

ESSAY:
THE GRAND POOBAH AND GORILLAS IN
OUR MIDST: ENHANCING CIVIL JUSTICE
IN THE FEDERAL COURTS—SWAPPING
DISCOVERY PROCEDURES IN THE
FEDERAL RULES OF CIVIL AND CRIMINAL
PROCEDURE AND OTHER REFORMS LIKE
TRIAL BY AGREEMENT

Mark W. Bennett*

ABSTRACT

Most commentators agree that the vanishing plaintiff and the vanishing civil jury trial in federal courts are primarily the result of the skyrocketing costs of litigation, especially discovery. I agree, but stand virtually alone in my view that the root of the problems and any solutions lie in the distinction between “trial lawyers” and “litigators.” The rise of the “litigation industry” fueled by the Federal Rules of Civil Procedure, and driven by the leveraging of litigation law firms, has become the eight hundred pound gorilla in our “midst.” So-called “experts” on discovery and the Rules have been writing about, tinkering with, and nibbling at the edges of the Rules since their passage in 1938—and the system is now more broken than ever. It is no coincidence that the demographics of the Judicial Conference Advisory Committee on Civil Rules has been, and continues to be, dominated by judges, lawyers, and law professors with primarily “Big Law” litigation experience.

Reducing cost and delay and increasing the role of trial by jury requires bold action. After being anointed the Grand Poobah of the Federal Courts for a day—my primary cure—strong medicine indeed—is to switch the discovery paradigm for criminal and civil cases. By rule, federal criminal discovery depends almost exclusively on the mandatory disclosure requirements triggered by a simple request from the defendant. In practice, mandatory mutual disclosure takes place quickly with discovery motions being far rarer than in civil cases. There are no depositions, interrogatories, or requests for production of documents. On the other hand, in civil discovery, where usually money, rather than liberty, is at

* Mark W. Bennett is in his twenty-first year as a U.S. district judge for the Northern District of Iowa.

stake, discovery is virtually wide open, extensive, expensive, and all too often a deep sea fishing expedition and battleground filled with obstructionist behavior on both sides.

Recent proposed amendments to the civil discovery rules will likely have the unintended consequences of further increasing the cost of discovery while affording greater opportunities for litigators to launch obstructionist tactics, even in mine-run cases. Switching the discovery paradigms in civil and criminal cases to allow for more discovery in criminal cases and far more limited discovery in civil cases, with strong mandatory disclosure requirements, and severe remedies for violating them, will greatly further justice in both. So, too, would modifying the transsubstantive nature of federal civil procedure by adopting simple tracking, case protocols, and dispositive motion reform. Finally, promoting the emerging Trial By Agreement reform movement now is something that is critically important without waiting for cumbersome and historically unavailing federal civil rules reform.

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The Hon. Mark W. Bennett
U.S. District Judge for the Northern District of Iowa
313 U.S. Courthouse
320 Sixth Street
Sioux City, IA 51101

Re: Anointment as the First and Only Grand Poobah of the
Federal Courts

Dear Judge Bennett,

We are ecstatic to announce that, after nearly 40 years of toiling in the cotton rows of the federal civil and criminal justice systems you have been anointed the first and only Grand Poobah of the Federal Courts. This special appointment gives you the right to make unilateral changes to the Federal Rules of Civil Procedure. However, you only have *one day* to do this. Please exercise this discretion wisely.

Sincerely,

The Grand Poobah of the Federal Courts Selection Committee
Administrative Office of the Federal Courts
One Columbus Circle, NE
Washington, DC 20544

Mr. Ellsworth Cash
Moore, Cash & Moore
320 LaSalle St.
Chicago, Ill. 60601

Re: The Grand Poobah of the Federal Courts Decree

Dear Ellsworth,

As you know, you have been our lead litigator for over thirty years in all our federal litigation throughout the United States. We on the management team of Farnsworth Industries have never been more excited than we are to be the first civil case in the Southern District of New York subject to the Grand Poobah of the Federal Courts Decree to reduce the time and expense of federal civil litigation. We hail this new era of reform where we can get our case before a federal jury without the unnecessary expense and delay of traditional massive discovery. You can expect our full cooperation in getting this commercial case to trial in the fourteen months from filing to its scheduled trial date. We are confident we will prevail and justice will be done.

Best,

Lionel Collins
President & CEO
Farnsworth Industries
1776 Victory Blvd.
Cleveland, OH 44112

CONFIDENTIAL MEMO

From: Ellsworth Cash
To: Moore, Cash & Moore Management Committee
Re: The Grand Poobah of the Federal Courts Decree and Firm Income

I regret to inform you that our latest piece of federal litigation filed on behalf of Farnsworth Industries, our single largest cash cow client, is now the first case under the Grand Poobah of the Federal Courts Decree to reduce the time and expense of federal civil litigation. We would have normally budgeted \$2,000,000+ in fees up to trial for Farnsworth Industries in this case and used a team of myself as the lead partner, four junior partners, and at least seven associates, and several contract attorneys. Like our other major litigation over the years for Farnsworth Industries, we would have been able to bill for close to four years before the case settled weeks before the trial date. Now we can no longer take the 40–50 depositions we used to take, file non-meritorious motions to dismiss and for summary judgment, and cat fight in discovery for three years. I need further direction as to how we can, in good faith, continue to over-staff this case and make the type of fees we are accustomed and entitled to. I think Collins would blow his top if we doubled our hourly rates. We need an emergency meeting of the Management Committee immediately!

Ellsworth Cash¹

¹ The two letters and memo are fictitious.

Every great idea starts out as blasphemy.—Bertrand Russell

Every blasphemy does not start as a great idea.—Mark W. Bennett

INTRODUCTION

A. *The Grand Poobah*

The lofty position, Grand Poobah of the Federal Courts,² held only for a single day, empowered me to propose unilateral changes in the Federal Rules of Civil Procedure (“Rules”). My proposed changes bear little resemblance to the “nibbling around the edges” that has been repeatedly suggested by scholars, judges, lawyers, and the Advisory Committee on Civil Rules (“Committee”). Since their passage in 1938, the Rules have been amended a staggering thirty-three times.³ Indeed, in 2015 the Rules face the passage of yet another round of nibbling amendments.⁴ Once again, the mantra for the 2015 proposed amendments is exorcising the demons of exploding cost and excessive delay. More than twenty years ago, Professor Mengler, in commenting on the barely settled dust “on the discovery amendments of the Eighties” noted that “[o]ne’s nose need not travel too close to the federal courthouse to smell the aroma of litigation abuse.”⁵ He legitimately questioned whether “the cause of our discovery ills is ineffective rulemaking and whether the cure—if there is any—is more, or different, rules.”⁶ “Make no mistake about it: no competent lawyer would claim that the Federal Rules of Civil Procedure attain their stated goal of ‘the just,

² “The sobriquet ‘Grand Poobah’ comes from the imperious character Pooh-Bah, who held, among other titles, that of ‘Lord-High-Everything-Else,’ in Gilbert and Sullivan’s 1885 opera *The Mikado*.” Mark W. Bennett, Essay, *From the “No Spittin’, No Cussin’ and No Summary Judgment” Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 686 n.3 (2012–2013). Pooh-Bah also spoke the following lines: “It is consequently my degrading duty to serve this upstart as First Lord of the Treasury, Lord Chief Justice, Commander-in-Chief, Lord High Admiral, Master of the Buck Hounds, Groom of the Back Stairs, Archbishop of Titipu, and Lord Mayor, both acting and elect, all rolled into one.” ARTHUR SULLIVAN & W.S. GILBERT, *THE MIKADO*, act I.

³ The Rules have been amended by Supreme Court Order in 1939, 1946, 1948, 1951, 1961, 1963, 1966, 1967, 1970, 1971, 1972, 1980, 1982, 1983, 1985, 1987, 1988, 1991, 1993, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2013, and 2014. See FED. R. CIV. P. historical note (listing the dates of amendments to the Rules).

⁴ COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 3–4 (2014) [hereinafter PRELIMINARY DRAFT OF PROPOSED AMENDMENTS], available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.

⁵ Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform*, 138 F.R.D. 155, 155–56 (1992). I totally reject Professor Mengler’s proposed solution that the cure is more judicial resources, including more judges and lighter caseloads. *Id.* at 165.

⁶ *Id.* at 156.

speedy, and inexpensive determination of every action and proceeding.’’⁷ This essay argues it’s not more, but different and more effective amendments that are needed. I do not question the good faith aspirations and hard work of past Rules’ reformers. But, surely, “the aroma of litigation abuse” is more feculent now than ever.⁸ The proposals offered in this essay will be viewed by the true believers in the Rules,⁹ in the judiciary, the legal academy, the Bar, and especially the Committee, as blasphemous. That is fine. Given the backward-looking nature of the legal profession, that is, perhaps, as it should be. However, I take my Grand Poobah position earnestly, as I do my “outside-the-box” suggestions for major reform. I offer these changes in the spirit of Robert Browning’s immortal phrase: “Ah, but a [person’s] reach should exceed his [or her] grasp”¹⁰ After all, look where the prior decades of tinkering and nibbling have gotten us? While I had just that one day to propose my changes discussed in this essay, I have spent much of my professional life, as a lawyer, U.S. magistrate judge, and U.S. district judge thinking about ways to improve the federal justice system and save jury trials from extinction.¹¹

⁷ James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1261 (2010).

⁸ “Disproportionate cost and excessive delay are complaints often cited by lawyers, clients, judges, and the legal academy as the symptoms of a discovery system gone sour.” Timothy Wilson, Note, *A Mandate for Failure: The Sedona Cooperation Proclamation and Modern Discovery Under the Federal Rules of Civil Procedure*, 35 U. LA VERNE L. REV. 165, 170 (2013) (footnotes omitted).

⁹ On the fiftieth anniversary of the Rules, Professor Subrin observed:

Many praised the Rules. Professor Geoffrey Hazard’s opening paragraph is illustrative:

The Federal Rules of Civil Procedure, whatever criticisms we might have of their details, have been a major triumph of law reform. They have served for 50 years substantially intact, a statement that can be made of few other pieces of major legislation in our era

Professor David Shapiro noted that “[t]he Federal Rules have not just survived; they have influenced procedural thinking in every court in the land (and some in other lands), and have indeed become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.” Professor Paul Carrington not only praised the Rules, but also staunchly defended the “aspiration for political neutrality in rulemaking” that he found as an underlying theme of the 1934 Rules Enabling Act. “The aspiration to neutrality is derived from and reinforced by the long tradition of judicial law reform giving rise to judicial rulemaking. That tradition descends from Roscoe Pound, David Dudley Field, Henry Brougham, Jeremy Bentham and unnumbered others who have labored in pursuit of the aims stated in Rule 1 for at least a century and a half.”

Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4, 4–5 (1989) [hereinafter Subrin, *Fireworks on the 50th Anniversary*] (footnotes omitted).

¹⁰ Robert Browning, *Andrea del Sarto*, available at <http://www.poetryfoundation.org/poem/173001>.

¹¹ In 1991, I was appointed the first Chair of the Civil Justice Reform Act Advisory Group for the Southern District of Iowa—a position I resigned when I was appointed a U.S. magistrate judge for the Southern District of Iowa later in 1991. In my two-plus-decade tenure as a federal district court judge, I have been assigned over 3700 civil cases in the Northern District of Iowa. I have also tried civil cases in the Southern District of Iowa, the District of Arizona, the District of the Northern Mariana Islands, and the Middle District of Florida, as well

One final introductory theme. This essay dramatically differs from prior critiques of reform of the Rules by its central emphasis on the difference between “litigators” and real trial lawyers. The essay argues that without an understanding of the ramifications of the differences between “litigators” and trial lawyers, meaningful reform of the Rules is impossible. In fact, it is this difference that drives the suggestion in the essay. Why others have failed to see the importance of this distinction is perplexing. Perhaps, I am totally wrong or others have fallen victim to The Invisible Gorilla effect.¹² In their now famous study, *Gorillas in Our Midst*, people are asked to count the number of aerial and bounce passes of a basketball during a short less-than-one-minute video.¹³ While the basketball players on two teams are passing the basketball, “[h]alfway through the video, a female student wearing a full-body gorilla suit walked into the scene, stopped in the middle of the players, faced the camera, thumped her chest, and then walked off, spending about nine seconds on-screen.”¹⁴ Often the results are the same: half the people did not recall even seeing the gorilla.¹⁵ Do others not see the impact of “litigators” and the “litigation industry,” the eight hundred pound chest-thumping gorillas, on excessive cost and delay in civil litigation?

B. *The Vanishing Civil Trials*

While jury trials are surely vanishing,¹⁶ there are no vanishing authors discussing the various aspects of civil procedure that affect whether the parties go to trial. No doubt thousands of law review articles have been written on the many aspects of federal civil procedure. One enterprising law student this year estimated that more than 2,500 law review articles discuss “the costs associated with discovery.”¹⁷ Tellingly, by 2010 the summary judgment trilogy *Anderson*, *Celotex*, and *Matsushita* (in that order) are the three most cited U.S. Supreme

as sitting by designation on the U.S. Courts of Appeals for both the Eighth and Ninth Circuits.

¹² See generally CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US* (2009).

¹³ *Id.* at 5.

¹⁴ *Id.* at 6.

¹⁵ *Id.*

¹⁶ “Today, in both the federal and state courts, civil jury trials are vanishingly rare.” Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 813 (2014); see, e.g., Mark W. Bennett et al., *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 306 (2005); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012).

¹⁷ Brian Morris, Note, *The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery*, 41 N. KY. L. REV. 133, 133 (2014).

Court cases of all time in reported federal court decisions, and the pleading decisions in *Conley* and *Twombly* are fourth and seventh.¹⁸

Some articles, like those written by Professor Stephen N. Subrin at Northeastern University School of Law,¹⁹ the honoree of this Symposium, have been incredibly informative, providing both historical insights that gave rise to the passage of the Rules in 1938, and forward thinking about the Rules' many positive features and substantial pitfalls. Regrettably, these articles, especially Pro-

¹⁸ Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 (2010) (citing Shepard's data of federal court decisions as of March 17, 2010); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Conley v. Gibson*, 355 U.S. 41 (1957).

¹⁹ Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992); Judith Olans Brown, Stephen N. Subrin & Phyllis Tropper Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487 (1997); Judith Olans Brown, Daniel J. Givelber & Stephen N. Subrin, *Treating Blacks as If They Were White: Problems of Definition and Proof in Section 1982 Cases*, 124 U. PA. L. REV. 1 (1975); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011) [hereinafter Burbank & Subrin, *Litigation and Democracy*]; Daniel R. Coquillette, Mary P. Squiers & Stephen N. Subrin, *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (1989); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196 (2003); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571 (2012); Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989); Subrin, *Fireworks on the 50th Anniversary*, *supra* note 9; Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*]; Stephen N. Subrin & A. Richard Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449 (1974); Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139 (1999); Stephen N. Subrin, *Procedure, Politics, Prediction, and Professors: A Response to Professors Burbank and Purcell*, 156 U. PA. L. REV. 2151 (2008); Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173 (2007); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993); Stephen N. Subrin, *Preface to The 50th Anniversary of the Federal Rules of Civil Procedure 1938-1988*, 137 U. PA. L. REV. 1873 (1989); Stephen N. Subrin & Thomas O. Main, *The Integration of Law and Fact in an Uncharted Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377 (2010) [hereinafter Subrin, *The Limitations of Transsubstantive Procedure*]; Stephen N. Subrin, *Thoughts on Misjudging Misjudging*, 7 NEV. L.J. 513 (2007); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79 (1997); Stephen N. Subrin & John Sutton, *Welfare Class Actions in Federal Court: A Procedural Analysis*, 8 HARV. C.R.-C.L. L. REV. 21 (1973).

fessor Subrin's more than thirty-year heroic effort to end the "one size fits all" nature of the Rules,²⁰ have failed to move the Committee in that direction. As a result, we now find ourselves closer than ever to the harsh reality: "Trials as we have known them . . . are not coming back."²¹ Indeed, an Illinois state court judge recently wrote about another judge teaching trial advocacy who proposed to students, akin to Johnny Carson's "Carnac the Magnificent" skit, where the answer is given first: Answer: "A Tyrannosaurus rex and a jury trial." Question: "Name two scary things today's lawyers will probably never encounter."²² Sadly, one will always be able to see a Tyrannosaurus in a museum, but what about a trial by jury? I recently mourned the death of the American trial lawyer in a mock obituary,²³ and bemoaned the increase in motions to dismiss and summary judgment (paper trials) to deny plaintiffs their day in court, especially in employment discrimination and civil rights litigation.²⁴ Others, like U.S. District Judge Xavier Rodriguez take a middling position: "Jury trials as we knew them are on the decline. That may or may not be problematic . . ."²⁵ Professors Subrin and Burbank, in an eye-popping introduction to a recent article, cleverly observed the impact of declining civil jury trials on major law firms:

It struck us as odd. At some time, probably in the middle 1970s or early 1980s, we heard that major law firms were conducting mock trials so that their young lawyers could experience what it was like to be in a courtroom. This was something new. Historically, young lawyers witnessed cases in real courts, argued motions before judges, and watched partners and older associates try cases. Young lawyers soon tried simple cases before judges and later with juries. This is how they learned to be trial lawyers and not just litigators.²⁶

In the span of less than eighty years, our federal civil justice system has morphed from trial by ambush with no formal discovery, but significant numbers of civil jury trials, to the passage of the Rules and the hot mess in which

²⁰ Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 19, at 377.

²¹ D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 468 (2007).

²² Ron Spears, *Dinosaurs and Jury Trials: Adaptation or Extinction?*, 101 ILL. B.J. 264, 264 (2013).

²³ Mark W. Bennett, *Obituary: The American Trial Lawyer, Born 1641–Died 20??*, LITIGATION, Spring 2013, at 5, 5. The article starts:

The American trial lawyer (ATL), who, in innumerable ways, enhanced the lives of so many Americans and made the United States a fairer, healthier, safer, more egalitarian, and just nation, passed away recently. Although a precise age is uncertain, ATL is believed to have been at least 371 years old at the time of death.

Id.

²⁴ Bennett, *supra* note 2, at 686.

²⁵ Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY'S L.J. 333, 365 (2014).

²⁶ Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 399. Indeed, in a November 2014 civil jury trial, a large Iowa law firm brought four associates four hundred miles round-trip to observe a day of jury trial featuring three of the firm's trial lawyers.

we now find ourselves.²⁷ We now have trial by avalanche, but that is a misnomer too, because we so rarely have civil jury trials in federal court. What we really have is an un-Godly expensive and protracted “litigation” by avalanche industry. This is true for small, mid-size, and large firms representing both plaintiffs and defendants. This includes deep sea fishing discovery expeditions, virtually unlimited obstructionist discovery tactics, a parallel cottage industry of discovery companies, e-discovery consultants, armies of contract lawyers, and highly-compensated associates and junior partners of litigation firms who almost exclusively replace real trial lawyers in the discovery process.

In the context of Professor Subrin’s career and his own scholarship, when the Rules were passed “about [18] percent of civil cases terminated in Federal Court were resolved by trial.”²⁸ When Professor Subrin “started practicing law in 1963, the figure was down to about [12] percent and in 2002 it was below [2] percent.”²⁹ Estimating Professor Subrin’s approximate date of birth to be 1938, in that year about 20 percent of federal civil cases were resolved by trial.³⁰ By 2009, the “percentage of jury trials in federal civil cases was down to just under 1 [percent], and the percentage of bench trials was even lower.”³¹ Between Professor Subrin’s birth and 2009, “there was a decline in the percentage of civil cases going to trial of over 90 [percent] and the pace of the decline was accelerating toward the end of that period, until very recently, when there was almost literally, no further decline possible.”³² As one of the gurus of the vanishing civil trial has recently observed: “The *no news* story is that the trend lines regarding trials are unchanged. The *big news* story is that the civil trial is approaching extinction.”³³

After discussing whether jury trials are worth saving, this essay addresses the big, but gloomy picture of declining civil jury trials and the rise of the obstructionist “litigation industry.” It then explains why the 2015 proposed amendments to the Rules are merely further “nibbling around the edges” with not only little prospect of reform but likely leading to substantial, unintended consequences. The penultimate section explores my proposed changes, as Grand Poobah, for fundamental reform of the Rules that would reduce cost and delay and provide our best hope for the revival of civil jury trials.

²⁷ “Hot mess” has many definitions, including: “A state of disarray so chaotic that it’s dizzying to look at. A mess that is beyond the normal range of disarray.” *Hot Mess*, URB. DICTIONARY, <http://www.urbandictionary.com/define.php?term=hot%20mess> (last visited May 4, 2015).

²⁸ Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 19, at 393.

²⁹ *Id.*

³⁰ Robert P. Burns, *What Will We Lose If the Trial Vanishes?* 3 (Nw. Univ. Sch. of Law, Faculty Working Paper No. 5, 2011), *available at* <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/5/>.

³¹ *Id.* at 4.

³² *Id.*

³³ Marc Galanter & Angela Frozena, ‘A Grin Without a Cat’: Civil Trials in the Federal Courts 1 (MAY 1, 2010), *available at* <http://www.uscourts.gov/file/3289/>.

I. ARE JURY TRIALS WORTH SAVING?

Depends on who you ask. No doubt the colonists valued the right to trial by jury.³⁴ In response to the Stamp Act of 1765, delegates met in New York from nine of the thirteen colonies in the Stamp Act Congress, adopting a Declaration of Rights and Grievances, including the provision “[t]hat Tryal [sic] by jury is the inherent and invaluable Right of every British Subject, in these Colonies.”³⁵ In the Declaration of Independence, the colonists stated as a reason for separation: “For depriving us in many cases, of the benefits of Trial by Jury.”³⁶ As Professor Lerner points out, early jurists like Judge Thomas Waites in 1794 in South Carolina, saw the right to trial by jury as a means to “help prevent judicial bias in favor of rich and influential private persons,” and to provide “‘a better chance, generally, that the poor [would] receive an equal measure of justice with the rich.’”³⁷

In most discussions of the value of trial by jury, authors inevitably cite *Democracy in America* by Alexis de Tocqueville.³⁸ Yet, U.S. District Judge Rodriguez noted that, while de Tocqueville admired the jury system for its educational value for jurors, he was not as sure about its value for the litigants.³⁹

³⁴ Before becoming Chief Justice, then-Justice William H. Rehnquist wrote:

The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural device that should be continued; the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign’s judges was important to the founders because juries represent the layman’s common sense, the “passional elements in our nature,” and thus keep the administration of law in accord with the wishes and feelings of the community. Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343–44 (1979) (Rehnquist, J., dissenting) (citation and footnotes omitted).

³⁵ Resolutions of the Stamp Act Congress (1765), *quoted in* Lerner, *supra* note 16, at 818.

³⁶ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

³⁷ Lerner, *supra* note 16, at 832–33 (alteration in original) (quoting *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 396 (S.C. 1794) (Waites, J.)).

³⁸ *See, e.g.*, three of my federal judicial colleague authors: Rodriguez, *supra* note 25, at 336 (“[A] number of commentators have expressed alarm that the political and socializing role of the jury will be lost. Many of these commentators will reference *Democracy in America* by Alexis de Tocqueville in support of their argument that the decline of jury trials must be reversed. There is no doubt de Tocqueville admired the role of juries. However, as with the writings of all great thinkers, everyone can find a sentence in de Tocqueville’s works to support his or her theory.” (footnotes omitted)); B. Lynn Winmill, *To My Russian Colleagues*, *ADVOCATE*, Dec. 2002, at 8, 10 (“In de Tocqueville’s view, the American jury system played a critical role in creating public respect and support for the judiciary and the rule of law.”); William G. Young, *An Open Letter to U.S. District Judges*, *FED. LAW.*, July 2003, at 30, 31 (“As Alexis de Tocqueville so elegantly put it, ‘[t]he jury system . . . [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.’” (alterations in original)).

³⁹ Rodriguez, *supra* note 25, at 336–37.

What has always struck me as odd is that some federal trial court judges see jury trial as a failure! Professor Judith Resnik observed more than a decade ago:

In the fall of 1994, the Los Angeles Federal Bar Association held a meeting for some hundred lawyers to discuss then-recent changes to the rules that govern the processes of litigation in the federal court system. At that time, of one hundred civil cases commenced in federal court, about eight started trial; the remaining ninety-two ended in other ways. Introducing the program, a federal district judge stated that he regarded the eight percent trial rate as evidence of “lawyers’ failure.”

That got my attention: a person whose title was “trial judge” equated going to trial with *failure*. His relevance rests on the fact that he is not alone. Found in reported decisions is the phrase “a bad settlement is almost always better than a good trial.” Found in rules and policy statements of the federal judiciary are increasing obligations of judges to press parties toward settlement. For example, a local rule in the federal trial courts of Massachusetts requires a judge to raise the topic of settlement at *every* conference held with attorneys. Moreover, this growing law of settlement is not simply hortatory. Court rules and statutes require litigants and their lawyers to engage in a variety of settlement processes; penalties flow from failure to comply.⁴⁰

Professors Burbank and Subrin also note a federal trial court judge stating as early as 1971 that, “[M]y goal is to settle all my cases. . . . Most of the time when I try a case I consider that I have somehow failed the lawyers and the litigants.”⁴¹ Shockingly, this was stated by a federal trial court judge at a training seminar for new federal trial court judges sponsored by the Federal Judicial Center.⁴² I have witnessed this, too:

I was stunned last year while speaking at a CLE program on an antitrust litigation panel when a federal judicial colleague and friend boldly declared that a “jury trial was a failure of the system.” Before calling 911, I did manage to blurt out my strong disagreement! With all due respect, this colleague suffers from a lethal dose of “managerial judging Kool-Aid.” But, in his defense, he came from a large firm “litigation” practice, not a true trial practice. He is a terrific judge, but simply doesn’t share my love, respect, and passion for trial by jury. I have, on occasion, heard similar expressions at judges-only conferences and in private conversations with a few judges, but to hear a colleague publicly declare that a jury trial was a failure of the system was absolutely flabbergasting.⁴³

Professors Burbank and Subrin recently articulated many of the reasons why restoring a realistic prospect of civil jury trials furthers our nation’s goals of democracy.⁴⁴ First, “[a]s Tocqueville observed in describing the newly cre-

⁴⁰ Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925–26 (2000) (footnotes omitted).

⁴¹ Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 399 (alterations in original).

⁴² *Id.* at 399 n.2.

⁴³ Bennett, *supra* note 2, at 707 (footnote omitted).

⁴⁴ Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 401–03.

ated American state, participating as jurors and witnessing trials were critical means of educating Americans about the law and giving them a stake in their courts and country.⁴⁵ My experience wholeheartedly confirms this. For over two decades, I have “debriefed” every jury after their verdict.⁴⁶ I am pleased to report that jurors nearly uniformly express admiration about the process and become enthusiastic ambassadors for trial by jury. Professors Burbank and Subrin also note that the right to be heard in a public trial is at the “core of due process” and “has been integral to democratic thought and institutions at least since the English Magna Carta in the thirteenth century.”⁴⁷ They also posit that civil jury trials are essential to “ensure informed settlement”,⁴⁸ are necessary to “counterbalance[] the authority of judges”,⁴⁹ and that the “founders believed that twelve heads are better than one in finding facts.”⁵⁰ “Finally, unlike confidential settlements, decisions after trial have the potential to affect the behavior of others”⁵¹ I also add that trials and appeals play an instrumental role in shaping the development of the common, statutory, and constitutional law.

In her penetrating article summarizing scholarship on the current state of summary judgment, Professor Brooke D. Coleman observes that the debate comes down to not so much the fairness or the efficiency of summary judgment, “but really just about one critical issue—the jury trial. Regardless of what the data might tell us, the bottom line is that one either has great faith in the value of the jury trial or one does not.”⁵² Based on my nearly forty years in the profession, my unshakeable faith in the jury trial has never been stronger.

⁴⁵ *Id.* at 402.

⁴⁶ I have described this process as follows:

After reading a verdict in open court, I debrief every juror in the jury room and answer their questions. As they are leaving, I give them a juror questionnaire, with a self-addressed stamped envelope, and ask them to fill it out at their convenience and mail it back to my chambers. I discuss this questionnaire with potential jurors in jury selection as a means of empowering them. I let them know that the lawyers and I are vitally interested in their feedback. I tell them that our court has made many changes in the way we do our business based on juror feedback over the years. When the questionnaires are returned, my judicial assistant shares the information with the attorneys for their review.

Mark W. Bennett, *Eight Traits of Great Trial Lawyers: A Federal Judge's View on How to Shed the Moniker "I Am a Litigator"*, 33 REV. LITIG. 1, 2 n.4 (2013).

⁴⁷ Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 401.

⁴⁸ *Id.*

⁴⁹ *Id.* at 402.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705, 725 (2012).

II. THE GLOOMY BIG PICTURE

A. Overview

Over a quarter of a century ago, Professor Stephen N. Subrin noted “[w]e are good at using equity process and thought to create new legal rights. We have, however, largely failed at . . . providing methods for their efficient vindication.”⁵³ Professor Subrin prophetically observed: “The momentum toward case management, settlement, and alternative dispute resolution represents, for the most part, a continued failure to use predefined procedures in a manner that will try, however imperfectly, to deliver predefined law and rights.”⁵⁴

In a succinct and insightful article, my mentor, U.S. District Judge D. Brock Hornby warned: “Law professors and judges should stop bemoaning disappearing trials. Trials have gone the way of landline telephones—useful back-ups, not the instruments primarily relied upon, if ever they were.”⁵⁵ For nearly a quarter-century, I have found it unwise to ignore Judge Hornby’s advice. My passion for civil jury trials and my desire to see them flourish once again perhaps clouds this exception. The intent of this essay is to establish a framework to overcome Judge Hornby’s sage observation that users of the federal courts’ civil justice system no longer “expect or even want a trial.”⁵⁶ Unless we can change the current “litigation industry” paradigm, civil jury trials will surely go from vanishing to extinction—a relic that confounded a solution. As Professors Burbank and Subrin have recently and elegantly written: “If trials became an economically realistic option in substantially more cases, lawyers could no longer hide behind settlement, and law schools would once again know that they were training students for the world as it is rather than as it was.”⁵⁷

Let me define the world of federal civil justice: “The Litigation Industry!” At bottom, it involves too many pleadings; far too much unnecessary discovery that will never be used, not even in the wildest imagination of a real trial lawyer who actually anticipates going to trial; too many retained experts for too much money; too much motion practice; too much legal research on too many frivolous issues largely to keep associates busy and bill out their time; too many intra-firm lawyer conferences and too much duplication of effort; too many resources thrown into summary judgment paper trials, all performed by far too many lawyers per side.⁵⁸

⁵³ Subrin, *How Equity Conquered Common Law*, *supra* note 19, at 1001.

⁵⁴ *Id.* at 1001–02.

⁵⁵ Hornby, *supra* note 21, at 467–68.

⁵⁶ *Id.* at 461.

⁵⁷ Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 414.

⁵⁸ I recently read an article in a widely read legal journal mourning the passing of a managing partner at a major East Coast law firm. It noted that he was universally considered a “hard-nosed litigator” and used that philosophy to grow the firm rapidly. I wondered what that meant. Did he notice depositions on short notice without a courtesy phone call to opposing counsel to find suitable dates for depositions? Did the deposition notices include grossly

B. Bennett's Multiphasic Litigator Inventory®

The old saw “litigators are always prepared but never ready for trial, while trial lawyers are never prepared but always ready for trial” is funny and, in my experience, mostly true, but a better “test” for determining the difference between a litigator and a trial lawyer is needed. Because there is no universally accepted definition of a “litigator” in legal or scientific literature, I have developed the ten-factor Bennett Multiphasic Litigator Inventory® to conclusively distinguish between a “litigator” and a real trial lawyer. A “yes” answer score of three or more strongly indicates a “litigator”; a score of five or more is presumptive for being a “litigator”; and a score of six or higher is conclusive. The ten-factor test is:

1. Does the lawyer travel in packs?⁵⁹
2. Does the lawyer suffer from “boiler plate objection to discovery” addiction?⁶⁰
3. Does the lawyer move for at least two continuances of the firm trial date?⁶¹
4. Does the lawyer always fail to suggest and argue strenuously against the most reasonable solution for a problem?⁶²

overbroad subpoenas for documents? Did he cuss often at depositions, interpose frivolous objections, and frequently improperly instruct the witness not to answer, object for the purposes of improperly coaching the witness by suggesting the answer he wanted in the objection? Did he file boilerplate objections to every one of the other sides' interrogatories and requests for production of documents with the intent to never provide clearly discoverable information? Did he bury the other side with needless and overbroad interrogatories and requests for production of documents? Was he quick to file discovery motions rather than making serious attempts to work out differences? Did he almost always resist the opposing sides' reasonable requests for extra time to answer discovery? Did he relish in filing needless motions to dismiss? Did he take seriously his Rule 26 duties of initial disclosure or jack opposing counsel around by giving only partial responses? Did he file multiple and mostly non-meritorious motions for summary judgment? If his cases actually got to the final pretrial conference stage, did he object to over 90 percent of the other sides' witnesses and object to exhibits on numerous and largely frivolous grounds? Did he file thirty-eight motions *in limine*, most of which were so vague the trial judge could not tell what he wanted excluded because he failed to attach any of the items he raised in the motions and assumed the trial judge must live in the discovery file? I certainly have witnessed up close and personal out-of-state law firms do all this and much, much more in the name of “hard-nosed litigation.” I have seldom had a real trial lawyer do any of this! (The name of the article and, thus, the “hard-nosed litigator” have been deleted out of respect for his passing.)

⁵⁹ Litigators cannot sign a pleading by themselves, it takes at least two litigators to sit at all depositions, three or more to attend a phone conference with the judge, and four or more to attend a court hearing. Bennett Multiphasic Litigator Inventory®, Question 1 (2015 edition).

⁶⁰ Objections never are made on a single, individualized, specific, and occasionally correct ground. Bennett Multiphasic Litigator Inventory®, Question 2 (2015 edition).

⁶¹ Trial lawyers accommodate firm trial dates because they like trying cases. Litigators avoid them at all costs including sometimes wacky reasons for the continuance. Be especially aware of last minute claims of conflicting trial dates. Bennett Multiphasic Litigator Inventory®, Question 3 (2015 edition).

5. Does the lawyer file repetitive motions to dismiss and for summary judgment with mostly frivolous arguments?⁶³
6. Does the lawyer habitually file motions to file over-length briefs even for the simplest of matters?⁶⁴
7. Does the lawyer insist on in-person hearings even after the judge has suggested doing it by telephone?⁶⁵
8. Does the lawyer always claim it is the other lawyer's fault *and* refuse to ever take responsibility for creating the problem?⁶⁶
9. Does the lawyer file record-setting numbers of motions *in limine* that are totally out of proportion to the case?⁶⁷
10. Does the lawyer call the magistrate judge during a deposition to have the judge decide the length of the lunch break?⁶⁸

Civil litigation in federal court is simply too expensive to accommodate many trials. This is actually nothing new. In 1987, Professor Subrin wrote about concerns over excessive costs and delays and discovery abuses raised at the 1976 Pound Conference.⁶⁹ The macro problem is that each of the actors in the system has lost their way. It is not that complicated. Because of the vanishing civil jury trial (and for that matter, real trial court judges rather than case managers), “litigators” no longer know how to try an effective case, if they ever did. In my experience, many “litigation” partners in litigation firms have not

⁶² Litigators by their very nature are often unreasonable. A helping test to determine this is to see if the lawyer has an allergy to reasonableness, which can be performed by a skin PRICK test. Bennett Multiphasic Litigator Inventory®, Question 4 (2015 edition).

⁶³ The litigator never takes “no” for an answer and repeatedly re-raises non-meritorious arguments at every opportunity that have already been rejected by the trial court judge. Bennett Multiphasic Litigator Inventory®, Question 5 (2015 edition).

⁶⁴ This is often the result of law firm leveraging with legions of the best and the brightest associates to keep busy billing at substantial hourly rates. Bennett Multiphasic Litigator Inventory®, Question 6 (2015 edition).

⁶⁵ Apparently, because litigators hate to actually go to trial, these in-person appearances generate great water cooler embellished stories to enthrall associates and intimidate opponents. Bennett Multiphasic Litigator Inventory®, Question 7 (2015 edition).

⁶⁶ The litigator's credo includes never, ever taking any personal responsibility for the problems created in litigation. Bennett Multiphasic Litigator Inventory®, Question 8 (2015 edition).

⁶⁷ Rather than filing a single motion *in limine* with ten parts, the litigator files ten separate motions with fifty parts. Often the litigator files dozens of motions *in limine* marked by make-work to preclude things like settlement negotiations, insurance, and the fact the litigator has been sanctioned in this and other cases—items the other side has no intention or interest in offering and that are clearly inadmissible, that is, if the litigator actually knew or consulted the Federal Rules of Evidence. Bennett Multiphasic Litigator Inventory®, Question 9 (2015 edition).

⁶⁸ This is the acid test and a “yes” answer to this question, regardless of the answers to the first nine questions, conclusively establish the lawyer is a litigator and beyond redemption. Bennett Multiphasic Litigator Inventory®, Question 10 (2015 edition). Order, *Hulina v. Marengo Rescue Squad*, No. 12-CV-10424 (N.D. Ill., Aug. 6, 2014), No. 80 (stating that litigators called U.S. Magistrate Judge Iain D. Johnston because they could not agree on the length of a lunch break during a deposition, in which the judge had previously had to determine the place for the deposition because the litigators were unable to agree).

⁶⁹ Subrin, *How Equity Conquered Common Law*, *supra* note 19, at 911, 974.

tried a jury trial in decades, if ever. What makes anyone think their next case will be their first? The lack of experience and fear of going to trial are major impediments to more federal trials. The Gerry Spence type real trial lawyers have been replaced with water cooler Clarence Darrows, tough-talking “litigators” who talk a great game but in the end *always* settle.⁷⁰ “Litigators” don’t try lawsuits, they “litigate” them *ad nauseam* with enormous expense and delay for their clients. No wonder it’s too expensive to actually proceed to trial. Two federal practitioners recently described the vicious cycle of escalating federal discovery this way:

In short, the actual operation of the Rules and the incentives they create for parties and their attorneys almost automatically turn what should be a two-step process of discovery requests followed by responses into an iterative, multi-step ordeal, in which responses are followed by conferences, then amended responses, then further conferences, and so on. All of this haggling and negotiation over what should largely be well-settled matters not only drives up costs, it may even encourage propounding parties to serve broader discovery requests than they otherwise would in order to leave themselves room to bargain. Such unnecessarily broad requests encourage similarly broad objections, in turn leading to further bargaining and significantly driving up costs.⁷¹

It is a daunting challenge to restructure the Rules to substantially reduce litigation costs, eliminate needless discovery and litigation obstructionism, and hopefully reinvigorate trial by jury. The latest efforts of the Committee, while no doubt the product of extraordinary hard work and noble intentions, with respect, will not likely accomplish any of these goals.

III. THE 2015 PROPOSED AMENDMENTS TO THE RULES: MORE NIBBLING AND UNINTENDED CONSEQUENCES

The Committee has proposed a new round of amendments to the Rules that may go into effect in 2015.⁷² The Committee “has proposed a package of amendments designed to streamline pretrial discovery, promote hands on litigation management by the courts and encourage cooperation among the parties and the courts in the conduct of the pretrial phase of a case.”⁷³ These proposed amendments “represent the first comprehensive change in discovery practice

⁷⁰ One of the keys to my chambers’ civil case management is stacking multiple civil jury cases on the same start date knowing that counsel in these cases will *always* settle. It has never failed. Once I am able identify a litigator as a “serial, recidivist settler” they have never gone to trial.

⁷¹ Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 477 (2010).

⁷² PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 4; Edward D. Cavanagh, *The 2015 Amendments to the Federal Rules of Civil Procedure: The Path to Meaningful Containment of Discovery Costs in Antitrust Litigation?*, ANTITRUST SOURCE, Apr. 2014, art. 4, at 1.

⁷³ Cavanagh, *supra* note 72.

since the Supreme Court’s decisions” in *Twombly* and *Iqbal*.⁷⁴ The way Professor Edward Cavanagh describes these amendments—“streamlining pretrial discovery,” “hands on litigation management,” and “encourage cooperation among the parties and the courts”—they sound more American than the flag and apple pie. While the implications of these proposed amendments for the federal civil justice system is beyond the scope of this article, I have grave reservations that, if adopted, they will improve anything. In fact, I predict these amendments, proposed by the large-law-firm-influenced Committee,⁷⁵ will sig-

⁷⁴ *Id.*; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁷⁵ The vast majority of the members of the Advisory Committee on Civil Rules have strong ties to large rather than small law firms. Those ties are as follows:

- Judge David G. Campbell worked at Osborn Maledon, a large Phoenix law firm. *David G. Campbell*, DUKE LAW, <https://law.duke.edu/judicialstudies/conferences/april2013/campbell/> (last visited May 4, 2015);
- John M. Barkett is a partner at Shook, Hardy & Bacon, a large international law firm. *Attorneys: John M. Barkett*, SHOOK, HARDY & BACON, http://www.shb.com/attorney_detail.aspx?id=276 (last visited May 4, 2015); *Integrated Legal Services*, SHOOK, HARDY & BACON, <http://www.shb.com/about/integrated-legal-services> (last visited May 4, 2015);
- Elizabeth Cabraser is a partner at Lief, Cabraser, Heimann & Bernstein, “a sixty-plus attorney law firm with offices in San Francisco, New York and Nashville.” *Attorneys: Elizabeth J. Cabraser*, LIEFF CABRASER HEIMANN & BERNSTEIN, <http://www.lieffcabraser.com/Attorneys/Elizabeth-J-Cabraser.shtml> (last visited May 4, 2015); *About Us*, LIEFF, CABRASER, HEIMANN & BERNSTEIN, <http://www.lieffcabraser.com/About-Us/> (last visited May 4, 2015);
- Stuart F. Delery was a partner at Wilmer Hale, a larger international law firm. Press Release, Dep’t of Justice, Attorney General Eric Holder Welcomes the Confirmation of Stuart F. Delery as Assistant Attorney General for the Civil Division (Aug. 1, 2013), *available at* <http://www.justice.gov/opa/pr/attorney-general-eric-holder-welcomes-confirmation-stuart-f-delery-assistant-attorney-general> (last visited May 4, 2015); *Offices*, WILMERHALE, <http://www.wilmerhale.com/offices/offices/> (last visited May 4, 2015) (“WilmerHale is 1,000 lawyers strong, with 14 offices in the United States, Europe and Asia.”);
- Judge Paul S. Diamond was a partner at Dilworth, Paxson, Kalish & Kauffman and Obermayer Rebmann Maxwell & Hippel, which are large East Coast law firms. *Judicial Nominations*, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/infocus/judicialnominations/diamond.html> (last visited May 4, 2015); *About Dilworth*, DILWORTH PAXSON, <http://www.dilworthlaw.com/AboutDilworth> (last visited May 4, 2015); *Offices*, OBERMAYER REBMANN MAXWELL & HIPPEL, <http://www.obermayer.com/our-firm/offices/> (last visited May 4, 2015);
- Parker C. Folse is a partner at Susman Godfrey, a large national law firm. *Attorneys*, SUSMAN GODFREY, <http://www.susmangodfrey.com/Attorneys/Parker-C-Folse/#Panel> (last visited May 4, 2015); *Contact Us*, SUSMAN GODFREY, <http://www.susmangodfrey.com/Contact-Us/> (last visited May 4, 2015);
- Peter D. Keisler is a partner at Sidley Austin, a large international law firm. *People*, SIDLEY AUSTIN, <http://www.sidley.com/en/people/peter-keisler> (last visited May 4, 2015); Press Release, Sidley Austin, For the Fifth Consecutive Year Sidley Austin LLP Is Recognized With the Most First-Tier National Rankings in the 2015 U.S. News—Best Lawyers “Best Law Firms” Survey (Nov. 3, 2014), *available at* <http://www.sidley.com/news/for-the-fifth-consecutive-year-sidley-austin-llp-is-recognized-with-the-most-first-tier-national-rankings-in-the-2015-us-news-best-lawyers-best-law-firms-survey-11-03-2014> (“With more than 1,800 lawyers in 18 offices worldwide, Sidley has built a reputation as a premier legal adviser for global businesses and financial institutions.”);
- Professor Robert Klonoff worked for Jones Day, a large international law firm. *Law Faculty*, LEWIS & CLARK LAW SCH., <http://law.lclark.edu/live/profiles/310-robert-klonoff> (last visited May 4, 2015);

nificantly *increase* both the costs and delay of federal civil litigation. One cannot help but wonder how the Rules would be different if, over the years, the Committee had instead been dominated by trial lawyers who do both plaintiff and defense work that hail from cities like Ft. Dodge, Iowa; Muncie, Indiana; Rapid City, South Dakota; and Lincoln, Nebraska. Indeed, are those skeptical of this most recent round of proposed amendments suspicious that “BigLaw” is salivating at the prospect of their adoption?

The alleged “streamlining” of “pretrial discovery” mostly recycles notions of discovery “proportionality”⁷⁶ that have been around for over thirty years in the Rules and currently reside in Rule 26(b)(2)(C)(iii), which “was adopted as part of the Federal Rules in 1983.”⁷⁷ The proposed nibbling moves the proportionality standard up to Rule 26(b)(1) and requires that discovery relevant to a claim or defense be “*proportional* to the needs of the case.”⁷⁸ Of course, pro-

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- Judge John G. Koeltl was a partner at Debevoise & Plimpton, a large international law firm. *Hon. John G. Koeltl*, PRACTISING L. INST., http://www.pli.edu/Content/Faculty/John_G_Koeltl/_N-1z13ed6Z4o?ID=PE188088 (last visited May 4, 2015); *About Us*, DEBEVOISE & PLIMPTON, <http://www.debevoise.com/aboutus/overview> (last visited Mar. 29, 2015) (stating that Debevoise has approximately 650 lawyers throughout its eight offices worldwide);
 - Judge Scott M. Matheson, Jr. worked for Williams & Connolly, a large law firm in Washington D.C. *Judge Scott M. Matheson, Jr.*, TENTH CIRCUIT CT. APPEALS, <https://www.ca10.uscourts.gov/judges/judge-scott-m-matheson-jr> (last visited May 4, 2015); *Firm Overview*, WILLIAMS & CONNOLLY, <http://www.wc.com/about.html> (last visited May 4, 2015) (noting that Williams & Connolly has approximately 275 lawyers);
 - Judge Michael W. Mosman worked for Miller Nash, a large Northwest law firm. Gordon Smith, Public Statements at the Nomination of Michael W. Mosman to be United States District Judge (Sept. 25, 2003), *available at* <http://votesmart.org/public-statement/21839/nomination-of-michael-w-mosman-to-be-united-states-district-judge>; *Firm History*, MILLER NASH, <http://www.millernash.com/timeline/> (last visited May 4, 2015) (“Today, the firm has about 160 attorneys practicing in Portland and Bend, Oregon; Seattle and Vancouver, Washington; and Long Beach, California.”);
 - Justice David E. Nahmias worked for Hogan & Hartson (now Hogan Lovells), a large international law firm. *Justice David E. Nahmias*, SUP. CT. GA., <http://www.gasupreme.us/biographies/nahmias.php> (last visited May 4, 2015); Amanda Becker, *Hogan Lovells Merger Makes Firm One of Largest in U.S.*, WASH. POST (May 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043002575.html>;
 - Judge Gene E.K. Pratter was a partner at Duane Morris, a large international law firm. *Alumni Profiles*, DUANE MORRIS, http://www.duanemorris.com/site/alumni_profiles_pratter.html (last visited May 4, 2015); *About Duane Morris*, DUANE MORRIS, <http://www.duanemorris.com/site/about.html> (last visited May 4, 2015) (“Duane Morris LLP [is] a law firm with more than 700 attorneys in offices across the United States and internationally”); and
 - Judge Diane P. Wood worked at Covington & Burling, a large international law firm. *The Faculty*, U. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/wood-d> (last visited May 4, 2015); *Firm History*, COVINGTON & BURLING, http://www.cov.com/about_the_firm/firm_history/ (last visited May 4, 2015) (“Today, the firm numbers more than 850 lawyers in ten offices [worldwide].”);

see also Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees, U.S. CTS., <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/committee-roster.pdf> (last visited May 4, 2015) (listing the committee’s current members).

⁷⁶ See PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 4, at 264–69.

⁷⁷ Cavanagh, *supra* note 72, at 5.

⁷⁸ *Id.*; *see also* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 4, at 289.

portionality is in the eye of the responder to a discovery request. Thus, the amendment's renewed, but restated, standard simply provides a newly emphasized target for additional discovery disputes arguing lack of proportionality on every discovery request. It appears that every litigator has a new weapon to oppose or limit discovery responses by *sua sponte* deciding lack of proportionality. This virtually guarantees that "proportionality" will become the new obstructionist mantra of the litigation industry.

Another proposed 2015 amendment strikes me as an *Alice in Wonderland*⁷⁹ approach to the litigation industry. While discovery is "a process meant to be collegial[,] [a]ttorneys will unleash a barrage of discovery requests, or a trickle of incomplete responses, to batter the opposing side into settlement or bleed it into surrender."⁸⁰ The Committee seeks to change the obstructionist culture of the litigation industry by amending Rule 1 to provide that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."⁸¹ To quote tennis legend John McEnroe's famous exhortation on a bad line call at Wimbledon in 1984: "YOU CANNOT BE SERIOUS!"⁸² This amendment is worthless. If anyone thinks it could have an iota of impact on the current culture of obstructionism, there awaits you a bridge in Brooklyn to purchase. This is exactly the type of Committee nibbling that makes true reform unlikely.

On a slightly more positive note, there are a few of the proposed 2015 amendments attempting to impose new presumptive limitations on discovery that make some sense. However, by engrafting huge exceptions to these presumptive limitations, the Committee continues to repeat the mistakes of the past. The new proposed presumptive limitations on depositions and their length include no more than five depositions being taken by a party for no more than six hours per deposition.⁸³ For the first time, there are limits on requests for admissions (twenty-five, including subparts);⁸⁴ and reductions to the number of

⁷⁹ LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865), available at <http://etc.usf.edu/lit2go/1/alices-adventures-in-wonderland/> (discussing the work that is frequently shortened to *Alice in Wonderland* as a classic novel by Rev. Charles Lutwidge Dodgson (pen name Lewis Carroll) creating a girl named Alice who follows the White Rabbit down a hole into a fantasy world of strange anthropomorphic creatures).

⁸⁰ Wilson, *supra* note 8, at 177.

⁸¹ PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 4, at 281 (listing new language in proposed Rule 1 shown by emphasis).

⁸² At Wimbledon in 2011, it was observed that it has been "30 years since John McEnroe electrified a first round match against Tom Gullikson with the immortal words, hurled at Edward James, the umpire: 'You can't be serious, man. YOU CANNOT BE SERIOUS! That ball was on the line! Chalk flew up! It was clearly in! You guys are the absolute pits of the world.'" Adam Lusher, *Thirty Years Ago? You Cannot be Serious*, TELEGRAPH (June 19, 2011, 7:00 AM), <http://www.telegraph.co.uk/culture/tvandradio/8584101/Thirty-years-ago-You-cannot-be-serious.html>.

⁸³ PRELIMINARY DRAFT OF PROPOSED AMENDMENTS, *supra* note 4, at 300–01.

⁸⁴ *Id.* at 310–11.

interrogatories from twenty-five to fifteen (including subparts).⁸⁵ Regrettably, all of these presumptive limitations may be waived by stipulations of the parties or court order.⁸⁶

I do not believe these reforms go nearly far enough. Of course, any value that might have come from these presumptive limitations in terms of reducing cost and delay can be easily stipulated away. Worse, when that does not happen, these proposed reforms will encourage litigators to engage in more bickering obstructionist conduct and create a new major round of extended discovery motion practice to expand these presumptive limitations. In sum, the 2015 proposed amendments are more reforms, yet little progress, creating likely unintended consequences that will exaggerate the continuing problems of excessive cost and delay.

IV. REFORMS AND TACKLING THE EIGHT HUNDRED POUND GORILLA

A. *Bitter Poison Pills for Litigators*

The suggested cures that follow will be a bitter poison pill for “litigators,” who are posers for real “trial lawyers.” Over a decade ago I wrote:

[I]t seems to this court that while there appears to be no shortage of “litigators”—indeed they seem to be propagating throughout the profession—true federal civil “trial lawyers,” those willing to delve into the crucible of federal civil jury trials on a regular basis, are becoming an endangered species. Moreover, there is probably no greater shell game in the law than “litigators” attempting to pass themselves off as real “trial lawyers.” Stories of “litigation partners” at mid- and large-size firms with virtually no or extremely limited real federal civil jury trial experience are legion. In sum, while there are many terrific litigators, there are far fewer terrific federal trial lawyers who ply their craft on a regular basis before federal civil juries.⁸⁷

The authors of a recent law review article on the lack of jury trial experience by the current crop of litigators advance an interesting argument that the failure to disclose this lack of jury trial experience to prospective clients is an ethical violation.⁸⁸ If their view comes to pass as a majority view, this might do more to reduce cost and delay than all the reforms to the Rules. Hiring real trial lawyers rather than a “litigation industry” approach would surely dramatically reduce cost and delay.

The cures I propose are surely more devastating to firms with “litigation” departments who bank their substantial incomes on leveraging teams of “litigating” lawyers for all cases from the large and complex to the small and simple.

⁸⁵ *Id.* at 305.

⁸⁶ *Id.* at 291 (order of the court); *id.* at 301 (stipulations for depositions); *id.* at 305 (stipulations for interrogatories); *id.* at 310 (stipulations for requests for admissions).

⁸⁷ *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161, 1190–91 (N.D. Iowa 2003).

⁸⁸ Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 *GEO. J. LEGAL ETHICS* 155, 155 (2010).

A recent extreme example of this law firm “leveraging” is a securities fraud class action lawsuit where one of the plaintiffs’ law firms was attempting to recover \$500.00 per hour for a “contract” lawyer hired for the case, which the firm was only actually paying \$15.00 per hour.⁸⁹ Federal trial court judges likely see this leveraging in most major civil cases—I know I do. “[T]he predominant compensation model for law firms and lawyers also contributes to” excessive discovery.⁹⁰ “[M]ore time in discovery also means more revenue for the big firms.”⁹¹ In my experience, this encourages lawyers to engage in protracted and often useless discovery because “each additional hour of discovery translates into higher profits for the firm and higher hours (necessary to reap bonuses) for associates.”⁹² Another likely rationale for grossly excessive discovery is the endless search for “smoking gun” documents—the Holy Grail of discovery. The problem is, in my nearly forty years as a member of the bar, I have only seen two smoking gun documents in two unrelated cases and both were more than a quarter century ago while in private practice. Both were obtained fortuitously from third parties and not in discovery. Indeed, once I had these smoking guns (actually more like heat-seeking missiles), I asked the opposing parties, whose key level employees authored the documents, for them in multiple discovery requests, without disclosing I had them. In each case, neither corporation produced them. Then, when I strategically disclosed them, they had the unmitigated gall of claiming I was hiding the ball. Their tune changed quickly.

With all due respect to the hard-working federal judges, lawyers, and law professors who draft the Rules, they have not kept pace with the economics of the practice of law or the rise of the litigation industry and paper trials in lieu of civil jury trials. The Committee members spend enormous amounts of time, energy, and intellect nit-picking words in the Rules and nibbling around the edges of structural change. Yet, the failure of the Rules to implement much needed major structural changes make them more of the problem than part of any solution. Take for example, the years of effort and energy devoted by the Committee to the use of the word “shall” in Rule 56. In her fascinating and exceptionally detailed analysis of the Committee’s schizophrenic approach to the word “shall” in Rule 56, Judge Lee Rosenthal spends seven pages of a law review article detailing the complex machinations, debates, extensive comments from the bench, bar, and academy over an eighteen-year period. She ultimately simplifies this extraordinary effort by writing: “The Rule 56 text had gone from

⁸⁹ *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 398 n.11 (S.D.N.Y. 2013). The court also reduced the “lodestar” request of \$51.4 million to \$25.1 million based on waste, inefficiency, inflated hourly rates, and unreasonable hours requested. *See id.* at 374.

⁹⁰ Wilson, *supra* note 8, at 179.

⁹¹ *Id.* (footnote omitted).

⁹² Jordan M. Singer, *Proportionality’s Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 171 (2012) (citing Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 34–36 (1982)).

‘shall,’ to a proposal for ‘may,’ to ‘should,’ and back to ‘shall.’”⁹³ My view is also shared by the major professional organizations for the civil defense bar who wrote, in their collective White Paper to the 2010 Duke Conference on Civil Litigation, concluding in an opening section on Prior Attempts to Solve Systemic Federal Litigation Problems, that: “While dissatisfaction undoubtedly exists with every legal system, we conclude that more than tinkering at the edges of the Rules of Civil Procedure is required. Fundamental and meaningful reforms are essential to achieve effective justice in the federal system.”⁹⁴ So what meaningful reforms hold a prospect for improvement?

B. Bold Reforms

1. The Simple Track

I begin with a bold, but in my view, low-hanging fruit reform. It is way beyond time to end the “one size fits all” approach of the Rules. Professor Subrin has “argued for three decades that the underlying transsubstantive philosophy of the Federal Rules of Civil Procedure is flawed.”⁹⁵ He is too gracious. This “one size fits all” approach, perhaps suitable in 1938, is now *deeply* flawed, and in my view, silly.⁹⁶ It allows relatively simple fact disputes like the reasons to hire, fire, and fail to promote employees; the sale of piglets based on an alleged

⁹³ Lee H. Rosenthal, *The Summary Judgment Changes That Weren't*, 43 LOY. U. CHI. L.J. 471, 486 (2012).

⁹⁴ LAWYERS FOR CIVIL JUSTICE ET AL., *RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE* at ix (2010).

⁹⁵ Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 19, at 377. Professor Subrin defines “transsubstantive” to mean two things:

the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or “case-type” transsubstantivity; and (2) regardless of the size of the litigation or the stakes involved, or “case-size” transsubstantivity. I use the term “transsubstantive” to cover both.

Id. at 378. Professor David Marcus explains:

The trans-substantivity principle reduces complexity for a straightforward reason. It requires that the procedural treatment that the Federal Rules prescribe for simple contracts disputes mirrors exactly what applies in complicated employment discrimination litigation. Judges and lawyers do not need to relearn procedure every time they delve into a new field of substantive doctrine.

David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 372 (2010).

⁹⁶ *But see* Marcus, *supra* note 95, at 426 (containing an excellent and comprehensive discussion of trans-substantivity of the Federal Rules of Civil Procedure and a robust but candid defense of it).

The Supreme Court’s recent decision to jettison a fifty-year-old interpretation of Rule 8 and the rejuvenation of pleading litigation that the 1938 authors intended “to wither and die” show at a minimum that nothing is sacred in American civil procedure. The uncertain future of trans-substantivity, a “foundational assumption” of the 1938 rules, is further evidence of this fact. Although central to the design of American procedural systems since the early nineteenth century, the principle has taken a licking in recent years and potentially fatal cracks appear in its theoretical foundation. Nonetheless, trans-substantivity remains robust, if not as a jurisprudential matter, then as a practical matter, as the actions of rulemakers in the federal system demonstrate.

Id. (footnotes omitted).

oral contract; the strip search of a jail detainee (to describe just a few of my recent civil jury trials) to mushroom into cases with extensive pretrial discovery, dispositive motions thicker than the Sioux City, Iowa phone book, and final pretrial orders with exhibit lists containing exhibits so numerous and irrelevant to the core issues that actually letting the lawyers use them in trial would inflict cruel and unusual punishment on the jurors. It is not that the issues raised in these cases are not über important, they are. I strongly believe they belong in federal court. But, they do not “generally warrant the whole panoply of federal process”⁹⁷ contained in the Rules. In other words there is a difference between a “federal case” and a “FEDERAL CASE.”

There is a better way, and it is some form of simple tracking. Professor Subrin has described the essential features of simple tracking as follows:

- Trial date set shortly after lawsuit filed
- Firm trial date in six to nine months
- At most one required conference
- Early setting of very limited discovery—two to three deposition and ten to fifteen interrogatories
- More specificity in document requests
- Consider eliminating mandatory disclosure
- Consider time limits for trial⁹⁸

Many of the cases I have tried would have benefited from some form of simple tracking. Indeed, most of them would have. Most of the cases that settle would have settled sooner, with much less expense, if they had been subject to some form of mandatory simple tracking. I say “mandatory” because it is my understanding that very few cases ever opt in in those state and federal courts that make simple tracking voluntary. I suspect that is a result of “litigation think”—if one sides thinks it is a good idea, the other side automatically rejects it. That is why the Iowa Supreme Court recently adopted an Expedited Civil Actions rule where the plaintiff can require defendants to proceed with expedited procedures by waiving any right to recover more than \$75,000.00.⁹⁹

⁹⁷ Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 19, at 399.

⁹⁸ *Id.*

⁹⁹ For example, the Iowa Supreme Court, after several years of study by an Iowa Civil Justice Reform Task Force, adopted in August of 2014 an Expedited Civil Action Rule, Iowa Court Rule, 1.281. See IOWA CIV. JUSTICE REFORM TASK FORCE, REFORMING THE IOWA CIVIL JUSTICE SYSTEM 12–13 (2012). The Task Force was made up of leading members of the academy, plaintiff and defense counsel, corporate and public interest counsel and Iowa judges. *Id.* at i. The Task Force was chaired by Iowa Supreme Court Justice Daryl L. Hecht. *Id.* It also received input from national experts like Rebecca Love Kourlis, Executive Director of the IAALS. *Id.* at 3. The thrust of the new rule is that plaintiffs who claim \$75,000 or less can require the opposing parties to opt into an expedited process, which features: a guaranteed jury or bench trial date in one year or less; very limited motion practice including substantial limitations on filing summary judgment motions; substantial limitation on discovery, including one deposition of the opposing party and up to two more depositions of non-parties; short time limits on the length of trials; enhanced admissibility of documents; and the admissibility of Health Care Provider Statements in lieu of testimony; and provisions for a non-unanimous 5-1 jury verdict after three hours of deliberation. See IOWA R. CIV. P.

While the devil is in the details, both Professor Subrin¹⁰⁰ and I are content to let the drafters of the Rules fine tune the simple track rules, not the least of the problems is deciding which cases should be assigned to simple tracking. I agree with Gerry Spence that the notion that so many cases are complex is more about litigators trying a case than real trial lawyers. As I recently penned:

Lawyers are great at taking a six-second automobile accident and morphing it into a two-week jury trial. An average lawyer makes simple events complicated, but great trial lawyers make complex events simple. [As Gerry Spence wrote]:

I have tried cases with many exhibits, cases that took months in which scores of witnesses were called, cases with jury instructions as thick as the Monkey-Ward catalog and supposed issues as entangled as the Gordian knot. But I have never tried a complex case. . . . All cases are reducible to the simplest of stories.¹⁰¹

2. *Suggested Paradigm Switch for Criminal and Civil Discovery*

The most controversial big picture reform this essay suggests has its origin in the insightful observation, made more than two decades ago, by federal district Judge H. Lee Sarokin and his co-author in their opening sentence of their law review article: “It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters.”¹⁰² That is still true today. Money is usually the issue in civil cases, and all parties receive enormous amounts of information from their adversaries in virtually wide-open, expensive, and time-consuming discovery. This is often marked by extraordinary judicial involvement in discovery disputes. But, where individual liberty is at stake in criminal cases, discovery is severely truncated by rule and extensive case law. In practice, there is virtually no judicial involvement in the criminal discovery process. At least not in our district, which, interestingly, has consistently been in the top ten of the ninety-four districts in the number of criminal cases per judge over the last decade.¹⁰³

1.281. The Rule also allows for parties with claims of more than \$75,000.00 to opt in to the Rule by consent. IOWA R. CIV. P. 1.281(f).

¹⁰⁰ Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 19, at 399.

¹⁰¹ Bennett, *supra* note 46, at 9–10.

¹⁰² H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1089 (1991). The thrust of Judge Sarokin’s article is to greatly expand federal criminal discovery, something that has not happened. *See generally id.* Professor Roberts has noted the “crux of the debate” about liberalizing criminal discovery “is captured in a seminal lecture published in 1963” by Justice William Brennan. Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1147 n.238 (2004) (citing William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279).

¹⁰³ *See Federal Court Management Statistics Archive*, U.S. CTS., <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/FederalCourtManage>

Scholars have often noted the wide gap in discovery between civil and criminal cases.¹⁰⁴ While “[m]any commentators, for many years, have called for the liberalization of criminal discovery statutes and rules,”¹⁰⁵—a call I wholeheartedly agree with—my call is the opposite. I believe that civil discovery should be severely limited and, indeed, switched with, or at least morphed toward, the limited criminal discovery. For a long time we have had discovery exactly backward: severely limited discovery in criminal cases and virtually wide-open discovery in civil cases. No doubt “[m]any criminal defense attorneys enjoy the fly-by-the-seat-of-your-pants experience that this scenario provides. It is challenging. It can be exciting. And in the end, it makes them better lawyers.”¹⁰⁶ I certainly agree the best criminal defense lawyers are much better trial lawyers than the best civil trial lawyers. After all, in federal criminal cases, they must cross examine witnesses with no prior deposition of the witness, in interrogatories, and often not even a written statement to law enforcement officials by the witness. In those jurisdictions where the Jencks Act, 18 U.S.C. § 3500, is strictly enforced, the prosecution is not required to produce a statement “signed or otherwise adopted or approved by” the witness until after the prosecution witness has testified on direct examination.¹⁰⁷ If there is no Jencks Act statement, the defense lawyer almost always has to cross-examine the witness cold, requiring skill very few civil litigators or civil trial lawyers have ever had to develop.

The vast majority of criminal discovery in federal court is covered by Rule 16 of the Federal Rules of Criminal Procedure. This Rule, *inter alia*, requires the United States to disclose for inspection and copying upon request by the defense the following: 1) any oral statements made by the defendant at any time that the prosecution intends to use at trial;¹⁰⁸ 2) any written or recorded state-

mentStatistics_Archive.aspx (last visited May 5, 2015) (ranking federal district courts according to the amount of criminal actions per judge).

¹⁰⁴ Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960) (noting in criminal cases “a long and deeply imbedded practice designed to keep the defendant in the dark as long as possible”); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1106 (2014) (“Though scholarship has recognized a discovery disparity between civil and criminal litigants, what is most significant is the disparity’s nature—a criminal defendant is a passive recipient of information whereas a civil litigant exercises discretion to compel information from multiple sources.” (footnote omitted)); Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 855–56 (1995) (noting that no criminal discovery procedures in state or federal courts match the broad discovery possibilities in civil procedure); Roberts, *supra* note 102, at 1098 (“Unlike rules governing discovery in civil cases, which require that the two sides exchange most information about their respective cases, criminal discovery results in a much more limited flow of information.” (footnote omitted)).

¹⁰⁵ Roberts, *supra* note 102, at 1098.

¹⁰⁶ W. Carl Lietz III, *Trial by Ambush Should Be a Two-Way Street: The Federal Notice-of-Alibi Rule and Mandatory Disclosure of Defense Witnesses*, CHAMPION, July 2009, at 38.

¹⁰⁷ 18 U.S.C. § 3500 (2012).

¹⁰⁸ FED. R. CRIM. P. 16(a)(1)(A).

ments by the defendant;¹⁰⁹ 3) documents or objects obtained by or belonging to the defendant, material to preparing the defense, or within the prosecution's possession, custody or control;¹¹⁰ 4) reports of examination or tests;¹¹¹ and 5) any written summary of testimony of an expert witness.¹¹² If the defendant requests such discovery, then the defendant has a reciprocal obligation to produce documents and objects, reports of examination and tests, and a written summary of expected expert testimony at trial.¹¹³

While state court criminal discovery varies from jurisdiction to jurisdiction, Professor Ion Meyn provides this excellent overview:

The typical criminal discovery statute does not grant a defendant *formal* pretrial investigatory power, defined as the discretion to compel facts from multiple sources. Formal investigatory powers may be expressed in various ways. In civil litigation, these powers take the form of depositions, interrogatories, and document requests. A criminal defendant, however, is rarely afforded such tools. He is instead entitled to discrete categories of opponent-sourced information found in the prosecutorial file.¹¹⁴

Turning back to federal criminal discovery, virtually all criminal cases in our district opt out of Rule 16 discovery in favor of a "stipulated discovery order." This order provides both sides with greater information than Rule 16 would provide and much earlier information than the Jencks Act provides. For example, it provides that both parties exchange witness and exhibit lists, including Jencks Act material, with copies of exhibits, at least seven days prior to trial. It further provides that:

The United States will include in its expanded discovery file or otherwise make available law enforcement reports (excluding evaluative material of matters such as possible defenses and legal strategies), grand jury testimony, and evidence or existing summaries of evidence in the custody of the United States Attorney's Office, which provide the basis for the case against the defendant. The file will include Rule 16, *Brady*, and Jencks Act materials of which the United States Attorney's Office is aware and which said Office possesses. Should the defendant become aware of any *Brady* material not contained in the expanded discovery file, the defendant will notify the United States Attorney's Office of such materials in order that the information may be obtained.¹¹⁵

The stipulated order further provides for reciprocal discovery from the defense: "Upon disclosure of the United States' discovery file, the defendant immediately must provide, and will be under a continuing obligation to provide, disclosure of statements as defined in 18 U.S.C. § 3500(e)(1) & (2), and recip-

¹⁰⁹ FED. R. CRIM. P. 16(a)(1)(B).

¹¹⁰ FED. R. CRIM. P. 16(a)(1)(E).

¹¹¹ FED. R. CRIM. P. 16(a)(1)(F).

¹¹² FED. R. CRIM. P. 16(a)(1)(G).

¹¹³ FED. R. CRIM. P. 16(b)(1)(A)–(C).

¹¹⁴ Meyn, *supra* note 104, at 1094.

¹¹⁵ Stock Order Setting Jury Trial in Criminal Cases and Stipulated Discovery Order of the Northern District of Iowa, Western Division ¶ 1 (on file with author).

rocal discovery under Federal Rules of Criminal Procedure 16(b) and 26.2.”¹¹⁶ Finally, the stipulated order provides: “For witnesses for whom there existed no statements or reports that were subject to disclosure through discovery, the party listing the witness also must note next to the witness’s name on the list the general purpose of his or her expected testimony.”¹¹⁷

While our “stipulated discovery order” is technically voluntary, all lawyers on both sides always opt in. Once that is done, it becomes the mandatory vehicle for reciprocal federal criminal discovery without any discovery motion practice and requires no court intervention. And this process is just not for those defendants who plead guilty, but works the same for those criminal cases that proceed to jury trial. Compared to most of the federal district courts, our district tries both a higher percentage and absolute number of criminal rather than civil jury trials.

The lawyers on both sides of criminal cases take their reciprocal discovery duties very seriously. As a result, neither I, nor the three other Article III judges and two U.S. magistrate judges in our district have had a discovery dispute in a criminal case for years (one judge reported one dispute over the timing of the release of a single document a number of years ago). Of course, when I tried two federal death penalty cases nearly a decade ago that each lasted nearly three months, there were a plethora of discovery disputes.¹¹⁸ But death penalty cases, like true mega civil cases, are the exception not the rule, at least in our district and the vast majority of districts. This vast body of experience also suggests that a “stipulated discovery” order works exceptionally well even in complex criminal cases with multiple parties, dozens and dozens of witnesses and thousands of exhibits.

The 1993 mandatory disclosure amendments to the Rules were deemed “radical” even by proponents.¹¹⁹ The rules imposed upon the parties “a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement.”¹²⁰ The origin of mandatory disclosure is often traced to articles by Wayne D. Brazil¹²¹ and Judge William W. Schwarzer.¹²²

¹¹⁶ *Id.* ¶ 6.

¹¹⁷ *Id.* ¶ 9.

¹¹⁸ Mark W. Bennett, *Sudden Death: A Federal Trial Judge’s Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 391, 393 n.13 (2013) (citing thirty-four reported decisions in these two death penalty cases; some of which dealt with discovery related issues).

¹¹⁹ Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 807 (1991) (quoting Paul Carrington, Reporter of the Advisory Committee on Civil Rules, in his cover memorandum accompanying the proposed revisions to the federal rules (Feb. 22, 1990)).

¹²⁰ FED. R. CIV. P. 26 advisory committee’s note.

¹²¹ Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978). Then-Professor Brazil, later a distinguished U.S. magistrate judge, envisioned a discovery milieu where attorneys would view themselves more as officers of the court rather than as Rambo litigators. *Id.* at 1349. As such,

The 1993 amendments required initial mandatory disclosure of three basic types of information: 1) witnesses and documents; 2) experts and their opinions; and 3) evidence to be used at trial.¹²³

Concerning documents, data compilations, and tangible things, the new mandatory disclosure rule required each party to, “without awaiting a discovery request, provide to other parties . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.”¹²⁴ The new rule also required the parties to “make its initial disclosures based on the information then reasonably available to it,” and provided that the party “is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party’s disclosures or because another party has not made its disclosures.”¹²⁵ However, the 1993 amendments allowed district courts to opt out of these mandatory disclosure requirements.¹²⁶ This loophole was closed by the 2000 amendment to Rule 26(a)(1).¹²⁷ However, the significant loophole that allows the parties to completely avoid initial mandatory disclosure by stipulation still exists and is undisturbed by the 2015 proposed amendments.¹²⁸

Thus, the major differences between the current discovery regime, even if modified by the proposed 2015 amendments, and my proposals are the following: 1) no ability to stipulate away mandatory disclosure; 2) a strong presumption of no additional discovery including depositions, interrogatories, request for production, and request for admissions; 3) no additional discovery could take place without court order and for “exceptional,” not “good,” cause—lest every litigator would yearn, whine, and request their usual discovery fare; and 4) much stronger sanctions, especially suspension and revocation of law licenses in addition to monetary fines would be imposed for willful failure to disclose required mandatory disclosure in a timely fashion. Finally, and most importantly, the duty of mandatory disclosure would be substantially broadened to in-

Brazil thought attorneys should be required under the rules to “search diligently for all data that might help resolve disputes fairly and to share voluntarily the results of their searches with both the court and other parties to the action.” *Id.* at 1349–50.

¹²² William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989). Judge Schwarzer suggested amending the discovery rules to mandate prompt disclosure of all material documents and information by every party at the beginning of all cases. *Id.* at 721–22. Schwarzer’s proposal replaced traditional discovery by the parties. Traditional discovery would be governed by court order, and only for good cause. *Id.*

¹²³ COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, *reprinted in* 137 F.R.D. 53, 99 (1991).

¹²⁴ FED. R. CIV. P. 26(a)(1)(B) (1993).

¹²⁵ FED. R. CIV. P. 26(a)(1)(E).

¹²⁶ FED. R. CIV. P. 26 advisory committee’s note.

¹²⁷ FED. R. CIV. P. 26 advisory committee’s note.

¹²⁸ FED. R. CIV. P. 26(a)(1)(C).

clude all of the core information a party needs to make a reasoned decision to settle or go to trial. Mandatory disclosures would be required not only for information “that the disclosing party may use to support its claims or defenses,”¹²⁹ but for any information in the possession, custody, or control, or that a party has knowledge of that, borrowing from Federal Rule of Criminal Procedure 16, “is material to preparing” the other party’s claim or defense. Of course, traditional privileges and attorney work product would be exempt from disclosure.

Justice Scalia claimed in 1993 that the then-proposed initial mandatory disclosure provisions were subject to a parade of horrors:

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is “relevant to disputed facts” plainly requires him to use his professional skills in the service of the adversary.¹³⁰

None of Justice Scalia’s parade of horrors have come to pass. His prediction that the “proposed radical reforms to the discovery process are potentially disastrous”¹³¹ was unmistakably more about crying wolf than correctly foretelling the real impact of the amended rules. Perhaps Justice Scalia’s far off the mark predictions are due to his candid concession of “[n]ever having specialized in trial practice.”¹³² His dire doomsday predictions are no more likely to come to pass regarding the suggestions for reform in this essay.¹³³

I am not the only one who thinks that comprehensive and very early reciprocal, mandatory disclosure of documents should be required in civil litigation. In their recent April 15, 2015 report, the American College of Trial Lawyers

¹²⁹ FED. R. CIV. P. 26(a)(1)(A)(i).

¹³⁰ AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 511 (1993) (Scalia, J. dissenting).

¹³¹ *Id.* at 510.

¹³² *Id.* at 513.

¹³³ One obvious criticism of my proposal is that federal criminal cases are sometimes initiated by the government after extensive and lengthy investigation and grand jury proceedings. On the other hand many federal criminal cases go to trial within the required seventy days from the arrest of a defendant because of the Speedy Trial Act, 18 U.S.C. § 3161(c)(1) (2012), with no prior government investigation before the defendants’ arrest. Also, unlike the need of the government to do a lengthy pre-indictment investigation to obtain documents, physical evidence and witness testimony from third parties—in the federal civil context most of the information needed for reciprocal discovery is in the parties’ possession. This makes feasible, mandatory reciprocal discovery in a relatively short period of time after the issues are joined.

and the Institute for the Advancement of the American Legal System jointly promulgated Principle 15, which states:

Shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations. The parties should retain the right in individual cases to make a showing to the court that this initial production may not be appropriate or may need to be modified.¹³⁴

Principle 15 is much broader than the current mandatory disclosure under the Federal Rules of Civil Procedure.¹³⁵ The current Rule requires description of documents by categories and location while this approach requires direct disclosure through production. Secondly, it is much broader because it requires early disclosure of all known and reasonably available documents and things that contradict “specifically pleaded factual allegations.”¹³⁶ This disclosure must be both “meaningful and robust.”¹³⁷ The rationale behind Principle 15 is very simple. Every “party should produce, without delay and without a formal request, documents that are known and reasonably available and that support or contradict specifically pleaded factual allegations.”¹³⁸ This would incentivize “the parties to bring the facts and issues to light at the earliest opportunity, thus allowing the litigation process to be shaped by the true nature of the dispute.”¹³⁹ Thus, revolutionizing civil litigation by truly meeting the twin goal of reducing cost and delay.

3. *Case Protocols*

Expanding on Professors Burbank and Subrin’s suggestion for “discovery protocols,”¹⁴⁰ this essay suggests going further with “case protocols.” I differ with the distinguished professors in suggesting “case protocols” be used not in the most expensive and burdensome discovery cases as they suggest (what my experience teaches are the true “mega cases”), but in the more routine cases

¹³⁴ THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & CIVIL JUSTICE & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE 19 (April 2015) [hereinafter REFORMING OUR CIVIL JUSTICE SYSTEM], available at http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ As Burbank & Subrin noted:

Our second proposal again abandons transsubstantive procedure, which is usually expressed in flexible, non-confining language designed to accommodate high-stakes, complex cases. We would encourage (or ask Congress to require) the rule makers to work with the bar to develop discovery protocols for the types of litigation thought (or, preferably, found in empirical studies) to impose the most burdensome discovery costs. The protocols would permit lawyers to inform their clients about what to expect in certain case types and would permit judges to compel or adjust the limitations in the protocol as necessary or appropriate for a particular case.

Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 412.

that better lend themselves to any type of protocols. I would suggest for starters, employment discrimination including harassment, FLSA, ERISA, excessive force, and breach of contract cases. These case protocols should be developed on a national basis by working groups of specialized plaintiff and defense lawyers from a cross section of geographic and small to BigLaw firms, U.S. magistrate and district court judges, and members of the legal academy.

The case protocols could be utilized with or without the primary suggestion of greatly expanded mandatory disclosure or with simple tracking or both. Because these protocols are broader than “discovery protocols” they would include restrictions to reduce cost and delay by streamlining pleadings, discovery, motion practice, and trials. This could be implemented on an experimental basis to determine through empirical testing that it actually reduces cost and delay without shrinking the quality of justice. Simple tracking with or without case protocols does not mean second-class justice. “Less discovery for simple cases thus does not mean second-class justice for those cases. Rather, by reducing the breadth of discovery, we effectively reduce transaction costs and force lawyers to focus on the heart of the dispute.”¹⁴¹ This should be true for case protocols, as well.

4. Dispositive Motion Reform

Reforming motion practice is beyond the scope of this essay. Yet, I fully recognize it is one of the most difficult and important nuts to crack to assist in the twin goals of reducing cost and delay and reinvigorating real trials (as distinguished from motions to dismiss and summary judgment paper trials). In a prior recent essay, I fully elaborated my views on reforming summary judgment.¹⁴² Professors Burbank and Subrin articulated summary judgment this way:

We turn finally to an area of reform that lies close to the heart of our concerns: summary judgment. This reform area forces one to look into the minds and hearts—the attitudes—of judges and lawyers. There is nothing obviously wrong with the governing Federal Rule 56 . . . [but] it is not clear how, at least on a transsubstantive basis, one could fashion a replacement that would prevent the mischief of ad hoc judgments that often appear arbitrary because of the amorphous nature of what constitutes an evidentiary foundation sufficient to support a jury finding. That mischief, confirmed by empirical study, consists of a supposedly uniform rule in fact operating in radically different fashion in different parts of the country and in different categories of cases, coupled with evidence that in some cases the actual application of the rule has unfairly deprived litigants (usually plaintiffs) of a trial by jury or a trial in open court.¹⁴³

¹⁴¹ *Id.* at 410.

¹⁴² Bennett, *supra* note 2.

¹⁴³ Burbank & Subrin, *Litigation and Democracy*, *supra* note 19, at 412–13 (footnote omitted).

With the rise of motion to dismiss practice, do we really need the elaborate summary judgment motion? In many cases, not the mega ones, which are the exceptions, it would be less expensive for the parties to try the case than motion it by avalanche.

5. *Trial by Agreement Reform*

The most promising civil litigation reform movement is one initiated exclusively by trial lawyers. It is *Trial by Agreement*.¹⁴⁴ This article is now required reading for all lawyers who file a civil case assigned to me. My Order Setting Jury Trial requires the lawyers to read the article and make a good faith effort to apply its principles to their civil case. The principles of Trial by Agreement—hard time limits, juror questions of witnesses, required preliminary jury instructions, and juror discussion of evidence before deliberations—dramatically increase the effectiveness of trial and reduce its cost.¹⁴⁵ The authors of this article, renowned Texas trial lawyers Stephen D. Susman and Thomas M. Melsheimer summarize their Trial by Agreement concept this way:

In the Susman approach, the crux of conducting a trial by agreement is to enter into a series of agreements designed not to advantage either side, but instead to aid in an efficient and intelligent presentation of the case to the jury. There are other important benefits as well outside of the jury context, such as saving court resources by avoiding useless and time-consuming disputes, or reducing the expenditure of fees and costs by both sides. . . .

Many of the proposed agreements focus directly on the conduct of the trial itself. These agreements do not simply save time and reduce the costs associated with unnecessary disputes; they also result in a trial process that produces more intelligent and informed results. In that sense they are a substantive improvement to the jury trial.

This approach to trying a case can be seen as an exercise in improving lawyer civility. By reducing the issues in dispute to what is truly material and outcome determinative, attorneys eliminate fractious disputes that can disrupt the relationship between opposing counsel. But that laudatory outcome is a side benefit to the trial by agreement approach, not a primary goal. The goal is an improved jury trial.¹⁴⁶

The Trial by Agreement concept and philosophy has an important benefit because it “can be seen as an exercise in improving lawyer civility. By reducing the issues in dispute to what is truly material and outcome determinative, attorneys eliminate fractious disputes that can disrupt the relationship between opposing counsel.”¹⁴⁷

¹⁴⁴ Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431 (2013).

¹⁴⁵ *Id.* at 441–62.

¹⁴⁶ *Id.* at 462–64 (footnotes omitted).

¹⁴⁷ *Id.* at 463.

The Trial by Agreement approach is particularly useful in eliminating the incredible time and expense most “litigators” generate in non-meritorious fighting over trial exhibits. Susman and Melsheimer write:

One important practice concerns the treatment of exhibits. With competent trial counsel on both sides, there is no reason that agreements cannot be reached on all but a handful of exhibits. It should always be agreed, for example, that a document produced by either party is deemed authentic. Further, in connection with the exchange of proposed trial exhibits, any exhibit not objected to should be deemed admissible.

We say “admissible” and not “deemed admitted” purposely. There are appellate risks inherent in simply “dumping” countless exhibits into evidence. This practice can provide a bloated and confused record on appeal. Consequently, the better practice is for counsel to offer the exhibits into evidence on at least a witness-by-witness basis to avoid an evidentiary “dump.”¹⁴⁸

Following this largely cooperative approach streamlines not only a jury trial but the discovery process as well.¹⁴⁹ An extremely important feature of the Trial by Agreement approach to civil litigation is in its sister: *Pretrial Agreements Made Easy*.¹⁵⁰ The whole approach of Pretrial Agreements Made Easy is that these extensive pretrial agreements “will make life easier for both sides and do not advantage one side over the other. Waiting until you are in the heat of battle to try to reach these agreements, one side or the other will feel disadvantaged.”¹⁵¹

The Susman *Pretrial Agreements Made Easy* website contains and discusses a dozen pretrial agreements from lawyer communication, deposition procedures, to limiting *in camera* inspection of documents to twenty.¹⁵²

The enormous significance of the Susman and Melsheimer approach is that until litigators figure out that mutual cooperation advances their clients interest and reduces cost and delay, no amount of amending the Federal Rules of Civil Procedure will have a significant real world impact.

CONCLUSION

Past reformers have been unsuccessful in solving the enduring problem of excessive cost and delay in federal civil litigation. Prior reformers seemed to believe that hope in the periodic amendments of the Rules would triumph over experience. It has not. Unless the problems created by the explosion in the “lit-

¹⁴⁸ *Id.* (footnote omitted).

¹⁴⁹ A very recent joint report by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System suggest that “[c]ooperation and communication between counsel is critical to the speedy, effective, and inexpensive resolution of disputes in our civil justice system.” REFORMING OUR CIVIL JUSTICE SYSTEM, *supra* note 134, at 11.

¹⁵⁰ Stephen Susman, *Pretrial Agreements Made Easy*, TRIAL BY AGREEMENT (May 4, 2011), <http://trialbyagreement.com/pretrial-agreements/pretrial-agreements-made-easy/>.

¹⁵¹ *Id.*

¹⁵² *Id.*

igation industry” are tackled, meaningful reform will not happen. The sweeping changes proposed in this essay would dramatically reduce the cost of processing a case through trial; severely punish lawyers who knowingly hide the ball on critical evidence; induce cases to settle earlier with less “litigation,” discovery, and transactional costs to the parties; require less, not more, judicial intervention; increase the demand for skilled trial lawyers while reducing the demand for “litigators,” and incrementally, but importantly, reverse the trend “that users increasingly do not expect or even want a trial.”¹⁵³

I fully understand that the suggestions for a major overhaul of the civil justice system are not going to be supported, endorsed or adopted by the “litigation industry,” or the Committee, or perhaps anyone else, let alone those with strong financial interests or cultural bias toward the litigation industry. This essay has more realistic and modest goals: to arouse members of the Committee, academy, judges, and lawyers to think more creatively to solve the enduring problems of excessive cost and delay in our civil justice system and, in the process, invigorate trial by jury.¹⁵⁴ Most importantly, the emerging Trial By Agreement movement can transform right now simple and complex cases, without the need for years of complex rules reform, to dramatically reduce cost and delay—and it is trial lawyer driven. For this the Grand Poobah will be eternally grateful.

¹⁵³ Hornby, *supra* note 21, at 461.

¹⁵⁴ Invigorating trial by jury is critically important to me and in my view our civil justice system. See Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: WWJW—What Would Jurors Want?—A Federal Trial Judge’s View*, 38 ARIZ. ST. L.J. (forthcoming Fall 2016).