

WIDENING THE LENS: REFOCUSING THE LITIGATION COST-AND-DELAY NARRATIVE

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INTRODUCTION

It is now more than sixty-three years since I was introduced to the wonderful world of civil procedure by my mentor, friend, and colleague, Professor (later Justice) Benjamin Kaplan of the Harvard Law School.¹ Ever since then, I have been involved with the subject and matters related to it in various capacities. Throughout the years, I have always respected and admired judges and the yeoman efforts they undertake to make the courts function. I always will remember a talk many, many years ago by a senior and noted procedure academic who referred to judges as a thin protective line that separates civilization from the jungle.

Judge Victor Marrero’s illuminating 2016 Article,² along with his follow-up piece in this special issue of the *Cardozo Law Review*,³ reaffirms that image of the bench for me. He is in an ideal position to provide commentary and perspective on the contemporary federal litigation landscape, having served as a district judge for almost two decades. Sitting in one of our country’s largest and most active districts, Judge Marrero has experienced the full gamut of civil cases. For those of us on the outside looking in, including practicing lawyers and (especially) cloistered academics, the articles are a bit like “inside baseball.” He has provided a unique panorama rarely seen in the literature: a portrayal of lawyer behavior and its relation to the costs and delays of federal civil litigation by someone qualified to speak about it. What has come to be called the so-called cost-and-delay narrative has usually been the province of competing interest groups; Judge Marrero allows us to look through a lens held by a dispassionate and distinguished commentator. He is to be commended for giving us a fresh viewpoint and providing the impetus for the interesting commentaries that accompany this one. The breadth of these contributions illustrates the far-reaching importance and implications of the subject.

¹ My debt to Ben is expressed in Arthur R. Miller, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1354, 1354–57 (2011).

² Victor Marrero, *The Cost of Rules, the Rule of Costs*, 37 CARDOZO L. REV. 1599 (2016).

³ See Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of Twombly/Iqbal*, 40 CARDOZO L. REV. 1 (2018).

No one can deny that many aspects of litigation today are expensive and time-consuming or that lawyers are at least partially to blame for that; some lawyers have never met a motion they don't like to make, while others insist on leaving no stone unturned in discovery. Both behaviors are often marginally useful or useless or toe the line of frivolity. This hyperactivity increases costs and delays in the resolution of cases, thereby squandering judicial and client resources in a manner that Judge Marrero rightly laments. He would like to curtail what he views as practices that are too trigger-happy, exemplified by many unnecessary motions and unproductive discovery that result in waste and inefficiency for everyone.⁴

Lawyers are the focal point of the Judge's Articles. But lawyers are not the only players on the litigation field, and I believe the dialogue should go beyond their behavior. To have a clearer picture of the cost-and-delay narrative, a wide-angle perspective rather than a telephoto view is necessary. What follows is an attempt to chronicle some of the legislative, judicial, and rulemaking procedural developments of the past half-century, as well as the influences of our complicated federalism. These are the tools that practicing lawyers use; I believe these developments are, at least in part, the by-products of the narrative and have contributed to the problem of unnecessary cost and delay. I caution the reader that what I have written is impressionistic at points and personal (with a few asides tucked into parentheses).

I. COST AND DELAY: PHENOMENON OR PHANTOM?

Judge Marrero paints a rather unflattering picture of the practicing bar's behavior, describing an individualistic climate that has left unfulfilled the "full promise of the Federal Rules [of Civil Procedure] as it relates to the efficiency and economy of justice."⁵ At its core, the Judge's account is about disparate resources, incentives, and motivations. To stay afloat in an "economic arms race," he believes some law firms are pursuing their own bottom lines at the expense of their clients' interests.⁶ Judges, in his view, apparently are left to clean up the mess, deploying limited systemic resources to resolve auxiliary disputes that are not worth the time devoted to them.⁷ Behind Judge Marrero's "functional approach"⁸ is a problem some think is insurmountable: litigation costs too much and takes too long.

⁴ Marrero, *Cost of Rules*, *supra* note 2, at 1639–40; *see, e.g.*, Marrero, *Mission to Dismiss*, *supra* note 3, at 3.

⁵ Marrero, *Cost of Rules*, *supra* note 2, at 1602.

⁶ *Id.* at 1619.

⁷ *Id.* at 1642.

⁸ *Id.* at 1635.

The pattern and history of judicial opinions, legislation, and rule changes in the last few decades reflect the view, at least among those who dominate these processes, that litigation suffers from these defects. The summary judgment trilogy of 1986,⁹ the enactment of the Private Securities Litigation Reform Act of 1995,¹⁰ the heightened pleading standard established in 2007 and extended in 2009,¹¹ together with successive amendments to the Federal Rules cabinining discovery, most recently in 2015,¹² have been motivated in part by the narrative—a concern with efficiency—and promote early case disposition. Each of these and other changes seem to leave, in their wake, additional demands for litigation containment.¹³ Almost like clockwork, once a decade, a conference is convened to tackle some aspect of litigation cost-and-delay.

That costs are rising seems undeniable. For example, outside legal fees for Fortune 200 companies nearly doubled from 2000 to 2008.¹⁴ Opinion surveys of practitioners demonstrate a widely held view that litigation is too expensive.¹⁵ As for delay, the median time from filing to trial in federal civil cases that are not otherwise disposed of has ballooned from 15 months in 1992 to 26.3 months in 2018.¹⁶ As the overall number of cases commenced has increased, the percentage of them that last three years or more has increased from 10.4% in 1990 to 14.7% in 2016.¹⁷ With statistics like these it is not surprising that the

⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see also discussion *infra* notes 118–29 (summary judgment).

¹⁰ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

¹¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). See discussion *infra* notes 76–117 (motions to dismiss).

¹² FED. R. CIV. P. 26(b). See generally Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016).

¹³ For an example, see the proposed Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017), which, at the time of this writing, has passed the House of Representatives and is pending in the Senate.

¹⁴ See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010) (citing LAWYERS FOR CIVIL JUSTICE, CIVIL JUSTICE REFORM GRP. & U.S. CHAMBER INST. FOR LEGAL REFORM, LITIGATION COST SURVEY OF MAJOR COMPANIES app. 1, at 2–3, 7 fig.3 (2010)).

¹⁵ See Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1101–02 (2012) (citing THE AM. COLL. OF TRIAL LAWYERS ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 1, at 2 (2009)).

¹⁶ Compare ADMIN. OFFICE OF U.S. COURTS, UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE (2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2018.pdf [<https://perma.cc/TL22-WQCA>], with ADMIN. OFFICE OF U.S. COURTS, UNITED STATES DISTRICT COURTS—NATIONAL JUDICIAL CASELOAD PROFILE (1997), http://www.uscourts.gov/sites/default/files/statistics_import_dir/District_FCMS_Sep_1997.pdf [<https://perma.cc/XU8D-AKAD>].

¹⁷ See ADMIN. OFFICE OF U.S. COURTS, TABLE 4.11: U.S. DISTRICT COURTS—CIVIL CASES PENDING BY LENGTH OF TIME PENDING, DURING THE 12-MONTH PERIODS ENDING JUNE 30, 1990, AND SEPTEMBER 30, 1995 THROUGH 2016 (2016), <http://www.uscourts.gov/sites/default/>

cost-and-delay narrative remains strong, and correspondingly so has the clamor for action targeting what is perceived as the root cause—a supposed epidemic of abusive, frivolous lawsuits and bloated discovery. The narrative has a defense-side orientation.

None of this is news. As Judge Marrero himself notes, the central premise of his criticism has deep historical roots.¹⁸ In fact, the cost-and-delay narrative is longstanding and ubiquitous.¹⁹ In recent times, those pressuring to change the American civil justice system have sought to remedy the expense and slowness of litigation at least since the 1960s, when the Federal Rules Advisory Committee of the Judicial Conference of the United States (the Advisory Committee) funded the Columbia Law School’s Project for Effective Justice (the Columbia Project) to research the costs associated with discovery.²⁰ The Columbia Project concluded that discovery costs were proportional to the stakes of a given case (as they seem to be today), and recommended no significant changes to the Federal Rules; and none were made.²¹ Nonetheless, when Chief Justice Warren Burger sponsored the 1976 Pound Conference to combat what he termed the “popular dissatisfaction” with the legal system, its primary focus was to make litigation faster and cheaper.²² The Chief Justice seemed to equate the pursuit of justice with the pursuit of efficiency: in short, justice was worth pursuing if doing so was quick and inexpensive.

That focus has continued. The rulemaking process of the 1970s and 1980s was similarly preoccupied with pretrial cost and delay.²³ When I

files/data_tables/jff_4.11_0930.2016.pdf [https://perma.cc/3EJN-BR9M].

¹⁸ See, e.g., Marrero, *Cost of Rules*, *supra* note 2, at 1603–04 (quoting Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 986 (2003)); see also Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 87, 89 (1921) (noting that in the third millennium before Christ people were complaining about the inefficiency of the legal process). See generally CHARLES DICKENS, *BLEAK HOUSE* (George Ford & Sylvere Monod eds., Modern Library 1985) (1853) (the author focused his social commentary on the long-running litigation in *Jarndyce v. Jarndyce*, which concluded only after the lawyers’ fees had consumed all of the money in the estate in litigation).

¹⁹ See, e.g., Miller, *Pretrial Rush to Judgment*, *supra* note 18, at 986 (noting that complaints about cost and delay are “bringing together a coalition of politicians, lawmakers, business people, and scholars that often bridges traditional [political] lines . . .”). The political and judicial history of the pressures to change the litigation scene are discussed in STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (2017); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

²⁰ See WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 41–43 (1968); see also Reda, *supra* note 15, at 1091 n.17.

²¹ FED. R. CIV. P. 26 advisory committee’s notes (1970).

²² THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 6 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter THE POUND CONFERENCE].

²³ See Reda, *supra* note 15, at 1094–95. Proposals for discovery changes continued in the same vein. See, e.g., GRIFFIN B. BELL, WILLIAM H. ERICKSON, JANE L. FRANK, FRANCIS R. KIRKHAM, WADE H. MCCREE, MAURICE ROSENBERG, WALTER V. SCHAEFER, A. LEO LEVIN &

was the Reporter to the Advisory Committee during that period, its work product, which became the rule amendments of 1983, attempted to address this concern by trying to improve the pretrial process.²⁴ That continued when I transitioned to Committee membership. However, as I have mentioned in previous writings, time—along with the increasing sophistication of empirical research—has cast doubt on the veracity of the narrative.²⁵

The Civil Justice Reform Act of 1990²⁶ was the product of a similar anti-litigation climate; it resulted from “a national discussion focused on a conception of the court system as exorbitantly expensive, slow, and, accordingly, the site of rampant abuse of justice.”²⁷ The Act’s legislative history identified three foundational goals of the Federal Rules—justice, speed, and affordability—but only addressed two: cost and delay.²⁸ In a vein similar to that of the Pound Conference, the Civil Justice Reform Act equated speed and economy with justice.²⁹ The proof of the connection is in the pudding: the Pound Conference proposed greater use of arbitration and cheaper methods of dispute resolution for smaller claims with no right to an appeal;³⁰ the statute required each federal district to develop an “expense and delay reduction plan.”³¹ The common thread seems to be a belief that litigation is inherently negative. Perhaps telling is Chief Justice Burger’s presentation after the Pound Conference, which praised Japan and its proclivity for resolving disputes privately, without litigation and its attendant costs.³² The dispute resolution system to be extolled as a model, therefore, is the one that litigates less.

In 2009, in preparation for the last significant conference on the

WANTLAND L. SANDEL, JR., AM. BAR ASS’N, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE (1976), reprinted in 74 F.R.D. 159, 191 (1976).

²⁴ The amendments focused on trying to upgrade litigation behavior (Rule 11), formally recognizing and promoting judicial management (Rule 16), and limiting certain types of unnecessary discovery (Rule 26). See ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 19–36 (Fed. Judicial Ctr. Jan. 20, 1984).

²⁵ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 61–71 (2010); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 354–55 (2013).

²⁶ Pub. L. 101-650, §§ 101–06, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–78).

²⁷ See Reda, *supra* note 15, at 1094.

²⁸ See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 390 n.46 (1992).

²⁹ See *id.* (“[B]y inference, it must be assumed that Congress equated reducing cost and delay with achieving justice.”); Reda, *supra* note 15, at 1092.

³⁰ See Reda, *supra* note 15, at 1093 (citing THE POUND CONFERENCE, *supra* note 22, at 33).

³¹ Civil Justice Reform Act, 28 U.S.C. § 471 (1990).

³² THE POUND CONFERENCE, *supra* note 22, at 33. The Chief Justice’s praise, unfortunately, ignored the enormous societal differences between the United States and Japan as well as the fact that dispute resolution methods exist in the latter society that do not in the former. For a discussion of the Japanese tracking system, see *infra* notes 211–30

subject, which was sponsored by the Federal Rules Advisory Committee and held at Duke Law School, the Federal Judicial Center conducted an empirical study of the costs of discovery. The results belied the narrative. The median total cost of litigation has not outpaced inflation.³³ Tellingly, discovery costs as a percentage of total litigation costs were less than what survey respondents (and the Conference organizers, I suspect) thought they would be.³⁴ The study identified a number of factors that influenced higher litigation costs, the primary one being the case's monetary stakes.³⁵ As a percentage of the stakes, the median costs of discovery were 1.6% for plaintiffs and 3.3% for defendants.³⁶ The narrative and its focus on "bloated" discovery presents a picture of costs that far exceeds anything justified by the existing empirical studies.

Discovery, the supposed greatest expense factor in litigation, actually is non-existent or quite limited in most cases. High costs characterize a relatively thin band of complex cases, although admittedly a greater number of complex lawsuits have appeared in the last half century. They are complex in terms of their dimension, the difficulty of the issues, and the number of parties and claims—all perfect candidates for extensive discovery.³⁷ The expanded aggregation of related cases, most commonly in the form of class actions and multidistrict consolidations for pretrial purposes under Section 1407 of the Judicial Code,³⁸ has been a major factor in this growth of complex cases. However, in part, this simply might be a reflection of the fact that our society itself continues to grow more complex, especially in terms of the expansion of substantive law and the increased sophistication of various disciplines such as technology, economics, and financial matters. And, in truth, everything has become more expensive (except the Staten Island ferry, which is now free).

The increase in litigation costs is not unique, nor is it out of step with other costs in the legal field or society at large. When I was a clueless 1L at Harvard Law School in 1955, my tuition was \$600 (and \$700 when I was a 2L), and my first year annual attorney's salary at Cleary, Gottlieb, Friendly & Hamilton was \$5,500. Today, the median

³³ EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009); *see also* Lee & Willging, *supra* note 14.

³⁴ *See* Reda, *supra* note 15, at 1107.

³⁵ For a detailed analysis of the best predictor of litigation costs, *see* Lee & Willging, *supra* note 14, at 771–73.

³⁶ *See* LEE & WILLGING, PRELIMINARY REPORT, *supra* note 33, at 2. The study also reported that the median cost to plaintiffs was \$15,000 and \$20,000 for defendants. At the 95% of cases mark, however, the figures became \$128,000 and \$300,000. *Id.* The study is discussed at length in Reda, *supra* note 15, at 1103–11.

³⁷ For a brief discussion of the growth of complexity of modern legal practice, *see* Miller, *Deformation of Federal Procedure*, *supra* note 25, at 290–92.

³⁸ 28 U.S.C. § 1407 (2012).

starting salary at most firms of 500 or more attorneys has risen from \$70,000 in 1990 to as high as \$190,000 in New York City.³⁹ The average private law school tuition has escalated from \$7,562 in 1985 to \$40,634 in 2012 (at many law schools, tuition and fees are now well above \$60,000).⁴⁰

Although it is possible that these increases are caused by (or cause) higher litigation costs, when placed alongside other rising costs in society, they hardly seem unique. The average annual cost of a year of higher education at a four-year public or private institution, only \$5,504 in 1986, more than quadrupled to \$26,120 in 2016.⁴¹ The median costs of medical school have ballooned from a little over \$1,000 in 1960 to \$55,295 in 2018.⁴² National healthcare costs per capita have increased from \$146 in 1960 to \$10,348 in 2016, which constitutes a rise from 5% of GDP to 17.9%.⁴³ Riding the New York City subway cost a nickel in my youth and \$0.15 in 1953, but today it costs \$2.75.⁴⁴ When viewed

³⁹ See Staci Zaretsky, *Salary Wars Scorecard: Which Firms Have Announced Raises and Bonuses?*, ABOVE L. (June 5, 2018, 1:46 PM), <https://abovethelaw.com/2018/06/salary-wars-scorecard-which-firms-have-announced-raises-2018> [https://perma.cc/D7FR-SNE4]; see also Kathryn Rubino, *Mega Law Firm Finally Steps Up with Summer Bonuses*, ABOVE L. (July 6, 2018, 4:03 PM), <https://abovethelaw.com/2018/07/mega-law-firm-finally-steps-up-with-summer-bonuses> [https://perma.cc/7BRR-PTHH]. *Salary Trends—A 15-Year Overview*, NAT'L ASS'N FOR LAW PLACEMENT (July 2005), <https://www.nalp.org/2005julsalarytrends> [https://perma.cc/F4F5-KEYR]. Year-end bonuses can bring compensation to \$200,000 or above. See Joe Patrice, *Associate Bonus Watch: Cravath Announces Its 2017 Associate Bonuses!*, ABOVE L. (Nov. 27, 2017, 3:29 PM), <https://abovethelaw.com/2017/11/associate-bonus-watch-cravath-announces-its-2017-associate-bonuses> [https://perma.cc/6GMB-XNYH].

⁴⁰ See *Law School Tuition 1985–2012*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lstuition.authcheckdam.pdf [https://perma.cc/3KJA-MGPN] (last visited Sept. 15, 2018); *School of Law (J.D. Program) 2017–2018*, N.Y.U., <https://www.nyu.edu/students/student-information-and-resources/bills-payments-and-refunds/tuition-and-fee-rates/2017-2018/school-of-law--j-d-program--2017-2018.html> [https://perma.cc/AVE5-FASG] (tuition and fees of \$66,422).

⁴¹ See *Tuition Costs of Colleges and Universities*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=76> [https://perma.cc/NT9X-DNQ4] (last visited June 19, 2018); see also Briana Boyington, *See 20 Years of Tuition Growth at National Universities*, US NEWS (Sept. 13, 2018, 10:03 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities>.

⁴² See Paul Jolly, *DataWatch: Medical Education in the United States, 1960–1987*, 7 HEALTH AFF., supp., 1988, at 144–57; *Tuition and Student Fees for First-Year Students Summary Statistics for Academic Years 2012–2013 through 2017–2018*, ASS'N OF AM. MED. COLLS., <https://www.aamc.org/data/tuitionandstudentfees> [https://perma.cc/S7XQ-FFD5] (last visited Sept. 15, 2018). New York University recently stunningly announced that no tuition would be charged by its Medical School for current and future students. See David W. Chen, *Surprise Gift: Free Tuition for All N.Y.U. Medical Students*, N.Y. TIMES, Aug. 16, 2018, <https://www.nytimes.com/2018/08/16/nyregion/nyu-free-tuition-medical-school.html>; Melissa Korn, *NYU Makes Tuition Free for All Medical Students*, WALL STREET J., Aug. 16, 2018, <https://www.wsj.com/articles/nyu-offers-full-tuition-scholarships-for-all-medical-students-1534433082>.

⁴³ See *NHE Summary Including Share of GDP, CY 1960–2016*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html> [https://perma.cc/VJ8Z-DPB9] (last updated Jan. 8, 2018, 11:17 AM).

⁴⁴ See *Fares & MetroCard*, METRO. TRANSIT AUTH., <http://web.mta.info/metrocard/mcgtreng.htm> [https://perma.cc/3P3T-S5WA] (last visited Sept. 15, 2018). *New York City*

from this wider perspective, the increase in litigation costs is not as striking as the narrative would have one believe.

The persistence of the cost-and-delay narrative is a bit of a mystery because it seems contradicted by studies dating back to the 1960s claiming otherwise.⁴⁵ But it is sustained in the popular mind by the legal horror stories occasionally propagated in the media—some real, some imaginary—with the running theme being the supposed overlitigiousness in American society, an alleged litigation crisis and its effect on business, and ambulance-chasing lawyers.⁴⁶ Defendants and conservative political forces seeking to constrain litigation, especially discovery, are happy to join in the clamor.⁴⁷ However, as Professor Danya Reda notes, these supposed characteristics of our system, litigiousness, high costs and delays, and avaricious professionals can only be measured by normative standards.⁴⁸ Other countries spend less, their people sue less, and have fewer lawyers, but their legal systems are structured differently to reflect their societal norms, especially regarding avenues available for dispute resolution that do not (or barely) exist in the United States, such as through social and cultural entities, family structures, internal company procedures, and community organizations.⁴⁹

Despite agitation for what some call “reform” without any supporting empirical evidence, the truth may be that the legal system is functioning as reasonably as could be expected given the pressures on it and its complex character. Perhaps those who are dissatisfied with the status quo and would change it are pursuing their own agendas, rather than addressing actual defects. Certainly, there is nothing wrong per se with trying to improve the status quo, but if changes are to be made, they should be evidence-based and take account of what the potential consequences (and side effects) might be.

The discrepancy between the narrative and the data probably is best explained by differences in perspectives and value judgments.

Transit—History and Chronology, METRO. TRANSIT AUTH., <http://web.mta.info/nyct/facts/ffhist.htm> [<https://perma.cc/C469-ZUJF>] (last visited Sept. 15, 2018); see also *Reduced-Fare*, METRO. TRANSIT AUTH., <http://web.mta.info/nyct/fare/rfindex.htm> [<https://perma.cc/3T95-RHYX>] (last visited Sept. 15, 2018).

⁴⁵ See Reda, *supra* note 15, at 1111.

⁴⁶ See *id.* at 1117–26; see also *Pretrial Rush to Judgment*, *supra* note 18, at 985–96. The paradigm, of course, is the widely misreported McDonald’s coffee spill case, *Lieback v. McDonald’s Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (Dist. N.M. Aug. 18, 1994), *vacated*, 1994 WL 16777704 (Dist. N.M. Nov. 28, 1994), now properly chronicled in the documentary *HOT COFFEE* (The Group Entertainment 2011).

⁴⁷ See Reda, *supra* note 15, at 1123.

⁴⁸ See *id.*

⁴⁹ See generally Mathias Rohe, *Alternative Dispute Resolution Among Muslims in Germany and the Debate on “Parallel Justice”*, in *EXPLORING THE MULTITUDE OF MUSLIMS IN EUROPE* (Niels Valdemar Vinding, Egdūnas Račius & Jörn Thielmann eds., 2018); John Benson, *Alternative Dispute Resolution in Japan: The Rise of Individualism*, 23 *INT’L J. HUMAN RESOURCE MGMT.* 511 (2012).

Whether litigation takes too long or costs too much is ultimately a normative question not truly answerable by empirical data. There is no stable, objective line demarcating what cost is too high or how long is too long. Opinions surrounding these matters reflect attitudes about how accessible our courts should be, who will benefit or be hurt by an increase or decrease in cost and delay, how much precision or certainty the system should demand at each point in the procedural process, and perceptions about what role litigation should play in our society.

As Professor Alexander A. Reinert notes in his Article,⁵⁰ Judge Marrero never explicitly accepts the cost-and-delay narrative, yet he implicitly acknowledges that it exists by addressing it. And, in a departure from the usual focus on procedural defects and bloated discovery, the Judge targets the behavior of litigators and the motivations behind it. In fact, he refers to evidence similar to the data noted above regarding rising billing rates and attorney compensation as part of what drives up the cost of litigation and effectively makes legal services and access to the courts unavailable to many, if not most, Americans.⁵¹ However, even if costs are not actually outpacing inflation, and are still but a small percentage of litigation stakes, one must question whether people are being priced out of court because legal services have grown disproportionately expensive, or whether it simply reflects our society's wealth inequality.

To illustrate his concern about excessive lawyer activity, Judge Marrero exhaustively surveyed motions to dismiss in securities actions in the Southern District of New York. I will return to the study's content.⁵² He believes that these cases serve as a particularly appropriate testing ground because motions and discovery are especially pronounced in securities cases.⁵³ But is that focus truly representative? In light of the wider Federal Judicial Center study, one wonders whether the Southern District experience is probative and extensive enough to establish that a nationwide problem actually exists. Proof of hyperactive motion practice in a litigation category, which the Judge himself admits is disproportionately saturated with it and represents but a very small fraction of the federal docket, does not tell us whether there is motion practice to the same degree in the many other realms of substantive law in the other ninety-three district courts, both within and outside the

⁵⁰ Alexander A. Reinert, *The Narrative of Costs, the Cost of Narrative*, 40 CARDOZO L. REV. 121 (2018). Professor Reinert rejects the validity of the cost-and-delay narrative. *Id.* at 123–32 (he characterizes it as “defense-oriented talking points”).

⁵¹ Marrero, *Cost of Rules*, *supra* note 2, at 1624–25.

⁵² See *infra* notes 91–97 and accompanying text.

⁵³ Marrero, *Mission to Dismiss*, *supra* note 3, at 5–7. Many securities cases are plagued by motions involving the appointment of class representatives and counsel, the Private Securities Litigation Reform Act of 1995's super-heightened pleading requirement, the definition of class membership, the qualification of experts, and class certification, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

fifty states, most of which rarely see a securities case.

If Judge Marrero's hypothesis about legal institutions and lawyer motivation was accurate, one would expect a discrepancy in motion success rates either along the public-private litigation line, or among different types of cases. If lawyers' incentives and the economics of litigation were to blame for unnecessary motion practice, one would expect more motions and lower success rates from private-sector attorneys billing by the hour. However, as Professor Reinert, who questions Judge Marrero's conclusions from the data,⁵⁴ also aptly points out, the survey neither shows more extensive motion practice in cases with lawyers who are typically paid on an hourly basis rather than publicly-funded lawyers; nor does it show that motion practice in substantive areas associated with large firms or lawyers pursuing unproductive objectives experience substantially different rates of success.⁵⁵ Perhaps lawyer behavior and motivations are not solely to blame for increased motion and discovery practice or other sources of cost and delay. But these are simply concerns about how much to rely on the Southern District survey; they do not establish its unreliability. The study is an interesting data point and should not be ignored.

The persistence of the cost-and-delay narrative undoubtedly has contributed to decades of civil procedure transformation in the name of efficiency and its alter egos—economy and gatekeeping. The legislative, judicial, and rulemaking developments during the past half-century have primarily served to impose more stringent filtration devices and front-load the litigation process with procedural obstacles, so that we now have a *pre*-trial, rather than a trial system. These developments demonstrate that those who have been in a position to alter the civil justice landscape desire one in which fewer people can get into court, and in which those who succeed in getting there are accorded less opportunity for the full presentation of their grievances.

Judge Marrero wants to make litigation speedier and less costly. That is admirable. However, in focusing on lawyer behavior and the institutional incentives that motivate it, the Judge's Articles do not accord much attention to others whose actions contribute to the excessive motion and discovery practice the Judge describes. Of course, that was not the mission of his Articles. So, I will try to widen the field of view. Adjusting the lens should make it apparent that much of today's procedural activity is not necessarily the product of inappropriate lawyer activity. In my view, a portion of the lawyer activity Judge Marrero describes is a byproduct of the nature of the American federal judicial system and of many of the procedural changes that have been made as responses to the cost-and-delay narrative.

⁵⁴ See Reinert, *supra* note 50, at 132–40.

⁵⁵ *Id.* at 136–37.

II. OF JUSTICES, JUDGES, CONGRESS, AND THE RULEMAKERS: THEIR IMPACT ON LAWYER BEHAVIOR, COST, AND DELAY

A. *The Influence of Federalism*

Widening the lens should demonstrate that some of the procedural activity in the federal courts is not the product of unnecessary lawyer behavior but results from certain aspects of our dual judicial system itself. For example, some of today's pretrial practice is generated by aspects of our Nation's federal-state system that are foundational. The legal structure that lawyers work within today traces back to the Constitution of 1787, the Bill of Rights of 1791, and subsequent constitutional amendments. Much of today's motion and discovery practice reflects the ways in which these documents distribute judicial power between the state and the federal courts, as well as the activities of Congress, the courts, and the rulemakers in the years since.

The distribution of judicial power established by the Constitution is a basic aspect of American federalism, but it generates a great deal of lawyer activity that requires the attention of judges at all levels and is resource consumptive in operation. Consider subject-matter jurisdiction, for example. Article III empowers Congress to give the federal courts jurisdiction over eight categories of cases. The Tenth Amendment effectively reserves to the states all judicial power not expressly mentioned in Article III and statutorily implemented by Congress.⁵⁶ The courts have spent two-and-a-quarter centuries fleshing out that division of judicial power in sometimes creative and often arcane ways, attempting to keep faith with the vision of our Founders regarding the allocation of judicial power.

Congress and the courts have taken the Constitution's few words and expanded and complexified them in application. A good illustration is the grant of power to hear all disputes "arising under" the Constitution, laws, and treaties of the United States. In terms of Judge Marrero's concerns, this simple sounding provision has resulted in considerable motion practice and discovery over the years in determining whether or not a federal court has subject-matter jurisdiction. One leading procedure treatise devotes thirty-four sections of discussion to the intricacies of this so-called federal-question jurisdiction.⁵⁷

⁵⁶ U.S. CONST. amend. X. The limited character of federal court jurisdiction has been jealously guarded since the beginning of the Republic. *See, e.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804). In certain limited contexts, federal common law can be judicially created, which qualifies for federal subject-matter jurisdiction. *See generally* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 4514–20 (3d ed. 2016).

⁵⁷ *See* 13D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD

The same can be said of the Constitution's grant of diversity-of-citizenship jurisdiction,⁵⁸ which has widened the federal courthouse doors but generated motions and discovery in countless cases to determine how open those doors are for cases in this category.⁵⁹ Not surprisingly, Congress and the courts have been called upon repeatedly to adjust and readjust the scope of diversity jurisdiction. These cases create their own paper (and electronic) trails of motions and related discovery concerning such matters as defining the citizenship of parties and computing the statutorily required amount in controversy.

In addition, the removal statutes⁶⁰ compound the costs and delays of deciding federal subject-matter jurisdiction because they necessitate answering additional questions following removal on motions to remand. A number of other statutes produce considerable lawyer activity simply to determine whether federal jurisdiction exists. One example is the Multidistrict Litigation statute,⁶¹ which created a special tribunal to make decisions regarding the transfer and consolidation of related cases for pretrial purposes. Another is the virtual federalization of class actions as a result of the 2005 enactment of the Class Action Fairness Act,⁶² which has brought a significant number of aggregated small-scale state law claims or related cases into the federal courts that previously could not be initiated there. These raise a myriad of accompanying questions that generate difficult motions, extensive discovery, and appeals.⁶³ Finally, the Supplemental Jurisdiction statute⁶⁴ requires that judicial, lawyer, and client resources be expended deciding which ancillary state law matters fall within the same Article III "case" or "controversy" as the jurisdiction-granting anchor claim.⁶⁵

Within all these contexts are difficult choice of law and preclusion issues that require federal courts to apply (or guess at) forum state law.⁶⁶ Federal litigators have made a national sport out of forum-and-judge

D. FREER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3561–85 (3d ed. 2004).

⁵⁸ 28 U.S.C. § 1332 (2012).

⁵⁹ See generally 13E & 13F CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3601–42, 3701–21 (3d ed. 2009).

⁶⁰ 28 U.S.C. §§ 1441–55 (2012).

⁶¹ 28 U.S.C. § 1407 (2012). Additional motion practice takes place under 28 U.S.C. § 1404(a) (2012), which authorizes a change of venue.

⁶² 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012).

⁶³ See generally Richard L. Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008).

⁶⁴ 28 U.S.C. § 1367 (2012). See generally 13D WRIGHT, MILLER, COOPER & FREER, *supra* note 57, §§ 3567–67.4.

⁶⁵ See, e.g., *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) ("The state and federal claims must derive from a common nucleus of operative fact.").

⁶⁶ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). See generally 19 WRIGHT, MILLER & COOPER, *supra* note 56, §§ 4501–13.

shopping looking for advantage; this inevitably involves cost and delay. Even those lawyers who do not litigate in the federal courts or do not relish engaging with the foregoing intricacies of federal jurisdiction are obliged to devote a portion of their law school education trying to understand them.⁶⁷ Other lawyers love to litigate (or teach) the minutiae of these subjects.

The courts (both state and federal), by constantly interpreting and reinterpreting aspects of our constitutional structure to accommodate changes in society, have caused an increase in litigation activity in other ways. Consider personal jurisdiction. In the days of *Pennoyer v. Neff*,⁶⁸ personal jurisdiction determinations were resolved with little or no difficulty. The defendant's actual presence in the forum was necessary. So it all turned on the simple question of whether the defendant was served with process in the state or not. Fast forward sixty-seven years. By then *Pennoyer* had been rendered obsolete by a highly mobile population, new modes of transportation, and a national, and increasingly global, economy. The Supreme Court responded in *International Shoe Co. v. Washington*⁶⁹ by replacing a determination of physical presence with a search for the defendant's minimum contacts with the forum to see if asserting personal jurisdiction was consistent with fair play and substantial justice,⁷⁰ a vague and fact-dependent standard ostensibly drawn from the Due Process Clause of the Fourteenth Amendment. And thirteen years later the Court asked whether a Delaware trustee's attenuated contacts with Florida constituted "purposeful availment" of the forum's laws sufficient to establish jurisdiction.⁷¹ After four more decades of doctrinal refinement (and various verbal formulations), a district court created a "sliding scale" to align constitutional personal jurisdiction principles with the "nature and quality of commercial activity that an entity conducts over the Internet."⁷² All that took place before the beginning of the twenty-first century. Today the doctrine is still in flux, gyrating between competing points of view, and it can take years of motions and appeals to determine whether there is personal jurisdiction over the defendant.⁷³ Note that all of this activity with its cost and delay is undertaken simply

⁶⁷ In Spring 2019, New York University School of Law will offer upper-level courses in Complex Litigation, Federal Courts and the Federal System, and Decision-making in the Federal Courts.

⁶⁸ 95 U.S. 714 (1877).

⁶⁹ 326 U.S. 310 (1945).

⁷⁰ *Id.* at 316.

⁷¹ *Hanson v. Denckla*, 357 U.S. 235 (1958).

⁷² *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). The Supreme Court has yet to decide what Internet activities will suffice to establish personal jurisdiction. See generally *MacDermid, Inc. v. Deiter*, 702 F.3d 725 (2d Cir. 2012).

⁷³ Since the turn of the century, personal jurisdiction issues have attracted the Supreme Court's attention and divided it on a number of occasions. See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (three opinions producing a four-two-three division).

to decide whether the litigants are in the right court.

Cost and delay are lamentable phenomena, but they often result from the need to interpret and apply some of the principles of American federalism. The web of complexity I have just scratched the surface of, has been spun over time by the Constitution, Congress, state legislatures, and the judiciary. A significant portion of the litigation activities engaged in by courts and counsel involve fundamental issues about our dual court system. These must be decided, I believe, even if it causes cost and delay. Like Victor Frankenstein's creature,⁷⁴ our creature, federalism, has turned out somewhat uglier than we imagined. It is myopic to denounce the creature while turning a blind eye toward its creators. Much of what is done in courts today is a lineal descendant of the work of the nation's Founders and more than two centuries of activities by legislatures and the courts. The motions and discovery associated with questions relating to our federal system are largely inevitable, often extremely difficult, and irreducible in number. Resolving these issues admittedly is resource consumptive, and sometimes does involve aggressive and possibly self-interested behavior by members of the bar. But perhaps that simply is the price that must be paid to honor our nation's constitutional allocation of judicial power.⁷⁵

B. *The Effect of Twombly and Iqbal on Civil Litigation*

Perhaps the most dramatic examples of how the judiciary has encumbered the litigation process by increasing pleading and motion practice are the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*⁷⁶ and *Ashcroft v. Iqbal*.⁷⁷ In these two cases, the Court effectively rolled back sixty years of notice pleading—the exemplar of the easy access, non-technical, and getting-to-the merits approach of the original rulemakers—and reverted to something akin to the fact pleading of the nineteenth century codes.⁷⁸ *Twombly*, as the two are irreverently known, “retired”⁷⁹ the long-standing standard that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim . . .”⁸⁰ Instead, the Court essentially unilaterally

⁷⁴ MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN: OR THE MODERN PROMETHEUS—THE 1818 TEXT* (Oxford Press 1994).

⁷⁵ The fact that these jurisdictional matters do not arise under Rule 12(b)(6), the focal point of Judge Marrero's Articles, but on other motions under the Federal Rules is of no-moment. They are all part of the lawyer-activity-cost-and-delay complex.

⁷⁶ 550 U.S. 544 (2007).

⁷⁷ 556 U.S. 662 (2009).

⁷⁸ See generally 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1201–02 (3d ed. 2004).

⁷⁹ *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting).

⁸⁰ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

rewrote Rule 8,⁸¹ asserting that in order to survive a Rule 12(b)(6) motion to dismiss, a pleading must contain “enough facts to state a claim to relief that is plausible on its face.”⁸² The pleader must do this without discovery.⁸³

By requiring that the complaint provide facts demonstrating that the claim has substantive plausibility, rather than just be a legally sufficient statement of a recognizable claim for relief, the Court shifted the center of gravity of civil litigation forward in time, giving Rule 12(b)(6) motions potential life-or-death significance.⁸⁴ Indeed, these two cases not only represent a reversal of the Court’s commitment to allowing plaintiffs easy *entrée* to a federal court, but they also are a signal to lawyers that motion practice during the initial stages of litigation may produce a dismissal or, at the very least, can be used to further tactical objectives.

A Rule 12(b)(6) motion to dismiss to enforce the heightened

⁸¹ Rule 8 has been construed as requiring only “notice” of the claim. That construction was affirmed and re-affirmed by the Supreme Court on several occasions. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Conley*, 355 U.S. at 47. But in *Twombly*, a complicated antitrust matter, the Court held that Rule 8 actually requires facts, not conclusions, “showing” a “plausible” claim. 550 U.S. at 563, 570, 579–80. The Court expanded on *Twombly* two years later in *Iqbal*. In finding the plaintiff’s complaint deficient, the Court held that *Twombly*’s new pleading requirements applied to all civil actions, not just to antitrust claims. 556 U.S. at 684. As I have noted previously, these two cases highlight how the Court has abandoned its commitment to the rulemaking process; instead of waiting for the rulemakers to reconsider the Rules’ pleading and Rule 12(b)(6) motion standards, the Court just did so by judicial fiat. *See Miller, Double Play, supra* note 25, at 85–86. This was a sharp departure from the Court’s stance for the better part of a century, which expressed confidence in, and respect for, the rulemaking process. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199 (2007); *Swierkiewicz*, 534 U.S. at 515.

⁸² *Twombly*, 550 U.S. at 570.

⁸³ *Iqbal*, 556 U.S. at 678–79.

⁸⁴ In *Iqbal*, the Court also described a two-step approach for determining whether a pleading would survive a Rule 12(b)(6) motion to dismiss. First, judges were directed to look only at the factual allegations in the complaint and ignore legal conclusions, since only the former should be accepted as true. *See Iqbal*, 556 U.S. at 678–79. What is a “fact” and what is a “conclusion” often lies in the eyes of the beholder, as experience under the codes of the nineteenth century demonstrated. *See generally* 5 WRIGHT & MILLER, *supra* note 78, § 1218. Second, once the facts are isolated, judges have to decide whether they state a plausible claim based on their own “judicial experience and common sense.” *Id.* But, as I and others have written, these concepts have no universal meaning, and are aggravatingly vague. *See Miller, Double Play, supra* note 25, at 26. The Supreme Court provided no real guidance to lower court judges as to which pleadings should withstand a Rule 12(b)(6) motion and which should not. Instead, it granted lower court judges free reign to make decisions based on their instincts. Given that federal judges have a wide array of experience and backgrounds, the Court’s directive that their application of this standard should be based on “common sense” inevitably results in inconsistent outcomes. *See id.* at 30. In effect, it means that the ability of a complaint to survive a Rule 12(b)(6) motion is dependent on whose courtroom it ends up in. *See id.* The literature on the two cases is voluminous. *See, e.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 575 (2012) (“The Supreme Court has acted lawlessly.”).

pleading that is now demanded by the Supreme Court inevitably mounts litigation expenses and slows a case's progress. Indeed, it is Judge Marrero's paradigm example of excessive lawyer activity. In addition to the expense of making the motion, defending against it, and the judge's considering and rendering of a decision, there is also often considerable delay between filing the motion and its determination. Moreover, although an appeal usually is not available if a Rule 12(b)(6) motion is denied, if it is granted, it is often with leave to replead, which may lead to a renewed motion to dismiss, followed by yet another repleading. When that pleading-and-motion sequence is exhausted, if the pleading is dismissed and a judgment entered, the plaintiff may appeal.⁸⁵ And if the grant of the initial motion is reversed on appeal, the litigants are left exactly where they were before the original motion was made but with emptier pockets and months—and probably years—older.

Thus, a Rule 12(b)(6) motion puts everyone on a potential litigation merry-go-round, a theoretically never-ending cycle that results in costs and delays. The defendant, of course, hopes that the plaintiff will be depleted economically, or fatigued, or willing to accept a low-ball settlement offer or otherwise rendered unable to continue. This tactic is especially appealing when the plaintiff is of comparatively limited means (or the lawyer is working on a contingent basis) and the defendant has superior financial and legal resources, as often is the situation in product defect, pharmaceutical, consumer, and discrimination and other civil rights cases.⁸⁶ By facilitating this motion-to-dismiss scenario, the Court's *Twombly* and *Iqbal* decisions have rendered ordinary plaintiffs even more helpless in their contests with corporate giants. The Court has effectively told society's Davids to go forth against economic Goliaths without a slingshot.⁸⁷ Admittedly, this involves lawyer behavior

⁸⁵ An appeal of a Rule 12(b)(6) denial was allowed in *Iqbal* because a legal question of qualified immunity was involved. 556 U.S. at 671–75. See generally Luke Meier, *The Reviewability of Denied Twombly Motions*, 84 U. CINN. L. REV. (forthcoming 2018).

⁸⁶ Moreover, in heightening the pleading standard, the Supreme Court ignored a reality characteristic of the early stages of many civil actions: information asymmetry. At the pleading stage, there is often a tremendous disparity between what the plaintiffs and the defendants know, usually favoring the defendants. Plaintiffs rarely know why a medication has life-threatening side effects, why a complicated electronic device has failed, or why they were dismissed from their job. They simply believe that they have been injured. But by making it harder for a plaintiff to meet the motion-to-dismiss standard, the Court has told plaintiffs that they need to plead facts (which they have no access to) that they might not even be aware of in order to reach the discovery stage. In effect, the Court has presented plaintiffs with an often insurmountable catch-22: they can get discovery to uncover critical facts only if they plead enough facts to survive a Rule 12(b)(6) motion. See Miller, *Double Play*, *supra* note 25, at 45–46.

⁸⁷ Some judges believe that *Twombly* and *Iqbal* should be read narrowly and that the cases do not have as dramatic an effect as is generally thought. For example, Judge Jon Newman of the Second Circuit has asserted that the two decisions do not mean that the Court “has categorically rejected the availability of an inference” when determining whether a complaint

(some of which assuredly is unnecessary and unproductive), but it is lawyer behavior that has been facilitated by the Supreme Court. Did the Justices fully appreciate the potential cost-delay-consequences when they decided *Twombly* and *Iqbal*?

Judge Marrero properly decries how the filing of unnecessary motions, such as motions to dismiss, reduces civil litigation efficiency.⁸⁸ He finds evidence of this from the fact that in all actions commenced in federal courts annually, litigants file motions to dismiss the complaint, either in its entirety or in part, in about 35% of cases, even though they only prevail completely in about 20% of the actions.⁸⁹ The Judge also points to the fact that 45% of motions to dismiss are withdrawn or abandoned by the litigants before the court acts as evidence of how these procedural activities are wasting time, money, and judicial resources.⁹⁰

The Judge also relies on the survey of Southern District securities actions mentioned earlier⁹¹ to examine the impact of *Twombly* and *Iqbal* on motion-to-dismiss practice.⁹² The study indicated that the number of securities actions filed decreased “significant[ly]” in the six-year period following *Twombly*, apparently in large part because of the “more exacting plausibility test established by those decisions.”⁹³ That the two decisions appear to have discouraged some litigants from even initiating cases helps to explain the seemingly surprising finding that dismissal

should survive a motion to dismiss. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 329 (2d Cir. 2010) (Newman, J., concurring). Rather, he argues, these two cases merely show that the Court believes that “whether a bare allegation of illegality would suffice to withstand a motion to dismiss depends on the *context* in which the allegation is made.” *Id.* (emphasis added). Some support for this emphasis on context can be found in the Supreme Court’s very recent per curiam opinion in *Sause v. Bauer*, 138 S. Ct. 2561 (2018), upholding a pro se complaint alleging a violation of the plaintiff’s First Amendment right to the free exercise of religion and stating that the district court was obliged to interpret the complaint liberally. *Id.* at 2563; *see also* *Erickson v. Pardus*, 551 U.S. 89 (2007). However, it is important to note that Judge Newman sits on the court of appeals that was overturned in both *Twombly* and *Iqbal*, a court that has historically championed notice pleading, *see, e.g.*, *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), and has been resistant to over-reading *Twombly* and *Iqbal*. The Second Circuit’s attitude is not shared by many other federal courts, which have applied *Twombly* and *Iqbal* to garden-variety cases that should not be subject to a heightened pleading standard. *See, e.g.*, *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009) (dismissing a complaint involving a slip-and-fall because it failed to allege “facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff’s accident occurred”). Although it is reassuring to know that some judges have not over-read *Twombly* and *Iqbal*, the fact is that those courts are probably in the minority. In Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016), the author (my co-author) suggests that pre-plausibility notice pleading can be preserved. (I hope this is not simply the optimism of youth.)

⁸⁸ *See* Marrero, *The Cost of Rules*, *supra* note 2, at 1633.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See supra* notes 52–55.

⁹² *See* Marrero, *Mission to Dismiss*, *supra* note 3, at 11, 24–29.

⁹³ *See id.* at 25. It is extremely difficult, indeed probably impossible, to separate the effects of *Twombly* from those of the enactment in 1995 of the restrictive Private Securities Litigation Reform Act on the reduction of securities actions.

motions decreased by approximately 4% in the years following *Twombly* and *Iqbal*.⁹⁴ But, of course, even though *Twombly* and *Iqbal* accorded the Rule 12(b)(6) motion's augmented potential for dismissal, fewer motions were filed in the years following the decisions for the simple reason that there were fewer securities cases in which they could be filed.⁹⁵

Although there were fewer motions to dismiss overall, the survey does show that the percentage of securities cases in which such motions were filed increased significantly—from 57.5% to 67%—in the years following *Twombly* and *Iqbal*.⁹⁶ However, the Judge's survey also found that the average number of motions granted in full prior to the decisions actually decreased by one percentage point, from 35% to 34%, in the six years following the two Supreme Court decisions. That low percentage suggests that many dismissal motions were unproductive, if not unnecessary.⁹⁷ Indeed, the study illuminates that even though *Twombly* may have had a dramatic effect on the number of federal securities actions instituted and the percentage of cases in which motions to dismiss were filed in the Southern District, they had little impact on the percentage of motions to dismiss actually granted and cases terminated.

That being said, the study does not—nor does any other study to date⁹⁸—explore whether the heightened pleading standard has actually reduced the cost or delay of litigation by eliminating frivolous lawsuits earlier in the process, as the Supreme Court assumed it would.⁹⁹ All the

⁹⁴ See *id.* at 20.

⁹⁵ Other studies report heightened motion activity after *Twombly* and *Iqbal*. See, e.g., JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, FED. JUDICIAL CTR., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL CONFERENCE ADVISORY ON CIVIL RULES 8 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf); see also Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 613–14 (2012) (showing that grants of the motion to dismiss went from 46% in the *Conley* era to 48% following *Twombly* and increased to 61% after *Iqbal*).

⁹⁶ See *Marrero, Mission to Dismiss*, *supra* note 3, at 17–18. Prior to *Twombly* and *Iqbal*, there was an average of 320 securities actions filed every year in the Southern District, and motions to dismiss were made, on average, in 184 cases annually. Post-*Twombly* and *Iqbal*, the number of cases filed decreased to 264, and motions to dismiss were made, on average, in 177 cases every year.

⁹⁷ See *id.* at 23, 26–29. The decrease in the number of Rule 12(b)(6) motions granted by Southern District judges may be attributable to *Twombly* and *Iqbal*'s heightened pleading standard, which oblige lawyers to craft more fact-specific pleadings that would be more likely to survive challenge. However, it is clear that the drafting of these detail-oriented pleadings has increased litigation costs and probably delay, and has kept litigants who could not afford to expend money on refining their pleadings out of federal court altogether.

⁹⁸ Indeed, there have been no studies that have examined how *Twombly* and *Iqbal* have impacted the cost or delay of litigation.

⁹⁹ As I have mentioned elsewhere, the Court's adoption of a heightened pleading standard in *Twombly* and *Iqbal* seems to indicate that it has accepted the cost-and-delay narrative. This is exemplified by the majority opinion's three justifications for this new pleading regime offered by a majority of the Justices: (1) the threat of abusive or frivolous lawsuits; (2) the possibility of extortionate settlements against businesses that could threaten the economy; and (3) the

Southern District survey makes clear is that, even though *Twombly* and *Iqbal* have encouraged increased motion-to-dismiss practice in that district's securities actions, they have not increased the number of cases resolved at the motion to dismiss stage.¹⁰⁰ Nor is it clear, given the potential that elaborate proceedings may accompany today's pleading and Rule 12(b)(6) motion practice, that the two decisions have improved the efficiency of these procedures. Indeed, the reverse may be true.

Are lawyers responsible for the increase in Rule 12(b)(6) motions following *Twombly* and *Iqbal*? To the extent those motions are the product of tactical and self-interested motivation, or just fishing for a favorable result, which Judge Marrero justifiably criticizes, the answer is yes. On the other hand, many of these motions are quite naturally motivated by the amorphous and subjective "plausibility," "judicial experience," and "common sense" standard announced by the Court.¹⁰¹ Ambiguity of outcome coupled with a heightened pleading burden is likely to breed a sense of opportunity in some lawyers. Rather, I think the Supreme Court can be faulted for making a change in doctrine that increases both pleading and motion practice without any empirical basis for doing so and without employing the rulemaking process.¹⁰²

Recognizing the cost and delay generated by Rule 12(b)(6) motions in the post-*Twombly* and *Iqbal* world, Judge Marrero's second Article, which appears in this issue, focuses on how to limit and streamline them. He suggests that dismissal motions be divided into two categories. Those in the first, denominated Rule 12(b)(6)(1), "rest primarily on the

expense of litigation. See *Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007); Miller, *Deformation of Federal Procedure*, *supra* note 25, at 360.

¹⁰⁰ See discussion *supra* notes 52–55.

¹⁰¹ See *Iqbal*, 556 U.S. at 678.

¹⁰² The Court rejected judicial management as a way of curbing rising litigation costs relying only on a 1989 law review article authored by Judge (then Professor) Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989). Justice Souter asserted in his opinion for the Court that "the success of judicial supervision in checking discovery abuse has been on the modest side." *Twombly*, 550 U.S. at 559. But the article was nearly twenty years old, written when judicial management was in its infancy. Thus, the Justice ignored the enormous improvements in judicial management that had transpired since 1989, as well as the 1983, 1993, and 2000 amendments of the discovery rules, and the impact of the Court's 1986 summary judgment trilogy. See Miller, *Deformation of Civil Procedure*, *supra* note 25, at 331. Justice Souter's reliance on an outdated law review article highlights the reality that most Justices do not have the resources or the practical trial court experience to evaluate the effects of changes to the Federal Rules. See Miller, *Double Play*, *supra* note 25, at 85. As Professor Stephen B. Burbank has noted, the Court is "ill equipped to gather the range of empirical data, and lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings . . ." Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 537. Instead, the Justices can only rely on highly theoretical and academic sources, such as Judge Easterbrook's comment on judicial management, that do not necessarily reflect the on-the-ground reality of contemporary litigation.

existence of a discrete, decisive legal issue or precedent that does not implicate evaluating the underlying facts or the merits of the substantive causes of action that the complaint alleges.”¹⁰³ Therefore, Judge Marrero suggests that these should be labeled “motion[s] for an order to dismiss the action as a matter of law.”¹⁰⁴ Given that “such motions may be decided on the basis of the pleadings supplemented by central documents,” in most cases they would not consume significant judicial resources.¹⁰⁵

Judge Marrero’s second category, called Rule 12(b)(6)(2), “generally [would] raise different challenges that are more difficult and time-consuming. These matters tend to be fact-intensive and demand the application of vague standards.”¹⁰⁶ Indeed, he views these motions as one of the primary sources of unnecessary activity at the early stages of litigation and labels them as “motion[s] for an order to dismiss the action as a matter of law for failure to state a claim upon which relief can be granted.”¹⁰⁷ These, he believes, should either be eliminated entirely or, alternatively, could be permitted if the court has allowed the “development of a factual record gathered . . . through limited discovery . . . to establish or negate factual assertions made in the pleadings . . . by either party.”¹⁰⁸

Judge Marrero’s frustration with the current resort to Rule 12(b)(6) activity is understandable. However, he does not acknowledge that his concern about Rule 12(b)(6) actually stems from the Court’s *Twombly* and *Iqbal* decisions. Indeed, the increase in motions to dismiss actually could be a judicial self-inflicted wound. It is not the result of lawyers choosing to pursue aggressive litigation tactics in a vacuum; rather, I suspect it is simply an understandable reaction by practitioners to a promising procedural mechanism that has been invigorated by the Supreme Court. *Twombly* and *Iqbal* have enhanced the possibility of securing a Rule 12(b)(6) dismissal and implicitly encouraged defense lawyers to pursue a motion that they may not really have taken seriously before.¹⁰⁹ Faced with an increasingly diverse (and changing) federal bench, and vague “judicial experience,” “common sense,” and “plausibility” standards, here was a new opportunity to nip lawsuits in the bud before the discovery stage. It is no surprise that the defense bar has been moving to dismiss more often than before on the off-chance of success.¹¹⁰

¹⁰³ See Marrero, *Mission to Dismiss*, *supra* note 3, at 34.

¹⁰⁴ See *id.* at 37.

¹⁰⁵ He identifies such matters as statute of limitations, lack of standing, res judicata, and the illegality of the transaction at issue. *Id.* at 24.

¹⁰⁶ See *id.* at 35.

¹⁰⁷ See *id.* at 37.

¹⁰⁸ See *id.* at 38–39.

¹⁰⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

¹¹⁰ See discussion *supra* notes 52–55.

Judge Marrero's Rule 12(b)(6)(1) motion is effectively what a Rule 12(b)(6) motion was before *Twombly* and *Iqbal*¹¹¹—a lineal descendant of the common law demurrer and the code motion to dismiss. Its limited purpose was to weed out complaints that had no legal basis. The judge only looked at the four corners of the complaint and did not ask whether the facts alleged were “plausible.”¹¹² The motion consumed minimal judicial resources, and plaintiffs were allowed to proceed with discovery contemporaneously.

Twombly and *Iqbal* transformed Rule 12(b)(6) into a fact-dependent motion. Indeed, by holding that Rule 8 actually requires facts “showing” a claim that is “plausible on its face,” the Court has required district judges to assess the sufficiency of the complaint's facts, which is a time-consuming and detail-oriented process that extends well beyond the four corners of the pleading.¹¹³ Judge Marrero's Rule 12(b)(6)(2) motion appears to be the same as the present Rule 12(b)(6) and presumably incorporates the *Twombly* and *Iqbal* standard but allows “limited discovery.”¹¹⁴ As already noted, he suggests that this motion should either be eliminated entirely or it should be made clear that only limited discovery is permitted.¹¹⁵

The same result could be achieved by the Supreme Court retreating from or lowering the plausibility barrier or the rulemakers modifying *Twombly* and *Iqbal* by amending the Rule 8(a)¹¹⁶ to eliminate any fact-specific inquiry characteristics; it would then no longer be such a paper-

¹¹¹ See Marrero, *Mission to Dismiss*, *supra* note 3, at 37. According to the Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957), a pleading only needed to “give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests” in order to survive a motion to dismiss. *Id.* at 47. Until the advent of *Twombly* and *Iqbal*, not only did the Court repeat this refrain, but it also instructed lower court judges to accept all factual allegations as true and draw all inferences in favor of the pleader on a Rule 12(b)(6) motion. See Miller, *Double Play*, *supra* note 25, at 18; see also *supra* note 81.

¹¹² FED. R. CIV. P. 8(a)(2); *Twombly*, 550 U.S. at 570. See the discussion in 5 WRIGHT & MILLER, *supra* note 78, §§ 1201–02.

¹¹³ *Twombly*, 550 U.S. at 570.

¹¹⁴ See Marrero, *Mission to Dismiss*, *supra* note 3, at 40. I am concerned that the Judge's proposed structure will produce unnecessary motion practice about which category a particular Rule 12(b)(6) motion falls into, what is “limited discovery,” what is a law or a fact-based motion, and other matters unrelated to a case's merits.

¹¹⁵ See *id.* Moreover, Judge Marrero's suggestion for a Rule 12(b)(6)(2) motion that allows limited discovery before the court decides a motion to dismiss effectively creates something in the nature of an early summary judgment motion. But, of course, if that were the case, judges would simply convert Rule 12(b)(6)(2) motions into Rule 56 summary judgment motions, just as they do under the current Rule 12(d) when material outside the complaint is presented and not excluded by the court. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1366 (3d ed. 2004). Thus, Judge Marrero's suggestion to allow limited discovery prior to resolving one of his proposed Rule 12(b)(6)(2) motions arguably would leave us exactly where we stand now, and would not help remedy the cost and delay of motions to dismiss. It is unlikely that judges would allow his Rule 12(b)(6)(2) proposal to morph into a preliminary summary judgment motion or, if they did, later allow what in effect would be a second summary judgment motion.

¹¹⁶ See Marrero, *Mission to Dismiss*, *supra* note 3, at 16–17 n.50.

generating and time-consuming procedure. The motion might return to what the original rulemakers intended it to be: a screen for terminating claims that lacked a sufficient legal basis. That would reduce the motion practice that Judge Marrero criticizes as burdening federal litigation. But, since the *Twombly* and *Iqbal* decisions, the Advisory Committee has not come up with any modification of the pleading rule.¹¹⁷ Consensus is not easy to come by these days, and the status quo is likely to continue indefinitely.

C. Summary Judgment and Class Actions

Pleading and discovery hyperactivity also are manifest in summary judgment and class action practice, thereby contributing to cost and delay and excessive lawyer activity. As in the pleading and discovery contexts, the practicing bar is not solely to blame. In 1986, the Supreme Court decided a trilogy of summary judgment cases,¹¹⁸ often seen as an effort to encourage the use of Rule 56 so that federal judges could “expedite legal proceedings and . . . intercept and dismiss factually deficient litigation before trial.”¹¹⁹ However, this may not have been their only result. The decisions required parties opposing summary judgment to present facts sufficient to meet a “plausibility” standard that would determine whether the case should be permitted to proceed to trial.¹²⁰ But how is this “plausibility” standard to be applied? Does the plaintiff need a different quantum of “plausibility” to survive a summary judgment motion than a motion to dismiss? Does it modify the “no genuine issue of material fact” test that has always been in Rule 56(b)?¹²¹ Some decisions suggest it has.¹²² Does it call for the same “common

¹¹⁷ See Edward H. Cooper, *King Arthur Confronts Twiqy Pleading*, 90 OR. L. REV. 955 (2012); see also Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483 (2013) (analyzing why neither Congress nor the Advisory Committee has attempted to amend Rule 8).

¹¹⁸ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–27 (1986) (clarifying the burdens of production, persuasion, and proof on summary judgment motions); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (applying a heightened evidentiary standard of proof in ruling on a Rule 56 motion); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–98 (1986) (applying a heightened standard for opposing a summary judgment motion by requiring unambiguous evidence to show that a cause of action exists and that there is a genuine issue of material fact for trial).

¹¹⁹ Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 LOY. U. CHI. L.J. 561 (2012).

¹²⁰ See *Matsushita*, 475 U.S. at 587 (“[I]f the factual context renders [a] claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”) (emphasis added).

¹²¹ See the discussion in 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2712 (4th ed. 2016).

¹²² See, e.g., *Scott v. Harris*, 550 U.S. 372 (2007) (summary judgment upheld after the Court viewed videotape and determined that the police’s action was unambiguous); *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402 (6th Cir. 1991) (summary judgment upheld upon the

sense” and “judicial experience” approach that the Court invented twenty years later in *Iqbal* for Rule 12(b)(6) motions?¹²³

Judges have diverse experiences and backgrounds, and what qualifies as “plausibility” or a “genuine issue of material fact” inevitably will differ from judge to judge.¹²⁴ The variant judicial attitudes that have developed since the summary judgment trilogy have created unpredictability as to what will succeed on a Rule 56(b) motion. One empirical study shows “substantial differences in summary judgment practice across individual federal districts, even within the same case types.”¹²⁵ As a result, lawyers cannot predict outcomes of Rule 56 motions with any great confidence.¹²⁶ This uncertainty probably

court in essence making a factual determination in a securities fraud action); *Williams v. Borough of West Chester*, 891 F.2d 458 (3d Cir. 1990) (summary judgment upheld upon the court in essence making factual findings in § 1983 action); see also SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017) (discussing how hyperactivity in granting summary judgment motions is undermining the jury’s role in discrimination cases). The *Scott* decision is highly controversial. See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). See generally Miller, *Deformation of Federal Procedure*, *supra* note 25, at 310–12.

¹²³ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); see also Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 752 (2018) (“[P]lausibility’ is to be judged by subjective and ambiguous factors such as ‘judicial experience’ and ‘common sense.’”).

¹²⁴ A former federal judge makes a powerful point about this in Nancy Gertner, *A Judge Hangs Up Her Robes*, 38 LITIG. 60, 61 (2012); see also Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 115 (2009) (“The discretionary power of the judge to follow his or her personal preferences in deciding the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded.”).

¹²⁵ CORINA D. GERETY & BRITTANY KAUFFMAN, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013* 30 (2014), <http://iaals.du.edu/publications/summary-empirical-research-civil-justice-process-2008-2013> [https://perma.cc/E4QR-QYJ8].

¹²⁶ Mullenix, *supra* note 119. As John Kiernan notes in *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 CARDOZO L. REV. 187, 229 n.55 (2018), Professor Mullenix cites studies that show that there has been no statistically significant difference in the increase or decrease in summary judgment motions after the trilogy. This does not mean that the summary judgment trilogy has had no effect on motion practice. Instead, it serves as a single point of reference. Other studies are to the contrary. See, e.g., Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 896 (2007) (showing an increase in motions made from 12% to 20% of the sample cases from 1975 to 2000 and an increase in the grant rate from 6% to 12% in those years); see also Miller, *Pretrial Rush to Judgment*, *supra* note 18, at 1048–57. Moreover, as Professor Reda has explained, empirical studies do not account for potentially meritorious claims not brought to court or not otherwise disposed of in a published opinion. When a plaintiff must proceed on a contingent fee basis, the expenses of bringing a case are costs that are not recovered by the plaintiff’s lawyers if the matter is unsuccessful. Naturally, many lawyers will be deterred from accepting an engagement because of the costs and risks of facing pleading, discovery, and summary judgment motions. In short, we still do not have definitive empirical data on the impact of today’s motion practice. Even the Southern District study Judge Marrero describes did not cover summary judgment. The same can be said for class actions. To my knowledge, there has been no persuasive cause-and-effect analysis of the summary judgment trilogy’s cost-and-delay effect in terms of

encourages greater motion activity. (In making motions, as elsewhere in life, hope springs eternal.)

Making motions is part of a lawyer's job, and it is axiomatic that defense lawyers want to avoid trial, especially in a big case against an important client. Summary judgment is an obvious possible pathway to that objective. Lawyers do not make motions or seek discovery in the abstract. That is especially true of summary judgment motions, which have real consequences that range from substantial (the termination of the action if granted and enhancing settlement value if denied) to the purely tactical (the generation of billable hours, delay, and attrition). Unfortunately, summary judgment practice has taken on a life of its own. Use of the motion has expanded and the activities associated with it have proliferated significantly. Since these consequences were facilitated by judicial decisions, it seems fair to suggest that the Supreme Court, other courts, and the rulemakers have indirectly contributed to the cost and delay associated with Rule 56 motions and the attendant (often voluminous) paperwork and (often protracted) court proceedings.¹²⁷ Because the potential procedural consequences of a grant or denial of a summary judgment motion track those described in connection with the motion to dismiss,¹²⁸ the 1986 effort to “expedite

detering the assertion of valid claims, making the motion, deciding the motion, and creating the possibility of appeal, and the contingency of a reversal. So far, no study has covered these topics and thus, we do not know what a balance sheet would show. This again demonstrates why evaluating the validity of the cost-and-delay narrative is more complicated than Judge Marrero (or its proponents) suggests.

¹²⁷ See Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 249–50 (2011) (attempts to strengthen summary judgment have had “unintended consequences”). Mention should be made of the impact of e-discovery developments on modern litigation, especially summary judgment since discovery generally is largely completed before the motion is made. Professor Yablon's Article in this special issue refers to e-discovery as a possible amelioration of cost and delay. Charles Yablon, *The Virtues of Complexity: Judge Marrero's Systemic Account of Litigation Abuse*, 40 CARDOZO L. REV. 233, 248 (2018) (discussing the merits of e-discovery, namely “cost savings, speed, efficiency, and accuracy of production” instead of “an adversarial contest”). It now seems clear that advances in information technology and artificial intelligence enable properly instructed machines to evaluate documents more cheaply and accurately than humans doing it manually. See Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011); H-5 EDGE OVERVIEW, https://h5.com/wp-content/uploads/2016/09/EDGE_brochure_final1.pdf [<https://perma.cc/GEU6-56ED>] (last visited Sept. 15, 2018). But e-discovery may well produce another resource war, with the greater-resourced defense interests having an upper hand. E-discovery has evolved into a contest over constructing search frames to secure the maximum value from the technology, leading to increased time, energy, and skirmishes about its utilization. No one knows the bottom-line impact of e-discovery on litigation efficiency; even if it is cheaper and more accurate than manual techniques, it is unknown whether the tremendously increased mass of electronically recorded information that must be evaluated offsets the efficiency gains. What is even more problematic is that few judges (and practitioners) understand the significance of what is at stake in deciding on search frames or how the technology functions, which provides tactical advantage to knowledgeable and better resourced lawyers. This may yet evolve into a battle of experts.

¹²⁸ See *supra* text accompanying note 81.

legal proceedings” and “dismiss factually deficient litigations” is not cost-and-delay free and may not have achieved its supposed objective.¹²⁹

Similarly, class actions have become a field day for the motion-makers. At the time Rule 23 was revised in 1966, no one could foresee the transformative growth and expansion of class action practice that would take place under subdivision (b)(3).¹³⁰ The provision was designed by its drafters as an enhanced permissive joinder device that would promote the resolution of issues “‘common’ to all plaintiffs in a single [proceeding], preventing wasteful and repetitive litigation,” and “the possibility of inconsistent results.”¹³¹ Tectonic changes in society, substantive law, and the adventurousness of the plaintiff’s bar have proven that assumption incorrect.

Over the years, the courts and the rulemakers have increased the density of motion practice, expert testimony, and discovery in connection with deciding whether an action should proceed on a class basis.¹³² In particular, the class certification motion has been subject to different standards from court to court and from time to time, with new issues arising periodically. The motion has become viewed by counsel as something akin to Armageddon because of the practical consequences of its outcome.

In addition, the judicially established “rigorous-analysis” standard, requiring the plaintiff to demonstrate the satisfaction of each of the class action prerequisites mandated by the Supreme Court both before and after the controversial decision in *Wal-Mart Stores, Inc. v. Dukes*,¹³³ produces enormous cost and delay. That analysis must be undertaken in every class action, and the insistence on a demonstration by the class on

¹²⁹ Mullenix, *supra* note 119. There is evidence that a majority of trials in the federal courts last no more than one day and the number of mega-trials (more than twenty days) have been declining for years. See Nora Freeman Engstrom, *The Diminished Trial*, 86 *FORDHAM L. REV.* 2131 (2018). If that is true, is it too naïve to ask why defendants don’t bypass or contain their summary judgment motions rather than expending countless hours briefing and arguing them (and burdening courts in the process)? I leave that for the reader to consider.

¹³⁰ I was a participant in the revision process and have a clear recollection of the relatively modest objectives of the Advisory Committee at that time regarding that provision. See *An Oral History of Rule 23: An interview of Professor Arthur R. Miller by Professor Samuel Issacharoff*, CTR. ON CIVIL JUST. (2016), http://www.law.nyu.edu/sites/default/files/ICCVCJUS17.1-CCJ%20Rule%2023%4050%20Booklet%20Project_RELEASE.pdf [https://perma.cc/VL8B-TYMZ]. See generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 *HARV. L. REV.* 664, 669–76 (1979).

¹³¹ Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 *IND. L.J.* 567 (2004). See generally 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1751–55 (3d ed. 2005).

¹³² See generally Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 *U. PA. L. REV.* 1793, 1802–06 (2014).

¹³³ 564 U.S. 338, 342, 351 (2011). The Supreme Court held that class action plaintiffs must show through a “rigorous analysis” that all class members “have suffered the same injury” and that their claims “depend upon a common contention,” the determination of which “will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350–51. The Court first articulated the standard in *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

a wide variety of subjects generates extensive presentations by counsel on both sides and corresponding detailed consideration by the court. And because many district courts and courts of appeal have set a high rigorous-analysis standard, the certification motion has become very labor intensive, and the process often is tantamount to a mini-trial.

On a related front, before Rule 23(f) came into effect in 1998, only limited options existed for immediate appellate review of a district court's certification decision because it did not produce a final judgment.¹³⁴ Today, if the court grants certification, the defendant may choose to seek appellate review¹³⁵ or choose to settle because of the risk of a large judgment for the class; if the court denies certification, the class representatives and their counsel may be obliged to abandon the case as economically unfeasible rather than seek Rule 23(f) review, probably leaving individual class members with small claims remediless. Pursuit of or opposition to Rule 23(f) review obviously entails cost and delay for the litigants and the expenditure of judicial resources. Although many applications for review are denied, if one is granted, it can take considerable time to complete the process.¹³⁶ The tactical use of Rule 23(f), which is appropriately viewed as a pro-defendant procedure, fits Judge Marrero's concern about excessive lawyer behavior to a T.¹³⁷

But should the lawyers be blamed for their Rule 23(f) activity? The Rule and its consequences came into being because of decisions made by the rulemaking process that seemed wise at the time, although its practical and strategic significance were obvious. Experience suggests that appellate review may be too frequently sought and too frequently granted. Rule 23(f) is an illustration of a procedural vehicle created by the rulemakers that is resource consumptive and has introduced inconsistencies and other side effects in the review process.

D. *End Note*

As Judge Marrero reports (and my own experience affirms), federal

¹³⁴ There were three limited options for seeking appellate review: file an interlocutory appeal under 28 U.S.C. § 1292(b) (2012), seek mandamus under 28 U.S.C. § 1651 (2012), or wait and appeal the final judgment. FED. R. CIV. P. 23(f).

¹³⁵ See generally 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1802-02.3 (3d ed. 2005).

¹³⁶ A study by lawyers at Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates analyzed Rule 23(f) filings between October 31, 2006 and December 31, 2013 and found that less than 25% of the petitions for interlocutory review were granted. John H. Beisner, Jessica D. Miller, Geoffrey M. Wyatt & Milton P. Wilkins, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings*, SKADDEN: INSIGHTS (Apr. 29, 2014), <https://www.skadden.com/-/media/files/publications/2014/04/studyrevealsuscourtsof-appealareless-receptivetorev.pdf>.

¹³⁷ Marrero, *Cost of Rules*, *supra* note 2, at 1644 (inefficiencies is a "professional disposition . . . embedded in many lawyers' practice styles").

litigation now often involves motion after motion. The pretrial process is littered with them, each acting as an expensive and delaying stop sign. But that certainly is not entirely the fault of the lawyers. The matter is far more complicated and does not justify finger pointing in any particular direction. Unfortunately, there is a lack of empirical data that effectively evaluates the pluses and minuses of the procedural changes of the last three or four decades. The examples discussed in this Section (and others¹³⁸) point to the fact that several changes by the courts and rulemakers have contributed to the cost and delay of the pretrial process and have led to unnecessary lawyer activity.

III. THE DEPRECIATION OF THE MEANINGFUL DAY-IN-COURT PRINCIPLE

I agree with Judge Marrero that excessive pretrial practice by lawyers aggravates the cost and delay inherent in litigation.¹³⁹ As his Southern District survey suggests, a possible (and I believe, likely) effect of *Twombly* and *Iqbal* is that a number of cases have not been brought because the heightened pleading standard has narrowed the entrance to the courthouse.¹⁴⁰ The other procedural changes I have discussed have reduced the ability to stay there.¹⁴¹ A natural consequence of a reduced number of cases (and early termination) obviously is a corresponding decrease in the number of motions and amount of discovery. (Unless the cost and delay of securing early termination exceed that of adjudicating the merits, which occasionally may be the case.) Should those who criticize cost and delay rejoice? Perhaps they will. But, are we happy about that or has the civil justice system lost something in the process? Many, including myself, believe that focusing on the cost-and-

¹³⁸ Two others are worth mentioning. First, is the trilogy of cases creating what often is an expensive and drawn-out pretrial proceeding to qualify expert witnesses. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589, 597 (1993) (directing that district judges oversee the admissibility of expert testimony on economic, scientific, and technological matters); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999) (applying *Daubert* to technical and specialized expert witnesses); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146–47 (1997) (holding that *Daubert* allows a court to exclude evidence “connected to existing data only by *ipse dixit* of the expert”). Second, is the judicial limitation of specific and general personal jurisdiction under the Fourteenth Amendment, which seems to have caused a flurry of motions to dismiss under Rule 12(b)(2) and its state counterparts. *See, e.g., Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

¹³⁹ *See, e.g., Marrero, Cost of Rules, supra* note 2, at 1609 (blaming “professional styles and actions of lawyers themselves” as an overlooked culprit for “rising litigation excess”). One ostensible way to ameliorate the problem is simply to reduce the ability of lawyers to make motions or engage in extensive discovery in the first place. Of course, both sides have reason to support the maintenance of each of those procedures. That leaves it to the judge to contain.

¹⁴⁰ Marrero, *Mission to Dismiss, supra* note 3, at 24–25.

¹⁴¹ The Southern District survey indicates that more motions are made in the cases that make it to court. *Id.* at 29.

delay narrative diverts attention from a more serious failure in today's litigation environment: citizen access to the civil justice system is impaired by heightened pleading standards, restraints on discovery, enhanced summary judgment, class action impediments, and compelled arbitration all of which erode the right to a meaningful day in court. This plethora of procedural stop signs may well make the trip to the courthouse not worth taking.

A. *Pleading and Early Termination*

Plausibility pleading is a byproduct of the cost-and-delay narrative that can lead to early (and sometimes premature) termination.¹⁴² A heightened pleading standard consequently curtails meaningful citizen access to a judicial forum in the process.¹⁴³ *Twombly* and *Iqbal* have reshaped practice under Rule 8(a) and Rule 12(b)(6); what once was a determination of the complaint's legal sufficiency has become a possible termination point. The motion has been transmogrified from a modest screening instrument to a merit-based filter that makes it easier to attrite plaintiffs and end their day in court.¹⁴⁴ That obviously is why the motion is so attractive to defense lawyers. Survival is now based on whether a single document is deemed plausible, and that is a far cry from the traditional conception of a day in court—what once was called the “gold standard,” a full trial on the merits (before a jury when applicable).¹⁴⁵

So, although courts most likely will see fewer actions because of *Twombly* and *Iqbal*, some of the claims not brought and some of the cases dismissed on “plausibility” grounds might have had merit and deserved to remain in the courthouse. Nonetheless, those claims are extinguished by pleading standards that effectively deprive potential plaintiffs of a meaningful opportunity to be heard. Particularly troublesome is *Twombly* and *Iqbal*'s alteration of practice under Rules 8(a) and 12(b)(6) and its concomitant curtailment of a plaintiff's ability to secure discovery unless the complaint has survived a motion to

¹⁴² See discussion in Section II.B *supra* notes 77–118.

¹⁴³ Some critics may argue that the day-in-court principle is satisfied simply by a judicial evaluation of a complaint's plausibility. But a day in court should be more than the mere entry into the courthouse. It should provide a meaningful appraisal of the merits of the plaintiff's claims.

¹⁴⁴ If Rule 12(b)(6) is a screening device that explores beyond the legal sufficiency of the plaintiff's statement, shouldn't a day in court mean that the plaintiff is able to use discovery to peek behind the curtain to have a realistic chance to survive summary judgment and reach trial on the merits of the plaintiff's grievance?

¹⁴⁵ Any discussion of *Twombly*'s demerits also must include the immeasurable loss of potentially valid claims not brought because the heightened pleading standard deters some plaintiffs from bringing suit. Miller, *Double Play*, *supra* note 25, at 47–49; see Reda, *supra* note 15, at 1121–22. The grievances unaddressed by our judicial system resist identification. I consider them a casualty of today's enhanced pleading and motion practice.

dismiss. That tangentially puts Seventh Amendment jury trial values in peril.¹⁴⁶

B. *The Flight to Arbitration and Other Forms of Alternative Dispute Resolution*

Another highly touted way to reduce motion practice, discovery, and its associated cost and delay is to induce (coerce is more accurate) potential plaintiffs to forgo the judicial system and opt for one or more forms of alternative dispute resolution, most significantly arbitration.¹⁴⁷ It is claimed that efficiency gains will result from this diversion from the courthouse and should be celebrated. But, again, why aren't the unquantifiable deleterious effects on due process protections, jury trial rights, and citizen access more important than a reduction in court filings? Today's pressure for alternative dispute resolution is symptomatic of an attempt to respond to the overblown cost-and-delay narrative by hailing those procedures as a solution to litigation's perceived ills. But they profoundly constrict citizen access to the public courts in the name of efficiency and economy. The interests of corporate America, including its desire to avoid a trial on the merits, let alone jury trial, are the underbelly of this flight from the courthouse. Hope of reversing this trend has diminished dramatically as the Supreme Court has upheld mandatory arbitration clauses in ever-widening circumstances, in no small measure because of changes in its ideological composition and what appears to be a pro-business (and possibly anti-litigation) orientation of some of the Justices.¹⁴⁸

¹⁴⁶ Early termination by pretrial motion undermines the integrity of the jury trial guarantee. See Miller, *Pretrial Rush to Judgment*, *supra* note 18, at 1074–1132. Some judges have become arbiters of the plausibility of matters such as the materiality of a misrepresentation in a securities claim that, prior to the pre-summary judgment trilogy and *Twiqbal*, were considered jury questions. Although judicial gatekeeping incorporates the linguistics of the judge-jury division of decision-making responsibility, members of the bench clearly have philosophical differences on where to draw the dividing line. See Miller, *Deformation of Federal Procedure*, *supra* note 25, at 306–09. This shift diminishes the Seventh Amendment's jury trial right. Particularly troublesome is *Twiqbal*'s prohibition on discovery until the complaint has survived a motion to dismiss. See also Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 LITIG. 1, 70 (2009) (“[T]he real question we should be asking is whether those opinions represent a reasonable approach to dealing with a very complex issue—the burden and expense of discovery in complex litigation—or whether the civil justice system would be best served by reexamining the rules of pleading and discovery, as well as the case management powers under which the district courts now supervise the process, in context with each other, in order to find a comprehensive solution.”).

¹⁴⁷ See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1635–42 (2005).

¹⁴⁸ During the stewardship of Chief Justices Burger and Rehnquist, the Supreme Court did an about-face on enforcing contractual arbitration clauses. The current Court has completed that reversal in the three cases described in text. For a more detailed discussion of this jurisprudential shift, see Miller, *Deformation of Federal Procedure*, *supra* note 25, at 322–31 &

In particular, three recent Supreme Court decisions enforcing arbitration clauses and waivers of all forms of aggregate litigation has encouraged the migration of dispute resolution from the judiciary to the nontransparent world of arbitration. As I have written previously,¹⁴⁹ the sequential arbitration decisions in *AT&T Mobility LLC v. Concepcion*,¹⁵⁰ immunizing no-class action arbitration clauses from state law unconscionability defenses; *American Express Company v. Italian Colors Restaurant*,¹⁵¹ approving the enforceability of adhesive no-aggregate arbitration clauses in contracts that are uneconomical to arbitrate individually; and, most recently, *Epic Systems Corporation v. Lewis*,¹⁵² upholding employment agreements compelling individual arbitration and class and collective action waivers despite protections otherwise afforded by the National Labor Relations Act¹⁵³ undoubtedly have altered the modern litigation landscape and impaired access to the courts for many.¹⁵⁴ This trilogy of decisions has shut the courthouse to a

nn.135–69 (explaining the Supreme Court’s progressive acceptance of, and support for, arbitration); see also Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006) (arguing that the Rehnquist Court was consistently motivated by its hostility toward, and skepticism of, civil litigation); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 314–32 (2012) (noting that, to the extent ideological differences explain the Court’s division on compelled arbitration, they “reveal[] some continuity between the Roberts Court’s focus on civil procedure and its predecessor Court’s focus on, and antipathy towards, litigation in general”). See generally Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2836–39 (2015) (noting that prior Supreme Courts were more protective of consumers and employees regarding arbitration clauses); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010) (reflecting on the philosophical shifts in civil procedure over time); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1854–55 (2014) (arguing that the enforcement of arbitration clauses is one indicator of a new era in civil procedure); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 317, 391–95 (discussing the evolution of how the Court’s ideology on arbitration “fundamentally shifted” in the Chief Justice Burger and Roberts courts).

¹⁴⁹ See, e.g., Arthur R. Miller, Keynote Address, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES L. 1, 28–34 (2018); Miller, *What Are Courts For?*, *supra* note 123, at 773–86; Miller, *Deformation of Federal Procedure*, *supra* note 25, at 322–31.

¹⁵⁰ 563 U.S. 333 (2011).

¹⁵¹ 570 U.S. 228 (2013).

¹⁵² 138 S. Ct. 1612 (2018).

¹⁵³ 29 U.S.C. §§ 151–69 (2012).

¹⁵⁴ For an exploration of a broad range of implications underlying these adhesive no-class-or-aggregate arbitration clauses, see Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639–52 (2012); Gilles, *The Day Doctrine Died*, *supra* note 148; Resnik, *Diffusing Disputes*, *supra* note 148; Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1; Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015). In Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977, 1983 (2017), the author, a former law clerk for Justice Scalia, states that the Justice’s

sweeping cross-section of society and their grievances relating to consumer and financial transactions, ranging from social amenities to necessities¹⁵⁵ to employment agreements exposing an individual's livelihood to the black box of arbitration, and even to nursing home applications affecting vulnerable members of our citizenry.¹⁵⁶

Because the Court held that the Federal Arbitration Act¹⁵⁷ preempts state law and trumps federal statutes, *Concepcion*, *Italian Colors*, and *Epic Systems* enable major economic entities to impose mandatory no-class-action or aggregate arbitration on consumers and employees through adhesion contracts that are rarely read or understood. In both contexts, a gross disparity in bargaining position exists between the legal muscle of corporate America and the much less-resourced citizens who are often in the greatest need of protection. There is only a glimmer of hope after *Epic Systems* that proposed federal legislation will prevent compelled arbitration in the limited context of sexual harassment claims.¹⁵⁸ But that legislation, even in the unlikely event it is passed, will only be a Band-Aid and not reach the multitude of claims that will continue to be denied access to a judicial forum by arbitration clauses.

In short, people are being strong-armed into arbitration with little or no concern that virtually none of them realize the significance of these clauses, have the ability to negotiate these clauses, or the resources to participate in the arbitration process. If people are unable to exercise their “right” to arbitrate or cannot find representation because the stakes are too small to justify contingent compensation arrangements, the alleged illicit conduct is left unredressed and is likely to continue. This, in turn, leaves more people vulnerable to exploitation without a viable possibility of remedy.¹⁵⁹ People have been stripped of their right

opinions in *Concepcion* and *Italian Colors* “have done more to hobble the class action than any other legal development since the Rule 23 class action was created”

¹⁵⁵ Miller, *Deformation of Federal Procedure*, *supra* note 25, at 323.

¹⁵⁶ *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (rejecting state court's decision against enforcing arbitration clause in nursing home agreement).

¹⁵⁷ 9 U.S.C. §§ 1–16 (2012).

¹⁵⁸ Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017).

¹⁵⁹ See Miller, *Deformation of Federal Procedure*, *supra* note 25, at 323. A recent case in the Northern District of California powerfully illustrates the insurmountable economic realities of compelled arbitration in consumer contracts. When the fitness technology company Fitbit, whose terms of service compel arbitration, unilaterally refused to arbitrate after the plaintiff had brought suit, the company's lawyer admitted that “no rational litigant” would sue for a \$162 arbitration award in the face of a \$750 filing fee. Transcript of Proceedings at 11, *McLellan v. Fitbit, Inc.*, No. C 16-00036 JD (N.D. Cal. May 31, 2018), <https://static.reuters.com/resources/media/editorial/20180601/fitbitclassaction--hearing5.31.pdf> [<https://perma.cc/PAS3-JCYM>]. The lawyer repeated the irrationality of such a litigant on six different occasions. *Id.* at 7, 9, 10–12, 15. In response, the court was “very disturbed” by Fitbit's tactics and considered holding the lawyer in contempt. *Id.* at 13–14. But the lawyer was merely articulating what is well-known in the legal community: a Hobson's choice faces anyone who wants to pursue a possibly meritorious claim but is confronted with the economic constraints on individual arbitration.

to seek recourse in a judicial tribunal, and the day-in-court principle that was a bedrock of the original rulemakers' access-seeking philosophy has been forsaken.¹⁶⁰

Proponents of arbitration praise its efficiency.¹⁶¹ Indeed, in his opinions for the Court in both *Concepcion* and *Italian Colors*, Justice Scalia mentioned the efficiencies of arbitration but did not provide any empirical support for his assertions.¹⁶² Although there are undeniable

¹⁶⁰ See Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329 (2015); Sara E. Costello, *Class Action Waivers Hang in the Balance*, 42 LITIG. NEWS, Winter 2017, at 10 (2017). But cf. Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under Concepcion: Reason and Reasonableness Deflect Strident Attacks*, 68 ARK. L. REV. 669, 678 (2015) (“[I]t is well recognized that individual arbitration is usually far swifter . . . and less expensive than litigation, and allows for a far easier recovery.”).

¹⁶¹ Moving disputes from the courthouse into arbitration is not cost-free for the judiciary. One side often vigorously opposes arbitration, resulting in interaction between the courts and the arbitrating parties. Skirmishes often emerge in court over an arbitration clause's validity, applicability, and scope, confirmation of the award, and its enforcement. See 3 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 55:1 (2018) (“While arbitration awards are *final and binding*, they are not self-executing and judicial involvement may become necessary if the losing party refuses to abide by the award and seeks vacatur, modification, correction, or clarification of an award.”) (emphasis in original); see also Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 30. The result? Cost and delay. Even if alternative dispute resolution brings processing efficiency, the proliferation of associated proceedings in the judicial system pose transaction costs that should be calculated as part of the arbitration-efficiency equation.

¹⁶² For example, Justice Scalia argued in *Concepcion* that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Justice Scalia further alluded to the efficiency of bilateral arbitration in *Concepcion* that he later quoted in the *Italian Colors* decision. *Id.* at 348; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. at 228, 238 (2013). Empirical research comparing the relative economy and efficiency of alternative dispute resolution and litigation is both scant and lacks consensus. For example, the economic research firm Micronomics released a study comparing the relative cost and delay of proceedings before the American Arbitration Association (AAA) with litigation and found, on average, that arbitration yields a significant reduction in time: United States district court cases took over twelve months longer to advance to trial than cases proceeding by arbitration and at least twenty-one months longer when the comparison included an appeal. ROY WEINSTEIN, CULLEN EDES, JOE HALE & NELS PEARSALL, MICRONOMICS, EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDINGS 2 (2017). But, the study only included data from “AAA and ICDR arbitration cases that had claimed amounts of at least \$75,000.” *Id.* at 32 (emphasis in original). This study completely ignores the relatively small monetary claims by consumers that are forced into arbitration yet are uneconomical to assert, and therefore are not heard at all. See the discussion of *McLellan v. Fitbit, Inc.* *supra* note 159. Other scholars and studies highlight the reality that arbitration can often mirror litigation's cost and delays. See Stipanowich, *supra* note 161, at 24–25 (“Arbitration too often involves the same sustained, customized, and labor-intensive approach as litigation; demands the commitment of significant in-house resources; and entails unacceptable risks.”); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 37–38 (2003) (noting that, in a questionnaire of leading commercial arbitrators, 72% affirmatively responded that they believed “arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes”); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007) (analyzing public firms with arbitration clauses

benefits from arbitration clauses in agreements that are the product of truly arm's-length bargaining processes,¹⁶³ the overwhelming majority of society face a much different reality, one in which bargaining power is patently unequal and the “freedom of contract” cliché is a myth.¹⁶⁴

From whose perspective is arbitration's alleged efficiency to be judged? From the perspective of large corporations, mandatory arbitration clauses are obviously efficient; they have effectively shielded themselves from any real possibility of accountability since the data is clear that individuals rarely invoke their “right” to arbitrate.¹⁶⁵ But these so-called efficiency gains come at the incalculable expense of a plaintiff's due process right to a meaningful opportunity to be heard in a judicial forum.¹⁶⁶ In reality, that right has been consigned to oblivion. This corporate-instigated avoidance of the courthouse reflects an

and finding “[l]ittle evidence . . . to support the proposition that these parties routinely regard arbitration clauses as efficient or otherwise desirable contract terms”). Because the increase in the use of arbitration has been driven in large part by its alleged efficiency, one would have thought there would be ample empirical support validating the assumption, especially in the realm of the often-overlooked world of small monetary claims—but the reality is that proof is lacking. See generally Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375 (2018).

¹⁶³ See Kiernan, *supra* note 126, at 206 n.16 (focusing on the merits of dispute resolution provisions “between parties having sufficiently similar bargaining power to have clearly agreed voluntarily to contractual dispute resolution provisions,” and acknowledging but not expanding on the “different policy questions” behind mandatory arbitration agreements).

¹⁶⁴ See Miller, *What Are Courts For?*, *supra* note 123, at 776. One of the contributors to this special issue supports “greater use of ADR processes offered to parties as options.” John D. Feerick, *Judge Victor Marrero and “A Revolution Now and Then”*, 40 CARDOZO L. REV. 147, 167 (2018). He believes that “mediation provides for a more complete rendering of justice in a great many situations.” *Id.* at 171. Yes, but mediation typically is volitional and non-binding. Not arbitration. As said in the text, whatever the merits of using arbitration between entities with similar levels of bargaining power, in the consumer and employment arbitration contexts people are simply coerced into it; they do not freely (or in many cases, knowingly) abandon their right to go to court. They have no other choice and their access to any dispute resolution mechanism has been compromised. For more discussion, see Miller, *What Are Courts For?*, *supra* note 123, at 776–79.

¹⁶⁵ See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 11 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/QT4M-33JD>] (finding that consumers are generally unaware of whether their credit card contracts include arbitration clauses, and some consumers incorrectly believe they have the ability to sue); see also Andrea Cann Chandrasekher & David Horton, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011); Gilles, *supra* note 148, at 397–98 (“[C]lass action bans promised virtual immunity from liability, given the certainty that consumers and employees would almost never seek to arbitrate small dollar claims individually or to attract counsel on a contingent fee basis.”); Resnik, *Diffusing Disputes*, *supra* note 148, at 2812–14 (“[T]he number of documented consumer arbitrations is startlingly small.”).

¹⁶⁶ See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 132–33 (2011) (criticizing the Supreme Court and providers of private dispute resolution for failing to address due process issues explicitly despite making process-based arguments in favor of arbitration).

institutional fear of trial, particularly before juries. Armed with the Supreme Court's approval, defense interests can now close the courthouse doors to those consumers and employees who have been coerced into mandatory individual arbitration.¹⁶⁷ This result has been promoted and propagated by repeated incantations of the cost-and-delay narrative.

But perhaps there is a theoretical (and somewhat perverse) "bright" spot. If potential plaintiffs—particularly those with meritorious claims—and their lawyers either are deterred from resorting to court by a fear of early termination or do not seek arbitration because of insurmountable legal and economic restraints, motion practice and discovery will decrease in both systems because there simply will be fewer claims. As a result, subscribers to the cost-and-delay narrative should applaud. But I am being facetious. The justice system should preserve people's access to at least one meaningful dispute-resolution process, even if that means accepting the cost and delay that invariably accompanies it. We should not begrudge the inevitable motions, discovery, and trial that may accompany the individual's ability to assert due process or jury trial rights.

¹⁶⁷ See *id.* at 122 (lamenting that consumers either accept forced arbitration in cell phone contracts or "do not have cell phones"). In the context of employment agreements, if faced with a decision between a job mandating arbitration and unemployment, one cannot have choice in any meaningful sense. As Professor Cynthia Estlund puts it: "[M]andatory arbitration . . . virtually amounts to an ex ante exculpatory clause, and an ex ante waiver of substantive rights . . ." Estlund, *supra* note 154, at 703. The Consumer Financial Protection Bureau promulgated a rule that would have invalidated these clauses in connection with a wide range of financial contracts, but it was vetoed by the narrowest of margins by a Republican-controlled Congress. A tie vote in the Senate was broken by Vice President Pence. The debacle is described in Miller, *What Are Courts For?*, *supra* note 123, at 779–81.

Society often expends resources in pursuit of values. Part of what drove the expansion of the federal docket in the second half of the twentieth century was pressure on Congress and in the courts for broad access to the legal system and the recognition and expansion of a variety of legal rights. Legislative and procedural initiatives along with an accommodating judiciary created and facilitated new substantive rights of action to deter a wide array of conduct thought antithetical to our values. Walking back on these developments cannot be justified in pursuit of frugality and speed. The cost-and-delay narrative's impetus for procedural changes that tend to curtail meaningful access to the courts is a sharp departure from the philosophy that birthed the Federal Rules (and can be traced back to the Constitution). Even if it provokes more motions and discovery and poses a risk that some lawyer activity will be of the type deplored by Judge Marrero, I would prefer to reverse the recent shuttering of the courthouse and open its doors again.

IV. WHERE DO WE GO FROM HERE?

The ambitious objectives of the drafters of the Federal Rules were—and presumably they should continue to be—“to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹⁶⁸ It has always been clear that these three values are somewhat in tension with each other and must be balanced, and that people may have good-faith disagreements about how the triumvirate is best pursued.¹⁶⁹ Unfortunately, at times the dialogue surrounding cost and delay has allowed procedural transformations to be shaped by anecdotal perceptions and institutional self-interest rather than the facts on the ground. Pursuing fair resolutions in a more efficient manner is a laudable goal, but we must not lose sight of the trade-offs that will be made if we afford speed, gatekeeping, and economy pride of place, especially when the mechanisms designed to achieve these objectives themselves may be breeders of cost and delay.

A. *The Case for Doing Nothing*

How might we proceed? Judge Marrero suggests that the problem of procedural hyperactivity is best resolved by addressing attorney behavior, which he thinks is its source. His concern about the extensive motion and discovery practice engaged in by many lawyers is appropriate. But most of those activities are not undertaken in a

¹⁶⁸ FED. R. CIV. P. 1.

¹⁶⁹ See Reinert, *supra* note 50, at 126; see also Miller, *What Are Courts For?*, *supra* note 123, at 808.

vacuum. To some unknown (and probably unknowable) degree, making motions, conducting discovery, and engaging in other procedural skirmishes are natural reactions by litigators to the judicial developments, rule changes, and legislation in the past few decades. The Judge's two Articles are as powerful a plea for a change in professional conduct as can be written. But in my judgment—perhaps too cynically—it is a bit of a fool's errand to attempt to persuade the practicing bar to respond in brief compass to pleas for lawyer restraint; the behavior and culture of the practicing bar cannot be changed overnight. (But, of course, we should try.) There are too many factors contributing to inertia, most of which are simply a result of human beings behaving like human beings.

The legal profession is self-selecting. Many of its members are imbued with a competitive spirit and attitude. That probably is particularly true of those who choose to pursue a litigation career; they probably are the most assertive quadrant in the practicing bar. Young lawyers are first exposed to this culture in law school, in which most law students are immersed in a competitive environment designed around the academic curve, making the law review, and getting a job with a prestigious law firm, all while imbibing the heady wine of the adversarial system, which glorifies winners and not losers.¹⁷⁰ Progressing to practice, competition among courtroom lawyers exists on both sides of the “v.” Firms on the same side of the “v.”—whether representing plaintiffs or defendants—are in constant competition to find new clients and retain existing ones. Success in litigating across the “v.” is naturally one of the most effective ways of accomplishing these goals, and that may motivate aggressive behavior. The culture is further exacerbated by the practice within most law firms of awarding compensation and internal power based on rainmaking and litigation success, further engraining competitive (and occasionally cutthroat) behavior.

All this breeds excessive litigation conduct in some people, contributing to the occasional “scorched earth” and “win at all costs” strategies that some believe worsen cost and delay. Add to that the lure of the billable hour or the siren call of winning a large contingent fee matter. It is axiomatic: no litigator wants to lose. Why should anyone be surprised that this culture produces “Rambo”¹⁷¹ attorneys who make

¹⁷⁰ In recent years, contemporary legal education and continuing legal education have been offering courses on mediation, negotiation, professional ethics, and collaborative lawyering. Professor Feerick also points out the positive influence of “curricular offerings in clinical legal education and pro bono and volunteer opportunities” on increased citizen access to the civil justice system to help combat the issues Judge Marrero chronicles. Education also promotes ethical activity in the dispute resolution process. Feerick, *supra* note 164, at 172–74. There is no hard evidence about what effect these forms of education may be having, but perhaps it is the start of the cultural revolution Judge Marrero advocates. If this is true, however, it will likely produce a gradual rather than an immediate change.

¹⁷¹ This became the generic referent in the 1990s for litigation tactics that were hyperactive

every available motion and pursue “no stone (or pebble) unturned” discovery?

In the infancy of the Federal Rules—when the world of litigation was far simpler, the economic stakes were smaller, and the profession was less internally antagonistic and competitive (but more elitist)—that type of motion and discovery practice, although it did exist, was considered unprofessional. Today, lawyers have been emboldened to push the envelope by cultural shifts, the potential of professional and economic rewards, the ambiguities created by participating in cases like *Twombly* and *Iqbal*¹⁷² and the summary judgment trilogy,¹⁷³ and the excitement of cases with hundreds of millions or billions of dollars at stake. Uncertainty created by the increased diversity of the bench and bar further encourages the motion-making and wide-angle discovery that many decry. The demography of federal judges, for example, has changed greatly in the years since my first court appearance,¹⁷⁴ and although that is immensely beneficial from many perspectives, it has lowered the predictability of the outcome of any particular motion, especially now that judges have been instructed to rely on their “experience” and “common sense” on motions to dismiss.

In addition to the vague and often inconsistent judicial precedents on various critical procedural subjects, some empirical evidence indicates that the percentage of motions to dismiss that are granted has increased after *Twombly* and *Iqbal*.¹⁷⁵ Thus, it seems unrealistic to expect lawyers to refrain from making motions solely in the name of reducing cost and delay when the likelihood of success on any individual motion is difficult to predict and the overall chance of success on one that accelerates disposition of the case may well be increasing. Litigators will not ignore a potential path to victory, and refraining from making a motion might well be a disservice to the client.

The wide range of ideological cleavages in American society further contributes to the intensity of certain aspects of contemporary litigation that may well be irreducible. Many cases today involve issues on which

and overly aggressive, invoking the Sylvester Stallone character in three popular action movies: *FIRST BLOOD* (Orion Pictures 1982), *RAMBO FIRST BLOOD: PART II* (TriStar Pictures 1985), and *RAMBO III* (TriStar Pictures 1988).

¹⁷² *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). No litigator can be certain of how to measure a particular jurist’s “common sense” and “experience”—it is almost humorously vague.

¹⁷³ See discussion *supra* notes 118–29.

¹⁷⁴ See *Demography of Article III Judges, 1789–2017*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/demography-article-iii-judges-1789-2017-introduction> [<https://perma.cc/54DP-L579>] (last visited Sept. 16, 2018) (depicting the major changes in the composition of Article III judges over time). As the reader is well aware, we are in the midst of a major transformation of the federal judiciary.

¹⁷⁵ One study found that 46% of motions to dismiss were granted, with and without leave to amend, under the *Conley* standard. That increased to 48% after *Twombly* and to 56% after *Iqbal*. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010); see also discussion *supra* notes 91–97.

people—including lawyers—have enormously polarized opinions and ideological disagreements. Lawyering in these contexts tends to produce even higher levels of adversarial conduct, position-taking, and intransigence. When obliged to litigate one's own beliefs, a lawyer may well become hyperactive, regardless of the probability of success.

It is almost naïve to believe that the entrenched litigation culture of the litigation bar is likely to undergo significant changes in the short term. It certainly will not happen in my lifetime, and I doubt it is likely to take place on a grand scale in the next generation of lawyers. Although gradual change is possible and civility should be encouraged, meaningful reengineering of the practicing bar's behavior is likely to take place over decades. Other methods for reducing litigation costs and delays should be explored. But whatever avenues are considered, our legal system's foundational principles and safeguards should not be further abandoned in a search for efficiency or economy.

Besides the cultural inertia, which inhibits significant changes in practitioner behavior unlikely, current economic incentives make it even more difficult. Judge Marrero appropriately recognizes how heavily intertwined a law firm's financial success is with the now prevalent hourly billing practices.¹⁷⁶ Sweeping procedural changes that would reduce motion practice and discovery—or any number of other suggestions—could have a significant impact on the billable hours system that motivates current attorney behavior, particularly for those in Big Law.¹⁷⁷ If procedural changes significantly reduce billable hours, lawyers would try to find new methods to create them to avoid their practices shrinking. The cliché is true—the practice of law has become a business. Economic realities significantly complicate any attempt to reduce present day costs and delays through changes in lawyer behavior.

Even beyond the difficulties of altering attorney behavior and firm business practices, experience indicates that many procedural changes intended to reduce cost and delay have not lived up to their promise. In Judge Marrero's judgment, many of the procedural steps that have been taken have resulted in either no impact or have actually added to the burdens of contemporary litigation.¹⁷⁸ Others have opined that some of

¹⁷⁶ See Marrero, *The Cost of Rules*, *supra* note 2, at 1608–09 (“[T]he high expense of litigation that generally prevails nowadays derives from free-market forces and is driven by lawyers’ open competition for business. . . . By this account, the market not only sets the prices but essentially shapes and guides the business models and practice norms that lawyers adopt in rendering legal services.”).

¹⁷⁷ As of 2010, 1900 billable hours a year was the standard requirement for associates in most law firms with more than 250 attorneys, while the standard has advanced towards 2000 hours in a significant portion of larger firms. See *id.* at 1613 (citing *A Look at Associate Hours and at Law Firm Pro Bono Programs*, NAT’L ASS’N FOR L. PLACEMENT (Apr. 2010), <http://www.nalp.org/july2009hoursandprobono> [<https://perma.cc/XJF9-74WQ>]).

¹⁷⁸ See Marrero, *Mission to Dismiss*, *supra* note 3, at 25–29 (concluding that even if procedural changes contributed to fewer securities lawsuits being commenced, those changes led to greater costs and delays producing significantly more work for the courts).

the steps taken by the courts and the rulemaking process have not produced significant results.¹⁷⁹

Virtually every recent procedural innovation has added a tool to a lawyer's toolkit, whether it be toughening sanctions under Rule 11, invigorating the Rule 12(b)(6) motion to dismiss, enhancing summary judgment, mandatory disclosure under Rule 26(a), demanding "rigorous analysis" of requests for class action certification and allowing interlocutory review of decisions on those motions under Rule 23(f), or mandating gatekeeping of expert testimony. It is not surprising that each of those tools became a plaything in the hands of litigators, who then, as is typical, played with their new toy, inevitably overusing and breaking it. If the profession fixates on preventing further increases in costs and delays and excessive lawyer activity, the best method for dealing with that may be to stop adding procedural toys for lawyers to play with in the litigation sandbox. In short, stop making procedural changes. Do nothing (or repair the broken toys). But that is contrary to the culture and egos of people in the rulemaking business.¹⁸⁰

Moreover, simply being complacent and accepting the status quo does not seem particularly satisfying knowing that there probably are unnecessary motions and discovery practices burdening the system, even if the dimension and consequences of that have been exaggerated by proponents of the cost-and-delay narrative. Even if things are not as bad as some claim and the system is functioning acceptably, complete inaction should not be the chosen option; there are improvements that can be made to make the litigation system more efficient and cost-effective. Therefore, acknowledging that some costs and delays are irreducible because of the complexity of our federalism and that there are strong inertial forces on the system's participants, some changes are worth considering. A sketch of a few suggestions follows.

B. *The Rejection of Transsubstantivity and the Tracking of Cases*

Since their promulgation in 1938, the Federal Rules have applied to all civil cases, regardless of complexity, substantive context, or claim size—that is the principle of transsubstantivity. Despite its longstanding acceptance as an operational principle for the federal courts, the time may have come to abandon it (perhaps only partially) and substitute a

¹⁷⁹ For example, two distinguished proceduralists see little that has been accomplished by the 2015 Amendments to Rule 26(b) regarding discovery proportionality. See Robert H. Klonoff, *Application of the New 'Proportionality' Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184576 [<https://perma.cc/3XHR-L34Y>]; Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 28–33 (2016).

¹⁸⁰ In retrospect, the Advisory Committee on Civil Rules and I, as its Reporter, may have fallen into that mindset between 1976 and 1983. See *infra* note 269.

different procedural and management system for different types of cases as a possible way to make litigation more efficient and less expensive.

Although a quest for a universally applicable set of procedures may have made aspirational sense in the 1930s, because litigation and the substantive law were comparatively simple at that time, that is no longer true and a different approach may be appropriate. When the Federal Rules were drafted, the original Advisory Committee could not have envisioned the cost, dimension, duration, and complexity that characterize a segment of federal litigation today. Party and claim joinder were primitive, detailed regulatory statutes (both state and federal) were few in number, class actions were rare, multidistrict litigation did not exist, supplemental jurisdiction would not be legislated for another half century, and a million-dollar case was considered very big and unusual. These are just a few of the changes that have occurred since.

One set of procedural rules no longer fits all litigation contexts. A system that formally or informally segregates cases and assigns them to different processing tracks either by dimension, complexity, or substance, each with custom-tailored procedures, may be better adapted to present conditions. For example, certain simple or routine cases could be fast-tracked, allowing for expeditious merit adjudication. It simply does not make sense to expend the time and resources on those cases that is required by today's "plausibility" pleading, "proportionate" discovery inquiries, and full-blown summary judgment motion practice.

1. Tracking in the Existing System

There has been considerable recognition that transsubstantivity is no longer ideal for many segments of American litigation.¹⁸¹ That seems particularly true because forms of tracking already exist in varying degrees in the federal and many state procedural systems. The drafters of the original Rule 9(b), for example, recognized the value of treating certain cases differently by expressly creating a heightened pleading requirement for claims involving fraud and mistake, while allowing relaxed pleading for claims involving "malice, intent, knowledge, and other conditions of a person's mind."¹⁸² Similar deviations from the general pleading regime were provided in Rules 9(c) and 9(g).¹⁸³

¹⁸¹ A Federal Judicial Center Preliminary Report found attorney support for testing simplified procedures in several districts. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/NN6B-LFJX>].

¹⁸² See generally 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 1296–1301.1 (3d ed. 2004).

¹⁸³ See generally *id.* §§ 1302–04, 1310–12.

Various provisions in Rule 16 and the *Manual for Complex Litigation* provide guidance for processing complex cases, encouraging greater judicial involvement in pretrial management and individual customization of discovery requirements, effectively creating a somewhat separate procedural track for complex cases.¹⁸⁴ Rule 26(a)(1)(B) exempts eight categories of cases from the mandatory disclosure requirements, essentially authorizing differential treatment of those cases.¹⁸⁵ Although there is no way of knowing with any certainty, it is quite possible that without these admittedly limited tracking mechanisms there would be even greater cost and delay in the federal courts.

Another form of tracking in the federal system is the Multidistrict Litigation Statute and the Judicial Panel on Multidistrict Litigation it created.¹⁸⁶ By facilitating the pretrial consolidation and coordination of related dispersed cases to avoid redundancy, differences in treatment, and the risk of inconsistent results, the statute essentially forms a special track. Lawyers (and judges) experienced in multidistrict litigation practice know that they are in a different procedural and case processing universe than the one articulated in the Federal Rules.

Indeed, the American Association for Justice has proposed that transsubstantivity be rejected altogether in multidistrict litigation.¹⁸⁷ It contends that the nature of multidistrict cases makes them unfit for a “one size fits all” procedural approach due to their case-specific nature. Rather than implementing uniform rules for these cases, the Association for Justice proposes that the Advisory Committee on Civil Rules address the specific topics and issues that repeatedly arise in these multidistrict consolidations. This proposal is an indication that an important segment of the practicing bar is ready for the abandonment, in whole or part, of transsubstantivity.

There have been other deviations from transsubstantivity by Congress. For example, the Civil Justice Reform Act of 1990 encouraged district courts to engage in the “differential treatment of civil cases” and reflect that in their individual expense-and-delay plans; many local

¹⁸⁴ FED. R. CIV. P. 16(a)(1); FED. R. CIV. P. 16(c)(2)(I), (L); FED. R. CIV. P. 26(f)(2); MANUAL FOR COMPLEX LITIGATION (FIRST) (rev. ed. 1973). See generally 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1522 (3d ed. 2007); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2001 (3d ed. 2010).

¹⁸⁵ See generally 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 2053–54 (3d ed. 2010).

¹⁸⁶ 28 U.S.C. § 1407 (2012). See generally 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3861–68 (4th ed. 2013).

¹⁸⁷ Memorandum from the AAJ MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee, *Preliminary Provisional MDL Suggestions* (Feb. 22, 2018), http://www.uscourts.gov/sites/default/files/18-cv-i-suggestion_aaj_re_mdل_rulemaking_0.pdf [https://perma.cc/F835-BHTX].

district rules have done so.¹⁸⁸ Another illustration is the Private Securities Litigation Reform Act of 1995,¹⁸⁹ which requires a greater level of pleading of scienter in securities fraud cases¹⁹⁰ and has a sanction provision that differs from that found in Federal Rule 11.¹⁹¹ Beyond statutes and the Civil Rules, many federal district courts and individual judges have engaged in differential case treatment under the rubric of judicial management. In that sense, many judges already have their own formal or informal tracking systems. In truth, the transsubstantivity principle exists in name only and differential case treatment seems firmly embedded in actual practice in several contexts.¹⁹²

Forms of tracking also can be found in various state procedural systems, including New York¹⁹³ and California.¹⁹⁴ Many state systems distribute cases onto different tracks based on the amount in controversy or the type of action, such as commercial matters or disputes with governmental entities. The fact that some degree of tracking already exists throughout the federal and state courts makes the prospect of moving away from transsubstantivity and accepting differential case management less dramatic a change than it once was thought to be and perhaps that should be seen as the natural next step in the evolution of federal procedure.

¹⁸⁸ 28 U.S.C. § 473 (2012).

¹⁸⁹ Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

¹⁹⁰ 15 U.S.C. § 78u-4(b)(2) (2012). See generally *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

¹⁹¹ 15 U.S.C. § 78u-4(c) (2012).

¹⁹² The Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), said that the determination of what is “plausible” is “context specific,” which is a form of non-substantivity regarding pleading. See generally Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1940 (1989) (“[U]niformity and trans-substantivity . . . are a sham.”); Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002) (critiquing the Advisory Committee’s simplified rules project, and noting that the existing Federal Rules allow for different approaches to different litigation tracks); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 373 (2010) (predicting the demise of the transsubstantivity principle and discussing its historical development); Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985) (proposing the creation of a formal fast-track litigation path in order to import the strengths of alternative dispute resolution into the federal judicial system); Miller, *Double Play*, *supra* note 25, at 118–25 (noting that the Federal Rules allow for tracking in the judicial management of discovery and proposing the further adoption of tracking, perhaps according to the British model); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 398–405 (2010) (proposing the adoption of a simple track for low dollar-value cases, ensuring quick claim resolution and limiting litigant and systemic costs).

¹⁹³ N.Y. COMP. CODES R. & REGS. tit. 22, § 202.70 (2018).

¹⁹⁴ CAL. R. CT. 3.501–3.550.

2. Tracking Systems in Other Countries

In thinking about a possible tracking system, it is useful to look at the approaches taken by other countries. The English, German, and Japanese tracking systems provide examples of different approaches to segmenting cases, which can be done either by dimension, case type, or a combination of the two. A skeletal description of those three approaches follows.

a. The British Tracking System

The British system segments cases by dimension rather than complexity or substantive context.¹⁹⁵ There are three different tracks: 1) a small-disputes track (for claims up to £5,000 (about \$6,629)), 2) a fast track (for claims between £5,000 and £15,000 (about \$19,887)), and 3) a multi-track (for claims of larger value, complexity, and importance).¹⁹⁶ Cases that fall on the small-claims track are subject to quick and informal procedures, making the need for attorney representation unnecessary; the objective is to allocate only those resources necessary to resolve the dispute. The fast track seeks to resolve relatively simple cases efficiently, with an aim of single-day hearings conducted within thirty weeks of track assignment. The multi-track provides the greatest degree of variety in the management of cases posted to it, including both simple, standardized procedures similar to those of the fast track and traditional hands-on judicial involvement for more complex matters. By creating standardized procedural rules for every case that falls within a given track, most cases that pass through the English system require little specialized judicial attention and supervision. However, multiple opportunities for judicial involvement exist in each track, thereby providing a degree of individualized or custom-tailored processing when that is thought necessary.

To implement this type of system in the United States would require major revisions, some of which many people might think are too drastic to undertake. Congress would have to amend the Rules Enabling Act¹⁹⁷ or the federal courts would have to reject the notion that the statute's reference to "general" rules embraces transsubstantivity. In addition, considerable adjustments would have to be made to accommodate the elaborate federal discovery regime, civil jury trial, and the high dollar value of many of today's cases. In any event, the British system of segmenting by case dimension is only one approach to

¹⁹⁵ See generally ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 482–500 (2d ed. 2006).

¹⁹⁶ See *id.* Jurisdiction based on the amount in controversy is well-established in the United States in the federal and state courts. See, e.g., 28 U.S.C. § 1332(a) (2012).

¹⁹⁷ 28 U.S.C. § 2072 (2012).

tracking, and an American system may be better served by tracking based on complexity or substantive content.

b. The German Tracking System

The German system provides a useful example of tracking based on case complexity or substantive content. As a general proposition, the German system does not seem to be burdened by the same litigation costs and delays seen in other countries and often is celebrated for its relative promptness and modest expense.¹⁹⁸ Although there are many factors contributing to the efficiency and economy of the German system, it seems reasonable to assume that some of it can be attributed to its tracking system.¹⁹⁹

Germany segregates cases according to their type and complexity, assigning specialized procedures to each category and to those actors in the system thought best equipped to perform various functions.²⁰⁰ Procedures have been designed to reflect the specific interests at stake and to further governmental policies.²⁰¹ A good example is the procedure used in family cases (*Familiensachen*), which were specifically designed to further policies that favor maintaining family units.²⁰² Accordingly, the rules governing these cases are intended to discourage the hasty termination of marriages and to protect weaker parties in marital disputes by requiring attorney representation in all divorce cases.²⁰³ Within the family case category, claims are further segregated with special provisions for marriage disputes in general (*Ehesachen*) and divorce cases in particular (*Scheidungssachen*).²⁰⁴

In contrast to the procedural rules in family matters, which were designed to discourage haste and encourage careful consideration of each case, documentary and check proceedings (*Urkunden- und Wechselprozess*) feature special accelerated procedures.²⁰⁵ To resolve these claims quickly and inexpensively, only documentary proof is allowed, and witness testimony and party interrogation are prohibited.²⁰⁶ Similarly, in civil warning debtor-creditor proceedings, creditors can issue an official warning notice to a debtor, typically

¹⁹⁸ PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 19, 22 (2004). As of this writing, however, the rather positive description in text does not seem to apply to the rather lethargic treatment of shareholder claims against Volkswagen for the misrepresentations regarding the emission control systems in some of its cars.

¹⁹⁹ See *id.* at 20.

²⁰⁰ See *id.* at 18, 20.

²⁰¹ See *id.* at 419.

²⁰² See *id.*

²⁰³ See *id.* at 421.

²⁰⁴ See *id.* at 419.

²⁰⁵ See *id.* at 425.

²⁰⁶ See *id.* at 425–26.

without using an attorney.²⁰⁷ If the debtor does not dispute the claim, the official warning results in an enforceable court order.²⁰⁸ This civil warning procedure (*Mahnverfahren*) allows the creditor to avoid commencing a lawsuit and the costs and time associated with it.²⁰⁹

Although the German tracking model seems to be successful in handling ordinary civil cases in an efficient and economic manner unencumbered by motion practice and extensive discovery, which is limited to what the court mandates, it may not be well equipped for more complex cases that require significant discovery.²¹⁰ Therefore, it is extremely doubtful that it could replace our current complex litigation procedures. However, adapting something akin to the German tracking system by adopting simplified, streamlined procedures that reflect certain important social policies in ordinary and formulary civil cases could lead to the efficient, economic, and fair disposition of a significant portion of federal litigation.

c. The Japanese Tracking System

The Japanese civil system provides a model for segregating cases by both dimension and case type.²¹¹ Small claim cases offer an example of how certain matters in the Japanese courts are segregated solely by dimension.²¹² Small claims (claims of no more than ¥1,400,000 (about \$12,730)) are assigned only to the Summary Court, which is positioned below the District Court.²¹³ When the disputed amount is ¥600,000 (about \$5,456) or less, parties can invoke a specialized single-day procedure for efficient resolution.²¹⁴ Because efficient adjudication is the objective, the complaint need not be as detailed as a District Court

²⁰⁷ See *id.* at 428.

²⁰⁸ See *id.* at 427–28.

²⁰⁹ See *id.* at 427. These warnings often lead to voluntary payment by the debtor, which means that a mere warning rather than the initiation of a lawsuit is all that is required to resolve the matter.

²¹⁰ See *id.* at 21. Germany does not yet have anything truly comparable to the American class action or multidistrict litigation statute. It does have a Capital Market Investors' Model Proceeding Act (*Kapitalanleger-Musterverfahrensgesetz* or KapMuG), a legal mechanism by which courts can collectively manage individual securities law cases through a bellwether-like process to determine liability. *Kapitalanleger-Musterverfahrensgesetz* [KapMuG] [Capital Markets Model Case Act], Oct. 19, 2012, BUNDESGESETZBLATT, TEIL I [BGBL I], as amended by Gesetz [G], June 23, 2017, BGBL I, at 1693, art. 24(1) (Ger.) Since its 2006 enactment, approximately a dozen cases have been filed, none of which have been resolved.

²¹¹ See OSCAR G. CHASE, HELEN HERSHKOFF, LINDA SILBERMAN, JOHN SORABJI, ROLF STÜRNER, YASUHEI TANIGUCHI & VINCENZO VARANO, CIVIL LITIGATION IN COMPARATIVE CONTEXT 395, 398 (Oscar G. Chase & Helen Hershkoff eds., 2d ed. 2017).

²¹² MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996, art. 368 (Japan); see CHASE, HERSHKOFF, SILBERMAN, SORABJI, STÜRNER, TANIGUCHI & VARANO, *supra* note 211, at 398.

²¹³ See CHASE, HERSHKOFF, SILBERMAN, SORABJI, STÜRNER, TANIGUCHI & VARANO, *supra* note 211, at 401.

²¹⁴ MINSOHŌ, *supra* note 212, at art. 370, para. 1; see CHASE, HERSHKOFF, SILBERMAN, SORABJI, STÜRNER, TANIGUCHI & VARANO, *supra* note 211, at 401–02.

complaint and there is no requirement of a writing, allowing parties to present their claims and defenses orally.²¹⁵ To prevent congestion of single-day trial proceedings (mainly by debt collectors with small claims), a claimant may use the procedure only ten times annually in a particular Summary Court.²¹⁶ The losing party may not appeal to a higher court and is only permitted to object, which returns the case to the Summary Court to proceed as if it were a typical adjudication.²¹⁷

There are also certain substantive areas in which cases are segregated based solely on their type. The labor tribunal, for instance, was designed to resolve employment disputes between employees and their employers.²¹⁸ The tribunal consists of a three-person panel, a judge, one lay citizen with specialized knowledge on the labor side, and another lay citizen with specialized knowledge from the management circle.²¹⁹ If a party challenges the tribunal's decision, the dispute becomes a formal civil proceeding; if it is not challenged, the decision is just as binding as a traditional judicial decision.²²⁰ Due to the speed and apparent fairness of the hearings, labor tribunal proceedings have grown in popularity for workplace disputes.²²¹

The rules relating to check proceedings illustrate the types of cases distributed based on dimension as well as subject matter.²²² The disputed amount determines whether it is brought in the District or the Summary Court.²²³ Once the claim is assigned, it must follow the specialized rules designed for those matters. The judge is required to set a date for a session as soon as possible and it is typical that it is no more than two weeks after the claim is filed.²²⁴ To promote efficiency, only documentary evidence is permitted and counterclaims are not permitted.²²⁵ As in small claim cases, the losing party is only allowed to object to the judgment in the same court and may not appeal to a superior court.²²⁶ If the losing party objects, the court will either dismiss if the objection is defective or will hear the matter in an ordinary court proceeding.²²⁷

²¹⁵ See CHASE, HERSHKOFF, SILBERMAN, SORABJI, STÜRNER, TANIGUCHI & VARANO, *supra* note 211, at 402.

²¹⁶ MINSOHŌ, *supra* note 212, at art. 370, para. 1; see CHASE, HERSHKOFF, SILBERMAN, SORABJI, STÜRNER, TANIGUCHI & VARANO, *supra* note 211, at 402.

²¹⁷ See CHASE, HERSHKOFF, SILBERMAN, SORABJI, STÜRNER, TANIGUCHI & VARANO, *supra* note 211, at 403.

²¹⁸ Labor tribunal proceedings do not include union or collective bargaining disputes. See *id.* at 395.

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See *id.*

²²² See *id.* at 394.

²²³ See *id.*

²²⁴ See *id.* at 394–95.

²²⁵ See *id.* at 395.

²²⁶ See *id.*

²²⁷ See *id.*

The Japanese civil system is interesting not only because its tracking system segregates cases by both dimension and complexity, but also because of that nation's unique dispute resolution culture.²²⁸ Litigation in Japan is a last resort, and is invoked only after every other avenue has been exhausted.²²⁹ As a result, a lawsuit very often features difficult legal and factual issues.²³⁰ The complexity of claims that actually are litigated as well as a shortage of judges²³¹ have created considerable congestion in the Japanese courts.²³² Since this congestion is caused by cultural and other structural factors, it is difficult to isolate and evaluate the tracking system's influence on efficiency. Nonetheless, the Japanese system provides a useful exemplar of segregating cases both by dimension and type. Perhaps one or more federal district courts might usefully experiment with something like it under the guidance of the Federal Judicial Center.

3. Barriers to Tracking

Although abandoning transsubstantivity and developing a tracking system might lead to greater efficiency in terms of cost and delay without compromising the pursuit of quality decision-making, practical difficulties and potential opposition pose obstacles to implementation that will not be easy to overcome. To create a well-functioning tracking system, judgments would have to be made regarding how to define groups of cases with common characteristics or to draw dimensional lines for doing so, and customized procedural rules would have to be drafted for each. Some categories and dimensional lines would be easy to identify; others would be difficult to ascertain or even impossible to agree upon; cases that cross category lines are inevitable and would precipitate motion practice contesting the track placement of individual cases. Moreover, judgments would have to take account of vast differences in procedural philosophy and self-interest because the track to which a case is sent might have significant consequences for litigants. Inevitably, politics and pressure groups will rear their ugly heads. Therefore, it is crucial that those tasked with organizing the tracking categories and drafting the specialized rules be chosen very carefully, with an emphasis on their litigation experience and objectivity.

The practical difficulties of creating a tracking system do not have to be overwhelming, however. Some case categories will be clear and

²²⁸ See *id.* at 43.

²²⁹ See *id.* at 57.

²³⁰ See *id.*

²³¹ The German system has about 10 times as many judges per capita as the Japanese system. See *id.*

²³² See *id.*

lead to consensus as to where to post most cases. A basic tracking system can be created initially that can provide a foundation for further development and refinement once experience accumulates. Dramatic steps need not be taken at the outset. There also is the possibility for experimenting with several differential case processing approaches in different district courts pursuant to the local rulemaking power in Federal Rule 83. Gathering and analyzing detailed data in the process may provide an objective and acceptable means of making difficult categorical and rulemaking judgments.

Perhaps the biggest obstacles to establishing a tracking system are philosophical and ideological. There are those unwilling to deviate from our current procedural structure and would oppose abandoning transsubstantivity. Given the diverse opinions regarding the state and objectives of our litigation system, policymakers and pressure groups may be unable or unwilling to ignore the interests of their clients or their own strongly held beliefs. But even if there is resistance to abandoning transsubstantivity completely, as suggested above, there are ways to move gradually toward a tracking system. Congress can amend the Rules Enabling Act²³³ to modify or eliminate the statute's "general-rules" requirement to better reflect the realities of contemporary litigation, thereby providing the rulemakers with enough flexibility to create a tracking system or to promote rulemaking at the district court level. Alternatively, the rulemakers or courts could reassess the current understanding of the statutory words.

Although obstacles can be overcome, it is unlikely that transsubstantivity will be formally abandoned anytime soon. To do so legislatively would require consensus among multiple groups that have different interests and viewpoints and a great degree of political muscle. But if there were support from influential members of Congress, federal judges, and bar associations, at some point the climate may be ripe for change. Short of that, perhaps certain districts (or individual judges) could experiment with different informal tracking approaches to determine the best approach. Indeed, that seems to be within the ambit of Rule 16. That is not facially inconsistent with the Federal Rules. One objective would be to produce enough data to enable the Federal Judicial Center to engage in some intensive research and prepare a comparative cost-benefit analysis to determine whether the Federal Rules' uniform procedural "gold standard," or some portions of it, have become too resource-intensive to be employed in all cases and that differential case tracking would be beneficial and not detrimental. Should that happen, a shift to tracking and the abandonment of transsubstantivity might be a helpful step in addressing Judge Marrero's concern about unnecessary and unproductive procedural activities.

²³³ 28 U.S.C. § 2072 (2012).

C. *Judicial Management*

1. Philosophy

During my professional life I have witnessed and been part of the difficult birth and slow maturation of judicial management.²³⁴ Since 1983, Rule 16 has given district judges all the authority they need to blueprint cases by conducting pretrial conferences, setting schedules, promoting case resolution, and issuing various orders. Today, both the bench and bar seem to accept that it improves efficiency and reduces cost and delay. Its use in various forms is pervasive and that has altered what judges and lawyers do in civil litigation. It is not an exaggeration to say that judicial management has been transformational.

But there always has been a concern that judicial management might so dominate judicial activity that judges become managers rather than adjudicators. By placing too much emphasis on management, “gatekeeping,” and promoting pretrial disposition, judges might lose sight of their obligation to decide cases on their merits. District Judge William G. Young of the District of Massachusetts and Professor Jordan M. Singer have suggested that, rather than focusing on judicial efficiency, the emphasis should be on judicial productivity to avoid this result.²³⁵ Measuring the time judges spend adjudicating cases rather than the time it takes to clear the docket focuses attention on a judge’s social and institutional role as a decision-maker rather than as a manager. But managing to motivate a settlement seems to have become the primary objective in some quarters; as a result, federal judges appear to have less and less bench presence.²³⁶

However, as Judge Patrick Higginbotham of the Fifth Circuit has warned, a preoccupation with case management at the expense of adjudication may well transform the judiciary into another

²³⁴ I encountered considerable opposition, almost hostility from some judges, in 1981–1982 when, as the Reporter to the Rules Advisory Committee, I presented the then-proposed complete revision of Rule 16, which authorized and promoted judicial management as well as involvement in settlement, at various judicial conferences. Contemporaneously, Professor Judith Resnik expressed concern that some judges might abuse their discretionary power under a case management regime. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982). Others, however, argued that the rewards of management outweighed its risks. See Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (critiquing Professor Resnik’s concerns and arguing that judicial management is beneficial). See generally 6A WRIGHT, MILLER & KANE, *supra* note 184, §§ 1521–31; Miller, *Pretrial Rush to Judgment*, *supra* note 25, at 1003–07; Miller, *Double Play*, *supra* note 25, at 54–57. Congress joined the management bandwagon when it enacted the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–82 (2012), now largely sunset, which called upon each district court to develop an expense and delay plan that included using “litigation management.”

²³⁵ See Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565 (2014).

²³⁶ *Id.*

administrative agency.²³⁷ And, as his colleague, the late Judge Alvin Rubin once stated, “[j]udicial case management, avoidance of delay, and denial of unjustified continuances are all commendable. They are, however, only means to an end. That end is justice; justice done and perceived to be done.”²³⁸ But judicial management is a reality and it has both positive and negative cost-and-delay consequences, so it is important that it be employed intelligently and effectively. Part of management should include being mindful of the potential need to adjudicate the merits; that should not be subordinated to the quest for efficiency or securing a settlement. Ironically, it often may be just as efficient and economical to use judicial management to adjudicate a case rather than to expend significant efforts in the hope of settling it.

2. The Role and Responsibilities of Judges

Much of Judge Marrero’s Article focuses on lawyers and their unnecessary procedural activity as contributors to the cost and delay burdening federal litigation. To be sure, the Judge’s observations are correct and heed should be paid to them. Given their real (and sometimes imagined) obligations to their clients and the culture of our adversary system, as well as their economic and professional self-interest, it is unrealistic to think that they will always exercise restraint or act in ways that will contain cost and delay. Attorney zeal and inventiveness are to be prized, not inhibited—at least when they are kept within the bounds of propriety. These are distinctive benchmarks of the American lawyer. But that zeal and inventiveness sometimes must be cabined. So once again the metaphorical lens Judge Marrero trained on litigation should be widened to embrace the role that federal judges can play in managing litigation to control excessive lawyer activity and to contain cost and delay.²³⁹

There now appears to be a consensus that management has become part of the judicial job description. It seems to me that part of

²³⁷ Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745 (2010). The growth of court caseloads in many parts of the country, the expansion and complexity of substantive law, and the bureaucratization of the federal judiciary should not be ignored as factors contributing to today’s preoccupation with efficiency and gatekeeping. See generally Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983) (commenting on the transformation of the judiciary into a large-scale organization); Diarmuid F. O’Scannlain, *Access to Justice Within the Federal Courts—A Ninth Circuit Perspective*, 90 OR. L. REV. 1033 (2012) (a description of the limited capacity and resources of the federal courts by a distinguished federal judge); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998) (noting the emergence of an administrative judiciary).

²³⁸ *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1353 (5th Cir. 1985) (Rubin, J., dissenting).

²³⁹ Marrero, *Cost of Rules*, *supra* note 2.

that job description is the bench's obligation to ensure that lawyers employ the procedural system appropriately, even if that requires judicial hands-on activity that occasionally must be firm. As the third person in the ring, so to speak, judges may be in the best position and have the authority (both express and inherent) to do so. They should try to prevent (or give short shrift to) purely tactical, unnecessary, and fruitless procedural activity through their control of motion practice and use their management power to rationalize discovery.²⁴⁰ Only judges can establish the behavioral tone in their courtrooms and make it clear what will and will not be acceptable, as well as set the pace at which the case will proceed.²⁴¹

I admit this conception of the judge's role is not entirely consistent with the historic conception of the adversary system. But we have qualified the sanctity of that system by accepting such things as judicial management, mandatory disclosure, and discovery itself. The traditional bilateral character of the adversary system has been replaced to some degree by the triangulated relationship that now exists among counsel and the court. It no longer is the lawyers' case; in many respects it is the judge's case.

Judges also must make sure that their rulings are made in a timely fashion, with clarity and definitiveness, so that counsel have a road map and know what is expected of them. How can we expect lawyers to be efficient and avoid delay or unproductive motions or discovery when federal judges occasionally fail to rule on motions for far too long? Similarly, schedules should be established pursuant to Rule 16 and maintained. Continuances ought to be the exception, not the rule.

3. Areas of Potential Useful Inquiry

Since doing nothing is not really an option, what areas of exploration might prove fruitful for reducing cost and delay? Simply by way of examples, three come to mind that deserve special attention. Each is worth a few paragraphs of comment.

a. Aggregate Litigation

²⁴⁰ In addition to sanctions for mal-signature in Rule 11, there is a panoply of sanctions for discovery malfeasance in Rules 26(g)(3) and 37. In addition, Section 1927 of Title 28 authorizes sanctioning the unreasonable and vexatious multiplication of proceedings. Finally, there is judicially created (but somewhat amorphous) inherent authority to sanction a wide range of bad-faith conduct. *See generally* *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

²⁴¹ At the 2010 Litigation Review Conference at Duke Law School, mentioned earlier, see *supra* notes 33–36 and accompanying text, a number of general counsels of major corporations indicated that effective and more extensive judicial management was at the top of their wish list. Some speakers even suggested that judges consider using their Rule 11 sanction powers more frequently.

One context in which effective judicial management is especially essential is in the handling of aggregate litigation. Class actions and Section 1407 multidistrict consolidations have enormous potential to promote efficiency and the rational use of judicial, lawyer, and client resources without having to sacrifice procedural fairness or efforts to achieve an appropriate result.²⁴² Aggregating related claims either for pretrial processing or for all purposes can provide efficiency, economy, and consistent treatment. Additionally, consolidating related matters gives plaintiffs and class members a forum for adjudicating claims that individually have zero or negative economic litigation value. Therefore, aggregation can be a socially desirable access-to-justice mechanism.²⁴³ But the “big” multi-party–multi-claim cases—which in actuality only represent a modest percentage of the cases on district court dockets—are enormous consumers of everyone’s time, energy, and resources. Great strides have been taken over the years developing sophisticated management techniques, but focusing even more intensively on how best to process class actions and handle multidistrict litigation may be effort well spent from the perspective of reducing cost and delay and helping to mollify those clamoring for greater gatekeeping and early termination.

Of course, that effort may require increased judicial involvement. For example, since settlement has become a dominant reality in both class and multidistrict actions, judicial oversight of negotiated settlements, the administration of those settlements, and the distribution of their benefits play a crucial role in ensuring that the lawyers have represented the best interests of their clients, whether they have been present or absent throughout the proceedings. This type of judicial scrutiny provides an important check on lawyer behavior in these cases and is a prime example of when judicial responsibility should not be overlooked simply to avoid what may appear to be unnecessary procedural activity. The expenditure of judicial resources in oversight and assuring procedural regularity may lead to significant savings for all and enhance the integrity of the system. Since that expenditure promotes the resolution of all the aggregated claims and result in a judgment that may yield a substantial preclusive effect, the time, energy, and money expended in effective management actually

²⁴² Multidistrict litigation is not without its critics, however. See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 117–18, 128 (2015).

²⁴³ The proper management of these cases is critical to minimize the possibility of a collateral attack on the judgment, as well as for many other reasons given the important issues and the number of people involved. See generally Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014).

may be quite justifiable, even though it will not necessarily be reflected in reduced motion practice and discovery.

b. Bellwether Trials

As the cost-and-delay narrative is likely to continue to have traction despite the lack of empirical support, it may be useful to evaluate the utility of conducting bellwether trials in aggregated litigation. Bellwethers can be valuable for testing defenses and liability theories, as well as because they frequently promote settlement. As former Judge Shira A. Scheindlin once noted, bellwether trials provide the means for courts and fact-finders to consider the major arguments of both parties and make informed judgments about the issues on which the litigation revolves.²⁴⁴ When they lead to a realistic appraisal of the litigation's merits and demerits, as well as its potential value, the prospect of settling may prove appealing.²⁴⁵ With full information in hand, and the desirability of securing closure, settlement may be the most reasonable and attractive disposition.²⁴⁶ Bellwether trials also may be valuable as dress rehearsals for the effective conduct of subsequent later trials should any be necessary. They also produce "trial packages" because bellwether litigants must consolidate and organize all the necessary materials.²⁴⁷ These often can be used by individual litigants to streamline any later trials.

But are bellwether trials really cost-effective or do they simply generate more procedural activity and economic rewards for lawyers? Preparing and conducting them can take anywhere from two to four years, and may lead to another two years or so for appellate review of the result. Bellwethers in a complex product-defect or pharmaceutical case, particularly one involving personal injuries, may cost millions of dollars in discovery, expert fees, and trial costs. All things considered, bellwether trials ironically seem to be both efficient and inefficient.

²⁴⁴ *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, No. 1:00-1898, 2007 WL 1791258, at *1 (S.D.N.Y. June 15, 2007).

²⁴⁵ See generally Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2366 (2008) ("[T]he objective results obtained through bellwether trials often do precipitate settlement negotiations and also ensure that all of the parties to such negotiations are grounded by the real-world evaluations of the litigation by multiple juries."); Jeffrey R. Johnson & Tami Becker Gómez, *Federal Multidistrict Litigation: Background, Basics, Global Settlements, and Bellwether Trials*, 79 DEF. COUNS. J. 21, 30 (2012) (discussing the use of bellwether trials as an informational tool to promote settlement).

²⁴⁶ Lawyers often use bellwether results to create a settlement grid of payments that is analogous to a worker's compensation schedule. See, e.g., U.S. DEP'T OF LABOR, DIVISION OF FEDERAL EMPLOYEES' COMPENSATION PROCEDURE MANUAL: PART TWO ch. 2-0808 (2018), <https://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/FECA-PT2/group2.htm#20808e1> [<https://perma.cc/V4ZA-AXXY>] (Exhibit 1: Percentage Table for Schedule Awards) (an example of a worker's compensation schedule).

²⁴⁷ See Fallon, Grabill & Wynne, *supra* note 245, at 2366 (discussing the production of trial packages as a benefit of bellwether trials).

Whether conducting them is worth the effort and expense hinges on the parties' objectives and whether they are likely to produce a resolution of some or all of the remaining aggregated cases. If they do produce a settlement and avoid full-blown individual trials, which conceivably could be quite numerous, then bellwethers seem to be a sound option. As of now, reasonable people disagree on the cost-benefit question.²⁴⁸ Again, there is an unfortunate lack of empiric evidence on the relevant merits and demerits of bellwether trials. It would be useful if that could be developed.

Finally, there are a number of difficult questions that remain unanswered. Among others, they relate to the process of selecting appropriate bellwether cases, whether the transferee court has personal jurisdiction over the bellwether defendant, the location of the trials, the governing law, and the powers of the transferee judge inasmuch as the cases were initially consolidated and transferred only for pretrial purposes. Litigating bellwethers continues to absorb a great deal of judicial, lawyer, and client resources.²⁴⁹ Much of this expenditure takes the form of internecine friction among the lawyers or various types of tactical activity in large part because of the significant economic stakes involved in these cases both for the clients and the lawyers, as well as the potential impact on the consolidated cases not involved in the bellwethers. Is this activity to be ascribed to lawyer behavior within the ambit of Judge Marrero's criticism or is it a natural consequence of the uncertainties and uniqueness of practice under the Multidistrict Litigation statute?

c. Magistrate Judges

There is no doubt that magistrate judges perform extremely useful functions in civil cases.²⁵⁰ But there are questions about existing

²⁴⁸ Compare Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 638 (2008) (arguing that in the context of mass tort cases, "bellwether trials will increase citizen participation in an area of the law that has been the consistent target of allegations of capture, bias, and abuse"), with Redish & Karaba, *supra* note 242, at 127–28 (arguing that settlements resulting from bellwether trials may be over- or under-valuing claims because they do not take into account the unique characteristics of individual claims), and Fallon, Grabill & Wynne, *supra* note 245, at 2366 (acknowledging that bellwether trials are usually more expensive than regular trials because attorneys "pull out all the stops" in light of the pervasive effects of the results on later trials or settlements).

²⁴⁹ The complexities of the multiple appeals of bellwethers in the so-called hip implant cases is illustrative. See, e.g., *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 778 (5th Cir. 2018); *Metzler v. DePuy Orthopaedics, Inc.*, No. 3-12-CV-2066-K, 2017 WL 843973 (N.D. Tex. Jan. 3, 2017), *appeal docketed*, No. 17-10831 (5th Cir. July 31, 2017) (appeal currently *sub judice*).

²⁵⁰ Some of the lawyer activity most assuredly is unnecessary and must be contained by the court through its management authority. Indeed it is an excellent illustration of the importance of judicial involvement. See *Peretz v. United States*, 501 U.S. 923, 928 (1991) ("Given the bloated dockets that district courts have now come to expect as ordinary, the role of the

practices worth evaluating: Are we employing magistrate judges optimally? Do they promote efficiency, or do they simply represent another procedural layer that contributes to the cost and delay associated with what often are repetitious proceedings? Would the civil system be better off either reducing or increasing magistrate involvement or using them in different ways, perhaps redistributing the functions and decision-making authority between the district judge and the magistrate judge? If properly deployed and trained, could magistrate judges alleviate some of the concerns raised by Judge Marrero? I think these are reasonable (and important) questions because the system certainly would be benefited by maximizing the utilization of the enormous talent and experience of magistrate judges.

Unfortunately, I have heard a number of lawyers voice displeasure over their inability to deal directly with the district judge when motion and discovery matters are being handled by a magistrate judge.²⁵¹ Former Judge Richard A. Posner once expressed reservations about the degree to which the discovery process is delegated to magistrate judges who may have an “imperfect sense of how widely the district judge would want the factual inquiry . . . to roam.”²⁵² If delegating a significant portion of the pretrial process to magistrate judges makes it difficult for district judges to manage and control cases effectively, it might be more efficient if they were managed by the district judge exclusively. However, that might be counterproductive in terms of the best use of the energies of both sets of judges.

There is little information about how the magistrate system is functioning. The last significant study of it was conducted by the Federal Judicial Center in 1985.²⁵³ Although that was a valuable case study on the role of magistrate judges in nine district courts, much has changed since that year—the magistrate statute has been amended, considerable experience with magistrate judges has accumulated, there

magistrate in today’s federal judicial system is nothing less than indispensable.”) (quoting *Virgin Islands v. Williams*, 892 F.2d 305, 308 (3d Cir. 1989)); see also Morton Denlow, *Should You Consent to the Magistrate Judge? Absolutely, and Here’s Why*, 37 LITIG. 3, 5 (2011) (discussing the advantages of utilizing a magistrate judge including that the magistrate judge may become more familiar with the case than the district judge and may have expertise and experience in the particular case type). See generally 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 3066–73 (3d ed. 2014).

²⁵¹ I also have heard murmurings about delays in issuing rulings and a lack of direction or drive in keeping the proceedings moving. As one experienced litigator expressed it to me: some magistrate judges have not “embraced their role.”

²⁵² *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411–12 (7th Cir. 2010) (Posner, J., dissenting in part).

²⁵³ CARROLL SERON, FED. JUDICIAL CTR., THE ROLES OF MAGISTRATES: NINE CASE STUDIES (1985), <https://www.ncjrs.gov/pdffiles1/Digitization/99226NCJRS.pdf> [<https://perma.cc/CB3Z-SR9N>]; see also CARROLL SERON, FED. JUDICIAL CTR., THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS (1983), <https://www.fjc.gov/sites/default/files/2012/MagRoles.pdf> [<https://perma.cc/SH5P-MAA9>].

is now expanded and experimental judicial management, new data technologies have become available to facilitate communication and information transfer among litigation participants, and other judicial and societal developments have occurred. It is time to conduct some comprehensive research on how the system is working and consider whether the results indicate a need for adjusting the roles of magistrate judges and their interaction with district judges, and whether the types of lawyer behaviors Judge Marrero describes in his Articles also infect proceedings before magistrate judges. It also might provide a basis for experimenting with different arrangements regarding their respective functions.²⁵⁴ A serious exploration of these matters probably would be a difficult and sensitive undertaking but it could be worthwhile if it leads to the more effective utilization of magistrate judges. Given the enormous importance of these judges, we should have far more comprehensive information than we do.

D. *The “Nuclear” Option*

For those who do not believe that case tracking, judicial management, and rule changes are substantial enough to meet what they claim is a cost-and-delay “problem” or Judge Marrero’s concern about excessive lawyer activity, there always is what might hyperbolically be called a “nuclear” option. If the system really is being overrun by the Huns and the Visigoths and inundated with unnecessary motions and discovery that are mounting costs and delays, maybe it would be rational (or sheer anarchy) to wipe the slate clean and create a new civil procedure system as was done in 1938. It seems hopelessly unrealistic to believe we can attain the 1938 Federal Rule “gold standard” of giving everyone a real prospect of a trial on the merits. The reality is that the number of federal civil cases that have gone to trial, let alone a jury trial, has been in steep decline since 1938.²⁵⁵ Despite ardent

²⁵⁴ See, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 515–16 (2002) (discussing the Eastern District of New York’s utilization of magistrate judges to oversee the pro se docket but expressing the need for greater research on the success of this approach).

²⁵⁵ In 1938, 19% of all federal civil cases went to trial. By 1962, that had decreased to 11.5%. By 2015, the rate plummeted to just 1.1%. See Jed S. Rakoff, *Why You Won’t Get Your Day in Court*, N.Y. REV. OF BOOKS (Nov. 24, 2016), <http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court> [<https://perma.cc/J5X7-CU5B>]. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524–25 (2012) (arguing that our system should be termed “nontrial procedure”). Judge William G. Young has been a leading crusader on this subject. See, e.g., *United States v. Massachusetts*, 781 F. Supp. 2d 1, 21–27 (D. Mass. 2011) (arguing in an addendum to his opinion against an “administrative model” of the courts); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006) (“[T]he civil jury trial has all but disappeared.”) (internal citations

supporters, trials may be going the way of buggy whips and the Dodo bird. Thus, to focus our procedural system on a trial model arguably is astigmatic. Pretrial dismissals, settlements, and abandonments dominate the litigation scene. Given that, perhaps there should be a transition from the current adversarial system to one far more collaborative or administrative or something closer to that in some civil law countries.²⁵⁶ But there are those (like me) who question whether we should sacrifice our aspiration for the “gold standard” for an undefined new procedural system in the interests of efficiency.

Some academics believe that the third iteration of American procedure—embodied in the Federal Rules—has ended and we already have transitioned to a fourth era that focuses on judicial management, efficiency, gatekeeping, and diversion to mediation and arbitration instead of actual merit adjudication.²⁵⁷ Given today’s political and judicial realities, resorting to a “nuclear” option undoubtedly would mean substituting rules based on these objectives for those embedded in the Federal Rules. For me, that is too risky an option for the same reasons I think that a constitutional convention would be dangerous today. Therefore, I decline to take the “nuclear” option seriously.²⁵⁸

Although some may praise alternative dispute resolution methods as fair and efficient substitutes for adversarial litigation,²⁵⁹ I do not think that is a panacea. The limited empirical evidence regarding these dispute resolution techniques strongly suggests it may not be as effective at reducing costs and delay as enthusiasts claim, and many judges are even hesitant to make mediation referrals because of that.²⁶⁰ In addition,

omitted).

²⁵⁶ One adventuresome attempt to moderate the adversarial system is the joint American Law Institute and International Institute for the Unification of Private Law project to propose a system of Transnational Civil Procedure. See AM. LAW INST. & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006), <https://www.unidroit.org/instruments/transnational-civil-procedure> [<https://perma.cc/TPZ2-QWSJ>]. However, I doubt such an international procedural Esperanto will replace the basic features of our current system.

²⁵⁷ See Subrin & Main, *Fourth Era of American Procedure*, *supra* note 148.

²⁵⁸ There are those who believe the system is functioning fairly effectively. See, e.g., STEVEN P. CROLEY, CIVIL JUSTICE RECONSIDERED: TOWARD A LESS COSTLY, MORE ACCESSIBLE LITIGATION SYSTEM 93–116 (2017).

²⁵⁹ See Kiernan, *supra* note 126, at 221 (“Managed correctly, court-supported or court-ordered mediation enhances rather than impedes the fair, inexpensive, and speedy resolution of disputes.”).

²⁶⁰ See JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VALANA, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 29–53 (1996), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR803.pdf [<https://perma.cc/8UYT-PGTQ>] (concluding that in the six districts studied, mediation did not significantly affect time to disposition or litigation costs); Michael Heise, *Justice Delayed: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE WESTERN RES. L. REV. 813, 846 (2000) (concluding that a case’s referral to alternative dispute resolution increased its disposition time in a “statistically significant manner”); REBECCA PRICE, U.S. DIST. COURT S.D.N.Y., MEDIATION PROGRAM ANNUAL REPORT: JANUARY 1, 2016–DECEMBER 31, 2016 (AS OF DECEMBER 5, 2017) (2017), http://www.nysd.uscourts.gov/docs/mediation/Annual_Reports/

these procedures, most notably arbitration, are currently invoked primarily by sophisticated and powerful economic entities who then impose them on consumers and employees by adhesion contracts.²⁶¹ Relatedly, there is a lack of empirical evidence to conclude that a significant transition toward a more collaborative lawyering system is in the offing, let alone would really ameliorate the costs and delays in our current system.

In any event, a dramatic overhaul of the procedural system is easier to talk about than to engineer. In addition to rewriting the Federal Rules, it probably also requires that practice under the Rules Enabling Act,²⁶² the Federal Arbitration Act,²⁶³ and the Multidistrict Litigation Act²⁶⁴ be rethought or at the very least reorganized, if not preemptively altered by legislation. It is not only risky to attempt dramatic change on that scale, it is likely impossible to achieve; everyone with a stake in civil litigation would bring out their long knives and be unwilling to compromise. The original Federal Rules were a product of the unique, relatively tranquil, and liberal conditions of the late 1920s and early 1930s. Today, the legal profession is polarized, as is society at large, and there is little likelihood of achieving a consensus on a sweeping procedural revision.

I doubt we can (or should) rely on the rulemaking process for any changes that might be called “nuclear.” The original Federal Rules Advisory Committee was apolitical and composed of some of the best and brightest judges, lawyers, and academics. As the cliché goes, clients were left at the door (as they were in my days with the Committee). The chasm between the plaintiffs’ bar and the defense bar at that time was far narrower than it is today; there were fewer philosophical differences and those were less extreme. Moreover, the rulemaking process has been significantly altered over time, primarily in the name of transparency. That is a good thing in the abstract, but the process is now open to the pressure of lobbyists, which is not to say that any pressure will be successful, but some believe the Committee is now vulnerable to political or ideological stacking by the Chief Justice.²⁶⁵

2016/Annual%20Report.2016.Final%20Draft.pdf [https://perma.cc/CZK5-574B] (“A common concern for judges making mediation referrals is that the referral to mediation will cause an unnecessary delay in the case.”).

²⁶¹ See discussion of arbitration *supra* notes 147–69.

²⁶² 28 U.S.C. § 2072 (2012).

²⁶³ 9 U.S.C. §§ 1–16 (2012).

²⁶⁴ 28 U.S.C. § 1407 (2012).

²⁶⁵ See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015) (discussing the backgrounds of the Advisory Committee members and the transition toward more pro-defendant proposals); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010) (describing the transition in the Advisory Committee and its impact during Professor Carrington’s years as Reporter); Arthur R. Miller, *Some Very Personal Reflections on the Rules, Rulemaking, and Reporters*, 46 U. MICH. J.L. REFORM 651, 657 (2013) (discussing my

The loss of confidence in the process perceived by some²⁶⁶ raises doubts about what might result if something “nuclear” were undertaken. A likely outcome of trying to start fresh, given the composition of the rulemaking structure and the politics of Congress at the moment, might be a paralysis that leads to preserving the status quo by default. The status quo, of course, means a continued focus on efficiency through arbitration, judicial management, gatekeeping, and early termination. That might result in a hardening of the procedural process and lead to fewer motions and less discovery. Those preoccupied with costs and delays may view these potential outcomes of a “nuclear” (or status quo) option favorably. However, with the massive gap in resources, organization, and access to power that now exists between the plaintiff and defense bars, as well as recent changes in the composition of the federal judiciary and what seems to be a conservative orientation of the rulemaking process, it is equally possible that maintaining the status quo would limit meaningful court access even more than our present system does. That might well result in further restrictions on plaintiff-friendly procedural tools, such as pleading simplicity, discovery, and class actions.²⁶⁷ Is that really consistent with what we want from the civil justice system?

CONCLUSION

I am grateful to Judge Marrero for his insights into important aspects of federal litigation. He clearly is correct in his observations about the increase in motion practice, too much of which has little or no utility. The same can be said of discovery. Although it is true that litigation costs and delays have increased over time, it also is true that those who continue to propagate the narrative have greatly exaggerated its dimension. In many respects, it is “fake news.” Now that Judge Marrero has trained a telescope on practicing lawyers and their hyperactivity as a source of cost and delay, a more panoramic lens should be trained on others who have contributed in one way or another to the activities he criticizes. Congress, the judiciary, and the rulemakers have all relied on the narrative to justify erecting procedural stop signs in the last few decades that, whatever their other merits, actually may have been neutral or counterproductive in terms of cost, delay, and excessive lawyer activity.

concern about the change that has occurred in the rulemaking process).

²⁶⁶ See, e.g., Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 293–96 (2009).

²⁶⁷ Reduced discovery, gatekeeping, diminished availability of the class action, and early termination might reverse corporate America’s flight from the courthouse and its use of mandatory no-aggregation-arbitration clauses.

So how should cost and delay be addressed if attempts to reduce them through judicial decisions, Federal Rule changes, and legislation have not fully lived up to their billing? Adding more procedural tools, even modest ones such as Judge Marrero's suggestion that Rule 12(b)(6) be divided into two motions,²⁶⁸ might only increase the blizzard of paper (or gigabytes of information) that besets current litigation. Tracking and sophisticated judicial management might provide some amelioration, but those who proposed or mandated earlier procedural modifications likely felt they had found a silver bullet. It is impossible to predict what effect even small changes in procedure will have. The law of unintended consequences is real. (I can attest to that.²⁶⁹) In a way, that uncertainty is what makes doing nothing a plausible option. Alas, being satisfied with the status quo would not be the American way. It can be tantamount to paralysis and is not likely to be embraced by the decision-makers (and most rulemakers who simply cannot resist the impulse to do "something").

At the very least, any proposed change should be preceded by meaningful independent research and a sophisticated objective inquiry of the type we have begun to see in recent decades. If it is claimed that the system has a "problem," let the draftsman's hand be stayed until it first has been demonstrated that it is a real one and that the proposed solution truly is "plausible" and without collateral damage. My "common sense" and non-"judicial experience" leads me to conclude that there probably are no silver bullets.

²⁶⁸ See discussion *supra* notes 103–17.

²⁶⁹ When the Advisory Committee and I, as Reporter, developed what became the 1983 amendment to Rule 11, we all thought it was simply a modest proposal to promote the accuracy of the papers that lawyers sign and to remind judges they had the power to sanction lawyers who failed to honor that standard of truthfulness. We hoped that would "upgrade" lawyer behavior. None of us foresaw that sanction motions would become a cottage industry or that it might be used discriminatorily against certain segments of the bar and their clients, which necessitated a substantial revision of the Rule that became effective in 1993. See generally 5A WRIGHT & MILLER, *supra* note 182, §§ 1331–32; Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 *FORDHAM L. REV.* 475 (1991).