message that there will be no second-chance discovery. And to be implemented effectively, the rules need time monitoring and sanctions to make judges rule promptly on discovery and dispositive motions.

Most recent pretrial reforms ignore the length of discovery. The most important example of this mistake is quite fresh: it is the limit on the number of depositions and interrogatories in the recent amendments to the Federal Rules. The Federal Rules limit the amount of discovery


\(^{14}\) See infra notes 52-56 and accompanying text.
without imposing any specific limit on the duration of discovery. The weaknesses of this approach are discussed in parts III.D and III.E below.

The rush to contain the number of discovery steps, in hopes of reducing pretrial delay, is unfortunate because a substantial body of research (described below in part III.B.3) shows that the most needed reform is a limit on the total time for discovery. Without an external standard, lawyers and parties avoid responding to discovery requests and delay their own requests for information. Limiting the number of depositions or interrogatories may only ensure that a smaller number of requests occurs in the same, longer than necessary, time period. The average time per step is likely to increase. In contrast, an overall time limit treats the problem of delay directly.

To implement time limits effectively, the Federal Rules should be amended to require courts to do the following:

1. Hold a pretrial conference as soon as the answer is due and enter a pretrial order scheduling all necessary discovery within nine months of the hearing. An early pretrial conference is required by the Federal Rules, as is the imposition of some discovery time limit, but not a uniform discovery time limit.

2. Set a firm trial date within one year of the first hearing.

3. Rule without delay on every discovery motion and dispositive motion. The rules need to provide short deadlines for courts to decide discovery motions, and perhaps dispositive motions, with motions reassigned if they are not decided in time.

4. Schedule a second hearing three months before the trial date. Parties who claim they are not ready for trial must be required to present a list of needed discovery and their plan for completing it in the months remaining.

5. Give courts an allowance of a small, fixed number of cases they can exempt from the nine-month period, so that judges have enough flexibility to avoid injustice, while not allowing so much leeway that it defeats the goal of a common pace.

This Article has four major parts. Part II outlines the structural characteristics of the court delay problem and pinpoints discovery as the key area for reform. Part III discusses the nine-month discovery schedule. It shows that uniform time limits allocate the incentive to prepare cases to the parties with the most information—lawyers and their clients—and summarizes the many studies that have found such limits necessary for effective reform. It also explains why limits need to be uniform across all cases and why time limits are a better reform than curtailing the amount of discovery.
Part IV discusses related institutional reforms that will be necessary to make time limits effective. This part focuses on four measures: (1) more judges to erase backlogged dockets; (2) deadlines for judicial discovery decisions and sanctions to punish nonperforming judges; (3) a requirement that parties who feel they cannot meet the timetable present an alternative plan three months before the period is over; and (4) firm trial limits. Part IV also argues that disciplinary rules have proven incapable of substituting for time limits as providing a more direct remedy to delay. Finally, part V argues that lawyers cannot expect to avoid drastic reforms to court processes unless they develop effective measures to reduce delay.

There is a point at which an increasing number of cases cannot be handled without increasing the resources—judges, courtrooms, juries—devoted to the task. Some of today’s growing backlog reflects our society’s unwillingness to pay the price of the public services it seeks. Yet different courts process widely differing amounts of litigation with roughly similar resources, so some improvements should be available in slower courts without added spending. Conversely, merely increasing spending is not going to cure the embedded problems of cost and delay. Without proper planning, spending more money will just intensify inefficient case processing. The problems of courts mired in litigation are structural, and they need structural reform.

Pretrial time limits would apply to civil cases. Civil litigation dominates court dockets. For example, civil cases constituted seventy-three percent of the thirty-four million filings in state courts of general

15. That the level of resources does not necessarily determine the number of cases handled is one of the surprising findings of two state court studies, performed ten years apart in 1978 and 1988, by the National Center for State Courts. Their research did not lead them to predict a necessary improvement in case processing by adding more judges or other “structural” reforms. THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (National Center for State Courts 1978); BRIAN MAHONEY ET AL., CHANGING TIMES IN STATE COURTS (National Center for State Courts 1988); see also infra notes 121-31 and accompanying text. As the authors of the first report noted, “additional judges will have no independent effect on the underlying legal culture that colors the expectations and practices of the trial bar.” CHURCH ET AL., supra, at 80.

At the same time, the persistent rise in case filings suggests that even with major improvements in court functioning, the courts will need more judges. Adding more judges, along with more efficient use of court staff and imposition of time limits, are major recommendations of the Brookings Institute’s Task Force on cost and delay in civil litigation. THE BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION, REPORT OF A TASK FORCE 30-33 (1989) [hereinafter THE BROOKINGS INSTITUTION].

For judges weighing in on the side of increasing their ranks, see the comments cited in Longan, supra note 12, at 670 n.34.
jurisdiction in 1993. The Article does not discuss reforms for criminal cases. Criminal cases involve the much more precious values of life and liberty, not just material goods, and are surrounded by a battery of constitutional protections that do not apply in civil litigation. Accordingly, the best place to begin reforming is on the civil side of the docket. Nonetheless, courts should consider carefully whether some of these reforms might not improve the criminal process, as well.

Pretrial time limits will not cost more money. Pretrial time limits do not require more study or research—indeed, the proposal rests on detailed prior research. And time limits have the advantage that, if

16. See STATE COURT 1993 ANNUAL REPORT, supra note 5, at 69; see also infra notes 33-35 and accompanying text.

17. One obvious solution to the problem of judicial crowding is to spend more money, to add more judges, build more courtrooms, and impanel more juries. One body of research predicts that adding more resources but handling cases the same way will not solve many of the problems of court crowding. See discussion infra note 123. More judges may be needed to keep pace with the expanding body of litigation, but manpower alone will not solve the problem that the existing resources do not, on average, do an adequate job with existing filings.

In addition, spending significantly more money is an unlikely remedy at a time of such deep shortage of government funds. The American Bar Association ("ABA") recently published an article suggesting the contrary. A recent ABA Journal-Gallup poll found that poll respondents guessed that 27% of the combined federal, state, and local budget was spent on "civil and criminal justice," rather than the actual 3%. See Steven Keeva, Demanding More Justice: Whether Americans Get What They Want from the Legal System Depends on Its Ability to Stretch Limited Resources, A.B.A. J., Aug. 1994, at 46, 47. And when respondents were asked to select in quintiles the portion of the budget that they thought should be devoted to "justice," the "average response" was 34%. Id. at 47.

These statistics may be music to lawyers' ears, but the exercise of asking what percentage of government spending should be devoted to any one area, without asking the test group to rank all areas of government spending, is almost utterly meaningless. Of course people are very concerned about crime. They are willing to spend a lot of money to stop it. Ask them how much to spend on national defense, in a poll only on that subject, and they may well add another 34% of total government spending. So too for education, a cure for cancer, health care, deficit reduction, and so on. Polling will quickly justify spending several times the total government budget.

Then ask the same people how much they are willing to have their taxes raised to pay for more courts; that question would provide a more reasonable assessment of what they are willing to pay for the administration of justice. The answer will be nowhere near enough to increase court spending to 34% of the total budget, a result that in any event would raise the daunting prospect of a policeman in every garage and a judge on every corner.

The ABA survey is one example of contingent valuation, surveys in which pollsters attempt to calculate the value of services that consumers do not buy directly in the marketplace by generating proxy measures of value. These techniques are becoming more common in measuring natural resource values and in environmental cases. For an opinion accepting this kind of methodology, see Ohio v. United States Dep't of the Interior, 880 F.2d 432, 474-81 (D.C. Cir. 1989). The procedures are rife with pitfalls, however. For a thorough discussion, see GENERAL COUNSEL'S REPORT OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, 58 Fed. Reg. 4601, 4602 (Appendix I, January 11, 1993 Report of NOAA Panel on Contingent Valuation (1994)). The ABA's survey lacks virtually every safeguard recommended in this report.
adopted, they can force change even on courts and lawyers who will not change their culture of litigating voluntarily.

II. DISCOVERY REFORM: THE KEY TO THE COURT DELAY PROBLEM

Most lawyers have a casual, anecdotal sense of trends in their own jurisdictions but little sense of the "court system" as a whole. Most are too busy working to study the institution that sustains their work and meaning. Politicians and the general public tend to have an equally anecdotal vision of the courts, albeit a much more negative vision.

So much misconception circulates about the way courts function, and what their problems are and are not, that the best place to begin a discussion of court reform is with some facts. Much is known about the way cases move through the judicial system. Law schools devote few resources to studying the courts empirically, but outside researchers have been taking a serious look at the way courts work in the United States for nearly forty years." The statistics indicate the need for fundamental reform in the structure of discovery.

A. Increasing Case Filings in State and Federal Courts

The most publicized problem in court crowding is that case filings are increasing and the problem is going to worsen. If recent trends in...
state courts continue, "many trial and appellate courts are likely to see their caseloads double before the end of the decade." Moreover, not enough courts are handling the increase well. Only two in five state courts had an average civil "clearance rate," the ratio of cases disposed to new cases received, of over 100% in the last year or averaged over the last three years. Three out of five courts lost ground. Federal judges are unlikely to pick up the slack. Each disposes on average of only half as many civil cases and one-sixth the criminal cases as his or her state-court counterparts and federal cases are a small fraction of state

government recovery cases) and falling in others. The incidence of cases depends on the type of case. Even the major categories of cases contain subgroupings, "each with a distinctive career:" Cf. Galanter, supra note 3, at 930 (discussing categories of social security litigation filings).

To truly understand these trends, one has to analyze the data far more carefully. Galanter is correct to note that, at present, very little is known about trends in populations of cases. Id. at 952. The patterns of conduct prohibited by different laws can bear very different relations to underlying human needs and instincts. Some laws may change conventions that the majority lives by, like an adjustment in the speed limit or a rule that wills need two witnesses. Others, like laws against rape or murder, punishments for commercial fraud, and laws against discrimination, outlaw much more deeply embedded forms of action. One could predict that violations of the first group of laws should fall sharply as the new rules become well-known and people adjust to their requirements. Increases in the number of these prohibitions should not lead to a significant permanent increase in litigation. The second category is quite different. Laws forbidding or punishing deeply embedded behavior may at best contain a changing, but incurably large, set of acts, like a lid that bubbles unsteadily on a pot of boiling water. It is likely that the more laws like these that Congress or state legislatures pass, the larger the total and per capita flow of litigation.

Comparative data between different parts of the judicial system also have to be scrutinized most carefully, because even small changes in design can produce very big changes in measured data. The court "system" is so intricate that statistics often reflect changes not apparent from the surface of the data, including shifts from somewhere else in the interlocking jurisdictional patterns of the various courts. To consider just how complex the data can be, consider the study of twenty years of reform in Illinois that seemed to find that delay fell only in the one period when there were no reforms. Priest, supra note 8, at 548-49. Delay remained constant during the many periods of reform. Id. at 556. This data suggested, paradoxically, that reforms might be counterproductive; they might increase delay. (This not being a wholly unlikely possibility, because every reform requires new procedures and behavior and thus imposes certain new costs.) It turns out instead that the decrease during a period of no reform reflected an increase in the jurisdictional limits of Chicago municipal courts, and a shift of cases from the courts studied to the municipal courts. Id. The growth trend returned as a sign that this change had been accommodated. Id. at 557.

20. State Court 1992 Annual Report, supra note 5, at xi. There are some signs that things have begun to improve, including the finding in 1993 that overall state filings declined for the first time in more than a decade. State Court 1993 Annual Report, supra note 5, at viii-ix.

21. The precise figures are that 19 out of 50 states had clearance rates of 100% or better in 1993 and 18 out of 50 for the prior three years. State Court 1993 Annual Report, supra note 5, at 13. This is some improvement over the 1992 figures, which found that only one in four courts met or exceeded a 100% clearance rate, but the numbers show that the courts have a long, long way to go. State Court 1992 Annual Report, supra note 5, at 14.
There is no sign that the problems of delay and overcrowding will go away without conscious efforts at reform.

State courts handle the overwhelming majority of all cases. In 1993, state courts of general jurisdiction received thirty-four million cases. This is ninety-eight percent of the state-federal total. If one adds traffic cases, far and away the largest category of state filings, state courts received almost ninety million cases, over fifty times the federal filings. For all the attention that federal courts receive for their decisions on such issues as desegregation, antitrust, securities fraud, racketeering, products liability, and civil rights, federal courts handle a small fraction of the national caseload.

Another core fact, one quite contrary to popular conception, is that the number of case filings per capita is not at an all-time high. Total filings will increase with an increasing population. As long as population increases, total filings can go up even if each person files fewer cases. But when one looks at filings per capita, a better barometer of litigation tendencies, a different story appears. In Los Angeles courts, for instance, the two peaks of filings per capita between 1880 and 1980 occurred in the 1890s and the late 1920s.

A study of at least one federal circuit

22. State Court 1993 Annual Report, supra note 5, at 69. On average, state court general jurisdiction judges handle more than three times as many cases as federal district court judges. Id. at 8. This wide variation in disposition rates says nothing about the efficiency of judges in the two systems. It may turn entirely on differences in the type or complexity of the average case (or of certain extremely difficult cases). It does suggest, however, that state courts cannot look to their federal brethren to solve the problem of congestion.

23. In 1993, state courts received 34,000,335 cases, excluding traffic cases. State Court 1993 Annual Report, supra note 5, at 69.

24. Id.

25. The 1993 state court filings, including traffic cases, totaled 89,584,001 cases. Id. Traffic cases often get omitted from debates over judicial caseload and slow dockets, for several reasons. One is that courts of limited jurisdiction handle many traffic cases, and these courts do not draw the kind of criticism that seems to be elicited by large jury verdicts in courts of general jurisdiction. Another reason is that most of us have received traffic tickets, and know they are usually well-deserved. A third reason may be that handling these cases often involves very few resources: “The majority of traffic cases are disposed of with a minimum of judicial attention.” State Court 1992 Annual Report, supra note 5, at 7.

The ratio of full-blown cases decided by state courts compared to federal courts is probably greater, because the great majority of federal cases were bankruptcy cases or tried before magistrates. Out of 1,683,924 cases filed in the federal system in 1993, bankruptcy cases accounted for 897,231 of the total, and another 510,057 were “magistrate” cases. State Court 1993 Annual Report, supra note 5, at 69. There were only 229,850 general civil cases, compared to 14,808,314 in the state system, and 46,786 criminal cases, compared to 12,987,604 in the state system. Id.

26. Molly Selvin & Patricia A. Ebener, Managing the Unmanageable: A History of Civil Delay in the Los Angeles Superior Court 34 (1984). The authors found that the number of judges and their individual productivity in Los Angeles county courts seemed to have
found that while total filings increased with population, filings per capita were higher at the start of the last century, with another peak in the 1920s, than they are today. Moreover, a number of other countries’ filing rates at least matched American rates. In addition, even the recent peak in filings may be starting to decline.

Civil cases fill the bulk of the docket. In state courts of general jurisdiction, “the civil side of the docket is nearly two and a half times the size of the criminal caseload.” The largest single category of civil cases are traffic cases, which took up fully thirty-five percent of all general jurisdiction and seventy-one percent of limited jurisdiction state cases in 1993. Tort cases, in contrast, occupied only sixteen percent of the civil filings in these courts, down from eighteen percent a decade before. Although alleged abuses in tort litigation preoccupy many court critics, there are more contract and estate cases and almost as many

kept pace with case filings—the number of judges increasing with more filings and productivity staying about the same. Id. at 35-43. What did change was the composition of cases and the way they were litigated. “Simple” contract cases like debt actions had fallen from over 50% of cases in 1930 to under 10% by 1980, while personal injury cases had risen from 20% to 60% in the same period. Id. at 43-45. Auto accident cases made up just over two-thirds of the personal injury cases. Id. at 45. Finally, the authors found a sharp increase in the “number of events” in discovery per case. Id. at 46, 48.

Another study that looked at federal courts in the 1970s and 1980s found that criminal and United States civil filings had remained quite stable, but the number of private civil lawsuits had risen sharply. The overall time to disposition remained remarkably stable. TERENCE DUNGWORTH & NICHOLAS PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 34-36 (1990). What did vary, and vary sharply, was the variation among districts in the time it took to resolve cases. The authors could not explain district speed by such common-sense explanations as the number of cases per judge or mix of cases between civil and criminal cases. Id. at 47-73. Indeed, they found a counterintuitive result. While “we would expect the districts with greater workloads per judge to process cases at a slower rate, the opposite is what we have actually found.” Id. at 73. This finding suggests that courts develop cultures with their own inertia, and that this rather than some inherent structural problem is the reason for congestion. This was the finding as well of two major studies of state court litigation conducted a decade apart by the National Center for State Courts. See infra part III.B.3.

27. See Marc Galanter, Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 39 (1983).
28. Id. at 51-56. Galanter found that even if one added a good estimate for cases filed in courts of limited jurisdiction, the United States’ rate still “is in the same range as England, Ontario, Australia, Denmark, New Zealand, somewhat higher than Germany or Sweden, and far higher than Japan, Spain or Italy.” Id. at 55.
29. See STATE COURT 1993 ANNUAL REPORT, supra note 5, at viii-ix.
30. Id. at 5.
31. Id. at 6.
property cases as tort cases in general jurisdiction courts.\textsuperscript{32}

Criminal cases accounted for eighteen percent of the state general jurisdiction caseload.\textsuperscript{33} Though a relatively small part of all cases and even of all criminal cases, serious criminal cases (felony filings) increased rapidly through 1992.\textsuperscript{34} Total criminal filings may have "plateaued" in the last few years,\textsuperscript{35} but the rush to enhance criminal sentences, making such behavior as obstructing abortion clinics a federal crime and enacting "three-strikes" laws, guarantees an accumulation of criminal trials and less time available for civil cases.\textsuperscript{36}

\textsuperscript{32} Id. at 11 (using a sample of general jurisdiction courts in 23 states). Small claims also exceeded the number of tort cases in the 23 state sample of general jurisdiction courts. Id. As the National Center for State Courts reported in its 1992 report, "[t]ort is the area of law that figures most prominently in the debate over the need for reform of the civil justice system." STATE COURT 1992 ANNUAL REPORT, supra note 5, at 16. Tort cases, however, are dominated by auto cases (not the ordinary focus of criticism), and tort filings in general grew more slowly than all civil filings. Id. at 16-17. A four state survey showed that 57% of tort cases in these state courts were automobile cases, while only 4% were the notorious products liability cases. Id. In its 1993 report, the National Center for State Courts noted that tort filings seemed to have begun falling after the enactment of tort reform measures in the mid-eighties. STATE COURT 1993 ANNUAL REPORT, supra note 5, at 19.

\textsuperscript{33} STATE COURT 1992 ANNUAL REPORT, supra note 5, at 6.

\textsuperscript{34} Criminal felony filings increased 65% from 1985 to 1992, more than any category of civil cases. Id. at xii, 39. In the study's 37 state survey, there were 676,512 felony filings in 1985, and by 1992, this number had grown to 1,188,569. Id. at 40. Felony filings decreased a little in 1993, but this "dampens only slightly the substantial growth in felony filings of 68 percent since 1984." STATE COURT 1993 ANNUAL REPORT, supra note 5, at 45. When this slight decrease is matched with the increasing severity of felony sentences, it is pretty easy to predict that felony cases will be imposing increasingly greater burdens on state and federal courts.

\textsuperscript{35} STATE COURT 1993 ANNUAL REPORT, supra note 5, at 37. In addition, civil filings had increased in state court from 1985 to 1992 but fell in the much smaller federal court system. STATE COURT 1992 ANNUAL REPORT, supra note 5, at 44.

\textsuperscript{36} One of the laws of unintended consequences that has plagued the courts in recent years has been the increase in criminal trials resulting from the federal sentencing guidelines. With federal judges now unable to exercise discretion to adjust mandatory sentences, criminal defendants have less reason to plea bargain and more reason to roll the dice on trial and possible acquittal. The result has been an increase in contested hearings, a decrease in guilty pleas, and for lawyers and parties with civil claims, a longer wait to get to trial. Longan, supra note 12, at 675-76.

The Contract with America is full of proposals to decrease the number of court filings, but not in the criminal area. Here the Republicans are quite willing to increase sentences and build prisons without any regard for the impact on case delays that they so lament. See CONTRACT WITH AMERICA, supra note 1, at 46-47 (recommending tougher minimum sentencing laws), 51-52 (proposing to allocate more money for prisons). The Contract proposes more money for prosecution, id. at 45, but nowhere mentions needing more money for the courts themselves. To get more people into jail, the judicial system is going to end up trying a lot more cases, and the Contract does not indicate whether its progenitors are willing to spend the necessary funds for judges who on other pages they accuse of "declar[ing] war on swift and certain punishment." Id. at 38. The criminal justice block grants presumably are available to fund courts or for other purposes, but by the time this society has built the added prisons welcomed in the Contract with America and added the resources needed to catch, prosecute, and house these prisoners, one will look long and hard without
B. Increased Filings Reflect Changing Social Priorities, Not Necessarily Increased Litigiousness

Trends in case filings reflect social trends. Not only does the filing rate vary by the type of law but it differs in different parts of the country. For instance, in one surprising statistic, some isolated rural states have higher per capita filings than large urban states like New York and California. Thus, even data that looks as firm as the data reflecting the growth in civil cases may disguise a complex structure of rising and falling rates in different regions and types of cases. There are new laws for new purposes; old laws disappear as the society outgrows them.

Professor Marc Galanter conducted a study of cases filed in the federal courts from 1960 to 1986. Filings increased 398% during this twenty-six year period. Yet the increases were not at all uniform. Some cases common in 1960 experienced a large decline in the percentage of overall filings by 1986, while others rarely seen at the start of the period filled large parts of the 1986 docket. One cannot discuss the "litigation explosion" rationally without considering the life cycles of different cases. There have been litigation explosions in some areas of the law, but there have been implosions in others.

Galanter divided his federal cases into the "Big Six," six categories that contained over seventy-eight percent of all federal cases filed in

finding the additional funds necessary to pay for additional courts and other judicial resources.

37. Vermont's rate exceeded New York's and was rapidly closing in on California's. STATE COURT 1992 ANNUAL REPORT, supra note 5, at 41. The fact that the number of filings reflects not merely litigiousness, but deep-rooted social trends too, is also reflected in the variation of criminal filings by state. For instance, the number of felony cases filed per 100,000 population in 1992 ranged from a low of 96 in Massachusetts to 2,975 in the District of Columbia. Id. Obviously this data reflects what different states choose to criminalize and how well they catch criminals, as well as the amount of underlying crime.

When all criminal filings, not just felonies, are considered, and one looks at courts of general jurisdiction, Vermont and New Hampshire ranked ahead of New York, California, and Texas in 1992 and again in 1993. Id. at 32; STATE COURT 1993 ANNUAL REPORT, supra note 5, at 39. The disparities were great; in 1993, New York had only 403 filings per 100,000 and California 518, while Idaho lead the list with 7,293 (ahead of even the District of Columbia) and a bucolic state like Vermont had 2,789. Id. at 39. Indeed, from these statistics, "most of the nation's largest cities that have reputations for high levels of criminal activity ... are in states that are below the median in terms of criminal filings per 100,000 population." STATE COURT 1992 ANNUAL REPORT, supra note 5, at 33. This data may suggest that the rural poor are not willing to take a backseat to their urban cousins in our increasingly interdependent world.

38. Galanter, supra note 3, at 924.
39. Id. at 925.
The largest group of cases remained contract cases, the ordinary commercial fare, although this category had fallen from 26% in 1960 to 18.7% of filings in 1986. Tort cases had fallen from 38.4% to 16.5% in the twenty-six year period. Even though tort cases ranked second among case groupings, one of the striking facts about the so-called tort explosion is that it fizzled, at least in federal court. Products liability cases grew from 10.2% to 31.5% of all tort cases, but many of these cases involved a handful of egregious products cases condensed into class actions.

The biggest absolute increase in litigation shares came from "recovery cases." These are cases in which the government sued to recover overpayments. Recovery cases rose from 4.4% to 16.1% of federal cases. Hard on the heels of recovery cases were prisoners' rights cases, which increased from 4.3% to 13.3%. This increase reflected the growing prison population; lawsuits filed per prisoner actually fell a little. The fastest increase was in civil rights cases,

40. Id. at 924. 
41. Id. at 925. Galanter excludes from contract cases government recovery cases, cases that might otherwise be viewed as government contract cases, and puts them in a separate category so that it is easier to determine the contribution of this rapidly growing group of cases. Id. at 942. 
42. Id. at 925, 936. 
43. Id. at 937. Asbestos cases, for instance, constituted a quarter of all products liability cases in the federal district courts for over an entire decade, from 1974 to 1986, and took up 43% of the products cases in 1986. Id. at 939-40. Dalkon Shield cases formed 6% of the products cases from 1974 through 1986. Id. at 940-41. 
44. Id. at 925, 928-29. 
45. Id. at 925, 931-32. 
46. Id. at 932-33. The Contract with America has a lot of fun with prisoners, whom the Republicans of course do not like anyway. Never bothering to note that the per capita prisoner filings are falling or that the rising number of total lawsuits is a certain result of increasing the number of prisoners, which itself is a guaranteed achievement of the Republican plan, the Republicans instead find it more important to tell their readers that prisoners have asserted claims over "Frisbees, art supplies, and chunky peanut butter (as opposed to creamy peanut butter)." CONTRACT WITH AMERICA, supra note 1, at 61. This is the same policymaking by caricature that dismisses the recent crime bill's efforts to begin dealing with the causes of crime as an attempt to use methods like "federally dictated midnight basketball, arts and crafts." Id. at 58. For some reason, Republicans have a clear preference for letting criminals commit crimes but then making sure they impose a very costly prison stay on this society. A nation that approaches its serious crime problem with this level of irrationality deserves all the failure it gets. When reading the Contract with America, it is hard to remember that a justification for representative government is that political specialization should function as a solution to bounded rationality: elected representatives should have the time and resources to give serious consideration to difficult policy issues that individual citizens cannot. The Contract is evidence of politicians with no answers who have little to do with designing better social policies and spend their time instead perfecting rhetoric and bombast in ways that can maximize votes.
which rose from .5% to 7.9%. Finally, the last of the Big Six, social security cases, rose from 1.1% to 5.7% of total cases filed.

Galanter's findings from one period of federal court litigation do not, of course, necessarily apply to federal courts at other times or to state courts. What his work does illustrate, though, are the varied forces behind rising dockets. It reminds us that those who propose to limit access to the courts indiscriminately will discourage desirable as well as undesirable lawsuits indiscriminately. Global reforms may throw out the tub, the bathwater, and a raft of unhappy babies who deserved better. Reforms that restrict overall access to the courts are not a measured response to the problem of increased case filings.

C. Efficient Reform Requires Discovery Reform

Given the likelihood that the stream of litigation will not dry up any time soon, reform is needed, and that means discovery reform. A basic fact about the American judicial process is the centrality of discovery. In the words of one commentator, the adoption of the Federal Rules in 1938 "helped shift the center of gravity from the trial to the pretrial stages."

47. Galanter, supra note 3, at 925. "Civil rights litigation has been the fastest growing category of all, with an annual growth rate of 17.9%." Id. at 933-34.

48. Id. at 925. Social security cases show just how volatile different kinds of cases can be. There were only 537 of these cases in 1961, over 5000 by 1975, and 29,985 by 1984. Id. at 929-30. The pattern of growth was not consistent and ebbed and flowed with specific changes in coverage, like the surge in Black Lung cases and, in the late seventies, a wave of Supplemental Income cases. Id. at 930-31.

Surprisingly, in spite of all the publicity they receive from time to time, securities cases formed only 1.2% of the federal docket in 1986 (up from .5%, a real but small increase), while antitrust cases were far less than one percent of filings. Id. at 925, 946. The 863 antitrust cases constituted only .3% of the total 254,249 federal filings. Id. at 946 n.92. Class actions comprised 2.7% of cases in 1976, but only .4% in 1985. Id. at 946.

49. This lesson in widespread variation in case filings comes through as well in the National Center for State Courts’s 1993 annual report. The report studied courts of general jurisdiction in 23 states. After omitting traffic filings, the study found that far and away the largest category of civil cases, fully 21%, were small claims cases. STATE COURT 1993 ANNUAL REPORT, supra note 5, at 11. These were followed by contract cases (18%), and only then tort cases (15%). Id. Moreover, far from filings representing a uniform national character defect, the per capita number of general-jurisdiction civil filings varied dramatically, from a high of 23,279 per 100,000 in the District of Columbia to 2,732 in Tennessee. STATE COURT 1992 ANNUAL REPORT, supra note 5, at 11. Nor did the pattern fit the stereotype of crowded urban centers having the most filings; such states as New Hampshire and Vermont were ahead of California and Texas. Id.

For another study of the increase in federal caseloads, see RICHARD POSNER, THE FEDERAL COURTS ch. 3 (1985).

Reforms directed at changing the pace of the court process must therefore focus on discovery.⁵¹

The statistics on settlement and trial rates reveal how few cases reach trial. A decade ago, an oft-heard rule-of-thumb was that at least ninety percent of cases settle. The true number, or at least the number today, seems to be even higher. Current statistics indicate that less than 5% of cases, perhaps less than 4%, reach trial. Galanter found that in his test group of federal cases, 11% went to trial in 1961, but only 4.4% went by 1986.⁵² A study of Illinois courts found that fewer than 5% of cases were tried each year, compared to the year’s filings.⁵³ And the median percentage of cases tried in ten federal district courts with a pilot arbitration program was just 2% in the mid-eighties.⁵⁴

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⁵¹ It is always possible that the world might be constructed in such a way that all cases run through discovery at the same pace, but judges can get bogged down in trial and trial delays gradually back up the judicial time necessary to handle discovery matters. Cases therefore slow down in discovery too. Or it might be possible that the average time to disposition of cases that settle before trial is decreasing, but the increased number of filings is swamping the total backlog. What certainly is true, however, is that courts are clearing less of their dockets. STATE COURT 1993 ANNUAL REPORT, supra note 5, at 13 (finding that only 19 of 50 states had case clearance rates of 100% or better). The combined factors discussed in this section—that most cases settle in discovery, the number of discovery “events” is increasing, and cases with more discovery generate more motions—suggest a working presumption that reducing discovery delays will directly improve case processing times.

⁵² Galanter, supra note 3, at 947. Galanter, who is the most persistent student of the courts among those concerned with facts rather than ideology, appears to have revised his estimates downward. See MARC GALANTER, THE REGULATORY FUNCTION OF THE CIVIL JURY 63 (The Brookings Institution 1993) (“Overall, [jury trials] take place in less than 1 percent of cases terminated in state courts and in 2 percent of terminations of federal courts . . . .”).

⁵³ Priest, supra note 8, at 541. These percentages can be misleading if the number of filings varies sharply from year to year, so that the number of cases disposed of in that year is compared to a very different total number of filings than in the year those cases actually were filed. (If 1988 trials are compared to the number of cases filed in 1988, for instance, but 1988 received twice as many new cases as the years in which the cases tried in 1988 were filed, the resulting trial percentage would be double the true trial percentage.) Priest was able to track individual suits to trial in fourteen years of his twenty year study, so his data should be able to avoid this possible distortion. Id. at 540.

In their study of Hawaiian litigation, Barkai and Kassebaum found that after adoption of Hawaii’s aggressive arbitration program, courts tried only 3% of tort cases. Barkai & Kassebaum, supra note 8, at 102.

Judith Resnik has noted that the commonly cited statistic that 95% of cases settle ignores the cases disposed of by the courts under summary judgment and other dispositive procedures. Resnik, supra note 2, at 511-12. The fact that an even higher percentage of cases may not make it through the pretrial stage does not undercut the argument that pretrial reforms are the likeliest reforms to expedite caseload.

⁵⁴ BARBARA MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 49 (Federal Judicial Center 1990). This trial rate is a bit misleading, because it includes cases that were subject to arbitration (so it does not reflect the efforts of an unaided court system), but it may well
A focus on pretrial reform becomes even more persuasive when one studies the limited time available for civil trials. The Illinois study found that in 1979, Chicago-area courts could try only 523 jury cases at a time when 49,000 cases were pending.55 Another study of selected federal courts found that in 1992 each judge tried an average of just over sixteen civil cases devoting only about fifty-three trial days to these cases. Even this calculation exaggerates the number of days available for trial because the seventeen “cases” included contested hearings as well as full-blown trials.56 Although the time available for civil trials varies by judge, these examples suggest how little impact reforms of trial procedure alone are likely to have on the expanded inventory of pending cases.

An emphasis on pretrial reform finds support in the Rand Corporation’s study of Los Angeles judicial delay.57 The study found that what seemed to have changed most in Los Angeles, as the delay in getting to trial increased from six to fifty-nine months between 1920 and the 1980s, was that cases became more complex. The number of judges had kept up with case filings. Courts disposed of as many or more cases per judge than before but there were more discovery “events” during the life of each case. The courts were not accommodating that change.58 Cases therefore took more time to reach resolution. Another study confirmed what one would expect: delay and use of court time rise with the number of discovery events.59 When the bulk of any civil case is focused on discovery, it is to be expected that increasing complexity in discovery means that cases will take more time to get to trial or other resolution.60

The understanding that discovery is central to the problem of delay

be representative of the “average” court, because more and more courts have adopted, or are on the way to adopting, trial diversion programs like mandatory arbitration. Id.

In a sample of 27 state courts of general jurisdiction in 1993, 7.6% of all cases went to trial. STATE COURT 1993 ANNUAL REPORT, supra note 5, at 14. Only 1.2% of cases, or less than one-fifth of the tried cases, received a jury trial. The other 6.4% received bench trials. Id.

55. Priest, supra note 8, at 558.

56. Longan, supra note 12, at 670 n.36, 671.

57. SELVIN & EBENER, supra note 26.

58. What seemed to have changed was the composition of cases and the way they were litigated; there was a sharp increase in the “number of events” in discovery per case. Id. at 46, 48. “Simple” contract cases like debt actions had fallen from over 50% of cases in 1930 to under 10% by 1980, while personal injury cases had risen from 20% to 60% in the same period. Id. at 44. Auto accident cases made up just over two-thirds of the personal injury cases. Id.

59. The median number of discovery motions tends to increase sharply in cases with a lot of discovery events. PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 34-35 (Federal Judicial Center 1978).

60. See SELVIN & EBENER, supra note 26, at 51.
explains the trend toward "managerial judges" and active docket management that has typified many courts and many reforms over the last fifteen years. Courts serious about solving the problem of dawdling cases know they must adopt new discovery restraints. The following sections argue that to ensure effective discovery reform, courts must limit the overall length of discovery. Courts have tried almost every other kind of pretrial reform without curing the problem of delay.

D. Most Cases Use Very Little Discovery; a Small Number Absorb a Lot

One last statistic is evidence of the direction for reform. Most cases do not need help making their way to resolution. This is suggested by high settlement statistics and is confirmed by data on how little discovery occurs in most cases.

The Federal Judicial Center ("FJC") conducted a study of 3000 federal cases in the late seventies. The FJC measured the number of discovery "events"—separate steps like document requests, interrogatories, depositions, and requests for admissions—that occurred in each case. Almost half of the cases had no discovery at all. Fewer than five percent, or one in twenty, had more than ten discovery requests.

Even in the cases in which some discovery did occur, almost half had fewer than three discovery requests. Barely ten percent received six or more requests. Even the average case in which discovery was completed had only 3.2 depositions, 2.88 interrogatories, .93 requests for production, and .34 requests for admission.

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61. A Harris poll commissioned by the Brookings Institute for its 1989 Task Force report on reducing court cost and delay, a project assumed at the request of the Senate Judiciary Committee, found in its survey of over 1000 "participants in the civil justice system" that "[t]he respondents agree that the most important cause of high litigation costs or delays is abuse by attorneys of the discovery process . . . ." THE BROOKINGS INSTITUTION, supra note 15, at 6.

62. CONNOLLY ET AL., supra note 59. The researchers analyzed 7000 "docketed requests" in the 3000 cases. Id. at xi.

63. Id. at 35.

64. Id.

65. A total of 42.7% of the cases with any discovery activity (the "discovered" cases) received one or two requests, with an average of 1.49 requests in these "low volume" cases. Id. at 28-29.

66. Id.

67. Id. at 32. This data fits the pattern in all cases that have discovery. Depositions were the most common form of discovery request, occupying 43.1% of all discovery measures, followed by interrogatories (35.4%), then a drop to document requests (14.5%) and requests for admission (5.6%). Id. at 30. The much underutilized and inexpensive depositions on written questions, a valuable tool for proving undisputed factual matters but a tool almost never used, filled only .2%
Not surprisingly, the use of judicial time increased with the number of discovery events. Cases that completed discovery generated an average of 2.13 discovery related motions. Of cases that had any discovery, discovery-related motions were filed in only one of seven cases with fewer than three discovery requests, the "low volume" cases. At the high end, cases with thirty-one or more requests had on average nine motions. Thus, the "big" case consumes a disproportionate amount of court time.

This report of how little activity most cases generate, but how much a minority require, received confirmation in a mid-eighties Georgetown study of antitrust litigation. Antitrust cases are the archetypal big case. They can impose "exceptional burdens" on the courts. Yet even in antitrust cases, roughly half involved no formal discovery at all—no depositions, no document requests, and no interrogatories.

Given the small amount of court time available to handle civil cases, increases in discovery steps may overwhelm the courts unless they plan for the increase carefully. The next section discusses the single most important reform, mandatory and uniform pretrial time limits, that would prepare the courts to do just that.
III. A MANDATORY, STREAMLINED NINE-MONTH DISCOVERY TIMETABLE IS NEEDED

The most significant step toward regaining control of stuck dockets is for courts to impose a mandatory, uniform plan for completing discovery in a fixed period. This Article recommends nine months as the best compromise between the need to gather information and the system's need to keep cases moving. A nine month pretrial period is predicated on a goal of putting all cases to trial within a year. If courts considering new rules believe they can afford to allow more than a year before trial, they can choose a slightly longer discovery period. The schedule should fit a realistic trial date and allow at least three months after the end of discovery for final trial preparation. Most importantly, the period must be enforced firmly and uniformly. In the rest of this Article, nine months will be used as the proposed standard period for pretrial preparation.

A firm time limit is the only reform that deals with delay directly. Time limits adjust incentives directly by using the currency of time. They are less intrusive than rules that fix the number of depositions, interrogatories, or other discovery measures, and rules designed to produce a quick start to a case.

It is hard to explain why courts have not adopted time limits more widely. Uniform time limits characterize most individual steps in pretrial and post-trial judicial management. Lawyers are used to having only so many days to respond to a document request, an interrogatory, a motion, or a brief. And a large body of empirical research suggests that a firm pretrial time limit is the most important reform for attacking delay.

A. Meeting Delay in the Discovery Process by Limiting the Length of Discovery

It is easy to understand why discovery bogs down if trial is three or four years away. Delay and inattention are rational responses to three- and four-year court dockets. Lawyers need an inventory of more cases than they can try in a year because they know that they will have to wait three, four, or five years before trial. But as they take more cases, their schedules develop conflicts and become their own reasons for delay.
Discovery is put off, hearings passed, and the system runs out of steam.\textsuperscript{75}

Too many courts reverse the logical order of events. Courts allow discovery to set the pace of trial. And, worse, courts allow the parties to set the pace of discovery. One lesson from the American experience with broad, largely unregulated discovery is that discovery left to the lawyers can take years even in simple cases.\textsuperscript{76} Discovery tends to expand to fill the time available on the court calendar.

The increasingly popular limits on the amount of discovery are unlikely to reduce delay. As long as courts leave the parties an unlimited time to use even a fixed number of discovery measures, new cases will move to the end of each lawyer's very long line. Discovery will be slow and intense discovery will be jammed into the end of the process. This, of course, is the experience today.

The problem of speeding cases is a principal/agent problem. Courts

\begin{itemize}
  \item \textsuperscript{75} This is why two extensive studies of state court litigation found that "local legal culture," not any single structural factor or combination of structural factors, seemed to best explain differences in the pace of state court systems. See infra notes 121-31 and accompanying text.
  \item \textsuperscript{76} Thus courts must retake control over discovery from lawyers if they are to have a chance at reactivating slow court dockets. See infra notes 132-59 and accompanying text.
\end{itemize}

One would think that profit-maximizing clients, who should want to spend as little as possible on litigation, would force their lawyers to move things along. The record of American litigation shows that this rarely happens. One reason may be that when time is unlimited, it is tempting to follow even peripheral leads just in case one gets lucky. Lawyers, of course, have an incentive to do the work because they make more money. Clients are hard pressed to squelch these efforts because they know the last little bit of discovery just might lead to something.

Once a lawyer takes a case, the client's fees become an investment in that lawyer's knowledge. Each spent dollar is a sunk cost. The lawyer's experience becomes a competitive advantage in the particular case, as well as in similar cases, and he or she holds an advantage over other lawyers who might bid for the same work. Thus even if the client is frustrated and believes that the lawyer is not handling the case efficiently, it becomes increasingly uneconomical to fire him (the greater the investment in the lawyer, the greater the sunk cost and, probably, the greater the expense of training a substitute lawyer) to and get a new lawyer.

Clients gain leverage if they supply the same lawyer with a stream of cases. Then some balance is restored because the loss of a repeat-business client is, on average, a greater loss to the attorney than the loss of a one-case client.

It is surprising how many clients with very repetitive business, like insurance companies and banks, have not pressed their lawyers more vigorously to come up with innovative ways of cutting discovery and trial short. A cynic would say that one reason is that most defendants' primary goal is to pay as little as possible and to pay as late as possible. Such clients have every incentive to drag things out as long as the interest earned on what they ultimately expect to pay exceeds the legal fees they pay in the meantime.

The more likely reason clients acquiesce during lawsuits that sit idle is that it is very difficult to get perfect or even good information about lawsuits. Legal strategy involves judgment calls that are hard to second-guess. In-house lawyers can be reluctant to intervene aggressively when the disrupted lawyer may point later to client pressure as the reason for a bad result.
need to change the behavior of their agents in case preparation. Phrasing the problem this way suggests that this is one institutional problem that ought to yield to a relatively simple cure. Most principal/agent problems involve conduct that is complex and largely unreviewable, where the principal faces difficult choices in designing incentives and monitoring performance. Whether controlled by private contract or public rules and statutes, behavior that is hard to specify and difficult to monitor can force reliance on participant good faith and elaborate incentives. The design of effective reforms for complex behavior can be difficult and high levels of success impossible to achieve.

The court delay problem should not fall into this category of social problems. Time constraints take advantage of the luxury that court timing is one problem in which the perpetrators—parties who do not complete discovery quickly—are already under the control of the victims, the courts. The behavior which needs to be controlled, expansive discovery time that slows the pace of cases, is easy to measure and impossible to conceal; courts need only look at the initial filing date on their dockets to measure how long a case has been consuming judicial resources. Providing the right incentives should be relatively simple, too, at least compared to incentive problems like health-care or welfare reform, because parties who file suit are subject to an established judicial rule-making power. The system is already predicated upon the parties responding to judicial rules.

A time constraint is the narrowest and in that sense, the most efficient, solution to this problem. Courts must impose short, mandatory discovery deadlines. Courts have tinkered for years on the edges of the discovery process, but shied away from changing the length of discovery. The fundamental problem is how much time it takes to prepare cases, yet reforms routinely, conspicuously, and paradoxically avoid putting a limit on that time.

Courts should make the parties file a plan identifying the investigation they need and showing how they will complete it in nine months.

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77. Characteristic principal/agent problems include shareholders who need to control the discretionary and often private actions of corporate management and insurers faced with predicting the behavior of insureds who cannot be monitored constantly and whose behavior may change for the worse as long as they expect the insurer to pick up the costs. See generally Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134 (1973) (stating that the principal/agent relationship naturally creates a situation in which monitoring is not economically viable); Michael Spence & Richard Zeckhauser, *Insurance, Information, and Individual Action*, 61 AM. ECON. REV. 380 (1971).
The plan should be due before the first pretrial conference. The plan should include a trial date within a year, with the three months after discovery available for mediation, left-over discovery disputes, and trial logistics. The court should enter the schedule as a pretrial order, backed by the force of law.

This Article derives a nine-month discovery period from the goal of getting each case to trial within a year while preserving the right of parties to have enough time to conduct all necessary discovery. The specific period is not as important as the selection of a period that is brief, fixed, and uniform across all cases. If a court system decided that a better goal was getting all cases to trial within fifteen months, it could choose a twelve-month discovery period. The period should be several months less than the desired period from filing to trial, because most cases also need a period of trial preparation.

If enforced, a short—at least to some lawyers—discovery period can end the long-winded, inefficient, expensive quest that passes as discovery in too many cases. That kind of discovery cannot be finished in nine months, and often not in five years. In some cases, there is no “natural” end to discovery. Everybody prefers to go on taking depositions, hoping for the magic bombshell that will transform their case. Or one side has a weak case and will do anything to avoid trial. These are just the kind of cases that need a good, swift judicial kick from behind to move toward trial.

Legitimate reasons will remain to extend some deadlines: parties may die; settlement discussions may be nearing fruition (although usually the best incentive for making the parties close their deal is sticking to tight trial deadlines); related administrative proceedings may be pending; and new evidence and changed circumstances may justify an extension. But courts can handle true emergencies by allowing a little more time upon a specific showing of need at the end of the discovery period. Part IV.B suggests that any new rule should limit the number of extensions each judge can grant to prevent the exceptions from swallowing the rule.

There may remain a class of “complex cases” in which the documents and witnesses cannot be produced within nine months. A case with multinational corporate parties may require the parties to gather, review, copy, and produce millions of documents at many different

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78. Such a discovery timetable is mandatory under the Federal Rules, FED. R. CIV. P. 16(b), but many states do not follow this. More fundamentally, Rule 16(b) remains toothless, because it contains no restriction on how much time the parties can request as their “limit.”
locations. Then each side will have to review the other side's production. Such a case may need a year for document review under the best of circumstances. For this reason, such cases already receive special treatment under the *Manual for Complex Litigation*.79

Rules that exclude "large" cases can be self-defeating, though, because (as shown in part II.D) a small number of big cases with broad discovery consume a disproportionate amount of court time. These are the cases whose progress the courts most need to monitor and control. Even in seemingly complex cases, it would be better to force the parties to try to meet a nine-month discovery schedule. Efficient judges often try massive cases within nine months or a year of filing.80 If the parties could not seek an extension until well into this period, perhaps after six months, they would have a concrete idea of how much more time, if any, they really needed. Ask the same parties for an estimate at the start of the case and at least one will proclaim that years are needed to complete discovery. The court should grant extensions only on a showing of specific need, and then only after evidence that the parties have taken all steps possible to comply with the original period. To force courts to treat extensions as a costly remedy, the rules should limit the number of extensions they can grant. The court should put a new trial date at the end of any new schedule. That way the court sends a clear message that the extension is not a ground for significant delay.

Extensions should not often be needed, not even in complex cases. Delay usually comes from lawyers thinking that a case is complex (and therefore must take a lot of time), not from the needs of the litigation.81 I have worked on cases in which well over a million pages of documents were produced. Each side deposed hundreds of witnesses. Yet even in these cases, despite there being a lot of money at stake and "complex" questions like market share and the "reasonableness" of business practices at issue, the trial turned on the testimony of only a handful of major witnesses.

Most discovery is never used and is never intended to be used at

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79. The *Manual* describes a variety of cases likely to need special procedural treatment. In first place are antitrust cases, followed by patent and trademark cases, products liability cases, certain securities cases, and other cases involving unusual multiplicity or complexity of factual issues. *Manual for Complex Litigation, Second* § 33 (1985). For a discussion of how to handle many of the issues that can arise in complex litigation, whether proceeding under the *Manual* or not, see RICHARD MARCUS & EDWARD SHERMAN, COMPLEX LITIGATION (1985). For a brief discussion of the background to the *Manual*, see CONNOLLY ET AL., supra note 59, at 15.

80. This Article describes how one court processed a very complex case. See infra part III.F.

81. See infra notes 85-86 and accompanying text.
trial. Few cases turn on more than a handful of documents and witnesses. The real evidence is the testimony of the witnesses who had authority over the actions in dispute. The documents likely to affect the trial, such as the memoranda discussing the conduct in dispute, fit into a few briefcases.

The proposal to impose a uniform discovery time limit assumes that a lawyer operating in good faith, and receiving real cooperation in return, can almost always identify the information needed for trial within nine months.\footnote{Discovery must go beyond those core documents and}{Discovery as Abuse, 69 B.U. L. REV. 635, 637-39 (1989).} “[W]e cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.” Id. at 639.

It is hard to take this article of faith seriously, even though it is coming from such an experienced jurist. Perhaps the best face to put on it is that Judge Easterbrook, having primarily an academic’s and appellate judge’s perspective on litigation, has not seen in detail just how quickly lawyers can hone in on the essential information. Instead, he sees the worst abuses in the rare discovery squabble that survives as an appellate point of error. In any event, the comment that “[the Federal Rules] make everything relevant and nothing dispositive,” id. at 643, redolent of a gigantic Know-Nothingism infecting the full pretrial process, find no resonance in my own experience. It is hard to believe that an appeal from a Rule 12 dismissal for failure to state a claim, in a case in which the plaintiff could not advance some quite specific theories and factual allegations to support the pleadings, would get anything but summary affirmance from Judge Easterbrook and the other members of the Seventh Circuit.

One conclusion that flows logically from views like Easterbrook’s, of course, is that lawyers too cannot regulate their own processes. So it is far better to simply deter lawsuits at the outset by increasing the risk for plaintiffs and adopting the English rule. Id. at 647. That advice is music to the ears of those who do not like juries in the first place. However, if Easterbrook’s position is taken seriously and one really believes that lawyers cannot tell what is relevant at or soon after the start of a lawsuit, the policy implication may be quite different than the one Easterbrook suggests. If parties acting in good faith cannot narrow their focus, they cannot realistically be asked to identify their core evidence or be expected to know how much of a case they have at the start. Ironically, one result of Easterbrook’s pessimistic viewpoint is that, in fairness, parties would need a lot more discovery. If parties cannot tell what they have got until they have performed a lot of discovery, it becomes even less fair to raise the ante by making losers pay the winners’ fees. By the time a party with a bad case has done enough discovery to know it, he or she would face a harsh penalty for the error.

The idea that discovery is an uncontrollable fishing expedition is widespread and a popular article of faith with critics of the judicial system. See, e.g., OLSON, supra note 19, at 113-14; see also discussion infra note 278. It is more disturbing to find the idea endorsed by a judge who is an important part of that system. Critics of fishing-expedition discovery choose to ignore the organic reality of any lawsuit, namely, that the scope of any case and of its discovery is created by the interaction between plaintiff
UNIFORM DISCOVERY TIME LIMITS

and defendant and their respective skill at wielding discovery devices. For every tool used to seek information, there is a corresponding tool used to test the relevance of the requests. Usually the plaintiff and defendant have the same tools. Defendants can use the same discovery devices available to plaintiffs, and these procedures remain just as effective for extracting the truth when wielded by defense counsel. Overbroad requests can be met with any of a variety of proper objections. Pleadings truly filed without any basis can be struck for failure to plead a claim or the underlying theory can be forced to light by motions for summary judgment or by discovery requests. If a defendant truly cannot understand the nature of the claim, he may take a party representative deposition. If the party cannot state a claim, so much the worse for it.

This elementary point was put forth with great clarity by Dean Clark over fifty years ago. His point remains as true today; however, many critics like to overlook it:

Now, it is usually said about those rules that they go too far, that they permit of fishing expeditions and so on. It would seem obvious to me, however, from what I am told is actually the case in the states where a system similar to this is followed, that they prevent fraud, because you immediately get the full story from the parties and you know what you have to cope with. Further, if they change their stories later on at the trial, they are, of course, "sunk."

I have heard it said that such broad deposition provisions work in favor of plaintiffs because plaintiffs could bring personal injury claims and then build up the evidence in this way. Again I am told what I think ought to be the natural conclusion anyhow, that it is most helpful to defendants, or, if that is not a fair statement, it is helpful to those who want to rely on truthful claims. In this kind of case if the defendants immediately ask for depositions from the plaintiffs, they then and there have the story in such a way as it cannot be changed.


If you need other evidence or information to prepare your case, you want to get it not from these more or less formalized allegations which can be easily changed, . . . but what you require are really provisions for depositions and discovery, for these are the devices whereby you get material of this sort.

Id.

In reference to criticisms of discovery delay and expense, it is the case that speed and low cost have never been the justification for the adversary system, even though this Article argues that the three are not incompatible: "[T]he aim, and the claim, has been and continues to be first in quality of disposition, not first in time." Robert E. Keeton, Time Limits as Incentives in an Adversary System, 137 U. PA. L. REV. 2053, 2054 (1989) [hereinafter Time Limits] (emphasis added).

The cry of too much disclosure, at too much cost, is the eternal cry of the guilty defendant who bristles at having to produce evidence of his or her wrongdoing. It is not that such requests are too intrusive, it is that they are too damaging because the truth hurts. That is, truth hurts the falsifiers of truth. On the other hand, innocent defendants, those who have committed no wrong, do quite well if they stop complaining and begin wielding the rules that are as open to defendants as they are to plaintiffs, and start picking away at weak cases.

The difficulties of implementing any reform are well known. See, e.g., JEFFREY PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION (3d ed. 1973). Social scientists have tried out a variety of ways to determine the approaches that will work with different problems. E.g., W. RICHARD SCOTT, ORGANIZATIONS (3d ed. 1992) (discussing successively more complex ways to model organizational environment); GRAHAM ALLISON, ESSENCE OF DECISION (1971) (discussing "classical" rational actor, organizational process, and governmental politics models of policy process). Court reform certainly will have problems, encounter obstacles, and require revision. Yet measures to improve courts are somewhat close to the rational actor model. They are carried out by a bureaucrat, the judge, who has a high degree of control and very effective sanctions over the people whose
witnesses because that is how this useful information is found. However, the search can be shortened because competent lawyers can determine the investigation needed to gather evidence during the nine months recommended here. This will be true in all but the most exceptional cases. Most of the necessary documents and witnesses can be identified in the first few months of a case. This is the rule, not the exception, for complex as well as simple cases.

A short discovery period would be unreasonable if parties had only a few weeks to prepare for trial. Nine months is a long time, however. A team of lawyers can take fifty or a hundred depositions in nine months. Lawyers will have to vary the way they handle cases. Complex cases should be prepared in constant motion, while simple cases may need little more attention than they currently receive. If lawyers are not able to make this kind of organizational adjustment, they do not deserve the responsibility for case preparation in the first place.

Lawyers who claim a right to unlimited discovery usually do not have a clear view of what they really need in order to try a case. Trial is a focused, short effort at persuasion. Most discovery falls by the wayside long before final trial preparation. Not surprisingly, at a time when so many cases never get to trial and "litigators" may try only a few cases in their careers, lawyers speak as if discovery has an unpredictable, organic path that must be followed to its equally unpredictable end.

behavior needs changing. The goal of quicker times is easy to specify and measure. The troubles with speeding case preparation are not on the same scale as balancing the budget, desegregating schools, or increasing job skills among the underemployed plaintiffs.

3. Seeming disagreement with this assumption, cases do sometimes change sharply because of evidence discovered very late in the game, but that usually is when there is bad faith concealment. The system has its own rules to deal with bad faith. Not only is concealment forbidden but, if deliberate, it is the one strategic mistake guaranteed to draw an immediate, severe response from the judge.

4. "In practice, however, the amount of discovery activity does not vary as much as is commonly believed, nor is the amount as large as is commonly believed." CONNOLLY ET AL., supra note 59, at 78.

5. Indeed, I have been involved in one antitrust case in which teams of lawyers took depositions simultaneously. Each side took more than one hundred depositions in a number of months. There were days when the parties took twenty or thirty depositions in a single day. Multi-track depositions are not that uncommon in large cases. If strict time limits become widespread, grouping of depositions should become more common. It is one way for lawyers to increase their efficiency at meeting discovery deadlines.

6. Professor Longan makes the interesting point that the fewer the trials, the less experience judges and lawyers have in evaluating what evidence really is relevant and might have some effect at trial. Longan, supra note 12, at 688-89, 691. If inexperience makes lawyers on average overestimate the value of evidence, the result is an increase in the number of cases that do not settle but should and, as Longan argues, an increase in the amount of evidence lawyers attempt
Yet when the rare case gets to trial, only a small part of that discovery will go with it. In addition, it is rare that extended discovery plays much role in the settlements that bring most lawsuits to an end.

Enforcing a rigorous rule of short discovery will make lawyers do their job sooner. They will have to identify the information most likely to be useful before they start, then refine and narrow their focus quickly as they receive information from the other side. Lawyers who do not know how to do this are going to have to learn or their clients will switch to more competent practitioners.

Experience may show that a nine-month period is too short and a slightly longer discovery period would offer a better fit between the courts' need for rapid case processing and litigants' rights to uncover the relevant facts. Once courts have implemented a basic, quick schedule, their experience may let them vary the timetable slightly by the type of case, the complexity of issues, and the amount in dispute. In general, however, the chaos in today's discovery suggests that the costs of multiple categories are likely to exceed the benefits. A single rule is far and away the best starting point. A single rule is necessary to give the legal culture the jolt it needs.

Perhaps in a costless world, courts could afford to leave it to the parties to request all the information they want, review it, and only then define relevance. This has been the American approach for decades. But it is why the system is breaking down. The backlog that results is too high a price to pay for leisurely discovery.

B. The Lawyer as Court Agent and the Efficiency of Time Limits

It is hard to explain why courts have not moved more quickly to adopt discovery time limits. Almost every individual step in case preparation—issuing discovery responses, answering motions, briefing on (unnecessarily) to put before the courts at trial. Id. at 701-03. Inexperience might cause lawyers to use too little evidence (and certainly is likely to cause them to use the wrong evidence), but if inexperience is coupled with risk aversion, the likely result is that too much will be used. Id.

87. The most common example of discovery deadlines that vary with the type of case are the separate rules the federal courts have developed for complex litigation. In another example, the authors of a careful study of tort litigation argue that tort cases fall naturally into at least three categories: "simple" cases like auto accident cases, more complex cases like malpractice claims where the standard of care is more likely to be subject to sharp dispute among experts, and mass tort litigation, which follows its own patterns. Deborah R. Hensler, Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research, 48 OHIO ST. L.J. 478, 478 (1987). And federal courts have considerable experience with case-weighting mechanisms. See generally FLANDERS, supra note 72.
appeal—proceeds under fixed, uniform time limits. Researchers repeatedly have found time limits necessary for efficient case management.

Imposing tight and firm deadlines, but allowing the parties to choose the discovery they want and how they will complete it, is an ideal balance of judicial coercion and voluntary participation. The court sets the bounds of discovery. Within those bounds, the parties remain free to select the range of discovery and when it will occur in the overall period. The fixed pretrial timetable encourages the parties to choose the optimal combination of resources, scheduling, and discovery measures. It is the judicial analog to combining the best of command and market economy planning.

1. Lawyers Have More Information and Flexibility than Courts

Letting the parties decide is efficient because the parties are best able to determine the resources needed for each case. Lawyers have access to more information about their cases than the judge. The parties, not the court, should decide whether to use depositions, interrogatories, or document requests to seek information. They can better decide if a case needs ten instead of five depositions or two sets of interrogatories instead of one. And given a deadline, they can judge best how to conclude discovery within the allotted time.

Moreover, lawyers and parties are in a far better position than the

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88. The limitation on judicial understanding is not just knowledge, but interests too. Judges have a strong interest in moving things along—in rapid dispositions and “neat” cases. They have an incentive to persuade both sides to limit objections and discovery and to increase case processing. See Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 HARV. L. REV. 1808, 1828-30 (1986) (characterizing pretrial conferences as “cajolery conferences” amid judicial pressure to settle). “In response to growing caseloads and perceptions of administrative crisis, judges, lawyers, and legal scholars have embraced a host of nonadjudicative shortcuts. They have invented innumerable rationalizations for not doing the job and innumerable ways to avoid it.” Id. at 1810-11. (It is always easier to criticize when one does not have to sit on the bench day after day, year after year.) For another discussion of “managerial” judges who show decreasing interest in adjudication and devise methods to bypass it, see Resnik, supra note 2, at 534-39, who argues that “[t]he volume of case dispositions (rather than the substantive law in general, the merits of a particular case, improved techniques for factfinding) has become the be-all and end-all of many within the federal judiciary.” Id. at 535. One of the harshest criticisms against overemphasizing case resolution rather than stressing the content of decisionmaking is discussed in Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073 (1984).

The adversary system assumes that the basic decisions about structuring a case can be made more fairly by the parties, and therefore leaves the choice of discovery measures to the parties and their lawyers rather than the court.
courts to match their resources to the needs of each case. Parties can adjust the number of lawyers and supporting staff used on a lawsuit. A lawyer may devote only a little time to a slip-and-fall case, but assemble a team of lawyers to prepare an antitrust case. The courts cannot readily make similar adjustments. Nor can they focus their efforts only on the larger and more consuming cases without having “smaller” cases back up mercilessly.

Presumably, resource management is one of the skills lawyers are paid to possess. After all, law is an information management business. Forcing a single discovery schedule onto all cases lays the burden of fitting each case to the schedule not on the courts, but on those responsible for delay—lawyers and their clients.

It is again fruitful to think about the problem of speeding cases as a delegation problem in the principal/agent framework. While lawyers are most conscious of their duty to serve their clients, lawyers function as dual agents. In planning and implementing their litigation plans, they serve the judicial system as well. Lawyers are officers of the court. It is the courts’ delegation of power that enables lawyers to seek judicial sanctions for violations of their discovery requests. In return, lawyers assume the obligation to complete discovery as it fits the needs of the court.

When the court delay problem is viewed in this light, the decision to monitor lawyer performance by using sanctions (and, more recently, by beginning to limit the number of discovery steps) looks particularly ill-advised. Courts let lawyers serve as agents precisely because the lawyer should be in a better position to determine how much discovery, and what kind of discovery, each case deserves. And the client should be in the best position to decide which investments in discovery are likely to be worth the cost. Courts would have to immerse themselves in the minutiae of cases in order to begin making these decisions in a reasoned manner.

89. One very human result of courts having too few resources to adjust their efforts to the need of each case is that in some courts, the cases that interest the judge will move more quickly than the cases the court hopes it will never have to try.

90. The classic early theoretical sketches can be found in Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 (1976); see also Ross, supra note 77; Spence & Zeckhauser, supra note 77. The early research has spurred the economic specialty known as mechanism design, whose practitioners apply game theory to predict how contracts should be crafted to maximize benefits, and minimize costs, to the delegating party. See, e.g., Benjamin E. Hermalin & Michael L. Katz, Judicial Modification of Contracts Between Sophisticated Parties: A More Complete View of Incomplete Contracts and Their Breach, 9 J.L. ECON. & ORGANIZATION 230 (1993).
manner. As the judge will never match the detailed knowledge of the case that the parties and their lawyers develop in discovery, it makes sense to leave the step-by-step discovery decisions to them. Courts do not have the knowledge to analyze this information in every case and it would be expensive and inefficient to make them do so. In return for leaving discovery to the parties, however, courts are entitled to impose a schedule for the parties’ discretionary activity.

One suspects that making lawyers prepare cases more quickly will be an “efficiency-forcing” reform. The need for quicker investigation creates an incentive for lawyers to experiment with better methods for uncovering the facts. Lawyers who first file a document request, then some months later take a few depositions, and perhaps wind up their case with some interrogatories, will have to learn to use the various discovery tools in a more compact, integrated manner. As the cost of time for formal discovery increases, lawyers should substitute informal discovery techniques. Whether an incentive for changed behavior actually produces institutional or technological improvement depends upon many factors, including the physical constraints of the technology used and the way in which lawyers react to the new regime. But even if the activity that lawyers perform remains exactly the same, causing lawyers to apply the same time to their cases in a shorter period, pretrial time limits will shorten total case processing time.

Principals should only delegate power when they can devise a system of incentives and monitoring mechanisms to ensure that their goals are met. Thus, the judicial delegation of power to lawyers, like all delegations of power, should travel on a two-way street. In civil law systems, courts perform most of the jobs we consider the functions of private lawyers, including deciding which witnesses to call, which documents to request, and how much discovery to conduct.

91. The unhappy history of sanctions litigation shows how poorly equipped courts are to weigh the minutiae of discovery quarrels. See infra part IV.E.

92. The literature on efficiency-forcing tends to focus on physical processes, an orientation attributable to its origination in environmental regulation. For examples of the “technology-forcing” debate in the area where it appears most developed, the environmental area, see James C. Robinson, The Impact of Environmental and Occupational Health Regulation on Productivity Growth in U.S. Manufacturing, 12 Yale J. on Reg. 387, 389 & nn.1 & 2 (1995). See also discussion infra note 188.

93. In most common-law trials, the judge regulates a process in which the parties present their chosen information to a jury. In the civil tradition, cases are not tried to juries and “trial” is in fact “a series of isolated meetings of and written communications between counsel and the judge.” John H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 112 (2d ed. 1985). Issues of proof can be treated between
courts give the job of investigating the facts to lawyers. In return, they are entitled to make lawyers do their job on the judicial timetable. Meeting a common time limit is a small price to pay for being allowed to structure discovery in all other respects.

2. Each Step of Litigation Falls Under a Uniform Time Limit

It is no accident that this Article proposes uniform pretrial time limits as its major recommendation. The deadlines in the Federal Rules and similar state rules embody the belief that the institutional costs of making the courts adjust to separate case needs, rather than making cases and lawyers adjust to the needs of the courts, are too high. That is why each significant pretrial action, like each document request or motion, carries its own uniform time limit. The only exception is an overall time limit. It is a fundamental inconsistency in the Federal Rules and in their state counterparts that neither match individual limits with a common limit on total discovery.

Uniform procedures are one of the achievements of the Federal Rules. Defendants in simple or complex federal cases, at law or in equity, face the same twenty days to answer a complaint; the same ten days to respond if a Rule 12 motion is denied or after a pleading amended to satisfy a Rule 12 order is filed. Timing does not depend on the complexity of the case, the causes of action, the inclination of the court, where the court sits, the eloquence of counsel, or the whims of local legal culture. Similarly, no matter how varied a case, all respondents get the same minimum ten-day notice before a hearing on motions for summary judgment under Rule 56. And uniform time limits
delimit all major appellate steps.\textsuperscript{97}

The Federal Rules impose uniform limits on discovery responses, too. Whether your client has one relevant document, a hundred thousand, or a million, the Federal Rules require an answer and objections within thirty days.\textsuperscript{98} Whether your witness is company president or an unemployed laborer, living overseas or at home, depositions can be set upon "reasonable" notice,\textsuperscript{99} a period that local rules often define as ten days or a similarly short period. No matter how much compiling it may take to prepare interrogatory answers, they are to be prepared within thirty days of receipt.\textsuperscript{100} The same thirty days applies to requests for admissions.\textsuperscript{101}

The fact that the discovery process is riddled with uniform deadlines suggests that lawyers can learn to work with an overall nine-month discovery schedule. They just need to start approaching the time limit as a joint challenge, not an imposition.

One objection to comparing the time limits fixed for the individual steps of discovery with an overall limit on discovery is that lawyers routinely extend individual deadlines by agreement. Lawyers would lose some of this flexibility in a uniform pretrial period.

It may be true that uniform discovery deadlines are too often honored in the breach, but that is precisely why cases need a firmer total limit. One effect of overall constraints is to cure the laxity with which many treat individual limits. Lawyers will have to become more careful in the way they spend time on the various steps in discovery when they are put on an overall time budget.\textsuperscript{102} That such an adjustment is

\textsuperscript{97} that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

\textsuperscript{98} Parties relying on this provision, in cases simple or complex, do so at their own peril, and in either case, need to be able to make a true showing of having sought the relevant discovery. Showing that one cannot present summary judgment affidavits means a lot more than one was too busy to gather the necessary information. "[T]he rule will not be liberally applied to aid parties who have been lazy or dilatory." 10A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2740, at 535 (2d ed. 1973).

\textsuperscript{99} E.g., FED. R. APP. P. 4(a), 5(a), 10(b), 11(b).

\textsuperscript{100} FED. R. Civ. P. 34(b). The provision allowing 45 days if the request was served with the complaint has been removed, because the new Federal Rules do not provide immediate written discovery during the period of mandated disclosure.

\textsuperscript{99} Id. 30(b)(1).

\textsuperscript{100} Id. 33(b)(3).

\textsuperscript{101} Id. 36(a).

\textsuperscript{102} See infra notes 108-11 and accompanying text.
possible is demonstrated by those current procedural deadlines that rarely get extended, such as the time to respond to a complaint or briefing on appeal. Lawyers can funnel cases of different complexity into the same channels.103 (If they cannot, it is time to reconsider the bargain that delegated investigatory powers from the courts to counsel.)

3. Empirical Studies Demonstrate the Need for Time Limits

Empirical studies confirm the effectiveness of time limits. Perhaps the major study remains the FJC’s 1978 study of case processing, discussed in part II.D above.104 This project’s “central finding” was that the “judiciary’s use of effective case and court management techniques can help speed the termination of civil actions without impairing the quality of justice.”105 Effective techniques meant the “regular use of discovery time controls [which] can shorten discovery time and can consequently reduce overall disposition time of civil cases.”106 On average, cases with discovery cutoffs were resolved eight months earlier than those without.107

When they asked why discovery cutoffs worked so well, the researchers found that in most cases discovery requests had not been

103. The pre-1938 experience with widely varied procedures is perhaps a second argument for uniform rules. Although each step of discovery is now subject to a uniform time limit, regardless of the type of case, the success of the Federal Rules’ “trans-substantive” procedural goal (mainly that cases do not get processed that way in practice) has been questioned. See, e.g., Resnik, supra note 2, at 526-29 (listing changes to habeas corpus rules, rules for complex litigation, managerial judges, Rules 11 and 26 and their sanctions, and the new emphasis on settlement as signs of “failing faith” in adjudication and the trans-substantive vision of the 1938 Federal Rules). This Article argues, of course, that the Federal Rules lack the most basic necessary undergirding—an overall time limit. But lawyers certainly have adjusted to common rules for all cases more easily than they struggled with the variety of standards for cases with different types of claims that characterized pre-1938 adjudication. Some cases will be harder to fit to the schedule than others, but learning to meet a single discovery schedule will be exactly the same process that lawyers already master in responding to pleadings and discovery measures, and preparing and answering appeals—in short, in almost every part of case preparation but the overall length of discovery. There is no reason to believe that here as elsewhere, the pressure to fit each case into a single mold will not produce an overall increase in efficiency.

Today’s primary criticism, if it should be called that, may be from those who feel the Federal Rules do not really work that way anymore. A number of authors have argued that there are so many exceptions to the uniform, court-oriented practices intended by the Federal Rules that their purpose has been defeated. See, e.g., id.; see also discussion infra note 296.

104. CONNOLLY ET AL., supra note 59.
105. Id. at 3.
106. Id.
107. Id. at 54. The speed-up was five months in “discovered” cases, or cases in which discovery occurred. Id.
getting a response within the mandated time.108 “Strong” time limits resulted “in closer conformity to rule provisions specifying time limits for response to requests,” as well as reducing “the time between requests.”109 Parties filed interrogatory responses one-and-a-half months earlier than otherwise and document responses one month earlier.110 And not only did lawyers respond to requests more quickly, they also initiated the next round of investigation more rapidly.111 In other words, discovery time limits made lawyers do the job they were supposed to do anyway.

Quicker schedules did not seem to reduce the quality of justice. Parties in courts with stronger controls conducted more formal discovery, not less, even though their time was limited.112 Parties in courts with shorter schedules had to file fewer, not more, motions to compel.113 Furthermore, courts with quicker schedules tried more, not fewer, cases than their less organized compatriots.114 The FJC report concluded by urging that all cases be put on a motion or discovery control track, with “[t]he basic principle of this element [being] that discovery timing controls should be applied to all claims as soon as they have been controverted.”115

A companion report stated the findings about discovery in equally stark language. “A weak system of governance makes effective policy action difficult or impossible.”116 One of the changes accomplished by the Federal Rules was the elimination of many mandatory time limits,

108. For instance, 80% of interrogatories and 60% of document requests consumed more than the 30 days allowed in the rules before a response materialized. Id. at 18.

109. Id. at 52. The strength of court practices was measured using four variables; consistency, earliness (how quickly the request was initiated), shortness of period, and firmness. Id. at 52-53. The average discovery cutoff was 120 days or less. Id. at 52.

110. Id. at 62.

111. Improving discovery timing “appears to have the effect of speeding both requests and responses.” Id. at 66. “Gaps of inactivity” were eliminated by increased judicial control. Id.

112. Id. at 59. This difference disappeared if informal discovery measures were included, id. at 60, but the lesson remains: nothing indicated that parties in quicker jurisdictions had to get by on less investigation or information than those in slower jurisdictions.

113. Id. at 64.

114. Cases in courts with the most controls settled 310 days before those with the least controls; cases in the former were tried a full 650 days sooner on average than in the courts with the least controls. Id. at 68-69. Though the rankings of “strong” and “weak” control may be somewhat subjective, differences of this size suggest that something important is occurring between these courts and this is a lesson for us all.

115. Id. at 79.

116. FLANDERS, supra note 72, at 7.
with the gap being filled by "judicial case management." A result of these changes has been that "[d]iscovery, especially, is now governed by very few time limits," a finding that remains conspicuously true more than fifteen years later. Differences in case timing did not seem associated with case characteristics or the mix of cases, but with the fact that faster courts used more "exacting" controls.

The FJC study does not stand alone. The National Center for State Courts ("NCSC") has performed two massive studies of delay in state court litigation. The studies occurred ten years apart, the first in 1978, the second in 1988. The first analyzed more than 20,000 cases; the second, 50,000 cases. The second study was able to look at a number of measures that the sample courts had adopted to improve case processing after the initial report ten years earlier.

The significance of these state-court studies is easily misconstrued. The NCSC reports focused attention on the "local legal culture" that the authors decided most explained differences in case speed. "Local legal culture" appeared significantly associated with case processing times, instead of commonly accepted structural reasons for delay. This led some commentators to the conclusion that structural reforms like time limits are not likely to solve a problem rooted in culture and motivation.

Differences in attitude seemed to explain variations in case resolution far better than such structural factors as the number of filings, the backlog, the number of trials, and the types of cases processed by a court. One reason for the emphasis on attitudes and values was the

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117. Id. at 17. The anomaly appears in a variety of places in the report. See, e.g., id. at 25 ("Discovery differs from pleadings in that it is governed by relatively few time limits in the Federal Rules. This phase is probably the most time-consuming element of federal civil litigation. There are no rules at all governing the total time allowed for discovery.").

118. Id.

119. Id. at 18-19.

120. The first study is the 1978 report, CHURCH ET AL., supra note 15, at 3; the second, MAHONEY ET AL., supra note 15, at 5.

121. See infra text accompanying notes 123-30.

122. Priest, supra note 8, at 529-31.

123. The novel and unexpected message of these two studies was that common structural factors such as the number of cases were not significant in explaining delay. This finding contradicted both received wisdom and the views of lawyers interviewed during the projects.

Often credited with beginning the serious research into ways that courts function in the United States, one of the most important early studies on court delay argued that if courts with backlogs could bring enough resources to bear to get caught up, this could cure problems of delay. ZEISEL ET AL., supra note 18. The study's recommendations are summarized in Priest, supra note 8, at 528-29. Zeisel's work has become a favorite target for those who argue that structural reforms,
surprising finding that in spite of all the procedural differences between state and federal courts, the pace of the two systems in the same jurisdictions seemed to vary together. Fast state courts had fast federal counterparts and slow state courts had slow federal companions. An obvious explanation seemed to be that judges and lawyers in these jurisdictions shared the same beliefs about the pace of litigation, and their beliefs determined the way the jurisdictions enforced their rules. The authors relied on subjective evidence as a second reason for emphasizing local culture. Interviews with lawyers confirmed that timing seemed related to beliefs about the appropriate pace for litigation. A third reason including more spending or adding more judges, will not themselves solve problems of delay. The two studies discussed here are perhaps the most ambitious and thorough of those critics; for a more theoretical approach, see discussion infra note 131.

The NCSC studies systematically tested and rejected expected correlations between delay and court "size," which included the size of the court (number of judges), the jurisdiction's population, and the number of cases. MAHONEY ET AL., supra note 15, at 46. Similarly, they found no correlation between case speed and caseload mix, rate of trials, total number of cases, duration of speedy trial statutes for criminal cases and the use of alternative dispute resolution ("ADR") techniques. For more detailed discussions, see CHURCH ET AL., supra note 15, at 21-23 ("size of court bears little relation to civil processing time;... [i]f anything, as the number of judges and tort filings increases, there is a tendency for disposition time to decrease"), 24-26 (the number of filings and caseload bore little relation to delay), 30 ("differences in the overall pace of criminal litigation among trial courts cannot be ascribed to heavy concentrations of serious criminal cases"), 32-35 (no clear relation between the number of trials or settlements and speed; indeed, "the most settlement intensive courts are the slowest courts"), 39-42 (imposing trial dates had little effect on processing; "[f]ew of the state courts examined in this study seem able to forge a tight relationship between scheduled and actual trial dates"). The 1988 study ended up confirming these conclusions. See MAHONEY ET AL., supra note 15, at ch. 3A (court size), ch. 3B (caseload mix), ch. 3C (number of trials and trial rate), ch. 3D (backlogs), ch. 3F (speedy trial laws), and ch. 3G (use of ADR).

The studies did find that using grand juries delayed criminal processing times, and that use of an individual docket system seemed to speed up civil cases. CHURCH ET AL., supra note 15, at 36-38 (individual calendar), 46 (grand jury takes longer); MAHONEY ET AL., supra note 15, at 57-58 (grand jury slower), 74-75 (individual calendar, which seems to lead to quicker judicial involvement, speeds up cases). They found that in civil cases, backlogs are positively correlated with slow courts. CHURCH ET AL., supra note 15, at 50. However, this may be just as attributable to the fact that slow courts generate backlogs as the possibility that courts weighed down with backlogs become slower. As the study pointed out,

The problem with this backlog-causes-delay model is that it is largely tautological: a court in which the median case is disposed of in three years, for example, will necessarily have approximately three years of filed cases pending at any one time if filings and terminations stay fairly constant.

Id. at 52.


125. Id. at 55-59.

126. The finding that case processing is determined by values is consistent with, and may explain, a Rand report finding that federal judges with greater workloads processed cases at a faster
for fixing blame on local culture was that criminal dockets in general moved faster than civil dockets. The NCSC traced this difference to public pressure on courts to try criminal cases quickly.\textsuperscript{127} Finally, and perhaps most significantly, cultural differences would explain the counter-intuitive finding that structural factors like the number of cases filed seemed to have little effect on case resolution times.

The authors stated their findings in stark terms: "[I]nformal expectations, attitudes and practices of attorneys have a great deal more to do with trial court delay than aspects of a court system that can be gleaned from an annual report, organization chart, or compilation of local rules."\textsuperscript{128} They found that "[i]f any one element is essential to the effort to reduce pretrial delay, it is concern by the court with delay as an institutional and social problem."\textsuperscript{129} Focusing on culture pointed to the need to change attitudes and to the likely failure of measures as simple as adding more judges.\textsuperscript{130}

These two state court studies can be misread as meaning that reforms to formal procedures like time periods cannot alter the pace of the courts.\textsuperscript{131} It seems to have become commonplace to argue that if
delay is caused by attitudes, then only educational and cultural reforms have much chance of effecting real change. Yet the fact that delay is caused by a corrosive “local legal culture” does not mean that rules cannot cure it. Indeed, both studies suggest that firm rules, particularly early time limits, can make a major difference. The power of local

in discussing Hans Zeisel’s argument that courts could catch up from a one-time cleansing of the stables, Priest counters:

The economic approach, however, suggests that this strategy is likely to be futile. Reducing congestion and delay increases the expected value of litigation and increases the volume of litigation. In terms of the metaphor, plucking logs off the lake increases the rate that logs flow into the lake. The rate of flow will increase until the equilibrium logjam for the jurisdiction is again attained.

Id. at 535.

Priest may have been attracted to such a pessimistic reading of the chances for successful reform because his own data, from Illinois’ Cook County courts, showed court delay persisting in spite of almost annual reforms. See id. at 548-56. This, in turn, leads him to elaborate his theoretical model, in which improving case processing does not necessarily reduce backlog or the number of cases, because lower delay will induce more cases to be filed and maintained. Priest models the decision to proceed with litigation as a function of the expected judgment minus the cost of litigating compared to the benefit of settlement. See id. at 532-39. Whenever the expected trial outcome less the cost of litigating exceeds the likely or anticipated settlement, parties stay in court.

From this foundation, Priest climbs to the conclusion that “there is likely to be some equilibrium level of delay within any jurisdiction.” Id. at 535. Trying to remove this backlog is futile, or would require massive investment in delay reduction, because decreasing congestion increases the net expected value of litigation and thus increases the volume of cases. Priest then cites Posner’s example of highway building leading to an increase rather than decrease in traffic as a metaphor for the perils of court reform. Id. at 536.

A lot of this argument just gussies up in calculus notation a position that can be analyzed with plain common sense. It certainly is likely that if delay falls, more cases will stay in the system than would otherwise be dropped.

This, however, is just the first round effect. Priest’s model should be wrong over any large group of cases for at least two reasons. First, assuming no change in underlying litigiousness, the marginal return to the next case will be falling too. As the “good cases,” (those worth enough to pursue over the costs of delay) are exhausted, the remaining stock will be worse and worse, and the decrease in expected return may fall more rapidly than decreases in delay. Put another way, there may not be too many bad cases waiting to be pursued.

Second, there are very significant fixed costs of litigation. These include not only startup transactions costs like legal expenses (filing fees, having at least some legal consultation), but the often quite high costs of disruption, embarrassment, and other noneconomic expenses. As soon as one starts thinking about Priest’s equation being dominated by fixed costs, it becomes clear that at some point it seems unlikely that there will be a line of cases waiting to replace the just-settled. It may take more delay reduction than society can afford to get there, but the theoretical model of each court finding its equilibrium without much regard for reforms seems quite far-fetched. Reducing delay may not bring immediate improvement in the next, marginal case, but Priest offers no significant reason to believe that carefully planned structural reforms, crafted in a way to leave little room for discretion, would not improve case processing. His studied courts in Illinois may have been laboring under a sticky equilibrium, or instead they may have pursued ineffective reforms, such as structural changes that left lawyers and courts free to maintain their patterns of slow case processing.
culture may mean that only a firm systemwide rule is likely to have much impact.

A closer look shows that the studies support structural reforms like pretrial time limits. In 1978, the authors noticed that one of the reasons criminal cases went to trial more quickly than civil cases seemed to be that judges exercised more control over those cases. Differences between fast and slow criminal courts were associated with the quicker courts setting a schedule sooner and providing a firm trial date. There was a "rough correspondence between the strength of control over criminal case movement, how early it was exercised, and upper court disposition time." The authors did not reach a similar conclusion about civil courts in 1978, but not because time limits had not worked. The civil trial courts studied in 1978 exercised "so little control that the cause of the significant differences in processing speed must lie elsewhere." In other words, the first study could not test time limits in civil discovery because "the observations were not extensive enough."

The quicker pace of criminal cases and practices of the faster criminal courts helped the NCSC conclude that the "major strategy recommended for reducing pretrial delay is the establishment of management systems by which the court—not the attorneys—controls the progress of cases." This included stricter control over trial scheduling and continuances. Courts needed to control timing: strong case management "is necessary to accelerate civil litigation in a court that has traditionally been slow," and delay reduction controls need to be imposed at all stages of the civil process.

133. In the fastest courts, this control is established at filing with a process for setting an early, and relatively firm, trial date. The slower courts exercise relatively little early control and do not push cases to disposition until much later. Id. at 45.
134. Id. at 46.
135. Id. at 42.
136. Id. at 68.
137. Id. at 64.
138. Id.
139. Id. at 66-67, 70. The authors did try to reconnect this structural reform with cultural variables by defining the "crucial element" as both judicial concern with delay and a "firm commitment" to do something about it. Id.

To the extent that the state court studies fall back on education and exhortation to improve the culture of litigating, they ignore the impact of their primary finding. If local legal cultures are so significant in causing delay, even to the extent of twisting speedy trial statutes and policies on trial dates and continuances to their subversive inclinations, then the more rigid and external, the more unbending a structural reform like a discovery timetable, the higher its chances for success.
The NCSC's second, decade-later study, this time of 50,000 cases, confirmed the importance of time limits. Many of the sample courts adopted civil time limits after the 1978 report. The NCSC replicated its earlier findings that commonly cited factors like caseload, the type of case, and "court size" did not seem correlated with delay. The authors again found that early, aggressive judicial control seemed necessary to move cases along. With a decade of court experimentation, the NCSC added that "time standards that establish guidelines for civil case processing from the inception of a lawsuit until its disposition are associated with a speedy pace of litigation." Running civil cases required early involvement, firm dates with few continuances, and periodic monitoring. Speedy cases got early trial dates and trials started near those dates: expeditious courts enforced firm trial settings.

The state court studies stress that values and expectations—attitudes, not just formal rules—must be controlled for effective reform. At the same time, they recommend external changes to force values to change. Proposing structural reforms to attack cultural problems is not inconsistent. When local cultures become cultures of delay, change is hardly likely to occur as a result of exhortation or education. This probably is the major reason for the persistent failure of jurisdictions that work hard at reform but do not impose limits on case duration. The culture of delay infects and weakens rules that do not carry external sanction.

Rules that leave discretion with the same courts and parties who are not getting the job done in the first place will perpetuate the problem. This is the advantage of strict time limits. Confront a legal culture drowning in lethargy with firm time limits and it can be forced to learn

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140. See supra note 123.
141. MAHONEY ET AL., supra note 15, at 77-79.
142. Id. at 68.
143. Id. at 90, 194. One of the necessary elements for successful programs was a "time standard[] for the processing of cases," a benchmark for the outer case duration. Id. at 199. The authors listed time standards as a "prime area for research." Id. at 209.
144. Id. at 81.
145. Not only was the ineffectiveness of many structural factors the core finding of these two state court reports, but it also appears in such studies as George Priest's analysis of Cook County, Illinois courts. See discussion supra note 131.
new ways. To be effective, though, the constraints must be firm, concise, and uniform.

The value of time limits, usually embodied in phrases like "judicial control" or "case management," has been emphasized in other studies of court delay besides those conducted by the FJC and the NCSC. Time limits formed the backbone of the recommendations of the 1989 Task Force Report of the Brookings Institute, a report requested by the Senate Judiciary Committee. The report led to the 1990 Civil Justice Reform Act, in which Congress required each district court to adopt a plan to reduce costs and delay. The Task Force questioned a wide range of participants in the court system and commissioned a Harris poll of over 1000 "court participants." Of the Task Force's twelve "procedural recommendations," five concerned the mechanics of imposing effective time limits.

In the mid-eighties, the ABA impaneled its own commission to study court costs and delay. The commission had access to many of the studies already cited and surveyed case management programs in Kentucky, Vermont, and Colorado. Its primary conclusion was that caseflow management, which included tight controls over the time for discovery and simplified procedures, could reduce the time to disposition.

146. THE BROOKINGS INSTITUTION, supra note 15, at 8-29.
147. The first recommendation of the Task Force, adopted that year, was that Congress direct all federal district courts to develop and implement within twelve months a "Civil Justice Reform Plan." Id. at 12.
148. Id. at 2-3, 6. The Task Force enjoyed the benefit of having Deborah Hensler, the Rand Institute Director of the Institute for Civil Justice who has been studying ADR programs for a number of years, among its members. Id. at 46.
149. Thus, after a first recommendation that federal courts establish a court reform plan, the Task Force urged, in order: (1) that each court develop a case tracking mechanism, id. at 14-17; (2) that early firm trial dates be set as an integral part of this reform for all noncomplex cases, id. at 17-19; (3) that clear time guidelines be set for the completion of discovery, id. at 19-21; (4) that only very narrow exceptions be granted to these deadlines, id. at 21-22; and (5) that courts establish procedures to make sure that they resolve all motions necessary to stay within their schedules, id. at 22.

The Task Force backed up its recommendation with a citation to the 1989 GAO report which also emphasized time limits. In a study of 782 cases that took longer than one year to complete, "the GAO found the establishment and enforcement of time standards for different stages of the cases to be the critical factor in effective case management," id. at 17 (emphasis added); see also infra notes 153-59 and accompanying text.

150. The Commission had the NCSC's work available as background for its report. The Commission identified the "local legal culture" hypothesis as a "likely explanation for delay, a factor perhaps more important than length of backlog, court size, caseload, and trial rate," citing Thomas Church's 1978 study, and indicated that "our work lends credence to that hypothesis." ABA LITIGATION COST AND DELAY REPORT, supra note 6, at 4.
in most courts. "The Commission’s experimentation combined two parallel efforts: delay reduction through judicial control over the pace of litigation and cost reduction through procedural simplification." In Kentucky, where a program was instituted which limited most cases to sixty days of discovery, the average processing time dropped sharply from sixteen months to five months.

Finally, prompted by a sixty-six percent increase in filings between 1974 and 1979, the General Accounting Office ("GAO") analyzed cases in nine federal district courts to determine how much backlog existed and what to do about it. The GAO issued its report in 1981 after examining the files of 782 closed cases that had taken a year or more to conclude. Every one of the four factors identified as "essential to effective case management" concerned limiting the time for discovery: (1) uniform court procedures; (2) early time frames and deadlines; (3) court monitoring of time frames; and (4) enforcement of time frames. Courts with large numbers of cases pending more than a year had deficiencies in some or all of these areas.

The GAO found that "[t]he establishment of time frames for the various steps in the civil process soon after a case has been filed is crucial to an effective case management system." Judicial success at moving cases was linked to "how uniformly and strictly" courts imposed time limits. "[C]ourts which effectively enforced case time frames minimized their backlog."

The frequent replication of the finding that time limits are an essential ingredient for effective discovery reform makes the lack of an overall discovery time limit in federal and state procedural rules all the more puzzling. It may be that judges have so little trust left in attorneys’ ability (or willingness) to stick to deadlines that they feel they must punish lawyers by telling them exactly how many discovery steps they can take. Yet if courts would only enforce time limits, lawyers could be

151. Id. at viii; see also id. at 7-9, 21-22.
152. Id. at 11.
153. GAO REPORT, supra note 2, at i.
154. Id. at ii.
155. Id. at i, 8-9. These factors comprised the first of three major recommendations, establishing a consistent case management system. The other two, increased use of magistrates’ and clerks’ office personnel and increasing the number of judges, involved reallocation of existing resources and increasing resources, not changes in the way courts apply rules. Id.
156. Id. at 8.
157. Id. at 11.
158. Id. at 10 (emphasis added).
159. Id. at 15 (emphasis added); see generally id. at 14-18.
constrained effectively. They would have to try their cases, finished or not, on the selected date.

C. Uniform Time Limits Produce Savings That Case-Specific Limits Lack

When courts do adopt time limits, there is good reason to think that uniform limits will be much more effective than case-by-case limits. Proponents of time limits often assert that discovery cutoffs must be set individually, or at most, by group of cases. Yet if the delay that infects the culture of slow courts is as powerful as many fear, leaving the setting of individual limits to the infected courts is self-defeating. The result will be the same as with trial dates, speedy trial rights, and continuances: fast courts will impose short and firm dates, slow courts will doddle along as before.

Time limits too often succumb to a perceived need to adjust their proposals for “local legal culture.” Even their proponents tend to worry about leaving them flexible in application to particular cases. As the ABA study concluded, “we did find that different courts need different kinds of delay reduction efforts. The key is a cooperative bench-bar mechanism to locate the points of delay and design programs to combat them...” In a similar vein, the Administrative Office of the United States Courts opposed the GAO’s recommendation that the Federal Rules be amended to provide uniform time limits for civil

160. This assumption comes from a wide range of time limit proponents. For instance, the NCSC studies urged some outer benchmark or time “standards,” rather than rules. MAHONEY ET AL., supra note 15, at 199. The Brookings Task Force urged courts to adopt a variety of tracking ranges for discovery duration, ranging from 50-100 days for quick cases, 100-200 days for run of the mill lawsuits, and 6-18 months for complex cases. THE BROOKINGS INSTITUTION, supra note 15, at 19. The Federal Rules now provide that judges “shall” impose time limits on discovery at the mandatory pretrial conference, and “may” impose a firm trial date, FED. R. CIV. P. 16(b), but offer absolutely no guidance on how long those limits should run. Even a strong and early proponent of firm discovery schedules like Judge Peckham recommends a “flexible” status conference that will draft the “timetable for remaining discovery,” apparently on a case-by-case basis. Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CAL. L. REV. 770, 779-80 (1981).

161. ABA LITIGATION COST AND DELAY REPORT, supra note 6, at vii-viii. As the ABA report continued, “it will be rare that a procedure, no matter how well-conceived or how successfully it may operate in one jurisdiction, can be imported whole into another. It must be adapted to local procedures, conditions, needs, and even tastes.” Id. at 70.
discovery processes, questioning whether the variety of cases ever could be accommodated by a single standard.\footnote{162}{The GAO believed as follows: While some of the suggestions for establishing deadlines and time frames in the report are provocative, they simply do not apply to highly complex cases or those with numerous parties . . . . For similar reasons we question the proposal to modify the Federal Rules of Civil Procedure to include maximum time frames for the various steps in the civil process, subject to waiver . . . . It is not realistic to include in [the Federal Rules] maximum time limits to fit the conditions of every case, whether it is a large antitrust case, involving an entire industry on the one hand, or a pro se prisoner petition on the other. Guidelines appropriate to various categories of litigation might be more appropriately advocated if local procedures of more uniform character are needed, but such guidelines should not treat all federal civil cases as fungible or even closely related. GAO REPORT, supra note 2, at 39-40 (citing November 25, 1980 Letter of William Foley, Director, Administrative Office of the United States Courts). The Administrative Office’s argument was that “[t]here is such a vast difference in the kinds of litigation . . . that no rigid time frame could be applied.” Id. at 40. Instead the Administrative Office grudgingly agreed that perhaps guidelines “could establish some reasonable norms in processing certain categories of cases, which would be a more flexible approach to the enormously varying conditions in 95 district courts and the different kinds of litigation within any given court.” Id.}

Congress fell for the local-culture approach when it required each federal district to appoint its own advisory group. District by district, each group is to “promptly complete a thorough assessment of the state of the court’s civil and criminal dockets.”\footnote{163}{Judicial Improvements Act of 1990, 28 U.S.C. § 472(c)(1) (Supp. V. 1994).} Further, each group must determine the condition of the civil and criminal dockets; identify trends in case filings . . . ; identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation; and examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts.\footnote{164}{Id. § 472(c)(1)(A)-(D).}

The groups are to submit separate plans to reduce delay and expense in their courts to the Director of the Administrative Office of the United States Courts, the judicial council of the circuit, and the chief judge of each other district court in their circuit.\footnote{165}{Id. § 472(d).}

Having launched this expensive, repetitive process of having every federal district make its own study of judicial improvements, the Act imposes even more localization. Each study group is to consider having its plan include provisions for the following:

- systematic, differential treatment of civil cases that tailors the level of
individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.\textsuperscript{166}

This expense and delay reduction project invites waste and inefficiency. The more time limits are customized for each case, the more they resemble no time limit at all. Courts have a problem with delay at the local level. The problem is fed, not reduced, when Congress requires every district—courts at the local level—to study the problems it has caused. Worse, the recommendation that study groups consider serious reforms like time limits is undercut by urging the reformers to “tailor” their plans to individual case complexity.

The predictable result of this district-by-district “reform” has been chaos. Many courts opted out of the procedure and the plans vary widely among the districts.\textsuperscript{167} Congress got just what it deserved: a transformation described by one observer with some but not much exaggeration, as “changel[ing] the once uniform federal practice to a district-by-district free-for-all.”\textsuperscript{168} There are two major court institutes, the FJC and the NCSC, that conduct research into court practices, as does the Rand Institute for Civil Justice (“Rand Institute”). Their studies have indicated repeatedly that the culture of litigating at the local level is the primary factor in explaining case delays. Yet when Congress gets around to court reform, it mandates committees \textit{at the most local level possible} within the federal court system and urges each to adopt its own rules.

This experience seems drearily familiar because the same thing occurred at the inception of criminal speedy trial rules.\textsuperscript{169} In 1972, the Supreme Court promulgated Rule 50(b) of the Federal Rules of Criminal Procedure. The Rule required each district to “conduct a continuing study of the administration of criminal justice” and to “prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place.”\textsuperscript{170} Just as with the later civil reforms, Rule

\begin{itemize}
  \item 166. \textit{id.} \textsection 473(a)(1).
  \item 167. \textit{see infra} notes 218-19 and accompanying text.
\end{itemize}
50(b) failed to "set any criteria by which delay could be gauged. Nor did they provide for any penalties in the event guidelines were not met."\textsuperscript{171} Rule 50(b) led to "nearly total ineffectiveness."\textsuperscript{172} To the extent that districts adopted any plan, they tended to add exceptions to the time limits in a fairly quick model plan drafted by the Administrative Office of the United States Courts.\textsuperscript{173} Congress grew so discouraged by the result that it passed the Speedy Trial Act.\textsuperscript{174} The Act, unfortunately, included one broad exception—"if the ends of justice"—required—as well as other exceptions where the court could find that time limits would not be "reasonable."\textsuperscript{175} The Act was met by hostility from judges and was not implemented seriously.\textsuperscript{176} Judges used the loopholes that allowed case-by-case variations to defeat the Act's broader purpose. In 1983, one observer noted that "'[e]xcludable time' and 'exceptions in the interest of justice' are terms being heard more frequently in the federal courts, and if this continues, the aims and purposes of the act will quickly be forgotten, with these formalisms all that remain."\textsuperscript{177}

It is little wonder that many reform packages do not accomplish their goals. The goal of quicker case management gets swamped in a wash of exhortations aimed at reforming supposedly intractable cultures.\textsuperscript{178} Reformers from the legal culture school succumb to multifaceted programs of cultural improvement that have no focus. Not only does reform that is fitted to the nuances of local practices lack the clarity of good standards, but the emphasis on culture diverts attention from specific, concrete reforms that might force changes in behavior. It invites loose, open-ended changes that may make no difference at all in practice.

\begin{footnotes}
\item[171] FEELEY, supra note 169, at 161.
\item[172] Id.
\item[173] Id. at 161-62.
\item[174] Id. at 163-69.
\item[175] Id. at 168.
\item[176] Id. at 170-72.
\item[177] Id. at 173.
\item[178] One is reminded of Shakespeare's description of the limits of seeking change by simply calling for it:

Glendower: I can call spirits from the vasty deep.
Hotspur: Why, so can I, or so can any man,
But will they come when you do call for them?
\textit{William Shakespeare, The First Part of King Henry Fourth} act 3, sc. 1, at 90 (A. R. Humphreys ed., Harvard University Press 1960). An awful lot of study, time, and money has already been poured into educating judges and lawyers on the need for quicker case processing. Yet the reforms have not included a time limitation to enforce the exhortations. More talk is not likely to become productive now.
\end{footnotes}
One criterion for effective reform must be that a proposal be specific enough for those implementing it to know what to do. Local-culture reforms often fail this simple test. Consider for instance the second study by the NCSC. While stressing time limits, the report's authors describe such other “most critical” factors as leadership, “good communication and broad consultation,” “judicial responsibility and commitment,” “education and training,” and “mechanisms for accountability.” Such reforms can degenerate into a collection of platitudes about “good case management,” “tight controls,” or more broadly, “good government.” Few would deny any of these ideals. The problem is that they are not specifically enforceable policies. They cannot be measured, tested, or enforced. They are goals, when what is needed are rules that can be implemented.

If case processing times range from a handful of months to five years and more and each court has its own “culture” of delay, the solution is not to design local plans and hope the courts enculturate properly. Court reformers have an advantage that most government administrators lack: courts have clear authority over the parties and lawyers who cause delay. The court system is arranged on hierarchical lines that transmit rules to all parts. If courts impose a uniform nine-month discovery limit, with power to grant only a fixed number of exemptions, and if the judges can be compelled to enforce this simple rule, differences in local cultures will count for little.

179. MAHONEY ET AL., supra note 15, at 198-205. For similarly mushy and inoperative recommendations, consider the ABA's Cost and Delay Commission's “bench and bar” recommendations:  
1. Examine cost and delay activity elsewhere.  
2. Identify problems with the jurisdiction and design specific rules and procedures to address the problems.  
3. Set priorities for action.  
4. Work together to implement the projects.  
5. Evaluate and report on their implementation.

ABA LITIGATION COST AND DELAY REPORT, supra note 6, at 76. This is the same commission that came up with perfectly sensible observations on the utility and need for time limits and case management. See supra text accompanying note 151.

The errors of overemphasizing the particular, at the expense of the systemic problem in the courts, and of letting analysis disintegrate into abstract discussion of unenforceable cultural reforms, are linked problems. The guidelines for the expense and delay reduction plans contain wise counsel about early trial dates, controlling the time as well as extent of discovery, and setting deadlines for such items as filing motions. Yet by the time a district court's advisory “group” has completed its study and recommendation, and tackled the job of providing for case management “that tailors the level of individual and case specific management to such criteria as case complexity [and] the amount of time reasonably needed to prepare the case for trial,” 28 U.S.C. § 473(a)(1), one would not be at all surprised to find courts turning back to educational suggestions.
One lesson of principal/agent theories is that the agent must be held to standards that satisfy the principal’s needs and can be understood and enforced by both sides. It is no surprise that the FJC found, more than fifteen years ago, that “[u]nder an effective system of case management, the rules speak for themselves, and lawyers are less dependent on the court to enforce those rules.” Those whose behavior needs to be controlled, parties and their lawyers, are already before the courts and subject to regulation. Performance is relatively easy to measure as it basically means having cases ready to try on the court’s schedule.

Using mandatory time limits to motivate prompt case preparation should be a relatively simple principal/agent application. Yet courts and reformers continue to treat the problem as if it were as complex as changing health care incentives in a private marketplace or altering patterns of residential and educational discrimination—areas where government cannot impose behavior directly. In view of the studies on the effects of time limits, it is more likely to be a lack of will than any failure of know-how that explains the persistent failure to adopt effective rules on case processing.

Of course, courts still have to enforce time limits. It is no surprise that some courts imposing “firm” trial dates have failed to improve their case handling because they have not enforced the dates. This does not mean that structural changes cannot change local culture. It just means that courts must mean what they say. Thus pretrial time limits have to be mandatory; a prudent judicial system will teach judges how to publicize and implement the changes and punish violators; and it will help lawyers improve their litigation styles and expectations. Part IV discusses structural measures to ensure that judges enforce time limits.

The rules should leave as little play as possible for variations in leadership, education, training, and commitment. There is no variation in local conditions wide enough to make it impossible for a California court to enforce the same limit on discovery as a New York court. That is why the Federal Rules do not provide different times from court to court for responses to pleadings, discovery requests, and briefs on appeal. Court systems already accommodate material case variations by providing a

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180. FLANDERS, supra note 72, at 17.

181. The effectiveness of trial dates seems to vary directly with the seriousness with which the courts and lawyers take their overall approach to case management. Left untended—i.e., if courts do not enforce time limits—the established slow pacing of courts and lawyers will erode whatever constraints are imposed. CHURCH ET AL., supra note 15, at 39-42 (civil trial dates seemed to have little effect because courts did not hold cases to schedule).
range of courts, from small claims courts to the separate procedures for complex litigation.

If courts take the time spent worrying about regional quirks and educating the bar and invest it instead in enforcing a plain, simple rule, they will begin to make headway. In contrast, if courts leave timing issues as a discretionary matter, delay will subvert almost any scheduling process. The paralysis will debilitate as simple and straightforward a reform as time limits. It is far better to start with a strict date that varies only in truly exceptional circumstances.

Allowing each court to devise its own time limits sacrifices the efficiency gains that can come when the entire system has to conform to one schedule. If the same rule applies to all jurisdictions and cases, lawyers will get a lot of practice learning to adjust to the single schedule. They will have many chances to perfect their speed. This kind of learned behavior already occurs successfully with appellate deadlines, which ordinarily are much firmer than pretrial deadlines and are rarely extended.

A single rule is easier for a court to enforce as well. The FJC study recommended that time limits be consistent within local courts. Uniformity would signal that the deadline is significant and requires less time to teach lawyers.182 "[I]f the court is perceived to have a uniform control policy, enforcement problems will be minimized." When the same limit applies throughout a jurisdiction, little will be gained by arguing about it.

This analysis is correct, but the insight does not stop at the borders of each court. Lawyers will modify their behavior more efficiently if the rule is constant across the federal system, and even more so as the states adopt the federal rule. One reason that the Federal Rules have enjoyed an influence out of proportion to the number of federal courts is that most lawyers had to learn the new procedures. The reforms overflowed into state courts in the years after 1938. A good federal rule of time limits can be just as valuable an educational device for state courts.

Some who agree that time limits should be somewhat more uniform

182. CONNOLLY ET AL., supra note 59, at 84. The ABA's Commission correctly joined the emphasis on simplicity, one of the two touchstones to its recommended reforms. ABA LITIGATION COST AND DELAY REPORT, supra note 6, at vii. The Commission did realize that simplicity was likely to be ineffective unless coupled with firm judicial controls. Id. Sadly, the Commission's own recommendations then abandoned simplicity for complexity and extraordinary vagueness. See supra note 179. A fondness for local variation and discretion seems, as this section argues in the text, a too frequent addiction for followers of the local legal culture approach.

183. CONNOLLY ET AL., supra note 59, at 84.
nonetheless want to let the limit vary not by jurisdiction, but by type of case. Other things being equal, the discovery needed may vary by the type of case, the number of parties, the presence or absence of a counterclaim, and the amount in controversy.\textsuperscript{184} Antitrust, tort, and civil rights cases tend to require a lot of investigation, while many prisoners’ rights cases, certain administrative appeals, and government seizures require less investigation.\textsuperscript{185} Moreover, given the fact that most cases take little or no discovery,\textsuperscript{186} requiring all cases to go through the same hoop of getting a schedule, disclosing documents, attending a pretrial conference and the like, may increase rather than decrease the total court burden.

On the other hand, varying time limits will increase administrative costs. Grouping cases in “tracks” or categories is some improvement, because it still allows courts to impose firm deadlines for each group of cases. However, this leaves room for lawyers to negotiate over just how complex, and deserving of discovery time, their cases may be. Each category creates a new range of decisions and hearings.

If courts do group cases by scheduling need, the basis for grouping must be clear and simple. There should be at most a few categories and they must be specific enough to preclude debate over categorization. The schedule must not be customized for each case. That is what most courts do today and it does not work. The categories cannot be anything that lawyers can dispute readily, or the process of categorization will degenerate into another costly pretrial diversion. Ultimately the ideal number of categories is an empirical question about the transaction costs of permitting schedules to vary by case or by class of case.

The costs saved by a uniform rule discussed thus far are the transaction costs that a case-by-case regime imposes when it allows cases to become subject to negotiation between the judge and the parties. Categories that permit case variation incur costs of negotiation, monitoring, and enforcement. Moreover, the studies of case timing suggest that looser rules guarantee that time limits will slip in jurisdictions that already have problems with delay.\textsuperscript{187}

In addition to avoiding these costs, a single rule would produce savings in learning and adaptation. It is becoming widely recognized that the adoption of a single standard can produce significant organizational

\textsuperscript{184} These factors, not at all surprisingly, come from the findings of the FJC study. CHURCH ET AL., supra note 15, at 39-51.
\textsuperscript{185} Id. at 36-39.
\textsuperscript{186} See supra part II.D.
\textsuperscript{187} See supra part III.B.3.
savings just because all involved adhere to the same standard. This is perhaps most easily seen in the adoption of a single standard for physical products like VCRs or computers, but the principle should apply to institutional standardization as well. The same kind of savings should accrue from standardized discovery timing. For instance, firms now could adopt a single discovery schedule, with internal warnings before the last date to file document requests, interrogatories, and to take depositions. Lawyers would know exactly how much time they had for discovery. For the first time, they could prepare a discovery plan with detailed timing, as well as substance, at the start of the case. Every case would become a chance to learn by meeting the same time limit. Professional training organizations like continuing legal education providers and judicial conference hosts would have a single standard to teach their students.

A uniform rule could afford to allow voluntary exemption from the discovery plan and hearings for small cases that do not need any case management. Many cases move quietly to termination without formal

188. W. Brian Arthur has studied the economic benefits that come from a shared standard, even if it is not necessarily the most “efficient” standard in an objective sense, using the typewriter keyboard as one of his primary examples. W. Brian Arthur, Competing Technologies, Increasing Returns, and Lock-In by Historical Events, 99 ECON. J., March 1989, at 116; see also W. Brian Arthur, Positive Feedbacks in the Economy, Sci. Am., Feb. 1990, at 92. The savings do not mean that the parties chose the form that would most reduce costs. “Once random economic events select a particular path, the choice may become locked-in regardless of the advantages of the alternatives.” Id. at 92. However, this results in real savings as compared to having no standard, assuming the standards are not irrational.

Sociologists as well have noted that one reason that organizational forms spread is the efficiency of operating in a single, known environment. Thus, once an organization becomes a recognized field, “key suppliers, resource and product consumers, regulatory agencies, and other organizations” adapt to the particular form. Paul Dimaggio & Walter Powell, The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 64-65 (Walter Powell & Paul Dimaggio eds., 1991). Dimaggio and Powell argue that organizational forms may spread for at least three other reasons unrelated to efficiency: “coercive isomorphism” resulting from formal and informal governmental directives, id. at 67-68; “mimetic isomorphism,” which is the tendency of organizations to imitate successful organizations, particularly in times of uncertainty, id. at 69; and “normative isomorphism,” which occurs as fields become professionalized, id. at 70.

It is possible that more constrained behavior will force lawyers to discover or employ more efficient techniques. Whether incentives to do more in less time will improve lawyers’ practices depends upon the “technology” of the law practice, whether lawyers operate at the margin of productivity, and lawyers’ willingness to experiment with new methods of preparing cases. A lawyer who wants to do more in the same amount of time might begin taking more depositions by telephone or video conference, thus reducing travel time; change his or her staff composition to delegate more jobs to paralegals; and use more publicly available data about corporate litigants. Others may just add more lawyers to a case and operate in roughly the same way as always.

The benefits this Article attributes to a firm, uniform time limit are those that would accrue even if the rule produces no technological improvements in the practice of law.
discovery measures and with only voluntary information exchanges. These cases might be delayed and their costs increased if subjected to a full panoply of pretrial procedures. To prevent small cases from being burdened with unnecessary procedures, the rules should allow parties to exempt cases from voluntary disclosure and other pretrial duties by mutual agreement. This exception will quickly swallow the rule, however, unless it is limited carefully. To make sure that the parties take certification seriously, and do not use it to buy more time, exempt case status should carry clear restraints. Exempted cases would have to meet the nine-month deadline. In return for avoiding formal pretrial obligations, the parties would waive their right to seek more time if they did not finish their discovery. Given that truly complex cases already receive separate treatment under the Manual for Complex Litigation, this added differentiation should satisfy needs for case differentiation.

D. Time Limits Are More Efficient and Less Intrusive than Limits on the Amount of Discovery

Part of the justice that litigants receive in American discovery is the opportunity to a full, fair process as they define "fairness." Parties and their counsel plan their own discovery. Their design may turn out to be "inefficient." A party may, for instance, ask for much more information than a "reasonable" lawyer would request and find nothing new for its labor. Yet for that party, the knowledge that it was able to settle or try its case after reviewing all the information it thought relevant is an essential ingredient in the perceived fairness of the judicial system. It is just this right to a fair process that we are in danger of losing.

Lawyers should not ignore just how significantly limits on the amount of discovery burden their right to full case development. Under

189. Cf. KARL D. SCHULTZ, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT 8 (1990) (The study was "premised on the theory that one of the primary measures of legitimacy is the opinion of the participants. In a democratic situation the opinions and beliefs of the participants are what either bestows or denies legitimacy.").

190. To extend this point, it must be true that some judges would be much more efficient at determining how to acquire needed discovery information than many of the lawyers who practice before them. Judges perform this task in the inquisitorial civil law tradition that characterizes European courts. See MERRYMAN, supra note 93, at 113-14. Yet judges who seek this power have no reason to treat the needs of either litigant as paramount. They have institutional reasons for preferring quick resolution over protracted resolution, settlement over trial, finality of determination over fairness of disputatation. Or they may form an early impression of which side should win and favor that side. American discovery emphasizes fuller investigation and party freedom, at the cost of court control.
the Federal Rules, the choice of the amount of discovery, as well as which techniques to use, has long been a free choice for lawyers and their clients. The view that discovery is a right of the parties is a part of our adversary system of justice. Judges may restrict discovery that is clearly abusive, but the presumption is that, in general, the parties will decide for themselves how far to dig into the facts.

The American brand of discovery has allowed this kind of full investigation since 1938. Full disclosure of information is assumed to lead to fairer trial and settlement results. And it is the parties and their chosen counsel, not the court or any outside authority, who decide how much investigation is needed.

Broad discovery has become so ingrained that lawyers bridle at the idea of discovery time limits. Mention discovery time limits and the likely response is a lecture on lawyers' skill at determining when a case is ready for trial. The problem with this objection is that it ignores the social cost of unregulated discovery. It assumes the possibility of continuing without fundamental change. The stream of reforms directed at improving case processing over the past fifteen years suggests that, to the contrary, if time limits are not adopted, other changes will replace them. This Article argues that time limits are preferable to what appears to be today's common alternative, limiting the amount of discovery like those appearing in the Federal Rules. The new Federal Rules limit each case to ten depositions, including written depositions, and twenty-

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191. One of the guiding assumptions behind the adoption of the Federal Rules in 1938 was that leaving control of the process of truth-gathering in the hands of the parties was the best way to lead the judge to the right result. Resnik, supra note 2, at 505. The criticisms discussed in part V show just how beleaguered this fundamental concept of the process of preparing lawsuits has become.

192. A common thread in many of these reports is that regaining control of discovery from lawyers is a necessary condition for effective reform. See CHURCH ET AL., supra note 15, at 64. The question about time limits is whether lawyers should simply lose control over the total time allotted to discovery, while retaining freedom to chart its course, or should they instead no longer decide how much and what kind of discovery is proper.

193. It is no accident that broad discovery was among the major improvements that two of the most prominent members of the advisory committee emphasized in their descriptions of the Federal Rules. Clark, supra note 78, at 567; Sunderland, supra note 94, at 22; see also Geoffrey C. Hazard, Jr., Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137 U. PA. L. REV. 2237, 2239-40 (1989) (discussing broad access to documents under the Federal Rules); Peckham, supra note 160, at 805 (quoting Judge Medina that the Federal Rules ended the prior "sporting theory of justice"); Rosenberg, supra note 50, at 2203-05 (summarizing shift in focus from trial to discovery).

194. Resnik, supra note 2, at 505-07.

195. This Article discusses the new amendments in part III.E, but the changes will not stop with the federal courts. Where federal judges have not feared to amend, the states have not been too long before rushing in. See, e.g., infra note 304 and accompanying text.
five interrogatories, subparts included. The parties need court permission or mutual agreement to do more.\textsuperscript{196} This is a far more intrusive limit on discovery than a rule that the parties need only take their depositions, whether ten, zero, or a hundred, and other discovery within nine months.

The trend to limit the amount of discovery is catching on. Similar reforms have begun to appear at the state level. As one example, an Advisory Committee to the Texas Supreme Court has been considering changes to Texas' discovery rules. The Committee has issued recommendations to the Texas Supreme Court to limit both the amount of discovery \textit{and} its duration.\textsuperscript{197}

Limits on the amount of discovery get the proper reform exactly backwards. They are an inefficient way to reduce delay. If the state-court studies of over 70,000 cases and their findings on local legal culture prove anything, it is that when lawyers are left to control the pace of litigation, they will delay responses to match their own timetables.\textsuperscript{198} And if legal cultures are as corrosive as many researchers believe, the smaller number of discovery measures will stretch to fill the time lawyers expect to have available. This is why the researchers found it so important to take the timing of case preparation out of the hands of attorneys. Rules that merely cap the number of discovery steps, while abandoning timing to local attitudes and beliefs as before, ignore the empirical evidence that court-imposed time boundaries are needed for good case management. The fox remains in charge of the hen house.

Moreover, capping the number of depositions and interrogatories ignores the fact that the amount of discovery needed can vary more widely than the time needed for investigation. Widely differing amounts

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\textsuperscript{196} See \textit{infra} part III.E.1.
\textsuperscript{197} \textsc{Supreme Court Advisory Committee, Discovery Subcommittee Proposed Rules of Discovery (Tex.)} (July 27, 1995 draft) [hereinafter \textsc{Texas Proposed Discovery Rules}]. This may be the first, but it surely will not be the last attempt to follow in the wake of the federal reforms.

The current version of the proposed rules, as reported to the Texas Supreme Court, is even more draconian than its initial version. The reform includes a nine-month discovery period, just like the one recommended here, but with a time limit of three hours for each individual deposition, six hours for each expert deposition, and a total limit of 50 hours of depositions. \textit{Id.} at 1, 2. The nine-month time limit would make a startling change in Texas practice, but if that reform is put in place, there is no reason to sharply restrict the amount of discovery allowed to the parties. See also \textit{infra} note 300 and accompanying text.

\textsuperscript{198} This is the meaning of the finding that shortening schedules made lawyers comply with discovery response deadlines and initiate follow-up requests more promptly. \textsc{Connolly Et Al., supra} note 59, at 59. The fact that lawyers will learn to respond to shorter deadlines and prepare cases more efficiently when they can see trial looming, should explain why cases receiving prompt deadlines had more, not less, discovery. See also \textit{supra} note 112 and accompanying text.
\end{flushleft}
of formal and informal fact gathering can be incorporated into the same time period. Limits on the number of depositions or interrogatories, on the other hand, deprive lawyers of the right to determine the efficient level of investigation for their cases. Such limits assume that every case has the same small number of facts that need to be uncovered before it goes to trial.

Courts should tighten discovery deadlines, but leave the parties free to decide how much they need to do within those deadlines. In this way the parties still can decide what discovery is appropriate and how to conduct it. It is difficult to deny that the privilege of adversaries to decide the degree of their own discovery is costly. Thus it is no surprise to see critics proposing European-style systems in which courts control discovery. The challenge for lawyers is to determine whether they and the courts can devise reforms that operate within the adversary system. If we miss this opportunity, we invite far more sweeping changes.


The recent amendments to the Federal Rules pursued an approach opposite to the one advocated here. The amendments make four big changes: (1) they require voluntary initial disclosure of documents and witnesses; (2) they limit the number of depositions and interrogatories; (3) they forbid certain common deposition abuses; and (4) they modify the sanction rules. Unfortunately, they do not impose any specific limit on the duration of discovery.

There is little doubt that these changes will do good. They do not, however, remove the flaws in the Federal Rules. Nor are they the best set of reforms. The Federal Rules have three big problems. First, they are too easy to evade. Congress was sufficiently divided about the amendments that it included many opt out provisions and at least half of all district courts seem to have taken some measures to limit their impact. Second, the Federal Rules fail to impose any specific time limit, even


though they now state that the courts “shall” impose time limits. In one place they actually delay discovery by forbidding depositions and interrogatories until after the initial period of voluntary disclosure. Third, as already discussed, the Federal Rules limit the amount of discovery when they should restrict its length.201

1. The Amendments Summarized

The amendments try to improve case processing on a number of fronts. Many of the reforms are cosmetic,202 but at least four seem destined to have a major impact.

The reform that has drawn the most attention is the obligation of both sides to disclose “relevant” documents, addresses of witnesses with knowledge, damage computations, and insurance agreements.203 This duty of mandatory disclosure appears based on a recommendation made

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201. One final, minor weakness is that the Federal Rules may generate litigation in the short run as parties fight over the definition of new terms. The Federal Rules invite litigation because they do not define the scope of the “relevant” documents that parties must disclose voluntarily. It is easy to see that a party producing documents, whether plaintiff or defendant, is near certain to have a different view of what is “relevant” than the requesting party. The view may not be narrower—a party may well be happy to bury its opponent in reams of arguably relevant but useless documents. The choice of “relevance” is a funny standard, because it is much narrower than the real scope of discovery, the reach of information “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). Presumably the hope is that lawyers will become better at identifying core, admissible discovery quickly. Each side still would have to prepare lists of more peripheral items that might lead to admissible evidence. Voluntary production will spawn new generations of sub-suits over whether each party really produced all “relevant” documents. This short-term problem was identified by dissenters on the Supreme Court. Amendments to the Federal Rules of Civil Procedure and Forms, 61 U.S.L.W. 4365, 4392-93 (U.S. Apr. 22, 1993) (Scalia, Souter & Thomas, JJ., dissenting); see also John C. Koski, Mandatory Disclosure: The New Rule That’s Meant to Simplify Litigation Could Do Just the Opposite, A.B.A. J., Feb. 1994, at 85, 87. As Justice Scalia points out, it does not take an “expert” on litigation to spot this problem. 61 U.S.L.W. at 4394.

Courts will certainly have to spend some time defining the terms in the new Federal Rules. Yet legal scraps to test the direction and limits of new laws are common. They ordinarily subside. Nothing suggests that this definitional battle will produce an unwarranted, disproportionate, or eternally prolonged struggle. Defining terms is likely to be a short-run problem, and it is one that occurs with most new laws.

202. Given the room for battles over form in procedural amendments, many would surely disagree with this Article over which reforms are cosmetic. In my mind, the addition of “administered” in Rule 1 and many of the discretionary areas in Rule 16 fall into the de minimis category. Such amendments are exhortations to judges to be more active, encouragement that has come from many quarters in recent years; it seems unlikely that such reforms alone will work much change.

nearly twenty years ago. The duty barely escaped a stillbirth when
the Senate at the last minute failed to approve a House bill that would
have deleted the disclosure provisions.

Mandatory, automatic disclosure is a major change in prior
practices. The duty means not only that documents will come knocking
at the door unbidden, but it imposes disclosure duties even if an
opponent is too lazy to get its case off quickly or misses the boat when
it does draft discovery requests. The baring of the party soul is to occur
no more than ten days after the newly required meeting of parties, which
in turn has to occur in the first few months of the case. In addition,
Rule 26 now requires disclosure of expert work in more detail than under
past discovery practice.

A second major reform is the limit on the number of depositions
and interrogatories available as a matter of right. Depositions are limited
to ten, absent leave of the court or stipulation of the parties, which also
includes depositions on written questions and third-party and expert
depositions. Ten depositions are more than most sides take in most
cases, but far fewer than in even medium-sized commercial cases. This
rule, if enforced, can sharply limit the discovery permitted in major
cases. More significantly, it is a beachhead into the terrain of courts' 
limiting discovery. No longer will parties conduct as much discovery as
they want. In a similar vein, the Federal Rules now limit interrogato-

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204. Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals
for Change, 31 VAND. L. REV. 1295, 1348-54 (1978). For a later, similar proposal, see William W.
Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. PITT. L. REV.
703, 721-23 (1989).

205. See Memorandum from Ralph Mecham, supra note 200.

206. The somewhat intricate structure of required disclosure is as follows. The parties must
make or arrange for the disclosures at least 14 days before, and are required to disclose no later than
10 days after, the Rule 16(b) scheduling conference. In turn, the conference must occur no more than
90 days after an appearance by a defendant or 120 days after the defendant is served with the
complaint. FED. R. CIV. P. 16(b), 26(a)(1), (f).

207. Expert disclosure is to include a “complete statement” of all opinions in a written report
and “the basis and reasons therefor;” the data the expert used in getting to these opinions; exhibits
to be used by the expert; the expert’s qualifications, including a list of all publications in the prior
ten years; the expert’s compensation; and cases the expert testified in within the prior four years. Id.
26(a)(2)(B).

208. Id. 30(a)(2)(A).

209. It is true that courts already could limit discovery that seems to be undertaken for
harassment or other improper purposes, including situations where the costs appear to outweigh the
benefits. Id. 26(b)(2). In practice, though, the broad scope of all items “reasonably calculated to lead
to the discovery of admissible evidence,” id. 26(b)(1), and the policy that cases are to be tried on
full information, has trumped the verbal possibility of cost/benefit rationing of discovery requests.
Courts have interpreted the Federal Rules aggressively to ensure full investigation. Courts impose
ries to twenty-five, including subparts. This parsimony already appeared in many local rules, but it is now a uniform rule of federal discovery. The restriction reinforces the message that discovery will not enjoy the unfettered scope of the past. (The Federal Rules do not yet limit the number of document requests.)

A third significant change is one that might work a major change in the way lawyers prepare cases, although it sounds fairly innocuous. This is the admonition about deposition objections. Rule 30(d)(1), as amended, now states:

Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

very few limits on discovery requests and rarely exercise their discretionary balancing powers.

210. Id. 33(a).

211. In one sense, it may seem true that the number of responsive documents is more likely to vary from party to party than the number of material witnesses or the number of issues for which an interrogatory answer really is necessary. Information that could be requested by interrogatory usually is available in deposition and there often are not too many significant depositions. Thus restricting depositions and interrogatories has been easier than cutting back on document requests.

Whether this is really true is hard to judge empirically. It is easy to think of cases that were top heavy with depositions and others where the focus of discovery fell on documents. The scope of document discovery has been a source of discontent among some of the Federal Rules' critics. Professor Hazard has defined the provisions of Rule 34 as the most important: "It is simply to say that the broad access to document repositories is the most powerful weapon in the [Federal] Rules' discovery armory, particularly in cases involving conduct by business or government." Hazard, supra note 192, at 2239. Documents often provide better evidence of the true reasons a decision or action occurred than after-the-fact reconstruction. As Hazard notes, "the content of a document is immutable." Id. (This overlooks a bit that its interpretation, of course, is not). For this reason, production provokes "the most intense resistance and game-playing." Id. at 2240.

Hazard then notes, seemingly with sympathy, that businessmen feel a "deep resentment" and "frank grievance" that document production violates some "principle of privacy." Id. at 2242-43. It is hard not to feel that the real reason businessmen do not like being forced to turn over all their documents is that the documents speak truthfully. This comes through even in Hazard's phrasing of the grievance: "Documents that speak with a candor unguarded by anticipation of litigation are particularly damaging. These communications subsequently are laid bare to the harsh light of second-guessing litigation." Id. at 2242-43.

It is more accurate to say that such documents have force, because they were prepared before the parties' lawyers began to clean up the witnesses' testimony and limit their candor. Candor is just "[open-mindedness; impartiality; freedom from malice; frankness." FOWLER'S CONCISE ENGLISH DICTIONARY 161 (1989). A frank, open-minded (truthful) disclosure of documents is exactly what these critics fear. In any event, it is hard to imagine any fair system of adjudication that did not require production of contemporaneous written evidence pertained to the items in dispute.

212. FED. R. CIV. P. 30(d)(1).
Speaking objections are among the worst discovery abuses. Objections designed to sidetrack deposition questioning strike particularly hard at the effectiveness of discovery because the deposition is the most common investigative technique. If courts rigorously enforce this ban on lawyers making speeches during depositions, the oral deposition may regain its rightful status as the most important, not just the most common, discovery device.

Finally, the Federal Rules make a number of changes to Rule 11...
sanctions. Some loosen the rule: sanctions will be discretionary, not mandatory; respondents get an opportunity to correct the alleged wrong before the movant proceeds in court; any sanction shall be limited "to what is sufficient to deter repetition;" and courts are limited in the sanctions they can award on their own initiative. Other parts of Rule 11 give it more force. The Rule is violated if a party persists in advocating a once-meritorious position that has become frivolous; the test for advocating changes in the law has shifted from subjective good faith to an objective standard; and law firms are jointly liable for violations by their minions, except in "exceptional" circumstances.

Rule 11's changes have drawn a lot of comment. However, the Rule thus far has not produced an appreciable improvement in case processing. Instead the Rule has reigned over a measurable deterioration in court costs, delay, and backlogs. The best bet is that these changes too will not significantly alter the day-to-day practice of law.

The amendments fall short of the reforms needed. The two major problems are the opt-out provisions, and the now even more conspicuous absence of guidance on discovery time limits and time-to-trial.

2. Evasion: The Non-Rule Rule Problem

The first serious problem with the Federal Rules is that they contain too many loopholes. In a twist that risks turning the Federal Rules into the Federal Suggestions, the limits on the number of depositions and interrogatories, and even the initial duty of disclosure, can be changed by stipulation or court order.

As of late 1995, up to half of all district...
courts that had ruled on the issue rejected some or all of the disclosure provisions.\textsuperscript{219}

It hardly suggests confidence for the Rules Advisory Committee to propose radical amendments, then invite the local courts and the parties (the very people who are not moving cases along in the first place) to reject the process. Yet this appears to be exactly the approach that the Committee adopted.

3. Still Unbounded After All These Years: The Continuing Lack of a Clear, Uniform Rule of Discovery Duration

The more fundamental problem with the amendments is the continuing lack of time limits. The drafters limited the amount of discovery, but offered no guidance as to how long it should take. This Article has already discussed the perils of restricting the amount of discovery. In this section, it addresses the amendments’ corresponding error: the continued absence of a common standard for how long lawyers have to prepare cases for trial.

Ironically, the drafters paid excruciating attention to the start of discovery. Parties must meet no later than fourteen days before the due date of the Rule 16 scheduling order, which in turn cannot be more than 120 days after the defendant was served.\textsuperscript{220} Within ten days of this meeting, they must produce, even if they have not received a request for this information, their list of people with relevant information, a description or copies of all “relevant documents,” a calculation of any damages claimed, and any insurance agreements.\textsuperscript{221} The Federal Rules require all of the above, but without a hint about time limits for discovery completion.

\textsuperscript{219} It is hard to calculate precisely just how many courts have “opted out” of the disclosure provisions. The FJC published a study of initial court response in March, 1994, three months after the Rule 26 amendments were adopted. Of 59 courts that had issued final decisions, 32 left the disclosure rules in effect, 6 had not put Rule 26(a) into effect, and 21 had rejected the new Rule but had some other provision for disclosure, either by authorizing judges to make this decision individually or by some other provision of local rules. DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS’ RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26, at 5 (Federal Judicial Center 1994). Of the 30 courts that had entered provisional orders, however, 25 decided not to follow the disclosure provisions, although some of these had substitute local rules. \textit{Id.} In short, implementation is a very complex picture and will depend, in many courts, on whether the judge endorses the amendments and their goals. For additional discussion of the implementation problems federal courts have had with the new disclosure rules, wedded as they are to district-by-district delay reduction plans, see Coleman, \textit{supra} note 168.

\textsuperscript{220} \textit{FED. R. CIV. P. 16(b), 26(a), (f).}

\textsuperscript{221} \textit{Id. 26(a)(1).}
a. The Rules Make Time Limits a Mandatory Topic at the Pretrial Conference but Are No Help in Setting Those Limits

The lack of a fixed standard for ending discovery is perplexing because the amendments give courts the power and duty to impose discovery time limits. Rule 16(b), as amended, mandates that the judge, at the now mandatory Rule 16 conference, "shall . . . enter a scheduling order that limits the time . . . to complete discovery." The order "may" include, among other things, a trial date.

If past experience is any guide, however, the lack of a uniform standard will encourage each court to perpetuate its current pace in setting time limits. Standards will vary from court to court and case to case. Courts that process cases quickly will impose short deadlines. Courts with substantial backlogs, beliefs that cases cannot easily get to trial anyway, or different senses of punctuality will allow too much time. And in the absence of a single rule, courts will be pulled this way and that, case by case, as counsel haggle over the time that their cases deserve.

Some courts may take the hint in this new power and begin shortening discovery deadlines beyond their existing practices. The experience under the prior Federal Rules, however, offers no reason to hope for success from merely giving courts discretionary power to impose rules for discovery duration.

b. The Rules Create More Problems by Prohibiting Discovery During the Voluntary Disclosure Period

A new timing problem is that in two places, the amended Federal Rules delay cases. Having established a duty of initial production that must occur within no more than ninety days, the Federal Rules provide that no depositions, document requests, or interrogatories can be filed until this period is over. This breathing period presumably is designed to allow the parties to focus on producing the first round of documents and other information. However, if the amendments ever hope to spur too-slow lawyers and courts to action, it is counterproductive to

222. Id. 16(b)(3) (emphasis added).
223. Id. 16(b)(5).
224. Id. 26(d), 30(a)(2)(C), 31(a)(2)(C), 33(a), 34(b).
penalize parties who want to initiate rapid discovery.225

The Federal Rules should encourage parties to exchange a first set of document requests and interrogatories before the Rules-mandated disclosure. One of the problem areas in the Federal Rules resulting from mandatory disclosure will be defining “relevance” for the duty of disclosure. It is unclear just how much narrower the producer's “relevance” can be from its opponent's relevance, or from the broader “reasonably calculated to lead to the discovery of admissible evidence” standard for ordinary discovery.226 Far from being prohibited, early discovery requests should be encouraged. They can help the parties define the concrete application of relevance to their case. A party that has received its opponent's first requests will have less standing to feign ignorance of the likely definition of relevance. Ideally, the parties would hold their first conference after exchanging requests, but before disclosure, to refine the scope of the early exchange.227

Courts cannot hope to enforce a nine-month discovery period, or anything like it, until they begin discouraging lackadaisical approaches to litigation. One place where change is most needed is in teaching lawyers that they need to begin quickly and maintain that pace. This lesson is inconsistent with a plan that creates a grace period of up to ninety days at the start of every case. This reward for slow parties should be deleted from the Federal Rules.

It is true that the new duty of automatic document production, even if it just results in cranked production of the documents the producer views as relevant, can expedite cases. The document part of cases will get off to a quicker start when the parties share core written data about the case. In a contract dispute, for instance, it is hard to imagine any good faith definition of relevance that would exclude notes of meetings and phone calls about the contract. In a case about the economic impact of a natural gas pipeline's expanding its network, no good faith definition of relevance would exclude the pipeline's market projections and economic plans. In a personal injury lawsuit, initial production should include medical records, witness statements, and documents showing lost

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225. It is true that this limit can be varied by mutual agreement. But in most cases that suffer delay, at least one party has a strong interest in not moving forward quickly. Those are exactly the cases in which mutual agreement is very unlikely.

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

227. Exchanging early requests might help resolve the danger of too much production as well as too little. One danger of voluntary disclosure is that defendants with a lot of documents will use the duty as an excuse to bury opponents with tons of irrelevant paper. Koski, supra note 201, at 87.
income. The initial production should get this basic evidence out on the table.

By requiring production within roughly three months, the rule raises the odds that even in sluggish cases, each side will begin looking at important documents when they otherwise might let the case languish. The recipient almost certainly will review the documents when received. If voluntary disclosure brings some surprises, as ordinarily is the case with a first document production, lawyers are far more likely to put in time on the case earlier in the process. It is the rare lawyer who can resist the smell of blood. Thus automatic production is likely to ensure quicker implementation of discovery.\textsuperscript{228}

A mandatory, reasonably quick start for documents, however, will not cure a sluggish pace until there is a mandatory finish. Without a reasonably short discovery cut-off, lawyers and their clients never know how hard they have to work a case. That information is not conveyed by telling them how quickly they have to start. When will discovery be over? When will they get to trial?

One reason for the omission of any endpoint may be that it seems easier to make all cases start at the same time than to order them to finish as quickly. A nine-month discovery period would mean giving a complex antitrust lawsuit with numerous expert issues no more discovery time than the smallest personal injury case. This Article argues that this is precisely what should happen. Competent lawyers can adjust their resources, time, and number of discovery steps to fit the "big" case, as well as its smaller siblings, in a uniform discovery schedule.

A nine-month time limit on discovery will create a great change in many courts. It is only if such rapid discovery does not reduce backlogs sharply that courts should consider more drastic measures. Only then

\textsuperscript{228.} My experience has been that a number of defendants delight in discovery that maximizes the appearance of good faith, but minimizes its substance. After months of delay, a defendant may produce documents it knows are not of much use but that will take months to review. Thus it will be happy to present the appearance of cooperation by offering to produce additional documents, after request and consultation with the opposing party. The wheels of justice can get stuck in the mire of nominally cooperative, but really resistant, discovery practices.

No competent lawyer will rely on Rule 26(a)(1), the rule outlining the new voluntary disclosure, as a substitute for filing complete document requests. See Fed. R. Civ. P. 30. Failing to do so invites opposing lawyers to produce mountains of innocuous documents, while putting off the good stuff.
would it be time to consider limiting the number of depositions or extending these restrictions to document requests and other discovery procedures.\footnote{229}

While limits on the amount of discovery probably could be imposed on many cases without harm (most cases do not involve that much discovery anyway), they are a radical change in direction. Making the lawyer and client justify their choice of the amount of discovery needed, when the discovery is not abusive or overly burdensome, fundamentally alters the script of the lawsuit. This is not a change to accept lightly. Nor is it a change that courts should implement if the less intrusive reform of discovery time limits works.


Some readers will be skeptical that a seemingly simple reform like shortened schedules can change the way lawyers handle lawsuits. My experience has been that simple, clear, and short deadlines do work. I have handled cases in a number of jurisdictions where the average time to trial is barely a year and in others where four or more years is the norm. The changes proposed here characterize the quicker jurisdictions. Every case in these courts is expected to go to trial within a year. What is different is that the court subjects each case to clear, simple, and short discovery periods, followed by trial. Everyone understands the court’s schedule and everyone knows that the court will enforce it. “Culture” can heal quickly.

Short schedules characterize not merely jurisdictions that are distinguished by quick dockets, but also individual judges whose dockets lap their more sluggish companions. Even jurisdictions with very clogged
dockets always seem to have at least one judge whose docket runs noticeably quicker than the others. These judges invariably keep discovery short and enforce strict deadlines.

A telling example of how well clear deadlines work is an airline antitrust case tried to a jury a few years ago in federal court in Galveston, Texas. The case was "complex" by any definition. It involved a billion-dollar predatory pricing claim that Continental Airlines and Northwest Airlines brought against American Airlines. The case arose from a special pricing program American initiated about a year before. Many courts would allow four or five years to prepare this kind of case. Yet the parties finished discovery in eight months. They were in trial a month later.

How did this billion-dollar lawsuit move on a track that many hundred-thousand-dollar cases cannot seem to imitate? The case got to trial quickly because a skilled, experienced, and aggressive judge did just what is recommended here. When he received the complaint, he told the parties that they would be in trial within a year and that nothing would stand in their way. His October 2, 1992 order set a trial date of July 12, 1993, just nine months after the complaint was received, and the order repeated, in capital letters, that the deadlines would not be extended. The judge ordered all discoverable material produced. He imposed clear and short discovery deadlines. He let the parties know the deadlines would be enforced. Then he held the parties to those deadlines.

The trial deadlines were backed up by careful control over the timing of discovery and by warnings that the court would enforce discovery rules as written. The pretrial order stated, in capitals, that,

THE PARTIES ARE FURTHER INSTRUCTED THAT THIS COURT CONSIDERS REVELATION TO BE THE ORDER OF THE DAY, AS REGARDS ALL DISCOVERY DISPUTES. CONSEQUENTLY,

231. The trial judge was the Honorable Samuel B. Kent in the federal district court in Galveston. He left nothing to chance and his language could not have been misread. His Order stated: "THIS IS AN ABSOLUTELY FIRM TRIAL SETTING, AND WILL NOT BE CONTINUED FOR ANY REASON, WHATSOEVER." One page later, he repeated the message, "AGAIN, THIS IS AN ABSOLUTELY FIRM SCHEDULE AND TIMETABLE, AND WILL NOT BE ALTERED OR AMENDED FOR ANY REASON WHATSOEVER. THE COURT WILL NOT CONSIDER ANY EXPANSION OF THIS TIME FRAME WHATSOEVER." Continental Airlines, Inc. v. American Airlines, Inc., No. G-92-259, at 3, 4 (S.D. Tex. Oct. 5, 1992) (order setting out docket control deadlines, trial schedule and certain particulars regarding discovery and pretrial conduct) [hereinafter Pretrial Order].
232. See id. at 10-11, 21-22.
THE COURT WILL VIEW WITH REAL APPREHENSION ANY OBJECTION CALCULATED TO WITHHOLD THE REVELATION OF APPROPRIATE INFORMATION.

The parties had eight months to perform all discovery. They were told “to make voluntary and complete disclosures, with regard to all evidentiary matters,” to cooperate on all discovery, and (with perhaps a slight jab of judicial sarcasm) to abide by “the concept of ‘reasonable-ness.’” The court limited depositions to eight hours apiece, sixteen hours for experts, and a total of forty fact witnesses on each side. It discouraged lengthy examination by ruling that it would not admit any deposition at trial for more than twenty minutes and that it would exclude cumulative evidence.

The court fought the case’s “potential for needlessly enormous filings” by prohibiting discovery motions altogether and authorizing the filing of most other non-dispositive motions only with permission from the court’s case manager. It further restricted any authorized motions to fifteen pages, responses to twelve, and prohibited replies.

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233. Id. at 22. One suspects that the court’s use of the word “revelation” was pointed in more ways than one.
234. Id. at 10-11.
235. Id. at 21 (emphasis omitted).
236. Id. at 17-18. The Order “expressly admonished” the parties that depositions are to be “taken with an eye toward the rather minimal amount of information which will be available from the use of any depositions, for trial purposes.” Id. at 20.
237. Id. at 5, 20. The subsequent court order outlining trial mechanics said that “[t]he [c]ourt wants no cumulative offerings, through multiple witnesses. Each witness shall contribute only that which he or she has most personal knowledge about, and each offering shall be in addition to other offerings, not in repetition thereof.” Continental Airlines, Inc. v. American Airlines, Inc., No. G-92-259, at 12 (S.D. Tex. June 7, 1993) [hereinafter Trial Order] (order controlling trial mechanics).

The court imposed other prohibitions to preserve the dignity of the trial from some common abuses. For instance, “UNDER NO CIRCUMSTANCES, SHALL OPPOSING COUNSEL CONFER DIRECTLY WITH EACH OTHER, IN OPEN COURT. UNDER NO CIRCUMSTANCES, WILL THE COURT ENTERTAIN OR ALLOW ANY SIDE BAR REMARKS OF ANY KIND.” Id. at 5. “Once an objection has been ruled on, there will be no further discussion on the point. Counsel will never argue with the Court, in the presence of the jury.” Id. at 6. Violations would be policed by reductions in the fixed trial time allotted. Id. at 30.
239. Id. at 15-16. To reinforce its insistence on clear, plain pleadings on the merits, the court added, in capitals, “THE PARTIES ARE EXPRESSLY ADMONISHED THAT BREVITY, SUCCINCTNESS AND CLARITY ARE EXPECTED AND REQUIRED, REGARDING EACH MOTION AND RESPONSE FILED. THE COURT ASSUMES THAT CONVOLUTED, OBSOKE AND VAGUE ARGUMENTS AND ANALYSIS ARE INTENDED TO INDICATE TO THE COURT A WEAKNESS OF POSITION.” Id. at 16.

Prohibiting replies to dispositive motions and allowing only very short motions may appear a severe limit on substantive rights. Yet, given the narrow scope of summary dispositions, which
parties had six months to file dispositive motions, which could not exceed thirty-five pages, with responses no longer than thirty pages.\textsuperscript{240} After the parties completed discovery in eight months, the trial followed in little over a month. Each side got twelve trial days to put on its case.\textsuperscript{241}

This rapid disposition was not purchased by inattention to other cases. The same court applied the same rules to all its cases. It resolved roughly twice the national average caseload, closing more than 1600 cases in the judge’s thirty-two months on the bench.\textsuperscript{242} The \textit{American Airlines} case got to trial because of the court’s strict procedural rules, not because the court focused its energies on one case at the expense of the rest of its caseload.

These pretrial orders will look familiar to the many experienced judges who move their dockets efficiently. The moral is clear and common-sensical: when enforced, discovery deadlines can move cases.

It is surprising that more changes like those proposed here have not been adopted already. Rule 16, which explicitly authorizes the district court to hold a discovery conference and establish a schedule,\textsuperscript{243} embodies the understanding that discovery must be structured by the court if a case is to flow in proper rhythm. The Federal Rules make some discovery time limit mandatory, but they offer not a word about how to require undisputed facts, there cannot be many cases in which the facts are not disputed but cannot be stated in a reasonably small number of pages. Beyond the first ten or fifteen pages, length of argument probably is correlated (positively) with unsuitability for the right to dispositive relief. If the facts are so unambiguous that the court can assume them, it should be fairly easy to say so. Replies generally would not be necessary, but probably should be permitted in very limited form to respond to any new issues raised in the response and to demonstrate any false factual statements in the responsive brief.

\textsuperscript{240} Id. at 9-10. Characteristically, the court added that “[t]he deadlines herein provided for the submission of dispositive motions will not be extended for any reason whatsoever.” Id. at 10.

\textsuperscript{241} Trial Order, \textit{supra} note 237, at 22. This Article is about getting cases to reach trial quickly, not about speeding up trials. Not surprisingly, though, the same kind of rules that can limit discovery can expedite trials as well. This is true for many trials besides the \textit{American Airlines} case. See Scott Brister, \textit{Living with Shorter Trials}, \textit{Tex. Law.}, Oct. 11, 1993, at 16 (discussing the effectiveness of time limits on examination of witnesses at trial). Limits at trial, of course, are far more severe than limits on a reasonably long discovery period. One can always pack more activity into the same discovery period, but it is hard to increase the amount of evidence put before the jury in the same time period. For another judge advocating the feasibility and desirability of speedier trials, see Edward Rafeedie, \textit{Speedier Trials}, 21 \textit{Litig.}, Fall 1994, at 6.

\textsuperscript{242} \textit{Honoring the Judiciary}, TOWNES HALL NOTES (Univ. Tex. Law Sch. Found.), Fall 1993, at 6, 14-15. Obviously, the \textit{American Airlines} case is not the only one Judge Kent moved rapidly to trial or other disposition.

\textsuperscript{243} \textit{Fed. R. Civ. P.} 16(b).
UNIFORM DISCOVERY TIME LIMITS

set the appropriate limit. Thus, the Federal Rules offer no guidelines for curing the anarchy that prevails in courts where litigants wait years to get to trial. Why is a uniform schedule not required in every state or federal case? The small amount of time an experienced judge would spend imposing order on the litigants' conflicting world views at the outset, would be paid back with compound interest as the case progressed. And having a uniform limit would prevent lawyers from squabbling endlessly over the time needed for their case.

General recommendations that judges should be more active in running their dockets have been around for a long time. They are the theory behind the pretrial conference, scheduling orders, and other widely-copied reforms in the federal courts. The current amendments to the Federal Rules, with new limits on depositions and interrogatories, and

244. Id. 16(b)(3).

245. For instance, in 1982 Judith Resnik wrote her influential book, first printed in the Harvard Law Review, that described how judges increasingly were taking control over their schedules, limiting discovery, and becoming actively involved in settlements. Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982), reprinted in JUDITH RESNIK, MANAGERIAL JUDGES (1982). Resnik contrasted her managerial judges with an older model of the passive judge who basically refereed the fight between adversaries. Id. at 383-86. Resnik cited enthusiastic articles by a number of judges urging this more active role in case management. See id. at 378 n.14, 379 n.18.

Resnik wisely cautioned that gains in efficiency and lower cost would not necessarily follow from increased judicial involvement, while the new activism could jeopardize judicial impartiality and due process. Id. at 421-31. She is right if mandatory time limits are reduced to absurdly short periods, time in which no one could prepare a case properly. See, e.g., Hugh Ray, Slow Down the Rocket Dockets, TEX. LAW., Nov. 29, 1993, at 16 (reporting that bankruptcy cases typically go to trial within 20 days of filing, with the period sometimes shortened to as little as three days or less).

While unchecked power is indeed a concern when judges push the parties to settle or to get to trial in impossibly short periods of time, there is much less danger when the judges are simply trying to force the parties to complete their discovery in nine months, see if they can settle, and if not, go promptly to trial. Surely this is the point at which the rights of other litigants to prompt disposition of their cases outweighs any single party's right to yet more discovery. It is only because our sense of the ordinary has been so badly perverted by today's delay that a nine-month schedule could seem to pose a threat to litigants' rights. Furthermore, allowing a nine-month period for every case is far preferable to such schemes as the one in which courts classify cases according to the amount of discovery the court thinks they deserve, with some cases permitted no discovery at all. The Hawaiian program, designed to limit discovery as much as possible, is discussed in Barkai & Kassebaum, supra note 8. Consider also federal discovery plans like that in the Eastern District of Texas, with cases to be assigned into any of six tracks, the first bringing no discovery, the second "disclosure only." Expense and Delay Reduction Plan, supra note 7, at 394 (art. 1). The plan arose from that court's concern that "[t]he expense of civil litigation today as a practical matter results in denial of access to the courts for a significant segment of our society." Id. at 393. The court traced litigation expense to the economic conflict that hourly billing creates between lawyer and client. Id.

A 1981 study of efforts to reduce court delay found that all but two states had adopted at least one of the following measures: resource management programs, expedited pretrial processing, or firm and certain trial dates. PATRICIA EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY 6-8 (1981). Twelve states had adopted all three measures. Id.
prohibitions against disruptive deposition tactics, are yet another drive down the same road. What is missing, though, is a short, uniform time limit, come what may, on the total period before trial. Without an overall boundary, well-meaning individual reforms lack the context to maximize their effectiveness.

IV. RELATED INSTITUTIONAL MEASURES NEEDED TO SUPPORT PRETRIAL TIME LIMITS, INCLUDING DEADLINES FOR JUDGES

Even the simplest rule may have unexpected consequences. Most reforms have latent as well as manifest effects.\textsuperscript{246} The delay-inducing effects of the three-strikes laws are one example of unanticipated effects of a seemingly simple reform. The fact that virtually all institutions have to apply formal rules in an environment of informal practices itself suggests that any formal rules will invite some unexpected consequences.

Some of these consequences are easy to predict. Resolving cases more quickly will encourage other litigants to file new cases, perversely increasing the total number of lawsuits. If time limits operate effectively on the current inventory of backlogged cases, the judiciary will have to process an unusual volume of cases as the system moves to a quicker pace. Clear, uniform, properly enforced time limits are sure to have other consequences that cannot be foreseen. Yet just because a reform may not turn out precisely as expected does not change the starting place for institutional change: one should start with reforms that appear to yield the biggest benefits for their costs. In the case of court delay, that reform is the imposition of clear time limits.

Though this Article argues that pretrial time limits are the most direct, effective measure courts can adopt to improve case processing, the changes are certain to encounter resistance. This section discusses four foreseeable measures that will be needed to counter this resistance: (1) increased court resources to process and try more cases as the courts catch up; (2) deadlines for judges to decide discovery matters and

\textsuperscript{246} The classic statement of this problem remains Robert K. Merton, The Unanticipated Consequences of Purposive Social Action, 1 Am. Soc. Rev. 894 (1936). Merton’s discussion focuses primarily on hidden functions of social practices. The function may be a direct consequence of the practice, but it is not immediately obvious. The unanticipated consequences discussed in this Article are a little different. These consequences ordinarily are not hidden; they are just different results than the ones intended by those who enact the rules. Examples would be the three-strikes laws that increase court congestion, or improvements in case processing that increase the need for more judges.
procedures to identify and punish judges who fail to meet deadlines; (3) a mandatory second pretrial conference to handle efforts to escape the discovery time limit; and (4) an equally firm trial date.

A. Courts Need More Judges to Process Their Backlogs

The first result of quicker case processing is easy to foresee. Time limits will compress existing backlogs. For the reform to work, this agglutination of cases has to move through the courts at one time. The courts will need to consume these cases with as little indigestion as possible. For instance, if a jurisdiction with a three-year backlog succeeds in channeling all cases into a discovery and trial period of a year, and assuming no change in settlement rates, it will need to process three times as many cases as usual in the first year of reform.

In spite of recent congressional suggestions that federal judges might benefit from time/motion studies, no researcher has ever found that judges have spare time for many more cases. Successful courts will have to find new ways to process more cases in the short run. Courts do have some mechanisms to increase total case processing. They can encourage retired judges to try more cases. They can offer parties a wider range of magistrates, lawyers, and other replacement judges for voluntary trials outside the ordinary courts. They can transfer judges from quiet jurisdictions to busy jurisdictions.

Some courts will need more judges to increase their short-term trial rate. The constitutional provision of lifetime tenure for federal judges will prevent Congress from impaneling Article III judges on a temporary basis. It should be constitutional, however, to appoint a block of fixed-term judges, serving, for example, three or five year terms, to try cases on an emergency basis. The judges could be transferred as needed to the most crowded districts in a modern version of circuit riding. The rules could require initial trials before these judges, with a right to appeal to the federal district court, which is the solution that has passed constitutional muster in the bankruptcy courts. Or these judges could be available for trials by party agreement.

B. Courts Must Penalize, Not Merely Exhort, Judges Who Fall Behind

A second predictable requirement is a mechanism to monitor and enforce judges' compliance with time rules. One of the strongest facts supporting proponents of cultural reform is that even structural measures like speedy trial requirements traditionally have varied with the pace of
the local court. That patterns of delay can infect even such a simple measure as time limits, which courts have full authority to impose on the parties, indicates that courts need a mechanism to monitor their own performance.

The judicial role is highly discretionary and protected. Judges are held to virtually no standards except a few ethical duties and the substantive review that higher courts apply to their opinions. The fact that the recent congressional measure to survey federal judges' work habits is controversial shows the degree to which society allows judges to operate without supervision.247

Like lawyers, judges have been free of any sanction for treating delay as costless. There are no rules establishing how quickly judges have to issue judgments or decide pretrial and dispositive motions, or requiring them to trim backlogs. Many courts do not even vary case allocations in order to prevent slow judges from accumulating backlogs.

It is easy to predict that some judges will collude with lawyers to subvert time limits. It is the certainty that local attitudes can subvert timing rules that explains the tendency to identify local legal culture as the key independent cause of delay. As one student of the federal efforts to impose time limits on criminal trials cautioned, "[t]he extent and impact of this [judicial] hostility cannot be underestimated."248 And, indeed, when lawyers and judges have practiced together for decades and developed deep-rooted beliefs about the nature of litigation, it is unrealistic to expect them to shift gears automatically for a new rule.

If faced with a complex and indirect reform like an insurance company trying to persuade insureds to drive more carefully, we might be forced to rely on education and a gradual change in participant attitudes. Time limits, however, are a relatively simple reform imposed

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247. This survey is yet another sign of the new climate for the courts. Court costs are ordinarily an area that all three branches would agree are off limits to the two political branches. Senator Charles Grassley, chairman of the Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts, has drafted a questionnaire for all federal judges that ranges from issues like backlog and times to disposition to how the judges use their time. Senator Questions Federal Judges About Activities, TEX. LAw., Feb. 12, 1996, at 5. Grassley commissioned the General Accounting Office to audit the judiciary and has proposed merging the FJC and the Administrative Office of the Courts. Rehnquist Says Study Can Hurt Courts’ Independence, S.F. CHRON., Jan. 1, 1996, at A2. One assumes that most judges would agree with Justice Rehnquist that the changes are "unwarranted and ill-considered." Id.


248. Feeley, supra note 169, at 170.
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within a rule-defined institution. The solution to judicial recalcitrance is for the judiciary to adopt very clear rules that monitor performance and punish violators, in this case, violators who are judges.

First, the judiciary needs to monitor its members' performance. It needs an information system to report the filing date and status of every case, including the completion of discovery and the trial date. Judges should receive this information in order to gauge their own performance and court administrators should use it to enforce time rules. For the judiciary to understand where its judges are losing ground, judicial data management systems must track the filing and decision dates of all motions, including discovery and dispositive motions. Courts need to record judges' average time to final disposition, time to discovery completion, and time to decide discovery and dispositive motions, as well as to inventory each judge's backlog of motions and cases.

Courts can choose from a variety of remedies for judges who fail to enforce time limits. Peer pressure is unlikely to work in jurisdictions that operate under slow legal cultures, because judges there have learned to view delay as inherent in case processing. One possible measure would be continual allocation of cases to maintain equal dockets—a step that would restrict the number of new cases going to judges who cannot decide their motions. If this is the only measure adopted, however, it will create a disincentive for efficient judges to decide more cases. They will know that the more cases they process, the more cases they will receive. Case reassignment would punish efficient judges.

A better alternative would be to impose deadlines for steps in case processing. Judges should be required to meet the nine-month period for all cases. There will always be cases that cannot be placed fairly under pretrial limits, just as some judges have found that not all criminal cases should fall under three-strikes criminal laws. Judges need some room to ensure that a single schedule does not damage cases with truly unusual needs. Judges must not, however, be given so much room that they can certify exceptions in many cases, essentially allowing them to continue at their current, slow pace. To enforce limits while allowing some flexibility, the rules should empower judges to exempt a very small, fixed percentage of cases, perhaps five percent of their docket, or a very small, fixed number of cases each year. A judge could extend limits for up to nine months upon a specific showing of good cause. The rules should require the exemption order to include deadlines for all remaining discovery steps and to mandate completion within no more than another nine months. Each exemption should count as a separate case in determining the judge's quota: Judges could grant more than one
extension in the same case, but only by using up another exemption. Thus, judges could not repeatedly delay the same cases without using up their exemption quota.

A related reform would impose deadlines for judicial decision. One odd characteristic of American legal rules is that they impose many deadlines on lawyers but virtually none on judges. The process of judging is such a personalized and case-specific process in American folklore that making judges decide cases by a certain date sounds like an invitation to reduce the quality of justice. The issuance of judgments certainly is one place where we want judges to use all the time they believe is necessary to reach a decision. Fortunately, judgments are not the most common decision issued by judges. Judges rule on discovery disputes and dispositive motions more frequently.

The easiest set of decisions on which to impose time limits would be discovery motions. There should be little cost in implementing a rule that requires discovery motions to be decided within a period as short as three weeks. Substantive rights ordinarily are not at stake in discovery disputes. Discovery generally should be granted, given the very broad scope of American discovery. A judge who sits on a motion to compel production for more than a week or two can substantially delay a case. Little would be lost if judges who proved incompetent to decide discovery motions within a few weeks had those motions reassigned to a judge or a magistrate.

Judith Resnik elevated the awareness of judicial control issues when she coined the phrase "managerial judges" in her influential 1982 article bearing that title.249 A number of reforms, including the pretrial conference amendment in 1983 and many of the other recent amendments, are meant to expand judicial power over discovery. Active management, though, has been difficult to implement without a time context. Isolated reforms like limiting the number of depositions and interrogatories lack a productive framework without agreement on the overall discovery period. The increased drain on court time to establish new procedures can even increase delay unless the courts choose the points for intervention with great care.250 For instance, courts that

249. Resnik, supra note 245.
250. One commentator's conclusion from a review of a wide variety of sources, including many of those cited here, is that "[m]ost empirical studies have concluded that judicial intervention [in settlement discussions] neither increases the aggregate number of settlements nor reduces case processing time. Nevertheless, judicial monitoring of case preparation by lawyers—for example, the establishment and enforcement of discovery schedules—appears to speed the disposition of cases
resolve every discovery dispute expeditiously still may find frustratingly little to show for their efforts as long as they leave it to the parties and their counsel to decide the period in which to complete the overall process.

If courts do impose discovery time limits, the schedule will work only if judges zealously resolve every discovery dispute. A nine-month schedule requires courts to police their dockets vigilantly. Otherwise, a party who does not want to go to trial can block any meaningful exchange of information. By withholding relevant information, bad faith litigants will twist short schedules to their advantage. They can waste six months "negotiating" the details of document production. By the time those documents are produced and reviewed, nine months will have passed. No time will remain for the opponent to file supplemental requests, to use the documents in depositions, or to decide if the evidence gives rise to added claims. The blameless victim will have to choose between going to trial without full information and seeking a delay. Similar problems will afflict depositions and interrogatories. Not only do the parties have to wait for the requested material, but the message that the court is not ruling promptly on routine matters encourages delay in other parts of the case. Thus, close judicial management of discovery disputes is an indispensable part of a proper timetable.

Unresolved discovery battles put courts at risk of spending even less time on trials. Courts have to devote unnecessary attention to pretrial substantially." Alschuler, supra note 88, at 1833 (citation omitted).

251. Thus, for example, firm trial dates, which if enforced impose a necessary limit on discovery duration as well, have had little impact when courts did not enforce them. The NCSC 1978 study of state courts found that "[f]ew of the state courts examined in this study seem able to forge a tight relationship between scheduled and actual trial dates." CHURCH ET AL., supra note 15, at 40. Indeed, the study could not make any findings on time limits in civil cases because so few state courts enforced them effectively. Id. at 42, 68. A decade later, that had all changed. See supra notes 141-44 and accompanying text.

252. One could call this the duty of zealous judicial management. Courts owe at least as much zeal to society and the body of litigants as lawyers owe to their clients. The duty means vigilance in protecting the interests of society and other litigants as well as of the parties in the particular case. Nothing in my experience suggests that courts need to choose between these interests, or that they cannot be served faithfully and simultaneously. But cf. Newman, supra note 8, at 1649-52 (urging consideration of system-wide justice, sometimes even when it can be accomplished only at the expense of case-by-case justice). It is a world of limited resources, but adversarial justice deserves a lot more effort before it is sacrificed to the allegedly conflicting needs of the system as a whole.

253. For just this reason, it is no surprise to find that courts exercising tighter discovery controls wind up with fewer discovery motions and process a greater number of cases. See supra text accompanying notes 113-15.
disputes that have gotten out of control, frequently because the judge was too busy to resolve the dispute when it first arose. Only one factor slows a case down more than the knowledge that trial is years away. That is the knowledge that the judge will not rule on motions promptly. Lawyers will refuse to produce items they know they must produce. Others will request information far beyond the scope of legitimate discovery. And many will press their opponents to drop legitimate requests. Each of these tactics raise the odds of discovery disputes, of higher costs to the parties, and an increasing queue demanding court attention.

The Federal Rules need time limits for deciding discovery motions because merely urging judges to rule “aggressively” is no more definite a reform than “local legal culture.” The judiciary needs to take a close look at the kinds of standards that could regulate judicial behavior. Lawyers have to file responses to discovery motions under tight deadlines; why not have judges decide those same motions in a fixed time period? To implement these limits, courts would have to track motion filing and decision dates—a reform that should be easy in this computerized age—and identify judges who did not decide motions promptly. The courts could penalize judges who leave motions undecided beyond certain time limits, or judges who accumulate more than a set number of undecided motions, by assigning their motions to other judges or to magistrates. Motion backlogs should be publicized so that underperforming judges would feel pressure from their better performing brethren.

Speed must be matched by substance. Courts must show that they

254. It is not surprising that judges do not jump at the chance to rule on discovery motions. Judging is one of society’s most important jobs. Yet far too often judges find themselves spending hours refereeing grudge matches between lawyers. Examples of recurring pretrial problems include: the lawyer who will not produce responsive documents because he will not agree on a protective order; the lawyer who thinks that “reasonably calculated to lead to the discovery of admissible evidence” means she does not have to produce evidence unless she, or even worse, her client, agrees that it is “important” to the other side’s case; the plaintiff who wants to force the defendant to bring its out-of-state witnesses to the forum for depositions; the lawyer who proposes to produce only “relevant” documents; the parent corporation that refuses to produce a subsidiary’s records even though they can easily be subpoenaed directly; and on and on. Every hearing calendar means another court full of lawyers wasting countless hours of court time and thousands of dollars in client (and court) resources.

255. Federal trial judges in the Northern District of Texas acknowledged this problem in an unusual en banc panel decision, in which they promulgated rules of conduct for lawyers and discussed the problem of lawyer misconduct. Dondi Props. Corp. v. Commerce Sav. and Loan Ass’n, 121 F.R.D. 284, 286 (N.D. Tex. 1988) (describing the problem of “unnecessary contention and sharp practices between lawyers” as one “so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants”).

http://scholarlycommons.law.hofstra.edu/hlr/vol24/iss4/1
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will protect the scope of discovery. Too many judges reward lawyers who withhold information. When one side moves to compel, the judge "splits the baby." This halving of production is an excuse for not considering each request on the merits. The judge assumes that each side probably is wrong about half the time (or that they share a collective responsibility for their inability to resolve simple disputes), so he or she orders about half of the disputed information produced. These judges are inviting, not penalizing, bad faith. They are telling the party withholding discovery that the less they produce, the less they will have to pro-
duce. 256 This word gets out quickly.

Most willful nonproduction, perhaps the major cause of delay in discovery, vanishes when a judge makes it clear that all discoverable items must be produced. The main reason parties try to defeat discovery is their belief that the judge will not compel them to produce everything, or will at least will not punish them for refusing to do so voluntarily. What is needed to clear the air is quite simple. If an item is reasonably calculated to lead to the discovery of admissible evidence, it must be produced. If there is reason to grant an order in limine (for instance, if a document contains information that is embarrassing and not particularly relevant or has confidential information), the material can be produced under seal. 257 Parties will stop refusing to comply with legitimate discovery requests as soon as the court makes it clear that it will enforce the proper, broad scope of discovery without delay.

Courts can spot and cure bad faith tactics easily because most information is producible under the liberal rules of American discovery. The standard of "reasonably calculated to lead to the discovery of admissible evidence" is deliberately broad. 258 For this reason, the party seeking information should win the majority of disputes. It is no accident that movants do win in the majority of discovery hearings, day after day, month after month, in courts all across the country. 259

256. To compare this with a more proper method for approaching parties that withhold information, see supra text accompanying note 232.

257. Lawyers often waste energy objecting that information is confidential or personal when there is no legitimate question about whether the information is relevant and discoverable. The proper objection is the one that does not limit discovery at all—that the evidence should be produced, but under seal—rather than contending that it is not reasonably calculated to lead to the discovery of admissible evidence.

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

259. The FJC found that rulings on motions to compel in its 3000-case study "were overwhelmingly favorable to the moving parties." CONNOLLY ET AL., supra note 59, at 20. Many were mooted by the respondent's coughing up the information just before the hearing date, but of those that received judicial consideration, the courts granted 94.4% of motions concerning
Trial is supposed to be based on full disclosure. It should not turn on the winner’s skill at deception and concealment. Behind the Federal Rules is the assumption that the adversary system extracts the truth from a competition among the facts. Within this context, the party refusing discovery is wrong in most disputes, and clearly so. Everybody involved in the case knows it. The exception, of course, is the judge, who cannot issue rulings based solely on the general right to discovery. The judge also cannot be familiar with the current discovery status of hundreds or even thousands of cases and must rely on the parties to bring problems to the court’s attention.

The problem of unprofessional lawyering will never go away.
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It will fall sharply, though, when judges take up disputes as soon as they arise, act immediately, and make it unmistakably clear that the parties are to produce all discoverable materials.\footnote{262}{262. It is true that clients sometimes insist on absurd discovery positions, and bad lawyers cannot, or will not, explain to their clients why certain items need to be produced. At other times even sophisticated clients simply refuse to produce their records. They dig in their heels and insist that they will do so only if the judge makes them. Reason succumbs to emotion. In such instances, unnecessary discovery disputes will continue to occur, but there will be far fewer of them.} Delay does not linger in the court of a decisive judge. The rules must give judges deadlines on discovery motions to ensure speedy decision.

The long-run savings from early judicial activism extend to dispositive motions as well. Good judges decide motions to dismiss and summary judgment motions as soon as the responses appear on file and the motions can be set for hearing. Dispositive motions can bring many benefits even when denied. The motions force both sides to put their best evidence forward. Everybody—the court, lawyers, and clients—gets a good look at the case. The chances for voluntary resolution increase. Dispositive motions introduce the judge to the case and let each side see what the judge thinks about the facts and the law. This new, sometimes startling information, can itself lead to settlement. And even when the court denies a motion, often it can discard frivolous claims and put the dispute in perspective.

The area of discovery disputes is one where wise courts often can delegate decisions to magistrates because most discovery motions yield the same solution (compel production). Parties still should have a right to appeal orders to the court, upon a specific showing that the...
magistrate’s order compelling production was outside the legitimate scope of discovery. Courts are far better advised to employ magistrates in this near-ministerial function than to substitute magistrate decisions on ultimate case issues.\textsuperscript{263}

Imposing a time limit for deciding dispositive motions cuts deeper into the merits, so it should not be adopted if the other measures advocated here improve case timing, but the costs are probably less than they might first appear. A court can always deny a dispositive motion and revisit dismissal before or during trial. Parties often refuse discovery after filing a dispositive motion, citing the waste that would be incurred if the case is dismissed. The pendency of undecided dispositive motions can have a disastrous effect upon case preparation.

The social costs of delay are too great for society to allow lawyers to keep treating delay as though it were costless. The same argument applies to judges. Both lawyers and judges must be forced to acknowledge that delays in case preparation have led to a large case backlog with unacceptable social costs. Both need to operate under rules that ensure timely case preparation.

C. Parties Seeking More Time Should Produce a Second Discovery Plan Three Months Before Discovery Ends

One of the problems courts will face is a cultural lag as lawyers come to court after nine months and claim they are not ready for trial. Lawyers will drift into court at the end of the discovery period with a variety of reasons why no one could possibly have finished discovery in nine months, why unconstitutional prejudice would result if they cannot get more time, how they have trial conflicts that will tie them up for months, and on and on. Particularly in slow jurisdictions, lawyers are sure to resist having to work more quickly. Courts will have trouble securing obedience until lawyers learn to take time limits seriously.

The best way to handle this problem is to insert an optional pretrial hearing after six months, two thirds of the way through discovery, at which parties who say they cannot complete discovery are required to explain their problems to the court. Parties should be prohibited from seeking more time unless they raise their problems at this hearing or can show that their need for more time arose from a problem that occurred

\textsuperscript{263} For a detailed criticism of using magistrates and special masters as first-order, final decisionmakers, see generally Linda Silberman, \textit{Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure}, 137 U. PA. L. REV. 2131 (1989).
after the hearing and that such problem could not have been foreseen.

Courts generally are not in a good position to analyze discovery excuses unless they are going to overinvest in learning the details of the many disputes before them. The efficiency of delegating discovery planning to lawyers is reduced every time the court has to become heavily involved in discovery minutiae. Courts should leave the burden on the parties to identify their problems and propose a solution that they can perform in the months remaining. The rare cases that truly cannot be completed with fair investigation in the discovery period can be extended by using the exemptions already discussed. Any order the court issues should make it very clear that it will not extend the trial date even if the parties miss the new discovery deadlines.

D. Courts Must Bolster the Pretrial Schedule with Firm Trial Dates

Firm trial dates are an essential part of a firm pretrial schedule. If the courts are to maximize the discovery schedule’s effectiveness, they must combine it with a firm trial date. The deadlines go hand in hand. Requiring expedited discovery without attaching a firm trial setting sends the message that the courts are not really serious about the deadlines. This conspicuous omission dilutes the forcefulness of the schedule. It is no accident that studies of case timing repeatedly include firm trial dates—dates that will be enforced—as a vital ingredient of efficient case management. That is as true under amended Federal

264. See supra part III.C.

265. It surely is right that trial dates, and for that matter discovery dates, are not likely to “galvanize” the proper response unless the court communicates that the dates are firm, serious deadlines. Longan, supra note 12, at 692. Nor is it any accident that one of the leaders of the managerial judge movement puts so much emphasis on the need to use discovery conferences to impose case timetables. Peckham, supra note 160, at 772. The added twist urged in this Article is that courts need to impose uniform timetables, not timetables adjusted to each court’s backlogged dockets and lawyers’ dulled perceptions.

266. See supra part III.B.3. The importance of firm trial dates crops up even in complex cases. The FJC’s study of asbestos litigation found that the “cornerstone of case management continues to be the scheduling of firm, credible trial dates.” THOMAS E. WILGING, TRENDS IN ASPBESTOS LITIGATION, at xv (1987). Less than three percent of asbestos cases reach trial, with a settlement rate of about 73%, Id. at 25, and settlements occur “when firm, credible trial dates are scheduled.” Id. at xvii. “In the opinion of the judges and lawyers interviewed, the use of firm trial dates controls the settlement process.” Id. at 59. Of the two points that “deserve emphasis” in the chapter on case disposition, the first was “the finding of the Asbestos Case Management Conference that the single most important aspect of judicial management of asbestos litigation is the setting of a firm, credible trial date.” Id. at 54.

The converse was also true. In a description that characterizes far too many cases today, not just asbestos cases, the study reported that “[a]bsent a clear structure for pretrial management, a
Rules 26 and 30 as it is under less aggressive discovery rules. Parties have no particular reason to believe they will be forced to adhere to a nine-month discovery schedule, or any rapid schedule, if the court has a three- or four-year backlog of cases awaiting trial. This probably is why so many good faith efforts to streamline discovery fail: the discovery cutoffs are not integrated into a full pretrial and trial schedule. Limited reforms are not believable if they are not part of a clear, prompt pretrial and trial schedule.

Not only is it hard to believe that a court would deny additional discovery to parties that had finished discovery and now face a three year wait before trial, but it would be unfair to do so. Three or four years is too great a divide between discovery and trial. Witnesses deposed in 1994 should not have to wait until 1997 or 1998 to testify. The parties should be able to test memories much closer to trial. And even if witnesses recall the events in dispute, they are unlikely to recall their deposition phrasing. As a result, they will be exposed to unfair impeachment on minor variations in the way they worded their answers during their depositions.

Trial is the great motivator. It is the moment of truth in more ways than one. It is the end of second-guessing, of arm-chair quarterbacking, of last-chance discovery. Generating in equal parts fear and excitement, a trial date ensures serious case preparation. When the court hoists a trial date on the discovery horizon, just a year away, no one will question that the nine-month discovery schedule must be taken seriously. One-year trial dates will force every step of preparation to occur in the shadow of trial, with the healthy incentive that a deadline imparts.

One reason that prior reforms, including time limits, seem to have succumbed to the dominant culture of their jurisdictions may well be that courts trying to speed up cases had no effective way of trying cases more quickly. Firm trial dates will require the temporary increase in judicial resources and the imposition of standards for monitoring judges. Improving discovery timing without addressing the current backlog of cases would be like building a new deck on a bridge whose traffic continued to bottleneck at a tunnel when it came off the bridge. But if judges receive the necessary resources, the courts in turn must ask that they use them to put cases to trial on the same kind of rapid schedule.
that should characterize trial preparation.

E. Disciplinary Rules Are No Substitute for Judicial Time Management

Finally, a word on disciplinary rules. Disciplinary rules are the old solution to delay. Unfortunately, while they fill other functions effectively, disciplinary rules are a failed solution for delay and congestion.

Rule 11 had just been beefed up when I began my practice in 1983. Many predicted that the new sanctions would solve the problems of discovery abuse and its companions, cost, delay, and congestion. That hope has not been fulfilled. Rule 11 activity has increased, but with no perceptible effect on court filings. Rule 11 did not resolve docket problems. Instead, those problems have continued to worsen even as the number of Rule 11 cases grows.

The lesson of the last decade is that disciplinary rules will not heal structural problems in case processing. Disciplinary rules are after-the-fact remedies for wrongdoing, not substitutes for better judicial management. If they could have worked, they would have had a measurable impact by now. The rules are necessary to discipline individual lawyers, but they have not solved systemic problems.

Motions under Federal Rule 11 and its state counterparts frequently are filed in bad faith. Many lawyers use the Rule as just another strategic weapon. They hope to bludgeon the other side into not filing a case, into withdrawing it, or into providing some other benefit. If these lawyers often fail in their efforts to turn Rule 11 into another weapon of discovery, it is not for lack of trying. A high percentage of discovery-related sanctions litigation is itself frivolous. Parties time and again

268. The new amendments to the Federal Rules require a small change in this description. Rule 11’s sanctions no longer apply directly to discovery behavior; instead Rule 11 now directs lawyers to Rules 26 through 37 for the standards to govern discovery. FED. R. CIV. P. 11(d).

269. The numbers are startling. From 1938 to 1976, there were only 19 reported Rule 11 cases; from 1983 to 1989, there were roughly 1000. Lawrence C. Marshall et al., The Use and Impact of Rule 11, 86 NW. U. L. REV. 943, 948 (1992).

270. If one assumes that lawyers should not file Rule 11 motions unless a violation has occurred and sanctions therefore are likely, then one can read a high degree of frivolousness into the findings that only about 15% of "counsel-initiated" motions for Rule 11 sanctions lead to imposition of sanctions. Id. at 952 (the ratio was 60% for court-initiated motions, and the overall average was 17%). The report was based on a survey of 3358 federal litigators in eleven districts in three circuits: the fifth, seventh, and ninth. Id. at 950. The report turned up the interesting findings that plaintiffs were hit with motions more often than defendants; sanctions were imposed disproportionately in civil rights and "complex" commercial cases; and that monetary sanctions were easily the most common form of sanctions but that large fines were rare. Id. at 953-57, 965-67. The median sanction, the
seek massive fines against their opponent or their opponent's lawyers rather than a discovery remedy tailored to the abuse.

Sanctions litigation is another example of the way that lawyers will bend rules to their adversarial needs if they are not restrained. The solution, and the only real solution, is to adopt clear rules that aim directly at the abuse to be corrected. To cure problems of timing, courts must impose limits on delay. This means timing rules.

This is not to suggest that judges should not sanction lawyer misconduct. Discovery violations are surprising in their variety and frequency. Clamping down on them will improve judicial dockets. But the knowledge gained from studying Rule 11 litigation is proof that the real problems behind judicial management are not instances of sanctionable behavior by lawyers—if anything, sanctions litigation exceeds the number of truly sanctionable activities. The problems are structural and need structural reforms.

V. PROFESSIONAL RATIONALITY AND THE NEED FOR REFORM

One of the puzzles of the court reform issue is the lack of a more organized response from the legal profession. It is a staple of several schools of organizational theory that institutions will try to manipulate their environment to ensure their long-run survival. Threatening changes should be met with institutional responses. Institutions are composed of participants who satisfy a number of demands through the institution. Members can be expected to react to threats to the organization with

"mid-point" of all sanctions, was only $2500. Id. at 957.

The authors pointed out that Rule 11 may have as much or more impact through the informal, threatened use of sanctions, which they concluded was quite common. The report concluded that the Rule had a "pervasive impact" on lawyers; over 60% reported taking one or more actions, such as increasing research because of the Rule; and those who reported taking any action took on average 2.8 "acts" because of the Rule. Id. at 960-61.

Even if Rule 11 does make some lawyers clean up their pleadings, it seems unlikely that the Rule has had a significant effect on the overall problem of delay in discovery. The lack of improvement in a period of heightened Rule 11 activity suggests the Rule's ineffectiveness as a good discovery policeman.

Another reason that Rule 11 is not likely to regulate discovery abuse effectively is that most Rule 11 motions appear to be aimed at pleading problems, not discovery behavior. Discovery abuse came only third, after filing frivolous suits and filing frivolous pleadings or responses (a category that may include some discovery pleadings), and involved only 14.9% of Rule 11 sanctions and 19.2% of motions. Id. at 953-54.

Finally, surveys showing that lawyers claim the Rule modifies their behavior do not indicate how much behavior changes, or whether the changes make any difference in the level of unnecessary delay. Many of the changes may be only conscientious lawyers being more careful, or sloppy lawyers dressing up non-meritorious pleadings so that they are harder to strike.
resistance and countermeasures. These principles should apply to the bar and to the other professions as well.

In spite of these theoretical predictions, lawyers have largely abandoned their individual responsibility for judicial reform. There

271. The older language of group resilience stemmed from a biological picture of social groups as having their own nature in the same sense that an organism has an internal reality. Groups would act to preserve their position in the same way that an individual life should unfold in health. For instance, one can find Emile Durkheim writing that “[a] group is not only a moral authority regulating the life of its members, but also a source of life sui generis.” EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY at xxxi (W.D. Halls, trans., 2d ed. 1984). For Durkheim, social groups generate a shared reality different from the experiences of their members. This shared consciousness “is the psychological type of society, one which has its properties, conditions for existence and mode of development, just as individual types do, but in a different fashion.” Id. at 39.

This view of the group was transmitted into American sociology by Talcott Parsons, who pictured social groups (and he would include the legal “system” as a distinct group) as engaged in a complex negotiation with their environment for survival. “[E]mpirically social systems are conceived as open systems, engaged in complicated processes of interchange with enframing systems. The enframing systems include, in this case, cultural and personality systems, the behavioral and other subsystems of the organism, and, through the organism, the physical environment.” Talcott Parsons, An Outline of the Social System, in THEORIES OF SOCIETY 30, 36 (Talcott Parsons et al. eds., 1961) (emphasis omitted). Parson’s approach lent itself, as did Durkheim’s, to developing laws for each system: “[A]ll systems . . . are differentiated and segmented into relatively independent units, i.e., must be treated as boundary-maintaining systems within an environment of other systems . . . .” Id. at 40. Though Parsons’s goal was to integrate knowledge at his various levels of action—cultural, social, personality, and the organism—as these quotes suggest, his effort to develop laws for each system carries a risk of forgetting that social systems are products of the interactions of individuals, so that the primary causes of change in systems like the legal system are likely to lie in the relation of its members’ needs and values to the profession’s place in society. It is in this sense that it is meaningful to talk about a group response to attacks on a group’s social position; the threat to the collectivity will jeopardize the settled interests of its members, and members are likely to adopt a variety of strategies to protect their position.

272. There may be a chicken-and-egg problem with determining why lawyers are not more involved in public debate over judicial reform (Are they not interested because they are not trained properly, or are they not trained because they are not interested?), but a number of commentators have lamented the short shift the profession gives to its own institutions.

As Marc Galanter, the academic who has done more than anyone else to collate and distribute accurate information on the legal system, puts it, “The poverty of systematic empirical study of American legal institutions reflects not only the research problems that Professor Rosenberg catalogs, but institutional problems as well. American law schools, despite repeated exhortations to change their ways, have not shown a sustained inclination to make the generation of this kind of knowledge one of their central functions.” Marc S. Galanter, The Federal Rules and the Quality of Settlements: A Comment on Rosenberg’s, The Federal Rules of Civil Procedure in Action, 137 U. PA. L. REV. 2231, 2235-36 (1989).

Judge Newman and Professor Rosenberg seem to point a finger of blame at learning to “think like a lawyer.” Newman’s view is that “lawyers’ preoccupation with results and their inadequate appreciation of the need to evaluate the system in which they function cause them to ignore the adverse consequences of the litigation process they have constructed. They know that the
are now over 650,000 lawyers in the United States, and this number may soon grow to a million. Yet judges and a handful of professors, not lawyers, write most articles on judicial reform in law reviews and other journals—journals which are becoming less relevant to this debate because of its focus toward the political system.

system is slow and costly.” Newman, supra note 8, at 1643. Newman continues: “As lawyers we are taught to consider the dispute at hand and not the operation of the legal system in which the dispute arises and is resolved.” Id. at 1650. Not surprisingly, one of the reforms Newman proposes is an overhaul of legal education. Id. at 1659.

Professor Rosenberg quite similarly complains that the “tendency of legally-trained minds to prefer thinking to counting is legendary. So is the lawyer's preference for learning by watching for the vivid case rather than tabulating the mine-run cases.” Rosenberg, supra note 50, at 2211.

One should certainly add books like Anthony Kronman’s and Sol Linowitz’s to critiques of lawyers’ failure to worry about the system as a whole. ANTHONY KRONMAN, THE LOST LAWYER (1993); SOL LINOWITZ, THE BETRAYED PROFESSION (1994). Both authors would agree that lawyers have far more duty to society and legal institutions than they fulfill.

One commentator argues that the defect in the way lawyers approach cases is built into the economic incentives of the adversary process. “The thesis I explore is that the adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed.” Brazil, supra note 204, at 1296 (footnote omitted); see also id. at 1315-31 (giving examples of specific abuses).

One commentator argues that the defect in the way lawyers approach cases is built into the economic incentives of the adversary process. “The thesis I explore is that the adversary character of civil discovery, with substantial reinforcement from the economic structure of our legal system, promotes practices that systematically impede the attainment of the principal purposes for which discovery was designed.” Brazil, supra note 204, at 1296 (footnote omitted); see also id. at 1315-31 (giving examples of specific abuses).

It may be overly optimistic to expect such a privileged profession to act as the agent of change, even though this Article argues that self-interest ought to propel lawyers in that direction. As Dean Clark and Professor Moore wrote years ago, they did not think that rule-making responsibility should ever devolve to lawyers alone or that much would come of it should that happen.

Anything like a census of the views of the bar will not only not be helpful but will be inimical to change and improvement. Experience teaches us, that while individual members of the bar are enlightened agents of reform, the general professional reaction is, quite naturally, against change. Thus, a reform of procedure which merely adjusts itself to the majority view of the bar at best can be only a minor readjustment, perhaps even harmful, as displacing a known system by one unfamiliar and retrogressive. Leadership in any walk of life can properly be expected only from the minority and from individuals; it is not a criticism of our profession if we recognize these actualities.


I am a little more optimistic about the ability of the profession to respond to crisis, although the recent record does not produce cause for optimism.


274. Judges are vastly over-represented in the debate on court reform. After all, in 1992 there still were less than ten thousand state-court judges (facing thirty-three million new cases) in state courts of general jurisdiction, twenty-eight thousand if all state courts are counted. STATE COURT 1992 ANNUAL REPORT, supra note 5, at 9. Compare this to the more than twenty-fold greater number of lawyers and one finds that the United States appears to have a relatively small number of judges. Galanter, supra note 27, at 55 (“The ratio of lawyers to judges in the United States is one of the highest anywhere . . . .”). In spite of this imbalance, judges have written far more articles on litigation reform than have ever been seen from practicing lawyers.

One reason for the large supply of scholarly writing by judges is the artificial restriction on
The scarcity of lawyers in the general debate over litigation practices is striking. Practicing lawyers do very little writing or organizing outside of their professional channels. Lawyers seem prepared neither by training nor by inclination to invest time protecting, much less improving, the institutions that define their place in society. Their withdrawal imposes a real social cost because lawyers are

judicial activity. The Canons of Judicial Conduct leave judges few areas in which they can openly influence public policy. A judge can “speak, write, lecture, teach and participate” in activities concerning “the law, the legal system, [and] the administration of justice,” MODEL CODE OF JUDICIAL CONDUCT Canon 4B (1990), but only to the extent they do not “cast reasonable doubt on the judge’s capacity to act impartially as a judge.” Id. Canon 4A(1). Because most judges in courts of general jurisdiction run a good chance of having almost any substantive issue come before them, this restriction tends to limit “safe” judicial politicking to procedural reforms or discussing apparently unintended consequences of laws. This subject matter constraint on extra-judicial activity is repeated throughout Canon 4. See, e.g., id. Canon 4C (governmental, civic and charitable activities), Canon 4D (financial activity).

By constraining the writing and debate of these often politically active former lawyers, the Canons artificially increase judges’ involvement in the few remaining areas that are not taboo, like judicial reform. The results are not necessarily favorable for the adversary system. See infra notes 311-20 and accompanying text.

275. There are hopeful signs that complacency may be decreasing. In the last few years, two important books analyzing the lawyer’s role and responsibility have been published. See KRONMAN, supra note 272; LINOWITZ, supra note 272. Both authors believe that economic and social forces have destroyed much of the role of lawyer as counselor, the wise guide for clients in a deeply personal relationship. (This is the model of lawyering idealized by Charles Fried in his justly famous essay The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976).) It is easy to see how that model can get swamped with the economic pressures generated by law firms engaged in leveraging behavior. See generally MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991) (critical exploration of the economic pressures on law firms).

As their choice of titles suggest, neither Kronman (The Lost Lawyer) nor Linowitz (The Betrayed Profession) has much sympathy for lawyers who are too busy to step back and look at what is happening to the profession in which they labor. Both, particularly Kronman, long for a simpler day. Yet neither has a realistic suggestion for restoring that world or, much more importantly given the remote odds that self-improvement alone can change the current deficiencies, for what else to do. Leading lawyers out of Babylon with well-intentioned exhortations seems an endeavor no more likely to succeed than trying to recast “local legal cultures” by urging judges and lawyers to think differently about the way they handle cases. Nor does Kronman or Linowitz truly respond to the problem, which they admit, that the role of counselor of which they are so fond was substantially the product of the elite socio-economic status of the white male Protestants who have historically dominated the profession.

276. See supra text accompanying note 272, for a few of the possible reasons why. A reason why some non-litigating lawyers might prefer the “bystander” role may be that they are quite happy to see litigators get their come-uppance, after litigators’ recent run of prosperity. See Stephen D. Susman, A Case for a Cease-Fire, TEX. LAW., May 23, 1994, at 18. If it exists, such smugness is misplaced. Even lawyers who spend their days doing transactional work or practicing in specialized courts like the tax and patent courts will find their clients, and hence their practices, sharply affected by reforms to the judicial system.
privy to the knowledge needed to protect the jury-based system of justice. Only they experience the full range of reasons for delay, and their cooperation is required to end delay.\footnote{277}

The vacuum in public writing on the courts created by lawyers’ abdication probably has helped the debate to focus increasingly on reforms that would diminish the practice of law without considering the values preserved by the adversary system, the lack of similar protection within alternative processes (like court-ordered arbitration), and the possibility of spending the same resources to improve the courts. Recent decades have already brought many limitations on an individual’s access to juries and even to judges. The widespread urging of reforms like the English loser-pays attorneys’ fees rule, the wave of support for the radical reforms in the \textit{Contract with America}, and innovations like mandatory arbitration before unregulated third parties all demonstrate how embattled the adversary system has become. It is much easier to blame the court system, which reflects underlying social conflicts, than it is to contemplate the more painful cures for the conflicts themselves. Our culture is infatuated with the idea that the legal system is a cause of what are in fact intractable social problems.\footnote{278}

\footnote{277} It may seem that judges and clients should be included here, but neither receive as much information about the root causes of delay and crowding. Judges’ vision is confined by the disputes that come before them. For every case in which they can rule on an abusive discovery position or frivolous pleading, there are many others in which the parties resolve such problems—after investing a lot of unnecessary time and effort—or one party decides it is not worth using up the judge’s patience raising the issue. Clients have fairly good access to information about their cases, but even they rarely see all of the discovery problems, and most see too few cases to comprehend the nature of system-wide problems.

There is a deeper problem of it in all discussions of court reform. It is that filed cases are only a small part of the total disputes resolved each year. \textit{See} Galanter, \textit{supra} note 27, at 11-18. Models of reform must make some assumption about the way unlitigated disputes relate to those that do enter the court system. If one views the world as containing many more lawsuits just below the margin of filing, then reforms that reduce cost and delay may merely succeed in inducing more cases to take the judicial path. \textit{See} Priest, \textit{supra} note 8, at 557. \textit{But see} discussion \textit{supra} note 131. If, on the other hand, one assumes that the marginal return of potential cases falls, or that many cases do not make it to the system because, in good part, parties value their relationships too highly or fear the inevitable disruption that comes with litigation, then effective reforms that help the cases already on file will not lead to a swarm of new cases. A study of patterns in unlitigated cases lies beyond the scope of this Article, which assumes that the line of cases waiting to get into the system is not limitless.

\footnote{278} One of the most popular books to starkly attack the legal system is Walter K. Olson’s \textit{The Litigation Explosion}, \textit{supra} note 19. Olson’s targets are all over the map: first-amendment-liberalized lawyer advertising rules, contingency fees, class actions, the minimum-contractual test, notice pleading, the scope of discovery, modern rules on expert testimony, punitive damages, and what he views as an assault on the law of contract by such doctrines as unconscionability.
Has anyone ever wondered (but who could have imagined the need?) whether it is possible to write a book purporting to describe a system in which almost one hundred million cases are filed each year by describing at most one or two hundred cases (or between 1/500,000 and 1/1,000,000 of the total cases); to do so without making any effort to establish that the cases described are representative; and, worse, whether anyone would read the book? If one has, the unfortunate answers are: yes, yes, and yes. It has been done, this is the book, and it even finds buyers. Olson makes no effort to demonstrate that his examples are representative. Instead he fills his book with colorful, exaggerated descriptions to demonize the judicial system as re-created by Olson.

Because this Article is about the need for discovery reform, it is perhaps appropriate to discuss Olson’s characterization of the flaws in modern pleading and discovery. His version of modern notice pleading, in a chapter titled “Litigation Made Easy: Suing Without Explaining,” begins with the story of a urologist who was sued but “could not learn what he was supposed to have done wrong. . . . Nor had he a clue where to turn for vindication.” *Id.* at 90.

With this introduction, Olson then spends five or six pages tracing his version of the development of the Federal Rules. His effortless interpretation is that now “[e]ach side could come to court unashamed of not knowing the details of its case.” *Id.* at 98. “Pleadings would serve only to put the parties on notice that they were being sued, and briefly state the general subject matter of the dispute.” *Id.* at 99. He quotes the exaggeration of two procedural scholars that a party can get into court “‘by alleg[ing] his claim in very general terms, so that it cannot clearly be discerned what he thinks the facts might be.’” *Id.* at 99 (alteration in original) (quoting FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 87 (2d. ed. 1977)). By discussing a 1946 case involving Cole Porter, Olson debunks to his own satisfaction summary judgment (one of the procedures that prevents such a lawsuit from getting very far) as easily avoidable, because “all you had to do was trump up, assert, or hallucinate a single factual dispute that would have to be looked into.” *Id.* at 104. Similarly, pretrial conferences (which now are required very early in most cases) are characterized as ineffectual procedures that occur “usually not until after people had been tied up in court for long periods on ill-defined charges.” *Id.*

Prosecutor Olson then sums up:

> [K]eeping all the options open, at whatever cost, came to seem the most important thing. Notice pleading was indeed litigation made easy, but only for lawyers on the offensive. For lawyers and clients trying to respond to charges, it was litigation made incomparably harder, the terrors of uncertainty multiplying with the knowledge that claims could grow and shift and turn into their opposites as a case went along.

. . . What began as a page out of Dickens ended as a page out of Kafka. *Id.* at 107.

The chapter on notice pleading melds seamlessly into Olson’s chapter on discovery. Olson finds (or wants to find, as he uses virtually no empirical data) modern litigation mired in a “sue-first-and-verify-later spirit of the new federal rules.” *Id.* at 113. Olson thinks that the broad discovery backing up this trend allowed “no end of probing [even] on matters that were not being raised as a legal issue or had already been fully conceded.” *Id.* at 114. In this nightmare vision of federal discovery, “[n]owadays a thousand-page transcript is nothing special,” *Id.* at 115; antitrust lawyers “often conduct hundreds of depositions,” *Id.* at 116 (discussing government’s antitrust case against IBM, one of the largest cases ever litigated); lawyers can demand “any private papers they had a mind to,” *Id.* at 119; and “confidentiality breaches routinely go unpunished,” *Id.* at 123.

Perhaps because he is so eager to portray an innocent and helpless public that has fallen prey to rapacious lawyers and out-of-control courts, Olson’s analysis itself succumbs to his obsession with victimization. His version of discovery is one in which plaintiffs have all the cards, but defendants have no tools to defend themselves. Olson disregards completely the fact that the tools of discovery are available equally for both sides. If anyone is dumb enough to file a lawsuit without a theory, hoping one will drop out of the sky during discovery, he is a sitting duck for a defendant who conducts early, aggressive discovery; the defendant can establish that his witness, under oath, does not know what he is talking about. Olson ignores motions to dismiss, discounts summary judgment
by giving an example of one case in which it perhaps did not work as it should (under older, less favorable standards), and discards pretrial conferences without any discussion of the way they really work. He never discusses the fact that the discovery tools whose effectiveness he bemoans on the offensive—depositions, document requests, and interrogatories—are just as effective in defense. And, because his book is written with no sense of the dynamics of trial, Olson has no idea just what a gift it is if a defendant can establish early on that the plaintiff does not know what he is talking about.

Fortunately, the drafters of the Federal Rules were wiser, and understood the craft better, than Olson. See supra note 82 for quotations from Dean Clark.

It is impossible to list every unwarranted inference, every general statement supported at best by one unrepresentative particular, and every unsupported but colorful indictment that pops up in Olson’s book, but a few of my favorites follow:

Having described an insurance scam run by a New York firm, and on the verge of mentioning two more conspiracies, one in Florida and one in New Jersey, Olson grandly projects that “around the rest of the country a wave of similar scandals was breaking.” OLSON, supra note 19, at 33.

In the middle of his attack on contingent fees, which Olson treats as encouragement for lawyers to trump up claims, Olson cites the nearly $200 million dollar fee that Houston’s corporate law firm of Vinson & Elkins “pocketed” in the landmark E.T.S.I. coal slurry pipeline case, a $600 million verdict Houston lawyer John O’Quinn won in a “natural gas” case, and Joe Jamail’s $10.5 billion dollar verdict in the Texaco/Pennzoil litigation. Id. at 46, 47-48. “Avoid the boring details, and get personal,” is how he describes O’Quinn’s approach. Id. at 48. This certainly is Olson’s approach. Olson is very careful to never discuss the fact that the actual business damages in each of these cases were in the hundreds of millions or, in Pennzoil’s case, billions of dollars, for such unremarkable and unemotional losses as payments due at an agreed price for agreed volumes of natural gas made available, but not taken. In Pennzoil’s case, the loss was not insignificant either, for Pennzoil lost the difference between the cost per barrel of its Getty acquisition and what it would have cost.

Discussing notice pleading, Olson alleges that even if “your ex” in a divorce case pleads one thing to get into court, “he can throw something completely different (and perhaps much more serious) at you when it comes time for trial. In fact if his lawyer has anything he thinks is really devastating he may well be holding it back deliberately at this point.” Id. at 92. Olson ignores the fact that if a party conceals charges or evidence in discovery, most courts will exclude it at trial.

Olson paints a world of parties who “could come to court unashamed of not knowing the details of its case,” ignoring that this is a recipe for losing your case. Id. at 98.

Olson projects a picture of unpunished confidentiality breaches, so that “many a target organization that summarily wins the underlying lawsuit loses the war for its privacy,” never once hinting as to what he is talking about or describing the draconian penalties that most judges would rightly impose for a breach of confidentiality. Id. at 123.

Ironically, for an author so critical of what he sees as liberal court standards, if Olson tried to offer his arguments in a trial of the court system, his writings would be laughed out of court for their combination of hearsay, masquerading as scholarship, and unverified assertions contradicted by the serious work that has been done in the area of judicial crowding.

For additional clarity on some of the wilder assertions about litigiousness, lawyers, and runaway lawsuits, see Marc Galanter, News from Nowhere: The Debased Debate on Civil Justice, 71 DENV. U. L. REV. 77 (1993). Among Galanter’s targets are then Vice-President Quayle, who fashioned much of his public platform against lawyers on the most inaccurate data possible and Olson’s fellow-Manhattan-Institute denizen, Peter Huber, who conjured up the calculation that $300 billion in goods and services fall to the legal sector each year. Id. at 77-78 & n.2, 83-87.

Not only does Galanter take on the many exaggerated estimates of the number of lawyers, but he makes the telling point that, assuming the United States may have between twenty-five and thirty percent of the world’s lawyers, this “is roughly the United States’ proportion of the world’s
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[GNP] and less than our percentage of the world's expenditures on scientific research and development." Id. at 80 (footnote omitted). Our abundance of goods and services depends on a free, flexible market system that, in turn, emanates from a highly sophisticated law of contract, property, corporations, bankruptcy, labor, antitrust, and other business areas.

Given Olson's dislike of lawyers and numerous laws, in addition to his distrust of juries, one of the most misplaced citations in modern American jurisprudence must be Justice O'Connor's citation to Olson, of all people, in support of the proposition that "[t]he jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values." TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 473 (1993) (dissenting opinion).

Olson would like to take the jury out of all kinds of areas; for example, in the area of products liability "[j]uries have . . . hit drug companies with punitive damages in cases where federal agencies and the scientific consensus in general flatly denied that a compound caused a claimed side effect at all." OLSON, supra note 19, at 283. While he does provide some authorial dictum about how much he likes juries, that is all it is, dictum. His book is an elaborate effort to make sure juries decide much less, not more or as much, than they do today. O'Connor's citation to Olson on the strength of the jury system will be a strong contender in any most-inappropriate citation contest. The most that can be said about her bizarre citation to his intemperate attack on juries and most other aspects of the judicial system is that it does fit the theme of her dissent, which is to attack the award of punitive damages in TXO.

A double irony of the TXO opinion is that the lower court opinion, the West Virginia Supreme Court's affirmation of a judgment that included punitive damages 526 times the actual awarded and 20 times the punitive damages previously awarded by a West Virginia jury, was authored by Justice Neely. TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870 (W. Va. 1992), aff'd, 509 U.S. 443 (1993). Neely's favorable comment on Olson's book graces its back cover. See infra note 316.

Olson could have used Neely's opinion as grist for another chapter on how badly he thinks courts function. Neely's opinion upheld the admission of testimony, by several lawyers who had sued the defendant in other cases, about how "bad" the defendant really was. The opinion mocked the defendant throughout. It classified punitive damage cases according to whether the conduct at issue was "really stupid" or "really mean." TXO, 419 S.E.2d at 894, app. B. The defendant's complaint, that it had later won one of the cases that an opposing lawyer had described critically in the TXO action, was met with the understandably uncited footnote that "[w]ell, even a blind hog finds an acorn now and again." 419 S.E.2d at 884. It would have been hard to write an opinion sounding less like justice.


For some facts and common sense about punitive damages, which juries rarely award and when awarded are rarely very large, see Stephen Daniels & Joanne Martin, Myth and Reality in Punitive Damages, 75 MINN. L. REV. 1 (1990), and Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 AM. U. L. REV. 1393 (1993).

The attribution of problems of lawyer behavior seems to crop up everywhere, in applications that range from the ridiculous to mildly plausible, if not sublime. In addition to Olson, who smoothly fits the first category, consider the chapter on lawyers in DEREK BOK, THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA 138 (1993) and the de rigueur chapter on lawyers in KEVIN PHILLIPS, ARROGANT CAPITAL: WASHINGTON, WALL STREET, AND THE FRUSTRATION OF AMERICAN POLITICS 198 (1994). See also discussion infra notes 298-99.
The failure of the bar to respond effectively as a group to the radical proposals for reform is hard to explain.\(^\text{279}\) One reason might be the problem of collective action—lawyers hoping to free ride on the efforts of others.\(^\text{280}\) The free rider problem can make it difficult for large groups to maintain member participation. Yet the bar should not suffer much from free riders because its statutory monopoly enables it to compel membership and fees. Thus the organized bar can command the resources needed to implement effective action.\(^\text{281}\) Another reason may be a lack of consensus within the profession. The lack of agreement to some extent reflects disagreement among clients. For instance, many defense lawyers have wealthy clients who want to restrict legal action, even if the lawyers' self-interest suggests that they should welcome more lawsuits because litigation means more work.\(^\text{282}\) On the other hand,

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279. It should be a point of embarrassment, albeit also appreciation, that the most consistent champion of the legal system in the face of court reform attacks, Marc Galanter, is a sociologist, not a lawyer or legal academic.

280. The risk of free riders in group organization received its theoretical articulation in Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1971). Olson argues that groups have difficulty getting members to pay for "collective goods," goods like political lobbying which are constructed "such that other individuals in the group cannot be kept from consuming it once any individual in the group has provided it for himself." Id. at 35. He posits that

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\text{[s]ince an individual member thus gets only part of the benefit of any expenditure he makes to obtain more of the collective good, he will discontinue his purchase of the collective good before the optimal amount for the group as a whole has been obtained. In addition, the amounts of the collective good that a member of the group receives free from other members will further reduce his incentive to provide more of that good at his own expense.} \\
\text{Id. in terms of lawyers' political action, assume that all lawyers contribute to an organization that studies the problem of court delay, identifies solutions, and lobbies for reform. Each individual member has an incentive to let the other members pay for the organization. Moreover, as the size of the group grows, individual contributions have less impact on the whole and members increasingly feel that they can withdraw their marginal contributions. Not surprisingly, Olson derived his theory from competitive markets, whose working postulate is that firms that would benefit from colluding and setting monopoly prices instead will compete against each other and drive profits out of their industry. See id. at 9. In his words, "the fact that profit-maximizing firms in a perfectly competitive industry can act contrary to their interests as a group is now widely understood and accepted." Id. at 9 (citing Edward H. Chamberlin, The Theory of Monopolistic Competition 4 (6th ed. 1950)).}
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281. The bar has the unusual advantage of requiring membership and dues payments before attorneys can practice law. Thus, the imprimatur of state power should be a viable substitute for the harmony of self-interest that might otherwise be necessary to support collective action in voluntary groups.

282. But consider the response made by the Association of Defense Counsel of Northern California to a state tort-reform proposition that was generally envisioned as aimed at plaintiffs' attorneys; the Association wrote its members, urging them to oppose the proposition also. Their letter noted that the initiative may "have a profound effect upon the livelihood of yourselves, your staff
there are also wealthy defendants who will profit from extended pretrial litigation and every day delay if they expect to lose a number of cases and the time value of their money exceeds court-ordered interest.

Both lawyers and courts may like the uncertainty associated with delay because it gives them more control. Judges accrue discretionary power because they can advance some cases over others. Lawyers have another variable that they can manipulate. And in most cases, at least one party has strategic reasons to prefer delay. A party that has a weak case but a lot of money, for instance, may hope to wear down its opponent, or uncover irrelevant but embarrassing information the opponent would prefer to keep secret. In addition, delay increases unpredictability, which itself increases the need for counsel.

It may be that the economic security lawyers enjoy has blinded them to the erosion of social support for the courts as constituted, just as a history of success blinded many American corporations to their eroding customer base in the seventies and eighties. The lack of an effective way for clients to exit the “legal system” may have reduced the bar’s sensitivity to criticism. If lawyers measure success only by clients and income, many will feel quite complacent. The number of lawyers per thousand people doubled between 1967 and 1979 and rose by almost fifty percent again by 1987. There were 286,000 lawyers in 1960, 650,000 in 1985, and if present trends continue there will be more

and your families for the remainder of this century and well into the next.” Reynolds Holding, Legal Grounds, S.F. CHRON., Feb. 19, 1996, at D1, D2.

283. Complacency and inefficiency are what economist Albert Hirschman would predict. Hirschman wrote the pioneering work on the importance of exit and of internal voice as means of ensuring long-term institutional health. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). While Hirschman’s main effort was to argue that economists had underemphasized the role of voice as a means of institutional improvement, he also complained that political scientists tend to ignore the role of exit as an efficiency-forcing measure. Id. at 30-31. Moreover, he hypothesized that monopolies might welcome just a little exit, if they could ignore the needs of disruptive customers without jeopardizing their primary customer base. Id. at 60. An analogy might be lawyers who welcome ADR if it relieves just enough pressure on the legal system to reduce the call for fundamental reform, as long as it does not become the preferred method of case resolution and begin to substantially reduce the demand for lawyers.

This may begin to change as the development of ADR makes “exit” from the private legal system a more realistic option. And the importance of exit in turn shows the significance of the ongoing debate over whether lawyers will be allowed to control the training and accreditation of mediators and other ADR practitioners.

than a million lawyers by the turn of the century.286 There are more lawyers per capita than doctors in the United States.287 The profession is in high demand.

To make things even better, in spite of the increasing supply of lawyers, which according to economic theory should tend to reduce lawyer wages, salaries (in real terms) have been climbing back to the peak that was reached in the early seventies.288 The simultaneous increase in lawyers and lawyers' salaries more than doubled the share of gross domestic product ("GDP") devoted to legal services in this century: from .6% in 1900 to .87% in 1980 and 1.39% in 1987.289 The nation's


287. In 1900 there were 1.8 doctors per thousand people, more than the 1.3 lawyers, but by 1987 there were 2.9 lawyers per 1000 compared to 2.76 doctors. Rosen, supra note 284, at 220-21.

288. Id. at 234.

289. Id. at 237. For all the public outcry about medical expenses, lawyers' salaries now surpass doctors' as a drain on the economy.

This comparison does not include the quite different figures for the total cost of legal and medical services. Unlike legal services, much of the cost of capital-intensive medical services comes from fixed costs, such as advanced equipment and larger supporting staffs, and not from paying doctors' salaries. The share of total GDP devoted to medicine certainly surpasses that devoted to legal services. See, e.g., United Nations, 1993 Human Development Report Table 35 (1993) (reporting that the United States spends 12.2% of GDP on health services). Nonetheless, it is fair to compare the respective shares of national income paid to doctors and to lawyers as one measure of the relative burden of the competing professions, this being an approximate measure of their labor cost.

A harder question is what the high incomes of lawyers really represent. In the two-decade period from 1967 to 1987, lawyers earned on average $62,000 in 1987 dollars, compared to $38,000 for college graduates generally. Rosen, supra note 284, at 216. This is a 63% premium for three years of law school, which represents a 16% return per year of law school education. Quite a difference when compared to the roughly 10% return gained per year from an undergraduate education. Id. at 216-17. However, after adjusting these amounts to remove the effect of the longer hours worked by lawyers, Rosen, a faculty member at the University of Chicago, found that an average return per year for the advanced schooling of lawyers was approximately 11.8%, much closer to the 10% return for college graduates.

Conservatives like to cite such statistics as justifying professional income differences; they claim the higher income is a reward for the hard work and delayed gratification of those who battle their way into and through college and law school. This is a standard postulate of the human capital vision of the labor market. See generally Gary S. Becker, Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education (2d ed. 1975). Given the complex interplay of parental background, family wealth, and other factors that are associated with education in the first place, this standard "human capital" argument ignores the more important questions of why some people become educated and others do not, and the extent to which social structure determines these outcomes. The argument also ignores the fact that far from being an experience to suffer through, higher education can and should be directly enriching. Good education produces an immediate return to those open to its promise, in addition to its effect on future income. People undertake education for consumption as well as investment.
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large and rising legal bill diverts billions of dollars in goods and services from other uses. The luxury of rising professional incomes has increasingly isolated lawyers (and other professionals) from the larger society.290

Although recent graduates from law school are having more difficulty finding jobs, the legal profession remains in a very favored position when compared with most occupational groups. Their privileged position probably reduces their sensitivity to the need for reform.

The ease with which lawyers have been able to dodge one recent set of reforms, the changes to the Federal Rules, probably has furthered the misconception that they can subvert reforms and dodge fundamental

Examples closer to home are two studies of lower wages for women attorneys, which show that differences in income are unlikely to reflect just differences in ability, schooling, and effort. In spite of researcher assumptions that female lawyers were perhaps least likely to put up with discrimination, statistically significant differences persisted, even after controls for differences in hours and child-rearing were taken into account. See David N. Laband & Bernard F. Lentz, Is There Sex Discrimination in the Legal Profession?: Further Evidence on Tangible and Intangible Margins, 28 J. HUM. RESOURCES 230 (1993); Robert G. Wood et al., Pay Differences Among the Highly Paid: The Male-Female Earnings Gap in Lawyers' Salaries, 11 J. LAB. ECON. 417 (1993).

Lawyers tend to talk about their falling reputation as if the problem was just that, reputational, and that this could be remedied by better advertising or education. See, for instance, the exhortations by a President of the ABA concerning the erosion of trust and confidence. R. William Ide III, Living Up to Our Past, A.B.A. J., May 1994, at 8. This is the "if-people-only-understood-what-we-do" theory.

There is much tunnel vision on the part of lawyers, who take no time to think about what the rest of the society has to do. If one realizes that access to paid work is the scarcest of resources for most people, one begins to understand the changing public view of lawyers. The world looks very different when one combines the assumption that "[a]ccess to market work is the primary determinant of family income" with the reality that "in our society, social and work roles provide the basis for defining and dividing classes. Incomes are directly tied to these roles, and the goods and services commanded by incomes outwardly mark each class in the society." CLAIR BROWN, THE AMERICAN STANDARD OF LIVING 14, 25 (1994). Add this to the fact that most people are only too painfully and immediately aware of what many lawyers prefer to forget, namely, that income differences are growing sharply in this society and that lawyers live at the top of a very hierarchical heap. See, e.g., Frank Levy & Richard J. Murname, U.S. Earnings Levels and Earnings Inequality: A Review of Recent Trends and Proposal Explanations, 30 J. ECON. LITERATURE 1333 (1992); LAWRENCE KATZ ET AL., A COMPARISON OF CHANGES IN THE STRUCTURE OF WAGES IN FOUR OECD COUNTRIES (National Bureau of Economic Research Working Paper No. 4297, 1993). There is no mystery why so much of the public is out of patience with lawyers.

None of the issues discussed in this Article, which concerns improving the way courts and lawyers try to produce the end-product of just results, will change the underlying economic arguments for or against the economic protection afforded professional classes in the United States. Nonetheless, getting the profession's house in order is a necessary prerequisite to having a fair debate over the issues that might affect the position of lawyers.
Many courts simply opted out of the new provisions.292 Lawyers relying on the robustness of their practice and the inefficiency of their foes are in for a shock. The professional advancement of lawyers has come at a time of economic decline for most other Americans. The public has grown widely skeptical of the rising cost of litigation. There can be a wide gap between professional welfare and social welfare. An often-cited Rand Institute study, which surveyed all tort lawsuits concluded in state and federal court in 1985, found that over half of the recoveries—between 16 and 19 billion dollars—went to lawyers, insurers, courts, and others involved in handling the cases.293 The plaintiffs—the victims—received from 14 to 16 billion dollars, less than half of the amounts awarded. This study suggests that at least in that year, those handling and processing tort cases collected more than the victims received for their injuries.294 Another Rand Institute study found that asbestos victims received an even lower percentage of total recoveries, just thirty-seven percent.295

Anyone relying on short-term business success as a predictor of the profession’s long-term position ignores the critical climate that spawned the amendments to the Federal Rules (which were not expected to pass); the determination of judges, clients, the public, Congress, and many state legislators to reduce the cost, delay, and profiteering that they believe characterizes the adversary system, and the ease with which portions of the Contract with America’s legal reforms have moved through Congress.

291. Another reason for the silence of lawyers in the debate over court reform may be that many of them are uneasy over how the system functions today but do not have any suggestions on how to improve things.

292. See supra part III.E.2. Like any sheltered profession, the bar takes comfort in denial. Thus, lawyers find solace in articles like a recent piece in the ABA Journal, tracing the decline in professional image to the unsavory advertising that seems to have followed the Supreme Court’s striking down the legal profession’s prior quality controls as violations of the First Amendment. See James Podgers, Image Problem: Burned by a Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising, 80 A.B.A. J., Feb. 1994, at 66, 67. Or, better yet and even more myopic, but comforting if taken seriously, the recent poll that had respondents suggesting that fully 34% percent of government spending (rather than the current 3%) should be devoted to the “justice system.” Keeva, supra note 17, at 47.

293. JAMES KAKALIK & NICHOLAS PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 68-70 (1986).

294. Id. Whether plaintiffs received more than half of the recoveries depended upon whether one included the cost of their time and claims processing expenses. If one does not count these costs, this study calculated that plaintiffs took home 56% of recoveries; include them, and the amount falls to 46%. Id.

295. This difference was possibly attributable to the higher cost of handling complex litigation. Hensler, supra note 87, at 491-92 (citing JAMES KAKALIK, COSTS OF ASBESTOS LITIGATION (1983)).
The press of business already has pushed courts far from the traditional adversarial process. There is a lot of evidence of deteriorating trial processes. Trial is not a realistic option for very many cases. A number of observers have documented the erosion of trial rights as more and more cases get shunted to special masters, magistrates, ADR, small claims courts, and administrative courts.296 The changes have prompted...
one long-time observer to "wonder... whether litigation of individuals' cases will be available fifty years hence;" another to announce, fortunately still with exaggeration, that "[t]he civil jury, if not yet dead, is in extremis." This is not an age for complacency by those who believe that a precious justice emerges from the American way of discovery and trial.

The tenor of the debate over the courts has become destructive. While the attacks cover far more than delays in the court, they gain support from the profession's failure to keep its house in order. The belief that courts and lawyers are not serving their proper functions has gotten wide currency. It appears in blunt form in works like Walter Olson's The Litigation Explosion, in only slightly more sophisticated form in the recent pop-culture best-seller by Kevin Phillips, Arrogant

1130 (7th Cir. 1992), the Seventh Circuit applied its aggressive reasonable inference test for summary judgment. Under this test, the judges get to decide whether the inferences from circumstantial evidence are reasonable enough to support a verdict. At issue were oil and gas projects that undeniably succumbed to fraud. The driller announced commercial production after it had retrieved the frac oil that it injected into the well, misrepresented the status of drilling, and engaged in other oilfield fraud. Id. at 1133-35. The two promoters relayed the driller's false reports to the investors but when sued, claimed that they had no more idea than the investors of the fraud. The Seventh Circuit affirmed a summary judgment because it found that the promoters "were finance types who did not have the technical skills to evaluate an oil well in the field," and the promoters had disclosed that they were relying on the driller. Id. at 1137. Left untended by this rush to judgment was any consideration of the most obvious question in the case, namely, whether the promoters were grossly reckless in not investigating further and whether they had a right to promote oil partnerships if they lacked the skill to conduct the most basic analysis of the investments.

On the criminal side of the docket, the most severe sign of public impatience with what it perceives as court malfunctioning has been the mandatory sentencing laws. For a trenchant criticism that mandatory sentencing is inconsistent with the concept of justice as a measured decisionmaking process, and of the act of judging as the exercise of judgment, see NILS CHRISTIE, CRIME CONTROL AS INDUSTRY ch. 8 (1993). One ironic result of mandatory sentencing, beyond its inevitable effect of dramatically slowing down the judicial process (see supra note 36), is that the certain injustice that the law will work in individual cases may shift the area of discretion forward in the criminal justice process from judges to prosecutors. For a detailed study of how this has happened in at least one of two county court systems, see Gary Rivlin, Bitter Harvest, East Bay Express, March 3, 1995, at 1.

It may seem inconsistent to argue that courts should impose strict time limits on civil cases, but to criticize the imposition of unyielding sentences in criminal cases. Yet there is a basic difference. Courts would impose firm discovery and trial time before cases begin, so that lawyers and their clients are on notice about the environment within which they must develop their cases. Mandatory sentences operate after the criminal defendant has already made his or her mistake; there is no room left for corrective action. The bigger problem is that there is little disproportion in requiring all civil cases to meet a one-year to trial schedule; there is extraordinary disproportion, the greatest possible injustice, in sentencing criminal defendants to life sentences if they commit any three felonies, from shoplifting, drug possession, and nonviolent robbery to rape and murder.

as the highly debatable proposition that the United States has a number of lawyers disproportionate to its population and economic activity passes into the myth-laden haze of popular culture, critiques based on supposedly objective analysis, but really the rankest of speculation, keep turning up. For instance, Kevin Phillips' recent fusillade against all sorts of establishments puts the "litigation explosion" in a prominent place in his analysis. Phillips repeatedly cites a 300 billion dollar cost of lawyers, takes the number of lawyers as one of his indices of decline, and makes "Diminishing the Excessive Role of Lawyers, Legalism, and Litigation" one of his ten major points for reform. PHILLIPS, supra note 277, at 46-47, 133-36, 198-99.

Phillips admits that at first blush the 300 billion dollar cost of lawyering "seems absurd" and has "a shoot-from-the-hip sound." Id. at 37, 135. But then he goes right ahead and treats it as serious science by inexplicably pronouncing that "they do furnish some basis for turning the political accusations of 1991-92 into a more serious national debate." Id. at 135. This is some sort of theory of the worst best: Phillips' thinking seems to be that even if an estimate is wholly ungrounded, surely no one would exaggerate too much, so if we discount the numbers a bit they must soon become good enough to use. Phillips thus lets the critics benefit from the same kind of inflation that tort reform critics claim is exercised by plaintiffs' lawyers, who allegedly inflate damages until they salvage a losing case.

Phillips is happy to leave the issue there. He never takes the added steps toward fairness of considering the detailed rebuttal by critics like Marc Galanter, of considering the value of the services that lawyers do provide, or of explaining why the United States could have ever reached its level of economic supremacy if the cost of lawyering was truly such a drag on the rest of the economy. Of course, Phillips does not want to inquire very far below the surface because his book is a polemic. The argument that there are too many lawyers fits neatly into his overall argument that declining empires are overrun by parasitic service providers. See generally id. at 48-51.

There are so many signs of the penetration of caricature into the broader culture that what one cites is almost arbitrary—there are so many choices. Another recent widely distributed effort is Joseph Nocera, Fatal Litigation, FORTUNE, Oct. 16, 1995, at 60.

When Derek Bok talks, lawyers should listen. Bok speaks from within the most secure and established reaches of the profession. As a lawyer and expert on labor law, he knows a great deal about the way labor markets should work; as the former Dean of Harvard Law School, he has held one of the highest positions open to any lawyer, and with the Presidency of Harvard University on his resume, his views are sure to get a wide and respectful ear in many circles.

Bok explained his views concerning the profession's economic position. See BOK, supra note 277. He begins his discussion of lawyers by noting that they were "the object of active suspicion and dislike" in the seventeenth century, a time when legislatures placed strict limits on attorneys' fees and ordered stiff fines for anyone charging above the maximum." Id. at 26-27. Bok traces the egalitarianism that opened the profession in the early 1800s, so that by 1889 there were more lawyers per thousand people than at any time until the 1960s, and then discusses the rise of professional licensing that has restored the economic differentiation of lawyers from the general population. Id. at 28-31.

As the practice of law has grown more complex, it has strayed far from ordinary free market regulation. "Curiously, however, the crowded market for legal services turns out to work quite differently from anything described in an economics textbook." Id. at 139. One classic market problem is that buyers often lack enough information to measure their purchases. "Most potential clients know very few lawyers and have no way of judging their abilities." Id. at 140. One area in which this imbalance tilts the fee bargain is, according to Bok, in contingent-fee arrangements. Here "[m]ost plaintiffs do not know whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take) when they happen to have an extremely
Political criticism is being converted into radical reform. The recent federal procedural amendments are likely to be the least dramatic of the reforms. One can predict that states will follow with other reforms, some of which may be more restrictive, like the limits proposed in Texas on the length and amount of discovery mentioned above.\footnote{300}

Far bigger substantive changes are threatening. An attack on courts and the legal profession was a major part of the \textit{Contract with America}, which was signed by 367 congressional candidates.\footnote{301} Congress overrode President Clinton's veto and passed the first major court-reform

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\textit{high probability of winning.\textsuperscript{\textsuperscript{3}}} Id.
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Even large corporate clients that one would expect to have the repetitive business and the resources to lead to discrimination in purchasing have a hard time regulating their lawyers. One problem is that their demand is inelastic: "\textquote{the amounts [lawyers] charge are typically only a tiny fraction of the annual budget of a medium to large company. They are also very small in relation to the amounts of money at stake in the kinds of big cases in which large elite law firms specialize.}" Id. at 145. It would be hard for corporations to police legal services in any event because

\begin{quote}
[lawyers can keep busy by taking the time to research legal issues a bit more thoroughly or by deciding to interview a few more witnesses in preparing a case. Because these are matters of professional judgment, it will be difficult for clients to protest as long as the work performed remains within reasonable limits.
\end{quote}

\textit{Id. at 146; see also id. at 149.}

Bok finds some hope in more aggressive bargaining by corporate clients as well as in the possibility of flat fee contracts as an improved incentive mechanism. \textit{Id.} at 153. He has been active in lending his name to critics of unrestricted contingent fee arrangements. \textit{See} Stuart Taylor, Jr., \textit{The Best Way to Tackle Contingencies}, \textit{Tex. Law.}, Feb. 20, 1995, at 22, col. 3 (listing Bok as one of several prominent supporters of efforts to require lawyers to solicit early settlement offers and to not extract a contingency if the case then settles prior to discovery).

For one economist's harsher position on professional privilege, including that of the bar, see \textit{Milton Friedman, Capitalism and Freedom} 137 (1982).

\textit{300. See supra note 197. Cases would be divided into those cases with claims below $50,000 and cases with more at stake. Cases where less than $50,000 is at stake would not receive a discovery cutoff until 30 days before trial, but would be limited to no more than six hours of depositions. \textit{Texas Proposed Discovery Rules}, supra note 197, at 1(1)(b)(2). The parties could increase the limit to 10 hours, but not more without court approval. \textit{Id.} In addition, parties would be limited to no more than 15 interrogatories. \textit{Id. 1(1)(b)(3). The rules count subparts of interrogatories in the 15 question limit but exclude document authentication or identification requests. \textit{Id. In cases with more than $50,000 at stake, discovery would be limited to nine months or 30 days before trial, whichever is less, a period that could be increased to 12 months only by agreement. \textit{Id. 1(3)(b)(1). Even in these cases, each side would be entitled to no more than 50 hours of depositions and 30 interrogatory answers. \textit{Id. 1(3)(b)(2)-(3).}}}

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On top of these restrictions, no single deposition's direct or cross-examination could take more than three hours for a fact witness or six hours for an expert, although each side is entitled to one deposition without limit. \textit{Id. 15(2)(a). While these time limits are similar in approach to the recommendations of this Article, the substantive limits on discovery are far more draconian. That the Texas advisory committee, most of whose members are practicing lawyers, decided to limit the amount of discovery as well as the time for depositions bespeaks a great distrust of lawyers' ability to get their job done.}\end{flushright}

\textit{301. \textit{Contract with America}, supra note 1, at 6.}

\textit{http://scholarlycommons.law.hofstra.edu/hlr/vol24/iss4/1}
UNIFORM DISCOVERY TIME LIMITS

proposal reported out of committee, the securities class-action bill, which restricts traditional adversarial rights in securities class actions. Other


One major change the Act accomplishes is that it reduces the lawyer’s ability to become counsel. Rather than merely ruling on challenges to the representative’s adequacy and typicality, the court now has to start a securities class case by appointing a “lead plaintiff.” Id. § 101(a), 109 Stat. at 738-40. The plaintiff who files first has to provide early notice so that other potential plaintiffs are aware of the case at the outset. Id. § 101(a), 109 Stat. at 738. The court adopts a rebuttable presumption that the “most adequate plaintiff” is the person or group that filed a complaint or response to the notice, “has the largest financial interest in the relief sought,” and otherwise satisfies Rule 23. Id. § 101(a), 109 Stat. at 739. The lead plaintiff then appoints counsel. Id. § 101(a), 109 Stat. at 740. Thus, far from the typical situation in which the lawyer and its chosen representative start out knowing they are quite likely to represent the class regardless of the size of their stake, counsel is at risk unless it can persuade the holder of the largest interest to retain it prior to filing.

In other measures designed to reduce lawyers’ ability to construct a class action, the court can bar a plaintiff who has been a lead plaintiff in more than five class actions in the past three years. Id. In addition, the Act bars bonus payments to the representative by limiting recovery to its proportionate share of the award. Id.

Lawyer’s incentives are likely to be reduced by a provision that limits fees to “a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.” Id. It will be some time before courts indicate whether they interpret “reasonable percentage” differently than the lodestar and other formulas they have applied in the past. The formula presumably will delay payment in settlements that create claims funds that are paid only upon application. The Act prohibits the payment of fees from funds created as a result of SEC action. Id. § 103(b), 109 Stat. at 756.

The Act also omits an earlier proposal that the loser pay the winner’s fees and expenses, but it requires that “upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rule of Civil Procedure.” Id. § 101(a), 109 Stat. at 742. The court “shall impose sanctions” upon the attorney or party if there is a violation. Id. As class members generally have nothing to do with the case filings (and class actions would become grossly inefficient if they did), the class “party” will be the class representative. This is by design: the bill requires the representative to certify that it has reviewed and approved the filing. Id. § 101(a), 109 Stat. at 738. Courts no doubt will now face litigation over just how much representatives have to know about the facts and the law before they should approve a complaint. Many parties, including wealthy parties with the largest stake, may be unwilling to serve as class representatives if the court is going to second-guess each of their strategic decisions at the end of the case.

The Act raises a substantial hurdle for plaintiffs. The 1934 Securities Act was amended to require that, in any action based upon a misleading statement or omission, not only shall the facts surrounding the misleading statement be pled with particularity, as under Rule 9(b) of the Federal Rules, but if proof of state of mind is required the complaint “shall,” for each act, “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” Id. § 101(b), 109 Stat. at 747 (emphasis added). Under this standard, discovery will be stayed if a motion to dismiss is filed challenging the pleading’s adequacy. Id. Whatever a “strong inference” may end up meaning, the language gives courts very wide latitude to dismiss cases that turn on knowledge uniquely within the control of corporate defendants without allowing discovery, and before anyone has the facts to determine why inaccurate statements were made.
The safe harbor defense is likely to be an even more important reduction in defendants' duty. The safe harbor reduces the duty of care for predictions. Forward-looking statements include projections of revenues, earnings, plans, or "future economic performance." Id. § 102(a), 109 Stat. at 752. Companies "shall not be liable" for these statements if they identify them as forward-looking and accompany them by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." Id. § 102(a), 109 Stat. at 754. The plaintiff must prove that the speaker had "actual knowledge... that the statement was false or misleading;" or if a company, that it was made by an officer with such knowledge. Id. Apparently even a grossly reckless officer will be entitled to argue to the jury that he or she "did not know" a statement was false.

Other significant reductions in exposure are the removal of securities fraud as a Rico predicate act unless the defendant has been criminally convicted, id. § 107, 109 Stat. at 758 (this provision is not limited to class actions), and a reduction in joint liability. Id. § 201, 109 Stat. at 758-62. Defendants will be jointly liable only for "knowing" securities violations. Id. In other instances the jury is to apportion wrongdoing. Id. The Act does protect plaintiffs against unrecoverable judgments by making the remaining defendants pick up an unrecoverable share. Id.


Class actions were, naturally, one of the objects of attack in Walter Olson's The Litigation Explosion. OLSON, supra note 19, at 57-66. Olson portrays the class action as a lawyer-run enterprise ginned up to profit the profession: "in the class action the client was increasingly shoved off the staff
parts of the *Contract* are working their way through Congress. Similar restrictive proposals are sure to spread to state legislatures as well.

The best single piece of evidence about how much things have changed remains the *Contract with America* itself. The *Contract* talks about courts and lawyers as if they constitute one of this society's most destructive institutions. This political platform is full of talk about altogether, his name alone being used. Finally, under the banner of the private attorney general, lawyers could start waging litigation purely and openly on their own behalf, for ideology, profit or both.” *Id.* at 66.

The *Contract with America* sounds the same theme. It paints the bleakest of pictures on securities class actions. “[C]lass-action lawyers can make decisions that are not in the best interest of the clients without fear of reprisal and take a big chunk of the settlement off the top, [while] shareholders are often exploited.” *Contract with America*, supra note 1, at 150. “Strike suits are money-makers for the lawyers, but such frivolous claims destroy jobs and hurt the economy.” *Id.*

Congress passed the Common Sense Product Liability and Legal Reform Act, which would have capped product liability punitive damages at $250,000, but President Clinton vetoed it in May 1996. John Broder, *Clinton Vetoes Bill to Limit Product Liability Lawsuits*, L.A. TIMES, May 3, 1996, at A1. Though Congress did not override the veto, some version of this bill is near-certain to reappear this session.

While Congress is in the middle of hashing out the proposals in the *Contract with America*, states have begun borrowing the Republican proposals. For instance, look at two of the more populated states, California and Texas. In California, Governor Wilson has submitted a bill that would limit punitive damages to three times actual damages, transfer the power to award punitives to the judge, and require a “reasonable relation” to the type and extent of damage. Reynolds Holding, *Wilson Asks Limits on Lawsuits*, S.F. CHRON., Feb. 25, 1995, at A17, A18. Piling on the measures he hopes will float along on the tide of anti-lawyer and anti-court sentiments, Governor Wilson wants to prevent illegally fired workers from recovering more than one year’s future earnings and to make victims of defective products “prove that the product’s dangers outweigh its benefits, that the maker knew of the dangers and that there was no reasonable alternative to the product’s design.” *Id.* Knowing they are on a cultural roll, the Republicans are clearly going to do all they can to lower business costs with virtually no regard for social costs.

California had two propositions on the ballot that would have sharply changed the nature of the state’s tort practice. Proposition 200 would have adopted a true no-fault automobile insurance system; proposition 202 would have capped contingent fees in quickly settled tort cases. Stuart Taylor, Jr., *California’s Tort Wars*, TEX. LAWYER, Feb. 5, 1996, at 29. None of these measures passed in the Spring 1996 elections, but there is no sign that these issues will disappear anytime soon. See Stephanie Simon, *The Propositions; Local Elections; Margin Leaves Mixed Verdict for Lawyers*, L.A. TIMES, Mar. 28, 1996, at B1. Moreover, Justice Ginsburg recently counted 16 states that have imposed some cap on punitive damages. BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1614 (1996) (Ginsburg, J., joined by Rehnquist, C.J., dissenting).

In Texas, the state senate sent out a bill to the state house of representatives that would limit punitives to twice the economic damages suffered or $200,000, whichever is greater, and require proof of fraud or malice, not just gross negligence. Walt Borges, *Caps on Punitives Lowered in Tort Bill*, TEX. LAWYER., Feb. 20, 1995, at 6. The likeliest prediction is that the *Contract with America* will have a deep and wide impact in the American legal system.

The move is on for procedural reform as well, at least in the state courts in Texas. *See supra* note 197 and accompanying text.
More Americans have heard these charges than anything else about the courts, just as they are likelier to have watched the O.J. Simpson trial than to know how criminal courts process ordinary litigation. The Republican’s distorted picture of reality has become the impetus for reforming the judicial system.306

305. “[O]ur judicial system saps our nation’s productivity and encourages frivolous ‘get-rich-quick’ lawsuits.” CONTRACT WITH AMERICA, supra note 1, at 14. 

“[D]uring the 1960’s and 1970’s, liberals—both members of Congress and members of the bench and bar—declared war on swift and certain punishment.” Id. at 38.

Isn’t it time to clean up the court system? Frivolous lawsuits and outlandish damage rewards [sic] make a mockery of our civil justice system. Americans spend an estimated $300 billion a year in needlessly higher prices for products and services as a result of excessive legal costs. The delays and costs caused by legal abuses put the legal system out of reach for average Americans.

Id. at 143.

As President Bush’s Council on Competitiveness found, this dramatic growth in litigation carries high costs for the American economy: manufacturers withdraw products from the market, discontinue product research, reduce their workforces, and raise their prices.

... In many cases, defendants know that the suit would not stand on its own merits, but agree to settle out of court just to avoid the endless and expensive claim and appeal processes. Such responses merely perpetuate our propensity to sue.

Id. at 144-45.

“[S]ecurities class-action lawsuits] usually involve highly speculative investments in the securities field (less than one percent involve truly fraudulent companies), and it is the attorney, not the shareholder, that benefits from the suit. Since class-action lawyers can make decisions that are not in the best interest of the clients without fear of reprisal and take a big chunk of the settlement off the top, shareholders are often exploited. Strike suits are money-makers for the lawyers, but such frivolous claims destroy jobs and hurt the economy.

Id. at 150.

For instance, the $300 billion estimate of the add-on cost of legal services, were it remotely accurate, makes no effort to determine what portion of those costs are efficiency enhancing measures that improve economic performance. Id. at 143. A growing school of economists traces much of the lead in advanced capitalist societies, including our own, to the sophistication of western legal institutions. Thus, far from being a cause of inefficiency, high legal costs may be an effect and necessary companion of highly complex, efficient free-market transactions.

In a free market economy, consumers and producers should purchase services, either for direct consumption or as factors of production, as long as the added benefit exceeds the added cost. Economists have become increasingly interested in the significance of the facts that more advanced economies purchase large amounts of legal services and that advanced form of contract and property law seem to accompany modern industrial economies. Thus, far from looking simplistically at legal expenses as a cost that inevitably raises the bottom line and lowers profits, they investigate the real question for the profit maximizing firm, namely, whether the added productivity expected from retaining lawyers and using legal forms exceeds the costs.

The current interest in mechanisms of exchange and with them the role of legal institutions seems most tied to Ronald Coase and his emphasis on transactions cost as explaining much about
The Republicans are pushing an aggressive package of reforms to restrict the rights of injured parties: product liability damages limited to three times actual damages, with a $250,000 cap in low-damage cases;
an end to joint liability in products cases; removal of securities fraud as a RICO predicate act (already passed); appointment of trustees for class-action plaintiffs; the English loser-pays attorneys’ fee rule; and a requirement that securities plaintiffs show reliance on intentionally misrepresented information (also passed). The assumption behind these reforms is that the courts and lawyers are incapable of managing their own business, so Congress needs to reduce the substantive rights of litigants to compensate for the courts’ deficiencies. This is what is at stake in the court reform debate.

In addition to the Private Securities Reform Act, both houses of Congress have passed a bill capping punitive damages, the House in all federal and state civil cases, the Senate in all products liability cases. Though Congress passed a compromise bill, it was unable to override President Clinton’s veto; it is a safe bet, however, that another version will emerge from the current session. More than half the states impose limits on punitive damages, product liability cases, or joint and several liability.

One final, telling sign of the depth of disenchantment is how far criticism has burrowed into the judiciary. If the writing is not on the wall with the limits in the Federal Rules and recent state and federal legislation, consider the suggestions made by the Second Circuit’s well-respected Judge Newman. Newman advocates that courts should move away from ensuring fairness in the individual case, long the touchstone of American justice. He would shift the focus to whether society can afford to remedy the suffering of groups, not just the suffering of those who bring suit.

307. CONTRACT WITH AMERICA, supra note 1, at 143-55.
309. Martha Middleton, A Changing Landscape: As Congress Struggles to Rewrite the Nation’s Tort Laws, the States Already May Have Done the Job, 81 A.B.A. J., Aug. 1995, at 59.
310. Consider as an example, the Hawaiian procedures that John Barkai and Gene Kassebaum describe in their 1989 article. Hawaii decided to require court-ordered arbitration in all tort cases with amounts in controversy up to $150,000, a relatively high cap for such programs. Barkai & Kassebaum, supra note 8, at 83-84. Arbitrators could limit or exclude discovery; parties could not conduct any discovery without the consent of the arbitrators, and arbitrators were encouraged to limit discovery. Id. at 95. While parties were free to appeal the arbitrators’ award, there was a catch: they had to receive at least fifteen percent more than the arbitration award or they were subject to sanctions. Id. at 98.
311. Newman, supra note 8, at 1648-54. Questions of courts enforcing a justice beyond the cases before them immediately raise the question of whose justice. Will it be that of judges whose earnings put them in the top percentiles of the national labor force, maybe with a sprinkling of suggestions from academics who are almost as secure from economic insecurity? Will it be a justice
Newman would confine pleadings to "assertions of the essential facts" (a standard narrower than current notice pleading). He "doubts that discovery should be routinely permitted" and if discovery is "needed," he "doubts depositions should be permitted beyond two or three, limited to one hour, [and] interrogatories . . . beyond five or ten, and that any but precisely identified documents need be searched for and produced." This very respected jurist would shrink state-court jury selection processes from anything as "elaborate" as today's routines; make lawyers examine witnesses using narrative techniques rather than the standard question-and-answer format in many instances; restrict the right to introduce trial witnesses ("juries could decide some disputes simply from the contending claims of the lawyers"); and even abandon appeals of right in some civil cases. And, as a tip of the hat to fairness for the many tort victims who do not make it to the courtroom (who receive existentially unfair treatment compared to those who do and prevail), Newman suggests scrapping recoveries for pain and suffering.

Judge Newman is only one of many critics on the bench. Judges designed by a bench that remains primarily white, male, rich, and older and more educated than the population at large? By John Rawls? If courts are to rip cases from their rootedness and common-law grounding in concrete controversies and use them instead to define some unspecified version of the societal good, it becomes time to question whether courts should be making these decisions, or if instead, there is a greater chance of fair decisions if issues once considered to be judicial are bused next door to the legislature.

Apparently because court outcomes are not guaranteed to be fair, Newman asks courts to think twice about "time-consuming, costly procedures" that make only a marginal contribution to fairness. Id. at 1648.

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312. Id. at 1650.
313. Id. at 1651.
314. Id.
315. Id. at 1653-54. This suggestion would be more manageable, perhaps, if Newman suggested collecting funds from tortfeasors in such cases, and then distributing them to a wider group of injured, whether "before" the court or not.
316. Here is the opinion of Judge William Schwarzer, the judge perhaps most influential in recent judicial reform:

Fifty years [after enacting the Federal Rules], that vision has become clouded and the framers' purpose is largely unfulfilled. The staggering increase in the volume and complexity of cases has thrust case management on judges and has involved them deeply in controlling the scope and pace of litigation. Discovery, originally conceived as the servant of the litigants to assist them in reaching a just outcome, now tends to dominate the litigation and inflict disproportionate costs and burdens. Often it is conducted so aggressively and abusively that it frustrates the objectives of the Federal Rules. It has been said that now lawyers must try their cases twice, once before trial and once at trial. Schwarzer, supra note 204, at 703. For a smattering of other pessimistic judicial views, see infra note 320.
suffer crowded dockets day after day while being faced with lawyers of mixed quality and possessing a bird’s eye view of the waste many lawyers create. They see sloppy work too often rewarded with great wealth. Many no longer can tolerate the antics they observe. Even judges who generally defend the individual system of adjudication, like Judge Jack Weinstein, see the need for less protection for individual rights in certain large-scale class actions. It is obvious that many

317. Resnik lists several of these factors as reasons why judges have lost faith in the broad promise of the Federal Rules. Resnik, supra note 2, at 523-24.

318. Judges’ interests diverge in many ways from the practicing bar’s. Unlike their peers in private practice, judges do not earn more money for enduring a larger docket. Their incentive is to worry about caseloads: most judges have access to data that rank them and their fellow judges by case disposition. The stress of judging surely mounts as the backlog of undisposed cases grows. Thus, one would expect judges to favor many reforms that reduce court dockets. It is only natural that support for reform should shift to exasperation and anger as judges see the number of far less competent lawyers, even beginning lawyers, who use their courts to earn incomes many times the judge’s. It is not surprising that judges have long played a central role in the movement for more active judicial management and other measures to seize control back from the parties who come before them.

319. Judge Weinstein believes that courts need new rules for handling mass tort litigation:
Faced with huge numbers of claimants and limited funds, we can no longer afford to grant every toxic tort plaintiff the option of going to trial. Nor can we continue to allow the plaintiffs’ attorneys unsupervised control of cases, with the run-up of large expenses for essentially redundant activities and traditional thirty-three to fifty percent fees under individual contingency fee contracts.

... If mass tort litigation is allowed to run its course in the tort system the result will be huge discrepancies in the awards received by similarly situated plaintiffs, backlogged courts, lengthy delays in compensation of victims, and enormous transactions costs. The end product will undoubtedly be the bankruptcy of many defendants and the depletion of available insurance and other assets well before all claimants are compensated. There are strong reasons in this situation to treat the entire problem—not just that between an individual defendant and its claimants—as a bankruptcy action or as a Rule 23(b)(1)(B) limited fund class.


Judges Newman and Weinstein are far from the only judges filled with criticism. E.g., Easterbrook, supra note 82. Also, consider the stature and number of prominent judges who were willing to let their names grace the back of a book as inaccurate and misleading as Walter Olson’s The Litigation Explosion. Some comments from those judges are as follows:


What Adam Smith was to free marketeers and Karl Marx was to revolutionaries, Walter Olson is to court reforms. The Litigation Explosion is a superb work of advocacy that catalogues every mistake the court system has made in the last fifty years. This book is the entering wedge for a serious reassessment of civil courts.
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critics operating within the legal system—judges, clients, and some lawyers—are ready to restrict the scope of case preparation and of trial.

Richard Neely, Chief Justice of West Virginia’s Supreme Court, supra note 19, jacket.

It is an extraordinary political event that such respected judges would let their names grace a book that is laden with the worst of junk science—ad hominem attacks, biased examples, argument without demonstration. Cf. Resnik, supra note 2, at 556 (“Repeatedly these days, prominent jurists (including members of the Supreme Court) say that litigation and lawyers are bad.”). And more troubling, and perhaps reflecting the end-point of Newman’s logic, is Resnik’s comment that she has “often heard from federal judges that they don’t have the time to spend on a small claim—that it’s not ‘worth it,’ that their time (and they) are too important for prisoners, social security claimants, and other rights-seekers under a variety of federal statutory schemes.” Resnik, supra note 297, at 2228 (citations omitted). Of added interest are Marc Galanter’s quotes of the lament by Justice Scalia about the insignificance of many federal cases and the vintage complaint by Judge Wyzanski to the same effect. Galanter, supra note 3, at 921-22, 928.

Even judges who disagree acknowledge the pressure. “Will litigation in the decade immediately ahead of us and in the years beyond become a twentieth century Roman circus with Rambo litigators as the gladiators and a Terminator as judge?” Robert E. Keeton, Times Are Changing for Trials in Court, 21 FLA. ST. U. L. REV. 1, 15 (1993). “The heavy caseload compared with limited resources tells the judge urgently, ‘just terminate—don’t worry so long and so much about terminating justly.’” Id.

While there are almost thirty thousand judges in the United States and it is a mistake to characterize their views by citing a handful of judges, this is not the lunatic fringe. These are judges at the top of their profession, precisely the jurists who should be most interested in debunking the distortions contained in Olson’s work.

320. Clients may be just as fed up as judges. Even conservative clients seem willing to demand radical changes in billing if it can spur their counsel to better performance. One sign of this trend is the effort of large institutional clients to shift to fixed-fee billings. Michael France, Taking Lawyers To Task, CAL. LAW., June 1994, at 35. The ABA’s Section of Litigation has gotten involved in an effort to establish “uniform” task categories and to budget each task separately. Jasmina A. Theodore, Section Leads Way Toward National Task-Based Billing Standard, LITIG. NEWS, Feb.-Mar. 1995, at 1.

Nor would one ever have heard the following language a decade ago from one as fond of the ups and downs of litigation as Steve Susman. “Hopefully, we all sense that something is amiss; that the curtain is about to fall; that we are in danger of extinction unless something drastically is done now and by us.” Susman, supra note 276, at 18. And, for more in the same vein, he continues, “[m]y thesis is that if we do not act now, we will not like the solutions that others devise for the problems.” Id.

Not surprisingly, the profession has begun to grow more aware of and worried about competition from outside service providers (and client in-house substitution) than at any time in the recent past. E.g., Dan Trigoboff, Competition from Outside the Profession, 81 A.B.A. J., April 1995, at 18; Claudia H. Deutsch, For Law Firms, the Shakeout in the Business World Has Finally Hit, N.Y. TIMES, Feb. 17, 1995, at B17.

321. Many of the trends away from litigation, described in the articles cited in footnote 296 supra, are byproducts of a decade of debate and reform by managerial judges. A common favorite by judges who have to pass on large attorneys’ fee awards with frequency is to impose the English loser-pays rule. Easterbrook, supra note 82, at 645-47. Other critics have proposed even more draconian systems. See, for instance, the “two-tier” trial system advanced by Albert Alschuler, in which parties would be forced to try their case to a “first instance” judge on very limited discovery and in what might be very summary fashion, with the loser paying attorneys’ fees, before deciding...
Making the courts run on time will not end these attacks upon the adversary model. Too many of the criticisms, like those aimed at punitive damages, class actions, and such laws as the civil rights and product liability statutes, are designed to reallocate power and wealth, not really to improve the way courts work. Improvements in case processing will not still those critics. But making courts run efficiently will remove one basis of criticism. The opportunity to reform is an opportunity to set an example by having attorneys resume their responsibilities and act deliberately to improve the quality of justice. The effort should push lawyers into the broader court-reform (itself a dubious euphemism) debate. In addition, time limits can remove one area where lawyers and judges should be defensive about their failure to do their job.

VI. JUSTICE MEANS KEEPING COURTS OPEN FOR CASES THAT TRULY NEED TO BE TRIED

Too often we forget that justice must be the heart of the matter. Our fidelity should not run solely to procedures that are familiar or to laws of easy and settled interpretation. We know that we are not delivering justice quickly enough or cheaply enough. Lawyers and judges should not rest until the courts regain their proper functions.

Pretrial time limits are a reform whose time has come. Common time limits are threaded through each step of case preparation. The Federal Rules even require some overall time limit for every case. Yet the courts have avoided the most logical, direct remedy to their time problem, which is a uniform limit for overall trial preparation. Other experiments, including summary jury trials, could also bear fruit in some

whether to risk more costs by appealing and trying to go on for a second trial. Alschuler, supra note 88, at 1845-57. Farfetched as his system may sound, its insistence on moving ahead to an adjudication after only limited discovery, and potential sanctions for those wanting more than the first opinion, sounds very much like parts of the Hawaiian experiment discussed previously. See Barkai & Kassebaum, supra note 8.
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circumstances. But my proposals, simple as they are, would be a
dramatic step forward.

Court-enforced discovery, early trial dates, and prompt rulings on
dispositive motions would work major changes in the way lawyers do
business. In just a few years, these changes could remove the deadwood
from today’s dockets. Cases really can go to trial within a year of filing,
discovery costs can fall, and courts can restore a reasonable balance
between the cost of litigating and what is at stake.

Few question that delivering prompt and affordable justice is
essential for a true system of justice. The centrality of prompt adjudica-
tion to the American judicial system is acknowledged in the first rule of
the Federal Rules. Rule 1 exhorts lawyers “to secure the just, speedy, and
inexpensive determination of every action.” Most state rules begin
with similar statements of purpose. These rules remind us that a system
of justice is broken when parties cannot get to trial at reasonable cost and
speed.

It is important to return to the starting point. Delay is an institution-
al problem that can destroy the administration of justice, but it is a
problem that can be cured. Delay is not inherent in our court system. Nor
are attitudes of delay incurable. The effectiveness of those jurisdictions
and those judges who do move their dockets proves that. The solution is
not that hard-working judges must work that much harder. For most
judges, that is not possible. Judges work long hours in great isolation for

322. One procedure that seems likely to bear only sour fruit is the immediate pretrial statement
that some judges demand in racketeering lawsuits. These procedures are a stubborn effort to thwart
the will of Congress and the word of the Supreme Court.

State and federal judge may feel that it is not wise policy to have a federal racketeering law.
Most state judges surely feel that RICO should not fall within state court jurisdiction. But Congress
and the United States Supreme Court have disagreed. Every time the lower courts have come up with
a reason to restrict the racketeering laws—by conjuring up the requirement of a link with organized
crime even though that language was expressly rejected in the legislative history, by likening
racketeering injury to antitrust injury, by requiring a prior criminal conviction on the predicate acts
even though Congress said nothing of the sort—the Supreme Court has rejected the restriction.

To require a summary judgment-like description of a case before discovery has even begun
in racketeering cases, but not other cases, is an effort to yet again drive RICO cases from the courts.
RICO is the law. It deserves equal protection from the courts, not discriminatory treatment from
conservative judges. Courts can provide this fair protection by applying standard rules of
interpretation to RICO in the same way as to all other laws.

323. FED. R. CIV. P. 1. To this day I cannot read Rule 1 without remembering Bernie Ward,
who taught me civil procedure, admonishing our class not to forget that Rule 1 is far and away the
most important rule of civil procedure and that it alone could decide many discovery disputes fairly.
Every year of practice has persuaded me how much wisdom is built into Ward’s observation. It
seems a fitting thought to offer as a last footnote.
a lot less than they would earn in private practice. The judiciary is an extremely dedicated workforce.

Courts, judges, and lawyers must work under a different constraint. Procedural rules need a uniform, fixed limit to discovery. They need strict trial schedules. The rules must put the burden of completing discovery in a prompt, timely manner on lawyers and their clients where it belongs. Judges need clear rules that compel cooperation in achieving the common goal of fair and prompt adjudication, while the court system needs structural measures to make sure judges do their job. A deliberate focus on the timing of discovery, as well as its substance, and a mechanism to force the parties to respond to court-imposed deadlines and to compel courts to impose deadlines are steps that can restore the system of justice to which every lawyer and every judge must aspire.