

# THE NARRATIVE OF COSTS, THE COST OF NARRATIVE

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*Why is this belief so enduring, when it has never been supported by a single empirical study of costs, as opposed to beliefs about costs?*<sup>1</sup>

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## INTRODUCTION

Battles over procedure occur on multiple levels. At the most granular level, litigants, usually through lawyers, use procedural tools to advance their interests in individual cases. At the most abstract level, the procedural rules we select are products of a complex balance of intersecting and competing interests.

This creates predictable problems. At the abstract level, all else being equal, there is likely consensus that the best procedural rules are those that best ensure just outcomes without being too costly or inefficient.<sup>2</sup> But there will always be differences of opinion as to the substantive content of these values as well as how to balance them. And

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<sup>1</sup> Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 786–87 (2010) (alteration omitted) [hereinafter Lee & Willging, *Defining the Problem*].

<sup>2</sup> Rule 1 encapsulates these values, with its focus on justice, speed, and cost. See FED. R. CIV. P. 1.

even if we can put aside differences about how both to define and weigh justice, cost, and efficiency, it is indisputable that at the granular level procedural rules offer an opportunity for litigants in individual cases to undermine justice, impose unnecessary costs, and foster inefficiency. Procedural rules, after all, even ones that depart from the federal system's default choice of trans-substantivity,<sup>3</sup> are blind to which party to a lawsuit is objectively "right." And so procedural rules sometimes can benefit the strategic litigant at the expense of the deserving one.

Judge Victor Marrero's Article, *The Cost of Rules, the Rule of Costs*, is an attempt to both diagnose and intervene at the abstract and granular levels of procedure.<sup>4</sup> His diagnosis: too many lawyers use too many procedural devices to cause too much inefficiency and impose too high cost on the system.<sup>5</sup> His prescription: operating at both the abstract and granular level, he proposes changes big and small to our procedural regime.<sup>6</sup>

Judge Marrero's observations and suggestions should be taken seriously. He has served as a judge for nearly two decades and prior to that he had extensive experience as a lawyer in both the public and private sector. When a judge with his experience speaks, people will pay attention—which is precisely why it is also important to critically engage with his article. And while I found some aspects of Judge Marrero's Article compelling, I have serious reservations about his diagnosis and some of his prescriptions.

In this Article, I will highlight some of my concerns, but they boil down to this: in terms of diagnosis, I am simply not convinced that Judge Marrero has compellingly demonstrated that in the run of cases, our procedural rules are being abused in ways that undermine justice and increase cost and inefficiencies. In part, this is a data-driven critique—there is little empirical support for the proposition that our procedural system is too costly in most cases. But my critique is also an attitudinal one. Judge Marrero makes much of the extent to which litigants fail—claims that are dismissed, motions that are lost, etc.—and finds in these instances proof of unnecessary cost and rampant inefficiency. But Judge Marrero's assessment, I fear, overlooks fundamental values that are advanced even when litigants seek legal relief and are ultimately unsuccessful.<sup>7</sup> Even if one accepts Judge

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<sup>3</sup> For a discussion of the trans-substantive approach to procedure, see generally Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989). One notable example where federal law departs from trans-substantive procedure is in the area of constitutional litigation on behalf of people confined in prisons and jails. See, e.g., 42 U.S.C. § 1997e (2012).

<sup>4</sup> 37 CARDOZO L. REV. 1599 (2016).

<sup>5</sup> *Id.* at 1632–42.

<sup>6</sup> *Id.* at 1675–91.

<sup>7</sup> I have covered this topic more extensively in other work. See Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014).

Marrero's diagnosis, some of his prescriptions will create their own inefficiencies, and sometimes undermine justice, in ways that Judge Marrero does not sufficiently address.

This is not to say that everything runs smoothly in every case in federal court. Litigants use procedural rules to their advantage sometimes unfairly and in ways that create unnecessary burdens on courts and others. It is worthwhile to consider ways to address these instances; however, one should not confuse anecdotal reports with systemic dysfunction, and one should always consider the downstream consequences of procedural interventions meant to address both individual and systemic problems.

### I. THE DIAGNOSTIC NARRATIVE: THE ECHO CHAMBER OVERWHELMS THE DATA

Many critics of the Federal Rules of Civil Procedure (Federal Rules) have a standard account of why reform is necessary. Simply put, the liberality of the Federal Rules permits too many insubstantial claims to survive and, because discovery obligations are broad, the costs of discovery outrun the value of the claims.<sup>8</sup> Judge Marrero begins his Article by rehearsing this standard account, cataloging the various fora in which concerns about rising cost and inefficiency in the federal judicial system have emerged.<sup>9</sup> The narrative will be familiar to people steeped in the history of debates about federal procedure (and it is a rich history),<sup>10</sup> but Judge Marrero's goal is different than most. He professes some agnosticism about whether indeed the account is accurate.<sup>11</sup> But where other critics lay the blame for alleged inefficiencies on the

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[hereinafter Reinert, *Meritless*].

<sup>8</sup> Many scholars have discussed these arguments in great detail in other work over several decades. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83–90 (1993); 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, 302 (2013); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1397–1409 (1994) (describing and rebutting arguments about excessive costs); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1087–89 (2012); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219–20 (1989).

<sup>9</sup> Marrero, *supra* note 4, at 1601–08.

<sup>10</sup> For some examples, see generally Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); see also sources cited *supra* note 8.

<sup>11</sup> Marrero, *supra* note 4, at 1603–06.

liberality of the Federal Rules, Judge Marrero places blame squarely on the legal profession.<sup>12</sup> The insight that drives Judge Marrero's Article is that accepted tenets of legal practice, informed by law firms' business models, create cost and inefficiency, not the Federal Rules themselves.<sup>13</sup> And because it is so important to his argument, it is the first place I pause.

There are two essential elements to Judge Marrero's central theme that lawyers, not the Federal Rules, bear responsibility for increasing inefficiency in litigation. The first element is empirical—although Judge Marrero professes agnosticism about the extent to which inefficiency and runaway costs run rampant in federal civil litigation, he needs the reader to accept this narrative as empirically rooted in reality to accept the heart of his argument. The second element is causal—Judge Marrero needs us to accept that lawyers, not the Federal Rules, are the root cause of inefficiency and high costs, to accept his prescriptive argument. My main goal in this Section is to explain why I remain skeptical of both Judge Marrero's empirical and causal claims, but precisely because Judge Marrero could be read as indifferent to whether critics' standard account is based in reality, I first explain why I think he ultimately needs readers to accept the standard account to trust the remaining arguments made in his Article.

As Judge Marrero lays out the standard account of cost and inefficiency, he is careful to pepper his narrative with language of "perception" and allegation rather than demonstrated proof.<sup>14</sup> He acknowledges that much of the rhetoric may be heated by "anecdotal horror stories and subjective impressions . . ."<sup>15</sup> One might, therefore, be left with the impression that Judge Marrero himself is unsure whether the standard account is rooted in reality. Judge Marrero, however, ultimately takes the narrative of abuse and waste as a given—speaking of the "historical and statistical record"<sup>16</sup> that "convey[s] that despite the reformers' periodic attempts to realize change, the offending practices have neither ceased nor abated, let alone improved litigation practice over time."<sup>17</sup>

To be sure, even as Judge Marrero takes the standard account as a given, he sources it in a different problem than most critics—not in the

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<sup>12</sup> *Id.* at 1607.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1603 ("That perception [of widespread discovery abuse] still underlies much of the criticism of court proceedings that regularly arises nowadays from various segments of the legal profession."); *id.* at 1604 ("Such perceptions have engendered responses and proposals from various sources and with shifting focus."); *id.* at 1605 (stating that attorneys' responses to 2009 Federal Judicial Center study "suggest" that attorneys themselves recognize that they impose unnecessary costs through some litigation tactics); *id.* at 1605–06 (discussing opposing perspectives of plaintiffs' and defense bar at 2010 Duke Conference).

<sup>15</sup> *Id.* at 1606.

<sup>16</sup> *Id.* at 1632.

<sup>17</sup> *Id.* at 1606–07.

liberality of the Federal Rules, but the “things many attorneys themselves do, omit to do, or condone in the course of everyday practice that directly produce the excess and magnify the unpleasantness of litigation, and thus that unnecessarily multiply the costs of legal services.”<sup>18</sup> This is Judge Marrero’s causal argument, but for it to have any force, the argument requires that the reader accept the standard narrative of runaway costs in federal civil cases.

In many ways, I think Judge Marrero’s message is one worth communicating—lawyers, a self-regulating profession, should take responsibility for our own excesses. Changing the Federal Rules may not help matters if we do not change professional practices that create perverse incentives. As Judge Marrero observes, nothing in the Federal Rules obligates attorneys to file frivolous complaints or baseless motions, nor to make “abusive demands for discovery.”<sup>19</sup> But in the same breath, Judge Marrero glides over the question of how real these problems are, referring to abuses that “lawyers themselves complain are now commonplace” or to “extreme methods” which, according to “critics’ accounts,” have become “virtually obligatory in much litigation today.”<sup>20</sup> These are forceful accusations. In the end, although Judge Marrero talks in the language of “perception” and acknowledges that much of the rhetoric may be overblown, his premise is that “the justice system, like a boat running against a strong current, has been waging a losing battle.”<sup>21</sup> I will spend the rest of this Section demonstrating why I think, putting aside Judge Marrero’s different take on causation, his acceptance of the standard account is problematic. I will then turn to why I believe the additional evidence he relies upon to bolster his causal argument is insufficient to carry the day.

At the outset, I think a personal confession is in order. In the nearly two decades that I have worked as a lawyer, I have almost always represented plaintiffs in civil rights cases. The lawyers on the other side of the “v” in my cases have almost always been better resourced public agencies or large law firms. To the extent that much of Judge Marrero’s Article reads as a critique of the business model of large law firms, I might be one of the last people expected to step in and question the critique. But the procedural battles of the past several decades are often driven by narratives that appear neutral on their face but obscure the underlying stakes and interests.<sup>22</sup> This makes for an unhealthy dialogue

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<sup>18</sup> *Id.* at 1632.

<sup>19</sup> *Id.* at 1642.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1607–08; see also *supra* note 14 and accompanying text.

<sup>22</sup> As just one set of examples, the presumptive limits on discovery devices such as depositions and interrogatories were proposed as a way to reduce costs and abuse across the board. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 104 (1991) (“The information explosion of recent decades has greatly increased the potential cost of wide-ranging discovery and thus

about procedure that raises the specter (and sometimes reality) of interest-group lobbying rather than principled decision-making.<sup>23</sup>

A. *Exploring the Narrative of Runaway Costs*

It is fair to say, as Judge Marrero points out, that almost from their inception the Federal Rules have prompted debate and criticism about how well they balance justice, efficiency, and timeliness.<sup>24</sup> But these critiques are often anecdotal, impressionistic, and, in many cases, conscious attempts to tilt the playing field one way or another in the absence of hard empirical evidence. Judge Marrero finds, however, that simply the existence of anecdotal reports and complaints is verification enough of a problem:

Even to the extent that it is merely based on anecdotal horror stories and subjective impressions, what lawyers relate about litigation abuse and attendant costs suggests that the underlying issues are real and substantial, and that their impacts not only reach the front lines of everyday law practice, but penetrate much farther so as to unsettle the very foundation of our justice system.<sup>25</sup>

This logic is reminiscent of comments made by Judge Paul V. Niemeyer in 1998, who repeated the then-prevailing account that 80% of costs of a case are attributable to discovery, even while acknowledging that there was no empirical data in support of the claim.<sup>26</sup> For Judge Niemeyer, “the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation.”<sup>27</sup> One cannot fail to think of the Bellman in Lewis Carroll’s poem, who declared three times that he and his crew had found “‘just the place for a Snark! I have said it thrice: What I tell

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increased the potential for discovery to be used as an instrument for delay or oppression.”). But limiting discovery tends to favor those with access to information, usually defendants over plaintiffs. As Judith Resnik has observed more generally, “[i]n short, we do not all suffer the civil rules equally.” Resnik, *supra* note 8, at 2225.

<sup>23</sup> See, e.g., Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917, 935 (2017) (describing how procedure has become “increasingly polarized and politicized”); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 844–56 (1991) (discussing interest group lobbying in multiple procedural contexts); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 542–45 (2001) (discussing the “ideological and distributional battle” behind different procedural reform proposals).

<sup>24</sup> See, e.g., Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: ‘Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 228–30 (2010) (describing the history of criticism of federal rules of procedure).

<sup>25</sup> Marrero, *supra* note 4, at 1606.

<sup>26</sup> Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998).

<sup>27</sup> *Id.*

you three times is true.”<sup>28</sup>

But the leap from anecdotal reports to concluding that there is a real and substantial problem to be solved is a dangerous one. Procedural reform has more and more been driven by interest groups, who have a particular incentive to put forward narratives about the impact of procedural rules.<sup>29</sup> Many years ago, Richard Marcus responded by arguing for neutrality, or at least as much neutrality as can be hoped for:

In some instances those who seek to advance their interests through civil litigation reform are overt about what they are doing, but many who seek advantage through reform proposals do not act so transparently. Thus, skepticism about hidden agendas sharpens our antennae as we scrutinize arguments phrased as neutral. This is a proper attitude to take toward much of the litigation crisis bombast that has become so common in the last ten years. Though it is phrased in general terms and purports to further neutral interests of society or the court system, in the hands of many this rhetoric seems to be narrowly gauged to serve the interests of a certain sector.<sup>30</sup>

The narrative of discovery and litigation abuse is generally driven by defendants, particularly those in particular kinds of cases. The history has been recounted at various times by others, and I will not repeat it here.<sup>31</sup> Suffice to say, it has been supported by questionable empirics.<sup>32</sup> Careful empirical work that rebuts the narrative rarely receives attention, for reasons beyond the scope of this author and this Article. But for decades, researchers, including those at the Federal Judicial Center, have provided data that undermine the narrative only to see overheated rhetoric about runaway costs take over and motivate reforms.<sup>33</sup>

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<sup>28</sup> LEWIS CARROLL, *THE HUNTING OF THE SNARK* 3 (1876) (quoted in *Parhat v. Gates*, 532 F.3d 834, 848–49 (D.C. Cir. 2008)) (alteration omitted).

<sup>29</sup> See Resnik, *supra* note 8, at 2219–20 (“I believe we cannot and should not ignore the political content and consequences of procedural rules. Over the last decade, a variety of powerful ‘repeat players’ have sought, sometimes openly, to influence ‘court reform’ efforts. By and large, that work has been done not by letters written to the Advisory Committee on Civil Rules, but rather by lobbying efforts directed towards legislatures and the public, by well-financed media campaigns, and by support for conferences and meetings to address and describe the ‘litigation crisis.’ However appealing might be the notion that writing the Rules of Civil Procedure (in contrast to the Rules of Criminal Procedure) is a ‘neutral’ task with diverse consequences on anonymous and interchangeable civil plaintiffs and defendants, that description is no longer available. ‘Tort reform,’ among other events of the last decade, has denied us the refuge of a comforting image.”).

<sup>30</sup> Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 772 (1993).

<sup>31</sup> See generally Elizabeth G. Thornburg, *Giving the “Haves” A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 243–49 (1999).

<sup>32</sup> See, e.g., *id.* at 244–45 (recounting the figure trotted out by Judge Paul V. Niemeyer that discovery “accounts for 80 percent of litigation costs”) (quoting Niemeyer, *supra* note 26, at 518).

<sup>33</sup> *Id.* at 246–48 (summarizing studies).

The importance of calling out the erroneous, data-free assumptions behind this rhetoric should not be overstated. As many commentators have observed, some of the most effective anti-litigation procedural doctrine has been fed by a narrative about abuse and out of control costs.<sup>34</sup> Accepting the narrative as a given perpetuates myths that interfere with a balanced discussion about procedural choices.<sup>35</sup> To the extent there are hard empirical data, they suggest that discovery abuse is focused on a small subset of cases on the federal docket, while the procedural reforms prompted by this narrative tend to have greater impact in the very cases that do not support the discovery abuse narrative.<sup>36</sup> The extreme cases drive the narrative and prompt reforms, and the impact of the reforms will be felt most in the cases in which there are minimal discovery costs.

Indeed, Judge Marrero uncritically cites Arthur Miller, a leading author in this area, as if Miller subscribes to the litigation explosion myth,<sup>37</sup> even though, in the article cited by Marrero, Miller makes clear his view that the myth is mostly perception and assumption rather than a data-driven conclusion:

The foregoing shows that the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition. Thus, one should be cautious and refrain from trumpeting conclusions on the subject lest it distract us from serious inquiry. Yet despite the lack of a solid foundation for it, the perception of a “litigation explosion” or “liability crisis” drives the “reform” movement.<sup>38</sup>

If much of the debate is prompted by strategic attempts to influence the rule-making process, which as many have observed has become highly politicized and tilted towards defense interests, then one should be very careful about concluding much from bellyaching on either side about the supposed excesses and abuses from opposing counsel. Take, for example, the 2009 report by the American College of

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<sup>34</sup> Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 520–21 (2016) (“A majority of the Supreme Court’s pleading, summary judgment, class action, compulsory arbitration, and justiciability jurisprudence, starting in the 1980s, has been similarly influenced by a mindset that assumes, without empirical support, that civil litigation is in some sense ‘out of control’ and infused with discovery abuse.”).

<sup>35</sup> *Id.* at 520.

<sup>36</sup> Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1850–51 (2014) (“Thus the cases where discovery abuse is most likely are also least likely to be constrained by the new discovery rules. Meanwhile, cases in which there is little or no discovery will suffer the additional transaction costs.”); Thornburg, *supra* note 31, at 248–49.

<sup>37</sup> Marrero, *supra* note 4, at 1604 n.9.

<sup>38</sup> 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, 996 (2003).

Trial Lawyers (ACTL),<sup>39</sup> cited by Judge Marrero and often held up by critics of liberalized procedure as proof that our procedural system perpetuates waste and inefficiency.<sup>40</sup> Methodologically, the survey lacks some of the telltale indications of empirical rigor—the sample of lawyers was biased (three-quarters of respondents represented defendants exclusively or primarily), and not particularly experienced in federal litigation (fewer than 20% litigated in federal court).<sup>41</sup> There are, in fact, no findings that are specific to federal court or federal procedure.<sup>42</sup> The “data” are impressionistic and anecdotal, exactly the kind of vague interest-group driven rhetoric one should be cautious about instantiating into law. Judge Marrero’s quotation from the report is consistent with this impression.<sup>43</sup> And notably, the proposals contained within the report are literally a grab-bag of defense-friendly procedural changes (making proportionality central to discovery, shifting from notice pleading to fact pleading, etc.).<sup>44</sup> And the report’s most “radical”—by its own account—proposal would cut plaintiffs’ cases out at the knees, especially in those kinds of cases where there is informational asymmetry (such as civil rights or employment discrimination claims): providing only “limited additional discovery” solely upon a showing of “good cause and proportionality” after the parties provided anemic initial disclosures.<sup>45</sup>

Indeed, the weight of empirical evidence suggests that many of the complaints are apocryphal rather than data-driven. Thanks to research conducted by the ablest of researchers, what we know is that discovery costs are not disproportionate in the vast majority of cases.<sup>46</sup> The Federal Judicial Center’s (FJC) 2009 closed-case study shows that in almost all cases discovery costs are modest and proportionate to

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<sup>39</sup> AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (2009) [hereinafter ACTL REPORT].

<sup>40</sup> Some have characterized the ACTL as carrying water primarily for defense-oriented interests in civil cases. See Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1418 (1993) (describing “tort reform proposals” favored by ACTL); James E. Rooks Jr., *Will E-Discovery Get Squeezed?*, 40 TRIAL 18, 18–19 (2004) (describing ACTL as an organization that, “while nominally neutral, [is] populated largely by corporate and insurance defense counsel”).

<sup>41</sup> ACTL REPORT, *supra* note 39, at 2.

<sup>42</sup> *Id.* at 2 (discussing results of survey).

<sup>43</sup> Marrero, *supra* note 4, at 1603 (“Lawyers depicted discovery proceedings as costing too much and having ‘become an end in [themselves],’ as well as ‘impractical in that they promote full discovery as a value above almost everything else.”) (quoting ACTL REPORT, *supra* note 39, at 2).

<sup>44</sup> ACTL REPORT, *supra* note 39, at 5–7.

<sup>45</sup> *Id.* at 9. The ACTL did recommend a correspondingly “slightly broader” initial disclosure rule. *Id.* at 7–8.

<sup>46</sup> For a helpful recent summary of the available empirical evidence, see Reda, *supra* note 8, at 1088–89.

stakes.<sup>47</sup> Just as in 1993<sup>48</sup> and in 2000,<sup>49</sup> when the standard narrative was used to argue for cutting back on access to discovery, evidence of system-wide, cost-multiplying abuse does not exist.

The FJC's 2009 study, discussed in Judge Marrero's Article, is worth going over in some detail. In late 2008, the Committee on Rules of Practice and Procedure asked the FJC to look closely at discovery costs in civil cases and to report its findings to the May 2010 conference on civil litigation at Duke University Law School.<sup>50</sup> To do so, the researchers self-consciously designed their research to find cases that involved as much discovery as possible. They excluded cases "in which discovery and discovery-related issues would be unlikely to occur."<sup>51</sup> They also eliminated any case that was terminated less than sixty days after it had been filed.<sup>52</sup> The study therefore likely over-represented how much discovery takes place in a typical civil case in federal court.

The FJC's closed-case survey found the median cost of litigation, including attorneys' fees, was \$20,000 for defendants and \$15,000 for plaintiffs.<sup>53</sup> These figures came as a surprise to many, particularly proponents of reform who had long assumed that litigation costs routinely careen out of control in federal civil cases. Just as significant—and perhaps just as surprising to many observers—were the FJC's findings with regard to the overall percentage of total litigation costs attributable to discovery. Discovery costs were reported by plaintiffs' lawyers to account, at the median, for only 20% of the total litigation costs; the median figure reported by defendants' lawyers was 27%.<sup>54</sup>

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47 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 (2009), <http://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/FDY5-VNNZ>] [hereinafter FJC 2009 STUDY]; see also Lee & Willging, *Defining the Problem*, *supra* note 1, at 771.

48 See Mullenix, *supra* note 8, at 1410–43 (strongly criticizing the "soft social science" opinion evidence used by the rule makers behind the 1993 reforms, while noting that the findings of the methodologically sound empirical studies did not support the reforms).

49 See James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636 (1998) (evaluating the RAND corporation study of the 1993 reforms, which found that under that set of rules, lawyer work hours on discovery were zero for 38% of general civil cases, and low for the majority of cases); see also *id.* at 650 tbl.2.10 (showing that while discovery costs grow with the size and complexity of a case, the proportion of total costs they represent does not dramatically increase; the median percent of discovery hours for the bottom 75%, top 25%, and top 10% of cases by hours worked were 25%, 33%, and 36% respectively); Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531–32 (1998) (finding that under the 1993 amendments, the median reported proportion of discovery costs to stakes was 3%, and that the proportion of litigation costs attributable to problems with discovery was about 4%).

50 FJC 2009 STUDY, *supra* note 47, at 5.

51 *Id.* at 77.

52 *Id.*

53 *Id.* at 2.

54 *Id.*

Perhaps most importantly, the reported costs of discovery, including attorney's fees, amounted to just 1.6% of stakes of the case for plaintiffs and only 3.3% of the case's value for defendants.<sup>55</sup> This means, of course, that in half of all civil cases, the costs of discovery amounted to even less than 1.6% of the case's value for plaintiffs and less than 3.3% of its value for defendants. The FJC's data therefore fail to show that disproportionality of discovery costs to the value of a case is a serious problem.

The FJC's study also identified characteristics that are associated with high litigation costs. The most significant is the amount of money at stake in the litigation, with factual complexity highly correlated with more expense.<sup>56</sup> Law firm economics also have an important impact on litigation costs. When other variables are controlled for, law firm size alone more than doubles the costs, and hourly billing also tends to make costs higher.<sup>57</sup> This should not be surprising—that costs are higher with larger firms does not demonstrate that those firms *unnecessarily* gin up costs because of their business model. Complex, high-stakes cases may be riddled with high discovery costs. Whether these costs are unjustifiably high has not been demonstrated.

Judge Marrero does not discuss any of these limitations or findings from the empirical data. Instead, he slips far too easily from the “smoke” of attorney complaints to the conclusion that something is fundamentally wrong with our legal system. Sometimes where there is smoke there is fire; sometimes there is just smoke and mirrors.

And to the extent that Judge Marrero argues that lawyers are imposing unnecessary burdens on courts, and therefore the public, it is worth noting that filings in federal court have been static over the past fifteen years, while a significant percentage of pending cases are aggregated in multi-district litigation.<sup>58</sup> As civil filings have been stagnant, judicial resources have increased—because criminal caseloads have increased, however, what this means in practice is that the workload of a federal district court appears to have increased very modestly over the past thirty years.<sup>59</sup> Reflecting this stasis, median disposition time has remained basically stable over the past three decades.<sup>60</sup> Courts are becoming more involved in helping to resolve

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<sup>55</sup> *Id.*

<sup>56</sup> See Lee & Willging, *Defining the Problem*, *supra* note 1, at 783.

<sup>57</sup> *Id.* at 784.

<sup>58</sup> See Judith Resnik, “Vital” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1768–72 (2017) (presenting data on filings and MDLs).

<sup>59</sup> Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1197–98 tbl.4 (reporting a decreased load for civil cases but overall increased load of 16% per district judge, when weighted for complexity and when accounting for civil and criminal cases).

<sup>60</sup> *Id.* at 1199.

cases than ever before, but many view this as a feature, not a bug, of our procedural system.

On the surface, even though Judge Marrero takes a superficially agnostic posture on whether the accounts of discovery abuse and the like can be credited as accurate depictions of the federal system as a whole, his narrative implicitly accepts the standard account. Judge Marrero's main target is lawyers, who he refers to as "the leading actor[s] in this drama" because of their "responsibility for rising litigation excess produced by professional styles and actions of lawyers themselves."<sup>61</sup> It should be obvious that one cannot, on one hand, claim indifference to whether reports of discovery abuse are accurate, and at the same time say that the real problem lies with lawyers themselves. If the claims of abuse are overstated for rhetorical and strategic purposes, then there is no need to search for other responsible actors for a problem that does not exist—the real problem is feeding the echo chamber by repeating defense-oriented talking points without engaging with the literature that raises empirical and motivational questions behind these talking points. Here, I fear Judge Marrero's Article contributes to the problem.

#### B. *The Role of Lawyers' Professional Practices*

For those readers who are not convinced by the foregoing, I will turn my focus instead on the responsible party Judge Marrero wants to bring into the fold: lawyers themselves (and Judge Marrero seems focused on a particular kind of lawyer),<sup>62</sup> and their role in abusing procedural rules to increase costs. Judge Marrero identifies two "forces" that are related to this abuse: (1) the "professional attitudes" adopted by lawyers; and (2) specific strategic choices lawyers make that create inefficiency and delay, and amplify costs.<sup>63</sup>

Judge Marrero relies on two principal sources to support his claim that the problems of inefficiency and abuse are driven by lawyering practices—empirical data provided to him from the Administrative Office of the U.S. Courts and results of a survey conducted by the FJC and published in 2010. For reasons I will explain, neither is sufficient to support Judge Marrero's thesis that lawyers are regularly engaged in abusive practices that cause unnecessary burdens on courts, opposing counsel, and the public.

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<sup>61</sup> Marrero, *supra* note 4, at 1609.

<sup>62</sup> It is worth noting that Judge Marrero's description of the legal practice and economy that he thinks is responsible for certain ills in our justice system would probably not resonate with most small-firm practitioners or non-profit lawyers. His description of changes to legal practices and the billing economy seem almost entirely about large corporate law firms. Marrero, *supra* note 4, at 1610–20.

<sup>63</sup> *Id.* at 1632.

Taking the 2010 FJC study first, I note that Judge Marrero quotes selectively from responses by some lawyers who reported to the FJC that lawyering practice was driven in part by fee-generating concerns.<sup>64</sup> But the FJC authors themselves note at the outset that, although they believe their survey is useful for understanding how rules of procedure operate, “the comments made in the interviews do not represent a random cross-section of the views of respondents to the case-based survey.”<sup>65</sup> Indeed, the comments appear to be from a very small self-selected group of people—thirty-five attorneys who either expressed interest in being interviewed on their own or who responded to an invitation to a slightly larger group of attorneys.<sup>66</sup> One does not have to be a sophisticated empiricist to know that this is hardly an ample sample size to draw conclusions about how the entire federal procedural system is functioning. But even if it were, reading the FJC study as a whole, it is not clear that it fully supports Judge Marrero’s conclusions. Yes, many attorneys reported that billing practices were connected at least in part to costs, but mostly in the context of discovery not motion practice.<sup>67</sup> As discussed below, much of Judge Marrero’s focus is on motion practice, primarily motions to dismiss and for summary judgment. In the FJC survey, many attorneys did not think that motions to dismiss played a large role in generating costs, and as to summary judgment, attorneys representing plaintiffs had substantially different views about abusive practices as compared to attorneys representing defendants, raising questions as to whether the anecdotal data are truly reliable or simply reflective of selective observation or strategic posturing.<sup>68</sup> For all of these reasons, the FJC’s 2010 study cannot bear the weight Judge Marrero places upon it.

Second, there is still Judge Marrero’s empirical data, which he concludes establishes the wasteful conduct of lawyers who bring unsuccessful (or abandoned) dispositive motions to dismiss or for summary judgment. Judge Marrero first observes that dispositive motions are filed in a substantial portion of cases in federal court (litigants file motions to dismiss in 35% of cases and motions for summary judgment in 40% of cases).<sup>69</sup> He then notes that these motions

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<sup>64</sup> *Id.* at 1634 (citing THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 10 (2010)).

<sup>65</sup> THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 1 (2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv3.pdf> [<https://perma.cc/PL7F-TTDE>].

<sup>66</sup> *Id.* at 1–2. Sixteen of these attorneys primarily represented plaintiffs, twelve primarily represented defendants, and seven represented plaintiffs and defendants about equally. *Id.* at 2.

<sup>67</sup> *Id.* at 12–13. In the report’s discussion of summary judgment, most attorneys reported that most costs already had been incurred through discovery and there was no discussion of summary judgment practices being driven by billing concerns. *Id.* at 29–33.

<sup>68</sup> *Id.* at 29–30.

<sup>69</sup> Marrero, *supra* note 4, at 1633.

“achieve clear, complete victories in only about 20% of the actions.”<sup>70</sup> And he further observes that about almost half (45%) of motions to dismiss and almost a third (30%) of motions for summary judgment are “withdrawn or abandoned by the parties” before they are resolved by a court.<sup>71</sup> It is unclear as an initial matter why Judge Marrero takes the position that a motion to dismiss or motion for summary judgment that is only partially successful results in “no net gains” for the litigant bringing the motion.<sup>72</sup>

I will not quarrel with these figures themselves,<sup>73</sup> although it is always preferable when reporting empirical data unavailable to the public that one provides more specifics as to methodology. Assuming these figures to be correct, the conclusion Judge Marrero draws from them is not, in my opinion, supportable. For Judge Marrero, the fact that motions to dismiss achieve a “complete victory” in fewer than a third of proceedings “reflect litigation deficiencies.”<sup>74</sup> And similar results in motions for summary judgment are indicative, in Judge Marrero’s words, of a procedural strategy that “produce[s] no net gains, and in fact could result in a calamitous setback for the summary judgment motion proponents.”<sup>75</sup> Judge Marrero ultimately concludes:

On any given day, therefore, a major part of our courts’ business entails unnecessary or avoidable proceedings that cannot be satisfactorily explained nor justified on any ground reasonably related to advancing the needs of the particular case, any legitimate interest of the litigants, or the mission of the justice system.<sup>76</sup>

Here I think it is important to step back and consider the context in which successful and unsuccessful litigation activity occurs. For the purpose of simplicity, I will identify some predominant tracks on which litigation can play out in federal court:

Track A: Complaint filed  $\rightleftarrows$  Case settled or dismissed  
 Track B: Complaint filed  $\rightleftarrows$  Discovery  $\rightleftarrows$  Case settled or dismissed  
 Track C: Complaint filed  $\rightleftarrows$  Discovery  $\rightleftarrows$  Trial  $\rightleftarrows$  Settlement or Judgment

This is obviously far from the universe of potential case trajectories

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1667.

<sup>73</sup> There are other data that suggest that the rate of dispositive motion practice may be lower. See 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* 8 (2011), <http://www.fjc.gov/sites/default/files/2012/MotionIqbal.pdf> [<https://perma.cc/H8SZ-ESQP>]. It appears that Judge Marrero obtained statistics directly from the Administrative Office of the U.S. Courts. See Marrero, *supra* note 4, at 1653 n.109.

<sup>74</sup> Marrero, *supra* note 4, at 1653.

<sup>75</sup> *Id.* at 1667.

<sup>76</sup> *Id.* at 1633–34.

and does not take into account pre-litigation settlement or any action on appeal. But within these straightforward tracks there are many different ways in which parties can seek a court's intervention in the matter (and I read Judge Marrero's Article as focused primarily on how attorneys abuse the federal procedural regime by unnecessarily using practices that burden the court with wasteful litigation tactics). From Judge Marrero's perspective, the complaint that is dismissed was wasteful because it lacked merit.<sup>77</sup> Similarly, the motion to dismiss that fails to resolve in a complete dismissal of the plaintiff's complaint is a waste of time and effort and, rather than indicative of good-faith professional judgment, is instead a means to gin up litigation costs.<sup>78</sup> The same goes for motions for summary judgment—a motion that is unsuccessful or withdrawn serves no purpose, per Judge Marrero, other than to abuse procedural rules and drive up costs.<sup>79</sup> And discovery is wasteful in Judge Marrero's world if it takes place in a case that is never tried but ultimately settled.<sup>80</sup>

But there are, to my mind, several dimensions along which these data do not necessarily line up with these conclusions. First, as an empirical matter, there are several unanswered questions posed by these data. The general numbers reported by Judge Marrero are not, for example, disaggregated according to some critical factors. They are not disaggregated by case type along multiple dimensions. For Judge Marrero to conclude, for example, that a higher failure rate of motions to dismiss is consistent with billing-driven filings, one would expect to see higher failure rates when motions to dismiss are brought by large firms where billing practices are said to dominate strategic decisions more than other firm models. One also would expect the success rates of motions to dismiss to be higher in certain kinds of cases (say, civil rights claims), when the defendants are represented by public-funded lawyers rather than by private counsel.<sup>81</sup> But Judge Marrero does not parse the data along these lines even though we know that a vast majority of litigation in the federal courts is conducted by lawyers who we would not expect to have the kinds of perverse profit motives that Judge Marrero identifies in his Article.

In fact, there are empirical data available that call into question Judge Marrero's assumptions about the relationship between motion practice and law firms' economic models. For example, I conducted a study of over 5,000 decisions on motions to dismiss made in the years 2006 and 2010. The goal of the study was to understand better what

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<sup>77</sup> *Id.* at 1633.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1660–62.

<sup>81</sup> To be clear, one would need to conduct this study within civil rights cases because there would otherwise be confounding variables that result in differing success rates.

impact the plausibility pleading doctrine might be having on resolutions of motions to dismiss, but I reported data that bear on the question presented in Judge Marrero's Article.<sup>82</sup> Most pertinent, I examined how motions to dismiss were resolved across different case types, some of which we would expect to be associated with large firm defense lawyers (employment discrimination, antitrust, financial instruments, wage and hour, and intellectual property),<sup>83</sup> and some of which we would expect to be associated with public agency defense lawyers (prison cases and civil rights cases).<sup>84</sup> If Judge Marrero's hypothesis that large firms tend to file more meritless motions solely to drum up costs were true,<sup>85</sup> then one would expect a lower rate of success in the former set of cases. But the data do not support that conclusion—the highest success rates of motions to dismiss in both 2006 and 2010 were found in cases where one would expect both billing-driven motion practice and merits-driven motion practice.<sup>86</sup> Nor do other data, generated by the FJC using a different methodology, support Judge Marrero's hypothesis.<sup>87</sup>

But let us move past these empirical questions to a different question: just what can one conclude from lawyers seeking court intervention and failing? Judge Marrero concludes that failure equates with waste, and waste suggests unnecessary choices driven by economic motives rather than good-faith strategy, but this is far from obvious. First, people seek judicial intervention for legitimate reasons, even if they believe there is a risk, sometimes a high risk, of failure. Start with plaintiffs, who bring cases that they might think have a high risk of failure for completely legitimate reasons. Sometimes it is because they believe that the law is in a process of change. There is only one way to create change in a world in which some of our most important law is made by courts: bring cases that will, especially on the cusp of change,

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<sup>82</sup> See generally Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015).

<sup>83</sup> Although I did not specifically code for wage and hour and intellectual property claims, they were encompassed by the "other" category of cases in my study. *Id.* at 2140.

<sup>84</sup> *Id.* at 2146 tbl.3.

<sup>85</sup> See Marrero, *supra* note 4, at 1633–34.

<sup>86</sup> In 2006, the success rate for motions to dismiss was bunched around 50% in antitrust, civil rights, and financial instruments cases. See Reinert, *supra* note 82, at 2146 tbl.3. In 2010, motions to dismiss were most successful in civil rights and financial instruments cases, at around 70% for both, with about a 50% success rate in employment discrimination, prison, antitrust, and "other" case types. *Id.*

<sup>87</sup> See CECIL, *supra* note 73, at 14 tbl.4 (reporting rates of success in motions to dismiss ranging from 60–70% in a variety of case types in both 2006 and 2010). Judge Marrero also looks to contested motions for awards of attorneys' fees to suggest that "litigation excess is real and severe." Marrero, *supra* note 4, at 1631. But he fails to recognize the serious selection bias that is present when looking at these cases—they reflect those cases in which the parties could not agree on a reasonable fee without seeking court intervention. There is no reason to believe that they reflect a majority or even a substantial portion of cases in which these disputes could arise. *Id.*

fail more often than not.<sup>88</sup> Change in the law is deeply connected to failure in the law. There is perhaps no better example than the line of litigation that led to the Supreme Court's decision in *Brown v. Board of Education*,<sup>89</sup> or, to take more recent examples, the Supreme Court's decisions regarding discrimination against same-sex couples.<sup>90</sup> Failure paved the way to some of the Supreme Court's most important constitutional decisions.

Second, even if plaintiffs do not believe they have a fighting chance to change law as announced by courts, they might instead bring a case to expose the injustice in legal doctrine, prompting change in other contexts.<sup>91</sup> Again, so long as plaintiffs have a good faith argument for their legal position, there is nothing illegitimate about using courts as levers in social movements. As Thurgood Marshall once said about the desegregation-era cases, “[t]he greatest gains from this period was the public education of school officials, the courts and the general public in the lawlessness of school officials . . . .”<sup>92</sup> Finally, plaintiffs might bring claims because they have been treated unjustly even if the law does not recognize this unjust treatment as actionable. Certainly it is preferable for plaintiffs to seek relief this way rather than engaging in self-help.

And on the other side, defendants might seek legal relief through motions to dismiss or for summary judgment for some of the same reasons—defendants can try to change the law through these motions just as plaintiffs may be trying to change the law through filing complaints resting on novel legal theories. Take the Supreme Court's decisions in *Bell Atlantic v. Twombly*<sup>93</sup> or *Ashcroft v. Iqbal*.<sup>94</sup> Prior to those cases, the Supreme Court had for fifty years rejected attempts by defendants to impose heightened pleading requirements in particular areas.<sup>95</sup> In both *Twombly* and *Iqbal*, the defendants had lost in the lower courts based largely on the Supreme Court's prior decisions.<sup>96</sup> From

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<sup>88</sup> I address this dynamic in full in other work. See Reinert, *Meritless*, *supra* note 7, at 1224–31.

<sup>89</sup> See *id.* at 1229 n.223 (discussing litigation leading to the Supreme Court's decision in *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)).

<sup>90</sup> Compare *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), with *Baker v. Nelson*, 409 U.S. 810 (1972).

<sup>91</sup> Jules Lobel, among others, has written about this approach to litigation. See, e.g., JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* (2003).

<sup>92</sup> Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 318 (1952).

<sup>93</sup> 550 U.S. 544 (2007).

<sup>94</sup> 556 U.S. 662 (2009).

<sup>95</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002) (rejecting heightened pleading in employment discrimination context); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (holding that heightened pleading for civil rights claims brought against municipalities is “impossible to square . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules”).

<sup>96</sup> In *Twombly*, the Second Circuit had reversed the district court's dismissal of the

Judge Marrero's perspective, what looks like wasteful motion practice ultimately led to a change in the law. I am no fan of the Supreme Court's new pleading regime, but I can recognize the role that defense counsel played in developing the law by bringing motions that, in the moment, were unlikely to succeed.

Moreover, the broader problem with Judge Marrero's critique is that it takes an *ex post* result (the failure of a particular motion) to draw a conclusion about the *ex ante* legitimacy of a decision to engage in a particular litigation tool. Even if they are unlikely to advance new legal doctrine, defendants might bring motions that have even a high rate of failure if the cost of bringing the motion is lower than the value to the client of a successful motion multiplied by the likelihood of success of the motion. Imagine that filing a motion to dismiss costs \$10,000 to the client and that it has only a 20% likelihood of success. If discovery costs will be, say, more than \$50,000, then it makes economic sense for a defendant to file the motion. One would of course have to build in other potential costs, such as defending a successful dismissal on appeal. But the point is that one cannot conclude, simply because we know *ex post* that many motions fail, that it is economically irrational or irresponsible *ex ante* to file a motion. From an economic perspective, it may not at all be wasteful (depending on the stakes of the case) to engage in dispositive motion practice that is more likely to fail than succeed.

Relatedly, even if motions to dismiss or for summary judgment do not help to develop the law, they can play an important role in helping to resolve a case even when they fail to result in a complete dismissal of a complaint. A motion that resolves some of the claims in a case, for example, changes the value of the case to both parties.<sup>97</sup> By resolving uncertainty about some of the claims in the case, the motion has clarified the relative strengths of each parties' position. This is true of motions for summary judgment as well.<sup>98</sup>

Motions for summary judgment provide an even more important function because, as Judge Marrero observes, much of the work that is done preparing a motion for summary judgment is the kind of work

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plaintiffs' antitrust complaint. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99 (2d Cir. 2005). In *Iqbal*, the Second Circuit had affirmed the district court's denial of the defendants' motions to dismiss. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). In the interest of full disclosure, I was one of the attorneys for the plaintiffs in *Iqbal*, and I argued the case in district court, the court of appeals, and the Supreme Court.

<sup>97</sup> See, e.g., Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 531 (2012) (discussing ways in which partial summary can narrow issues in cases or reduce need for certain discovery).

<sup>98</sup> As for motions that are withdrawn or abandoned, it is difficult to see what Judge Marrero finds to criticize. See Marrero, *supra* note 4, at 1633. If the parties can spare a court from spending time resolving the motion because motion practice in the absence of a judicial decision helps to more clearly frame the issues, it is far from clear that the motion represents a waste of resources for anyone.

that one would need to do to prepare for trial.<sup>99</sup> If, as Judge Marrero would appear to prefer, the parties instead went straight to trial in some cases, it is unclear how that would save anyone time and effort. To prepare for trial, parties would have to do much of the same work, sifting the record for the discovery critical to their case, connecting the legal theories to the evidence adduced through discovery, etc. Of course, preparing motion papers takes time apart from sifting the record, so the question becomes whether that time is worth the expense given the likelihood that at least some of the claims presented in the case would have greater clarity after the motion for summary judgment is decided.

Moreover, if there is a trial and a judgment, some of the work of preparing post-trial motions becomes less arduous having already done the work of preparing for summary judgment. After all, the standard for a post-trial motion for judgment as a matter of law “mirrors” the standard on summary judgment,<sup>100</sup> and although trial will present a slightly different record than was on paper at the summary judgment stage, there will nonetheless be substantial overlap.

I am perhaps most puzzled by Judge Marrero’s suggestion that spending time on discovery only to have a case settle before trial represents wasted energy and resources and likely is motivated by attorney billing practices rather than principled legal strategy. Judge Marrero suggests that most depositions are unnecessary because “the testimony they record is geared for trials that rarely take place.”<sup>101</sup> Moreover, according to Judge Marrero, “only small portions of the massive records counsel nowadays routinely gather, especially in complex cases, are truly essential” to resolving the case.<sup>102</sup> He concludes with the following question: “For what trials, then, are litigants conducting such extraordinary discovery proceedings as a matter of customary practice?”<sup>103</sup>

There are several answers to Judge Marrero’s question. First, much like his argument regarding failing motions, he conflates *ex post* knowledge with *ex ante* predictions. It may be clear, *after* having engaged in discovery, that a large portion of it was unnecessary. That is

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<sup>99</sup> After all, to prepare a motion for summary judgment, one has to scour the record for the evidence most relevant to the matter at hand, determine the vulnerabilities in one’s own claims or defenses, and assess the strength of the opposing party’s evidence. See Gary T. Foremaster, *The Movant’s Burden in a Motion for Summary Judgment*, 1987 UTAH L. REV. 731, 734 (“Even when a motion for summary judgment is denied, benefits accrue because an exchange of information occurs, and the parties may use the information to better prepare their respective cases for trial.”); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 44 (2003) (“By forcing parties to focus on the merits of their positions, and by educating parties regarding a suit’s likely value, summary judgment opinions can serve some of the same purposes as the settlement conference.”).

<sup>100</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

<sup>101</sup> Marrero, *supra* note 4, at 1660.

<sup>102</sup> *Id.* at 1662.

<sup>103</sup> *Id.*

different from concluding, *prior* to seeking discovery, that the attorney knows which modes of discovery, which documents, which depositions, will or will not be useful to sussing out the merits of a case.<sup>104</sup> That, after all, is the very purpose of discovery. It would be obviated to some degree if there were truly broad mandatory initial disclosures in civil cases, but that is a different battle entirely. Second, it is hard to understand why Judge Marrero would criticize lawyers for taking discovery and settling in the shadow of trial. I take it as a given among trial lawyers that discovery is essential to framing settlement. In many cases it is pointless to have settlement discussion absent discovery. It hardly strikes me as an indication of wasted resources that litigants would take discovery and decline to litigate the case to trial. Rather, this is much more likely a rational assessment of the costs (mostly in attorneys' fees) that would be incurred should the matter go to trial. And discovery, much like decisions on motions to dismiss or for summary judgment, simply provides more relevant information to enable parties to accurately assess their forward-looking risk. It is, in fact, unclear what Judge Marrero believes would be preferable—not have parties take discovery and settle in the absence of full information? Or go to trial unprepared for the other sides' case? Or, more troublingly, not balance the power dynamic in play when there is informational asymmetry? Indeed, the most "radical" and transformative aspect of the Federal Rules might just be the mutual discovery obligations they embrace.<sup>105</sup> In a world in which information is not equally distributed, muscular discovery obligations are more likely to ensure that litigants are truly equal before the law.

This is not meant to deny, as Judge Marrero notes, that plaintiffs sometimes file complaints for illegitimate reasons—to secure coercive settlements, to harass or annoy, etc. Nor can it be denied that defendants bring motions that are meant to impose unnecessary burdens on the other side; or that some lawyers might engage in practices that are motivated, in whole or in part, by the desire to pump up billing records. And lawyers on both sides can surely be accused in some cases of imposing high discovery costs that are disconnected from the merits of the case. Judge Marrero's call for an examination of how lawyers use and sometimes abuse our procedural system is perfectly appropriate. At the same time, we should not rush to judgment on the basis of anecdote or empirics that should be analyzed with more nuance.

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<sup>104</sup> In light of this problem, Scott Moss suggests deferring "close decisions on possibly useful but costly evidence until meritorious cases separate from the pool." Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 890 (2009).

<sup>105</sup> George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 94 ("For the first time, all litigants could force their adversaries to provide extensive information about the adversaries' cases."); Ezra Siller, *The Origins of the Oral Deposition in the Federal Rules: Who's in Charge?*, 10 SETON HALL CIR. REV. 43, 91 (2013) (describing contemporaneous responses to introduction of Federal Rules).

## II. UNINTENDED CONSEQUENCES OF PROCEDURAL CHANGE

I finally want to turn to some of Judge Marrero's proposals for change. I think many of them may be worthwhile to consider, but in the interest of space I will focus on two that are directed at what Judge Marrero believes are systemic problems in our federal civil system: (1) the filing of broad blunderbuss complaints; and (2) the filing of unnecessary motions for summary judgment. Here, I will raise some concerns about potential unintended consequences of Judge Marrero's proposals.

With respect to plaintiffs' complaints, Judge Marrero has several suggestions. He proposes that plaintiffs be required to file a verified statement as part of their initial complaint "detailing their efforts to communicate with the defendants to discuss the dispute."<sup>106</sup> And even after doing so, plaintiffs should "begin prosecuting their actions by launching the litigation with the best-grounded claims against the most definite defendants while holding any other uncertain claims and defendants in reserve."<sup>107</sup> As to the first suggestion, it is my experience that plaintiffs often send a so-called "demand letter" to defendants in advance of litigation, but this is admittedly anecdotal. There is evidence that the vast majority of disputes never end up in court,<sup>108</sup> which might reflect lack of access to legal services, the low stakes of most disputes that could be litigated, or pre-filing settlements. But let us assume for the moment that, in those cases that are litigated, some or perhaps most plaintiffs' counsel do not already follow the practice of sending demand letters. For Judge Marrero's proposal to do work (assuming one could overcome Rules Enabling Act barriers),<sup>109</sup> it would have to be true that the value of this pre-filing procedure, in increasing pre-filing resolution, outweighs the potential costs (including the time spent preparing and responding to the demand letters, the risk of putting a defendant on notice of the pendency of litigation, and the cost of delay). Given that most judges are now encouraged to ask about settlement at the initial case conference,<sup>110</sup> I am not convinced that the proposal would bear fruit.

As to the second suggestion, I have more serious reservations. Judge Marrero claims in a footnote that the notion of proceeding only with the best claims against the "most definite defendants" is "startlingly

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<sup>106</sup> Marrero, *supra* note 4, at 1675.

<sup>107</sup> *Id.* at 1651.

<sup>108</sup> Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 875 n.185 (2012) (collecting sources suggesting that, across a range of case types, "[m]ost people who believe their rights have been violated never sue").

<sup>109</sup> The Rules Enabling Act prohibits the adoption of Federal Rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (2012).

<sup>110</sup> FED. R. CIV. P. 16(a)(5), (c)(1).

simple,” analogizing the strategy to suing pseudonymously named defendants when one is unaware of their identity.<sup>111</sup> But he appears to overlook the serious statute of limitations problems that would arise with this strategy—indeed, those problems are best exemplified by claims brought against Doe defendants. In many circuits, including the Second Circuit, it is very difficult to “relate back” a complaint filed against a Doe defendant after one learns their identity.<sup>112</sup> It would prove even more difficult to do so for known defendants who a plaintiff consciously fails to include in a complaint simply because, at the time of filing, her claims against that defendant are not among the “best-grounded” claims. Moreover, it creates potential prejudice for the excluded defendant, who will not be present at discovery proceedings or court proceedings, which might affect the contours of a case once the defendant is ultimately added.<sup>113</sup> Finally, it ignores the problem of informational asymmetry by essentially punishing plaintiffs simply because they lack full information when we know that in many kinds of cases, defendants have superior access to relevant information.<sup>114</sup> Given the narrowing of discovery from information related to the “subject matter” of the litigation to “claims and defenses,”<sup>115</sup> it is not even clear how a plaintiff would obtain discovery relevant to a putative defendant who the plaintiff excluded from the initial complaint under Judge Marrero’s proposal.

I understand the motivation behind Judge Marrero’s proposals—plaintiffs’ counsel surely sometimes file “shotgun” complaints against too many defendants. The Federal Rules do account for this practice.<sup>116</sup> However, and more importantly, the Federal Rules contemplate that a plaintiff need not sue only those defendants against which the plaintiff

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<sup>111</sup> Marrero, *supra* note 4, at 1651 n.107.

<sup>112</sup> See *Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 469–70 (2d Cir. 1995), *modified*, 74 F.3d 1366 (2d Cir. 2016); see also *Heglund v. Aitkin Cty.*, 871 F.3d 572, 580 (8th Cir. 2017) (collecting cases). The Second Circuit has limited *Barrow*’s holding somewhat, holding that relation back could occur in some situations involving pseudonymously-named defendants when doing so is permissible under applicable state statute of limitations law. See *Hogan v. Fischer*, 738 F.3d 509, 518–19 (2d Cir. 2013).

<sup>113</sup> *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009) (noting that even defendants who are not subjected to formal discovery demands may be burdened by discovery against other parties, because of the need “to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position”).

<sup>114</sup> See Alexander A. Reinert, *Pleading as Information-Forcing*, 75 L. & CONTEMP. PROBS. 1, 32–35 (2012) (discussing informational asymmetry in context of pleading doctrine).

<sup>115</sup> As originally enacted, the Federal Rules permitted parties to obtain discovery relevant to the “subject matter” of the litigation. The 2000 amendments changed this presumption so that the scope of discovery was limited to material relevant to “claims and defenses,” permitting discovery to be broadened if the requesting party could demonstrate “good cause.” In 2015, the “good cause” safety valve was eliminated, meaning that parties could only obtain discovery relevant to claims and defenses but not the “subject matter” of the litigation. For a thorough discussion of these changes, see generally Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1 (2016).

<sup>116</sup> FED. R. CIV. P. 11(b).

has the best-grounded claims.<sup>117</sup> There are costs to this liberal approach to pleadings, but benefits as well.

Judge Marrero's suggestions regarding summary judgment procedure prompt similar questions and challenges. As I read it, Judge Marrero proposes, among other things, having an expedited trial in lieu of summary judgment, with the judge making a Rule 50 decision after close of the plaintiff's case in chief.<sup>118</sup> Judge Marrero finds support for a procedure like this in Rule 52.<sup>119</sup> This raises some questions.

First, does this mean that the plaintiff's case will be presented solely to the judge so that the judge can make a Rule 50 determination? If so, it seems likely that this would create more inefficiencies in terms of costs, thereby making the proposal counter-productive. This is for a variety of reasons. First, both parties would likely still expend a significant amount of energy and time on trial preparation. They would sift through the record, prepare witnesses, etc. Indeed, they might end up spending more lawyer time (and therefore billable hours) on this procedure than on summary judgment. It all depends on how much time attorneys will have to spend sifting the record (something one has to do for summary judgment as well as for trial) as opposed to preparing motion papers (although presumably if this alternative became more common, attorneys would start filing written Rule 50 motions that look a lot like Rule 56 motions).<sup>120</sup>

Second, the outcome would not necessarily advance the issues. If the judge denies the Rule 50 motion, the parties are left in the same place as if the judge has denied a motion for summary judgment—and now they will have to have a full-blown trial, with jury selection (in cases in which there is a jury trial). Assuming that the case has only been presented in front of the judge, this will mean going back and repeating the plaintiff's case in chief. If the Rule 50 motion is granted, the parties would be in the same place as if the summary judgment motion had been granted. And we would expect to see appeals from those grants in the same proportion as we now see appeals from grants of Rule 56 motions.

If instead Judge Marrero is proposing that the plaintiff's case should be presented in front of a jury, there are ways in which it could both increase and decrease efficiency. Efficiency could be advanced if the court denies the Rule 50 motion at the close of the plaintiff's case. Then we have basically eliminated summary judgment by defendants in favor of full-blown trials.<sup>121</sup> But, again, query how much this has

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<sup>117</sup> FED. R. CIV. P. 8(d) (permitting pleading in the alternative and inconsistent pleading).

<sup>118</sup> FED. R. CIV. P. 50.

<sup>119</sup> Marrero, *supra* note 4, at 1678–79 (referencing FED. R. CIV. P. 52).

<sup>120</sup> FED. R. CIV. P. 50, 56.

<sup>121</sup> The framers of the Federal Rules originally meant for summary judgment to be used by plaintiffs in debtor judgment cases. See Stephen B. Burbank, *Vanishing Trials and Summary*

reduced costs if all of the time spent preparing for trial overlaps with the time spent preparing a summary judgment motion. There is no question that there is substantial overlap; I take it as an open question as to how much overlap there is.

Indeed, Judge Marrero's proposal could lead to greater inefficiency if the court grants the Rule 50 motion. In that event, the plaintiff will almost certainly appeal and if the plaintiff prevails on appeal, the case will be returned to the district court to be tried again. This is why most judges almost never grant Rule 50 motions at the close of a plaintiff's case—the cost of being wrong in terms of judicial efficiency is far too high.

#### CONCLUSION

Narratives matter. They capture our imagination and spur us to action. They can lead us astray as surely as they can lead us to water. For decades, rising costs and inefficiency has been one dominant narrative in procedural debates. Judge Marrero's Article helpfully asks us to focus on the role of the lawyer and law firm economics in assessing how to solve waste and abuse in civil litigation. But it also reinforces a narrative that, in my view, obscures some of the nuance in procedural reform. In this brief Article I have highlighted points of contention based both on data and on concerns about unintended consequences.

At the same time, I am confident that some of Judge Marrero's prescriptions are surely sensible whether or not they are supported by sophisticated empirical evidence. And some procedural problems will not be amenable to data-based inquiry. Sometimes we will have to be satisfied with fumbling towards the right procedure through experience.

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*Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004). It has expanded to be used almost exclusively by defendants, which was not the apparent intent of the drafters of the 1938 Amendments.