

Spring 1993

Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective

Jeffrey W. Stempel

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 Val. U. L. Rev. 313 (1993).

Available at: <https://scholar.valpo.edu/vulr/vol27/iss2/2>

This Essay is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



CULTURAL LITERACY AND THE ADVERSARY SYSTEM: THE ENDURING PROBLEMS OF DISTRUST, MISUNDERSTANDING, AND NARROW PERSPECTIVE

JEFFREY W. STEMPEL*

I. INTRODUCTION

My six-year-old son's current vocational ambition is to play professional hockey. A budding masochist, he aspires to join the New Jersey Devils. Knowing all too well the athletic limits of his paternal gene pool, I have tried to steer him toward more cerebral and less physical endeavors. Consequently, I was an easy mark when his school's fundraising book sale offered E.D. Hirsch's *What Your 2nd Grader Needs to Know*¹ among its selections. Yes, Hirsch, who authored the bestseller *Cultural Literacy*,² has brought his educational agenda to the elementary level. The "cultural literacy" series, which includes similar volumes for other grades, operates on the principle that effective critical thinking cannot occur in a vacuum but requires that those doing the thinking, debating, discussing, arguing, governing, etc., possess a core of factual knowledge upon which to base their analyses. For example, adults should know basic facts about American history, including the approximate dates of important events, while children should not only know the mechanics of reading and arithmetic, but also rudimentary history and at least the gist of some literary classics.³

According to Hirsch and his collaborators,⁴ one of the classic parables that even young children should know is the tale of the Blind Men and the Elephant.

* Professor of Law, Brooklyn Law School. Thanks to David Herr, to my colleagues teaching civil procedure at Brooklyn Law, and to the members of the Committees on Federal Courts of the Association of the Bar of the City of New York, the New York County Lawyer's Association, and the Federal Bar Council, who keep me thinking about issues of adversarialism and litigation from what I hope is a reasonably broad perspective. Work underlying this essay was supported by a Brooklyn Law School Summer Research Stipend. Although I have been active in bar association commentary on proposed litigation reform, the views in this essay are solely my own.

1. E.D. HIRSCH, JR., *WHAT YOUR 2ND GRADER NEEDS TO KNOW* (1991).

2. E.D. HIRSCH, JR., *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* (1987).

3. See HIRSCH, *supra* note 1, at 1-5.

4. In response to criticisms suggesting that his approach is hierarchal and privileging of an established elite, Hirsch takes some pains to explain the process of enlisting scores of educators in distilling his core of "must know" information. See HIRSCH, *supra* note 1, at 5-7.

Having somehow attained adulthood in ignorance of the “textbook” version of the story, my attention was drawn to the simple, didactic, frequently paraphrased tale. According to Hirsch’s version:

There were once six blind men who went to see an elephant. The first blind man stretched his hands in front of him and felt the animal’s huge side. “This elephant is like a high strong wall,” he announced.

The second man, who was standing near the elephant’s head, put his hand on its long, sharp tusk. “A wall? NO! I would say that it is more like a spear.”

The third man reached around the elephant’s leg with both arms. “I hate to contradict you,” he said, “but I am sure that the elephant is very like a tree.”

The fourth man happened to reach up and touch the elephant’s ear. “All of you are mistaken,” he said. “The elephant is actually similar to a fan.” The fifth man was standing by himself at the elephant’s other end. He happened to grab the animal’s tail. “I don’t understand the confusion,” he said. “I am sure I am correct in saying that the elephant is much like a rope.”

Now the elephant was a bit playful, so he tickled the sixth man with his trunk. The startled man pushed the trunk away and said with a shudder, “Please stay calm while I swear to you that the elephant is really a very large snake!”

“Nonsense!” said the others. Still, they quietly began to move away, and they never bothered to put their heads together to understand what the elephant was really like.⁵

Although I have some misgivings about making six disabled persons an illustration of human cognitive failing, the parable nonetheless provides more insight than political incorrectness.⁶ In addition, the sighted world of civil litigation reform continues to provide vivid evidence that distrust among segments of the legal profession, misunderstanding, particularly about the adversary system, and narrowness of perspective are hardly restricted to any particular group. Like the six blind men, different elements of the legal profession and the American body politic have consistently approached the issue of litigation reform with cognitive tunnel vision, failing, among other things, to appreciate the practical import of the adversarial model of civil disputing.

5. HIRSCH, *supra* note 1, at 20-21.

6. The tale has, however, an underlying but probably unintentional modernity. After all, it was a group of six *men* who so abysmally failed to collaborate. Many readers probably assume that a group of six *women* would never be so isolated in their investigation. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

As a result, reform efforts are likely to accomplish little and may even result in a net diminution of a civil litigation system that, for all its inarguable failings, has functioned well in the role in which society has cast it.⁷ In particular, I suspect that many of the “expense and delay reduction plans” resulting from the 1990 Civil Justice Reform Act⁸ and current proposed amendments to the discovery provisions of the Federal Rules of Civil Procedure now under consideration by the Supreme Court⁹ will bring greater transaction costs and some shift in the relative power of certain litigants, but not the streamlined litigation sought by the revisors.

The meandering road to discovery reform illustrates, among other things, the ineffectiveness of an atomized profession that lacks either sufficient understanding of the adversary system or the resources and forcefulness to address the practical impact of adversarialism. In some ways, lawyers reforming litigation can be characterized as poorer investigators than the sixsome who examined the elephant. The elephant sleuths were guilty of isolation and ignorance. Lawyers and policymakers not only exhibit a lack of information and empathy, but also often show an unwarranted distrust of or contempt for the elements of the profession with which they disagree. Unfortunately, however, the distrust is often earned.

In raising these concerns, I make rather elastic use of the now popularized

7. Powerful recent academic criticism less tentative than my own concludes that recent litigation developments like the proliferation of local rules and the 1990 Civil Justice Reform Act have gutted much of what was good in civil litigation while creating substantial new problems. See, e.g., Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1993).

8. The Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5090 (codified at 28 U.S.C. §§ 471-482 (Supp. II 1990) (hereinafter “CJRA” or “Biden Bill,” after Sen. Joseph Biden (D-Del.), its principal sponsor) requires that all federal district courts implement a “civil justice expense and delay reduction plan” designed to speed case processing. See 28 U.S.C. § 471 (Supp. II 1990). For a review of common features of delay reduction plans, see *Report of the Task Force on the Civil Justice Reform Act*, 1992 A.B.A. SEC. LITIG. (Brad D. Brian & Richard McMillan, Jr., eds.); Mullenix, *supra* note 7, at 385-406; Tobias, *supra* note 7, at 10-30.

9. The current package of proposed amendments establishes a regime of “disclosure” of basic information by the parties at the outset of litigation where claims are pleaded “with particularity” and of expert information disclosure prior to trial. In addition, presumptive limits of 25 interrogatories and 10 depositions are established, subject to change by court order. The discovery package also provides for increased “meet-and-confer” obligations of counsel and a more stringent duty of supplementation as well as specifying in greater detail the obligations of counsel regarding support for claims of privilege and the permissible scope of objections at depositions. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS (Sept. 22, 1992); ALI-ABA, NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE (Jan. 21, 1993). Part IV, *infra*, discusses what I regard as the more problematic changes.

“cultural literacy” term to mean: (1) basic knowledge; (2) understanding of legal cultures or subcultures such as the “culture” of trial lawyer customs; and (3) tolerance among legal subcultures such as the degree of cooperation among the bench, the bar, Congress, and the executive.¹⁰ In my view, the profession’s frequent lack of such cultural literacy undermines both the operation and reform of civil litigation. Part II of this Essay sketches the major forces of legal policymaking (I have avoided the temptation to divide the field into six categories, although the points of demarcation are somewhat malleable.). Part III reviews the profession’s enduring and disturbing tendency to pursue change despite relatively scanty information. Part IV discusses the pending changes in discovery, concluding that this packet of rule revisions reflects all too well the problem of insufficient cultural literacy with regard to the adversary system.

II. DIFFERENT VIEWS OF THE ELEPHANT: THE VARIEGATED AND SHORT-SIGHTED PERSPECTIVES AND AGENDAS OF THE LAW AND POLICY ESTABLISHMENT

A. *The Bench*

Since adoption of the Rules Enabling Act of 1934 and probably well before, judges have been first among equals in the arena of civil litigation reform. Although recent congressional activity, such as passage of the 1990 Civil Justice Reform Act¹¹ in which proponents self-consciously chose not to consult sitting judges before introducing the bill, probably reflects a shift in rulemaking power away from the judicial hegemony of the 1934-1970 period,¹² judges continue to enjoy a favored position. Typical changes in civil litigation practice begin with amendments to the Federal Civil Rules, which usually begin with the Advisory Committee discussing a possible amendment, agreeing upon a trial draft, circulating it informally, revising it, and publishing the draft for public comment. The Committee next determines whether to forward a proposed amended rule to a Standing Committee on Rules of Practice and Procedure, which also oversees developments from Advisory Committees on the Rules of Criminal Procedure, Bankruptcy, and, beginning soon, Evidence; and then to

10. Although non-lawyer officials, clients, interest groups, and politicians are not part of the legal profession proper, I include them to the extent they are involved in legal policymaking.

11. 28 U.S.C. §§ 471-482 (Supp. II 1990). See *supra* note 8.

12. See Mullenix, *supra* note 7, at 377. The CJRA “is fomenting a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938.” *Id.* The CJRA “has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch.” *Id.* at 279.

the Judicial Conference of the United States.¹³ If the Judicial Conference approves a proposed amendment, it is forwarded to the U.S. Supreme Court. After non-public deliberation and consideration, the Court determines whether to promulgate the proposed change. If the Court makes timely issuance of a new rule, the amended rule automatically takes effect six months later unless Congress intervenes.¹⁴

Although the bench does not have the official "last word" on rulemaking, it has the first word and the most words. As a practical matter, the bench shapes litigation rules and is ordinarily stymied in rulemaking only when Congress strongly disagrees.¹⁵ Of course, individual trial courts and judges retain considerable power even when not victorious in the rulemaking process. District courts are permitted to enact local rules,¹⁶ a power whose exercise exploded during the 1970-1990 period. By one count, there were more than 5000 local rules, many of them arguably inconsistent with the actual "national" rules but nonetheless continuing in apparent full effect.¹⁷ During the past fifteen years, individual judges have further balkanized¹⁸ the structure of litigation rules by entering "standing orders" governing litigation practice in their courtrooms. Standing orders ordinarily address the technical details of litigation: length of memoranda and briefs; timetables; format of motions and other submissions; use of witnesses; and so on. Nonetheless, standing orders can often look suspiciously like local rules, which often look suspiciously like revisions of the "real" national civil rules.

13. See Rules Enabling Act of 1934, *codified as amended* 28 U.S.C. §§ 2072-74. For a comprehensive examination of the Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). The Judicial Conference is comprised of the Chief Justice, the chief judge of each federal circuit court of appeals and a selected district judge, as well as the chief judge of the Court of International Trade. It meets periodically to consider possible changes in federal rules (criminal, evidence, bankruptcy, and appellate, as well as civil), meetings at which the Chief Justice presides. For a description of recent rulemaking activity by the Advisory Committee on Civil Rules, see Hon. Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992).

14. See 28 U.S.C. § 2074 (1988).

15. *But see* Mullenix, *supra* note 7 (suggesting that the judiciary is now clearly subservient to Congress and other interests in setting the tone of federal civil procedure).

16. See FED. R. CIV. P. 83.

17. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, LOCAL RULES PROJECT (Final Draft Apr. 1989); Tobias, *supra* note 7, at 5-7.

18. In a disturbing instance of serendipity, several scholars have independently found a metaphor of political and social disintegration (as exemplified in the pejorative "balkanize") to adequately characterize the emerging new world of civil litigation. See Mullenix, *supra* note 7, at 382; Tobias, *supra* note 7 (*passim*). See also Mullenix, *supra* note 7, at 381 n.22 (in congressional hearing testimony, Professor Maurice Rosenberg described the situation as a "Tower of Babel"). Professor Tobias defines balkanization as the "fragmentation of federal civil procedure, which is manifested more specifically in the increasingly disuniform and complex nature of the procedural system."

The almost cancerous growth of local rules and standing orders provides an example of the bench's ability to overlook the concerns of lawyers and litigants. Although not an issue of the adversary system as such, insensitivity to lawyers and clients is emblematic of a larger problem. Local and individual judicial action undermines uniformity, requiring counsel to become conversant with additional regulations. This takes time and raises costs. Clients usually pay the tab. Although that tab is perhaps not steep in each case, the cumulative cost is probably significant. Judges undoubtedly would respond that this cost is outweighed by the reduced costs to judges that result when counsel present their cases in a consistent manner more digestible to the presiding judge. I suspect, however, that judicial myopia has misread the cost-benefit analysis.

For example, even if a reasonably busy trial judge receives only twenty new cases per month but has a detailed standing order prescribing only motion format, this will prompt some increase in costs: half the cases will have motions, and movant's counsel will need to spend some time ensuring that the motion complies with the standing order. Even if only thirty minutes are required and the average billing rate of counsel is \$100 per hour, the minor but idiosyncratic provision generates approximately \$500 per month in additional counsel fees.¹⁹ During the judge's tenure, tens of thousands of dollars of additional counsel time are charged so that the judge may receive motions in the format he or she desires. Does this uniformity save judicial resources? Thousands of dollars of judicial resources?²⁰ I am skeptical.

The bench's willingness to force private parties to internalize costs in order to provide a benefit to the court recurs frequently in civil litigation. The final pretrial order is a useful tool for focusing counsel upon a pending case and provides the judge with a ready roadmap of the trial, undoubtedly improving the court's conduct of the enterprise. Usually, courts require counsel to collaborate on the pretrial order. However, many judges have labyrinth-like format requirements for the pretrial order (for example, requiring color-coding of

19. These estimates are extremely conservative. In larger law firms, the compliance review will probably be foisted upon new associates, who will need more time to read the order and interpret it, perhaps taking the time of other colleagues for consultation. If more experienced lawyers are involved, the billing rate increases. According to recent reports, the average billing rate for relatively inexperienced lawyers even in small communities is \$100 per hour. In addition, I am assuming a narrow and not terribly picayune standing order. Many are not.

20. Of course, measuring the value of judicial time is difficult because judges do not (thankfully) bill the government by the hour. The savings, if any, from a court's streamlined reading of motions are particularly difficult to calculate. One must assume that the judge saves some time and uses it to render either more decisions, better decisions, or faster decisions and that these improvements either obviate the need to appoint additional judges or result in tangible economic gains to the litigants through having their cases heard faster or decided better. If the judge uses additional time for leisure, professional development, or (brace yourself) civil rules revision, the purported benefits of the hypothetical standing order become even more problematic to estimate.

different contents), making its preparation a more costly and time-consuming task. Although the picayune pretrial order may increase incentives to settle, this has never been systematically studied, much less empirically confirmed.²¹ If the "settlement-enhancement" premise is anything short of correct, overly micro-managed pretrial orders only serve to increase legal fees and litigation costs by more than they can ever conserve judicial resources.

Of course, this is true of any "settlement enhancement" practice. If the case fails to settle, the settlement enhancement procedures have added to the costs of the case. However, the common methods for encouraging settlements, such as conferences with the court, summary jury trials, mini-trials, and early neutral evaluation, do appear, according to the comments of participants, to achieve tangible success in prompting settlement. Whether the savings from an increase in settlements (both more settlements and faster settlements) outweigh the costs of court resources invested in settlements and possible "justice costs"²² resulting from settlements is a more difficult inquiry.

Motion hearings provide another example of the bench valuing its resources while largely ignoring those of litigants and lawyers. Many, perhaps most, district and magistrate judges routinely hold motion hearings in the "cattle call" format, in which all movants scheduled for the court's motion day are assigned the same time. Obviously, not all are heard at the same time. Rather, motions are heard seriatim, but all lawyers are required to be present from the beginning. Some lawyers consequently do not begin to present their positions at the 9:00 a.m. hearings until noon or afterward in many courts. A little

21. Professor Rosenberg's noted study concluded that pretrial conferences aided case disposition but did not suggest that elaborate conferences, standing orders, or other procedures were necessary to achieve this effect. See MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE & EFFECTIVE JUSTICE* (1964). In my view, too enlarged a conference system (or any case management system) not only fails to further the efficiency but actually impedes it.

22. By justice costs, I mean primarily the possibility that by pushing settlement of a case that would otherwise be tried, the court achieves an outcome distinctly worse than at least one party would achieve if the case were litigated and that society cares about this party's loss. So long as the court's "pushing" did not become overly coercive, counsel and client are still free to refuse to settle. Thus, in many cases, society simply should not care that a litigant settled a case it should have tried, even if the court prompted the settlement. Where the court's arm-twisting was too great, however, society should care. Society should also care when even relatively benign judicial prompting results in unfair settlements by poorer, less sophisticated, or less well-represented litigants.

A related justice cost occurs when an individual case is settled equitably but the judicial system and society arguably lose something because the settlement creates salient costs to those outside the litigation, as may occur in some cases where the settlement is confidential, evidence is lost, or the judiciary fails to make an authoritative statement about the matter in dispute. See Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984). See also Carrie Menkel-Meadow, *For And Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 *UCLA L. REV.* 485 (1985).

calculation suggests this may be a significant addition to the cost of litigation. In a given morning of motion hearings, a courtroom packed with twenty to thirty lawyers, three-fourths of whom bill by the hour,²³ with gradual exit by counsel as motions are heard, probably produces at least \$5000 in counsel fees.²⁴ This figure could be significantly reduced if judges respected counsels' time as much as the court's own and assigned motion hearings with specific times, such as in ten to fifteen minute intervals, in order to minimize lawyer waiting time. At most, the court might incur a few moments of silence should a matter end early or the ensuing lawyer be late.²⁵

Of course, the typical court's focus upon its own efficiency in derogation of others is only unfortunate human nature.²⁶ And court inefficiencies result in a relatively small portion of litigation costs in the average case: only a slight percentage of counsel's billable time is spent waiting in court,²⁷ complying with

23. I am assuming that half the cases are commercial disputes with counsel billing on an hourly basis. The other half of the cases are assumed to be personal injury, civil rights, or some other type in which the plaintiff's counsel (but not defense counsel) does not bill hourly, although some counsel may ultimately submit claims for the time at the motion hearing if fee-shifting is permitted, as in a successful Title VII employment discrimination case. On the temptations for excessive billing when using the hourly fee method, see William G. Ross, *The Ethics of Hourly Billing By Attorneys*, 44 RUTGERS L. REV. 1 (1991).

24. Conservatively, I estimate \$100 per hour billing and that each hour reduces the 25-attorney crowd by approximately eight lawyers. Although many of the lawyers waiting their turn may work on other matters for other clients, they will probably "double-bill" the clients rather than reduce charges for the client paying for waiting time. If the waiting lawyer can productively do some other work for the client paying waiting time, this will reduce somewhat the amount of wasted fees.

25. At least one source has estimated that judicial resources cost the public \$600 per hour. See A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 (1985). However, many of the costs comprising that figure are sunk costs entailed in providing physical structure and support for the court and assembling a basic staff. Each additional minute of judicial "down time" does not necessarily result in \$10 of out-of-pocket loss to taxpayers (or buyers of Treasury bills, notes, and bonds that finance the national debt). Even if it did, that cost is equalled or exceeded when traded off against cumulative counsel time wasted in a multi-party case, as in the case of the motion hearing cattle call, where a roomful of lawyers is forced to wait, or one in which counsel are expensive. For example, Cravath, Swaine & Moore charged the Federal Deposit Insurance Corporation approximately \$600 per hour for the time of some partners in a modified contingency fee arrangement in pursuing claims arising out of the savings and loan debacle.

26. But as applied to judicial policymaking, it can have a powerful effect. See Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273 (1991) (concluding that interests of efficient case processing, measured primarily from the vantage point of the judiciary, and judicial discretion were pre-eminent in modern efforts to revise procedures for administering complex civil litigation).

27. Although citing billable hours provides an easier illustration of my point, contingency fee counsel are not costless. If successful, they will take a big chunk, usually one-third, of the client's recovery. Presuming a relatively efficient market for contingent fee legal services, it is not far-fetched to presume that the going contingency fee rate of 33% has factored into it the inefficiencies of practicing law, including waiting time, compliance with standing orders, local rules, and the like.

local rules, or preparing a pretrial order as compared to meeting with clients and witnesses, conducting discovery, researching law, developing strategies, drafting papers, and otherwise preparing the case in the office or in the field. Cumulatively, however, the costs of lawyer inefficiency to ease matters for the court probably total millions of dollars. Although easing things for the judge undoubtedly provides some benefit, I am not at all confident that society comes out ahead on the exchange.²⁸

Narrow focus is not an affliction affecting only judge-lawyer relations. Judges occasionally seem out of touch with the obstacles faced by other judges. For example, a particularly insightful appellate judge, Stephen Reinhardt of the Ninth Circuit, recently argued persuasively that the number of federal appellate judges should be doubled from 160 to 320.²⁹ He suggested that this would not necessarily double case dispositions, because doubling the appeals bench would also provide improved quality, as circuit judges would be permitted more time to reflect upon each case. However, in addressing problems with his proposal, Judge Reinhardt mused that a similar doubling of district court judgeships seemed in order, but that this would consequently double the number of district cases from which appeal is taken.³⁰ Painfully aware of his own harried workload and the attendant temptation to cut intellectual corners, Judge Reinhardt seems to assume that district judges would use additional resources solely to churn out more case dispositions rather than investing more intellectual capital into trial court decisionmaking.³¹

To the extent that these logistical costs were widely reduced, one would expect some reduction in the contingency fee percentage absent other factors.

28. Judicial capacity to overlook the concerns of the private bar extends to even architectural matters that probably seem trivial to nonlawyers. For example, a new federal courthouse planned for Manhattan is to provide large and comfortable quarters for judges and staff as well as courtside private conference rooms ("war rooms" in the jargon of the trade) for use of the United States Attorney's office in trying its cases, but makes no similar provision of war rooms for private counsel.

New York lawyers are justifiably puzzled, disappointed, and even outraged about the oversight. They may go to trial infrequently, but when they do it is often for several weeks with file cabinets full of documents and a small army of witnesses. I view it as unfortunately too typical of bench-bar relations that the judges involved in planning courthouse construction did not think to consult with the private bar. When attorneys sought to change the plans and obtain some space designated for the private bar, they were essentially told that the plans could not be altered but were offered the token satisfaction of a small "attorneys' lounge" for the courthouse as a whole.

29. See Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J. 52 (Jan. 1993).

30. *Id.* at 53.

31. Although circuit judges rightfully claim to be overworked, in my experience trial judges work even harder and under more adverse conditions, the result of the substantial but not fully manageable administrative tasks imposed upon them. For example, circuit judges can ensure that oral argument time limits are adhered to by advocates. Trial judges who took a similarly severe view in limiting witness testimony would risk reversal and could easily suggest unfairness to a

In short, the judiciary has tended to see its perspective as the correct one, often seeming to take the view that it is the only guardian of justice, attempting to keep the judicial system afloat in an onslaught of case expansion and budget contraction while fending off the self-interested and harmful efforts of the practicing bar, unappreciative litigants, and shallow politicians. Unfortunately, this attitude of embattlement or lack of empathy for the position of the bar has affected the rulemaking process as well as the trial conduct process. In return, the other affected interests have to some extent counterattacked against the judiciary's traditional hegemony over civil litigation policymaking, a development most dramatically demonstrated by the Civil Justice Reform Act.³²

To be fair, the bench has also on many occasions gone to substantial lengths to accommodate the interests of the bar. Recently, this was evident in the work of the Civil Rules Advisory Committee, which engaged in extensive work revising Rule 11 sanctions of the Federal Rules of Civil Procedure in response to complaints from the bar, including a separate call for comments and hearing on Rule 11 as well as consideration of Rule 11 as part of the package of proposed amendments currently before the Supreme Court.³³

Although these efforts are admirable and proposed Rule 11 on the whole improves upon current Rule 11,³⁴ the entire episode of changing sanctions practice illustrates the odd quasi-cooperation of bench and bar during the modern era. Rather than consulting the bar to any significant degree prior to amending Rule 11, the Advisory Committee during the early 1980s seized upon a strengthened sanctions rule as the solution to perceived abusive litigation by the

viewing jury. Recent research suggests that trial judges are at least as frustrated as the circuit judges described by Judge Reinhardt. See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3.

32. But the bar's efforts to countermand or change judicial rules, policies, or administration have been anything but monolithic or uniform in outcome. On some issues (e.g., proof in discrimination cases, allowing Rule 68 to become more like the English rule), plaintiffs' and liberal public interest lawyers have succeeded in stemming the tide. In other areas (such as discovery reform) defense firms and corporations have achieved considerable success in Congress and the executive branch, as is evidenced by the CJRA and former Vice-President Quayle's Competitiveness Council Report. See A REPORT FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991).

33. The hard work of the Advisory Committee, including overnight drafting efforts by Chairman Judge Sam Pointer (N.D. Ala.), is described in Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855 (1992). See also Winter, *supra* note 13 (Advisory Committee responded to bar's criticisms of draft discovery rules).

34. However, no rulemaking deed, whether good or ill, goes unpunished. Proposed Amended Rule 11 has been the subject of considerable criticism. In addition, a competing proposal was promulgated by several distinguished lawyers and judges. The proposed "Bench-Bar Alternative Rule 11," which in the main would have returned to something akin to the pre-1983 version of Rule 11, did not gain any significant support from the Advisory Committee or the Judicial Conference but may have helped to force changes in the initial revised Rule 11.

bar. Not surprisingly, the 1983 amendment to Rule 11 proved problematic in application. If all goes smoothly, some of the problems will be assuaged ten years after the amendment through yet another amendment. This entire exercise of trial-and-error might have been avoided or at least minimized by better bench-bar collaboration at the outset. To be sure, judicial activity during the 1990-92 period was quite solicitous of the bar, but it came as a means of making amends for having first "sprung" the 1983 Rule 11 on the profession, with many judges exacerbating the situation by misapplying the rule, particularly during the 1984-88 period.

Although the openness of rulemaking proceedings mandated by the 1988 Judicial Improvements Act³⁵ and the apparent responsiveness of the Advisory Committee in its 1991 and 1992 hearings reflects significant learning from the lessons of Rule 11, the overall thrust of other rulemaking activity, such as the discovery and disclosure rules pending before the Supreme Court, suggests continuing judicial difficulty in appreciating the effect of the adversary system and the legal profession in the implementation of rules.

The dedicated judges who have worked on rulemaking probably view my criticism as unfair. They may be correct, but they certainly seem defensive, sometimes launching pre-emptive protests with a speed that makes *Hamlet's* Ophelia look reluctant. At a recent ALI-ABA program on civil procedure developments, for example, the program chair volunteered that proposed rules changes and CJRA plans were not the work of "a bunch of judges sitting around concocting rules to make life miserable to the bar."³⁶ He described current rules proposals as resulting from "hearings throughout the country,"³⁷ a bit of hyperbole since there were only hearings in New Orleans, Los Angeles and Atlanta, one of which (New Orleans) was devoted only to Rule 11. The chair of the Advisory Committee stressed that there was "about an equal division of judges and non-judges" on the Advisory Committee, which is accurate but easily misleading. Rulemaking during the 1980s and 1990s has remained dominated by judges, with a relative handful of judges being particularly influential.³⁸ At

35. 28 U.S.C. § 2071 (1988). The Act mandates that there be a period of public comment attending rule changes and provides that Advisory Committee meetings are to be open to the public. See also Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 861 (1992).

36. Comments of Hon. William W. Schwarzer (N.D. Cal.), Director, Federal Judicial Center at ALI-ABA Video Law Review, *New Directions in Federal Civil Procedure* (Jan. 21, 1993).

37. *Id.*

38. See Tobias, *supra* note 35, at 862-70 (describing key roles of Advisory Committee Chair Sam Pointer (N.D. Ala.) and Judge Ralph K. Winter (2d Cir.), who recently was named chair of the newly constituted Advisory Committee on the Federal Rules of Evidence). Judge Winter is also credited with being an influential force in favor of retaining but modifying the current package of disclosure provisions in the Proposed Amendments to the Rules when the Committee was considering retreating from the idea in the face of criticism from the bar.

the three hearings, for example, judges did approximately ninety percent of the questioning of witnesses.

Although the rulemaking bench at times has prided itself on independence from the potentially selfish or short-sighted opinions of practicing lawyers,³⁹ it also shows signs of being stung by the adverse bar and scholarly response to its work effort. Nonetheless, on the whole, the policy-making judiciary seems to have a clear idea that lawyers are the primary problem with litigation and that new rules are necessary to cure the excesses of attorneys.⁴⁰ Although hurt or annoyed when the bar does not appreciate its efforts, the bench nonetheless ultimately acts as though essentially nonplussed by bar criticism. In the final analysis, judicial rulemakers of course know that the bar must conform to the bench's will unless the bar can obtain the support of Congress.⁴¹

B. The Bar

America is closing in on having a million lawyers. Regardless of whether

From my observations and discussions with others, it also appears that Magistrate Judge Wayne D. Brazil (N.D. Cal.), Judge Robert E. Keeton (D. Mass.), Chair of the Judicial Conference Standing Committee on Rules of Practice and Procedure, and Federal Judicial Center Director Judge William Schwarzer have inordinate influence on the process.

For example, Judge Schwarzer in 1985 wrote an article favoring a revised summary judgment rule. In 1992, the Advisory Committee recommended a similar change (but the Judicial Conference declined). See Paul D. Carrington, *The New Order in Judicial Rulemaking, Speech to American Judicature Society* (Aug. 1991), in 75 JUDICATURE 161 (Oct.-Nov. 1991). In 1991, Judge Schwarzer wrote in favor of a disclosure mechanism as a solution to discovery abuse. In 1992, the Judicial Conference forwarded such a rule to the Supreme Court. In 1992, Judge Schwarzer recommended changes in Fed. R. Civ. P. 68. See William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (Oct.-Nov. 1992). According to Advisory Committee Chair Judge Pointer, the Advisory Committee will give Rule 68 changes serious consideration in the near future. See Schwarzer, *supra* note 36.

39. For example, Judge Pointer seemed more than a little piqued at the Advisory Committee's February 19, 1992 Atlanta hearing on the Proposed Amended Rules when a testifying lawyer asserted that the Committee "can not" sponsor rules changes so unpopular with the bar. "We're not conducting a plebiscite," replied Judge Pointer, in cold tones that made the witness (and many other witnesses waiting in the wings) buckle at the knees.

40. See Winter, *supra* note 13, at 268-71 (criticizing the bar for misreading of Proposed Amended Rules and misbegotten notions of effective practice).

41. See Mullenix, *supra* note 7, at 385-407 (describing the dominance of Congress, the Executive, and key "insider" business interests in passing the CJRA despite strong judicial objection; characterizing Advisory Committee efforts as bending to the views of Sen. Biden and CJRA supporters rather than offering alternative vision; and finding that the "lack of congressional responsiveness to the concerns of the judiciary is striking." *Id.* at 399).

Professor Mullenix, however, has been equally critical of efforts by practicing lawyers to appeal to Congress in order to thwart Advisory Committee proposals with which they disagree. See Linda S. Mullenix, *Hop Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

one sees this as an achievement or an embarrassment, the sheer size of the nation's bar makes generalization difficult. Despite their common professional training, lawyers appear to differ almost as widely in their views of politics and government as does the population as a whole.⁴² Some lawyers favor radical restructuring of the legal system. For the most part, however, lawyers exhibit a certain comfort with the status quo that has largely been good to them. But within the broad range of legal consensus of loyalty to the justice system, solicitude for human rights, and commitment to fairness and access, the profession divides substantially over particular proposals for change in the substantive law. Often this reflects the lawyer's professional loyalties as a fiduciary. For example, defense counsel may favor caps on damage awards for pain and suffering while plaintiffs' lawyers oppose such caps. For the most part, however, lawyers seem less divided over procedural reform issues than they are over changes in substantive law. For example, in debate over the proposed pending changes in the discovery rules, both product liability defense lawyers and plaintiffs' personal injury lawyers tended to oppose the suggested amendments, a matter discussed at greater length in Part IV.⁴³

Lawyers are among the least popular vocational groups in America, so much so that they became scapegoats in the past presidential election campaign with both President George Bush and Vice-President Dan Quayle making high-profile attacks on the profession. What truly underscored the pariah-like status of attorneys, however, was the absence of response from anyone other than the organized bar. Not even Democrats Bill Clinton and Al Gore, two lawyers whose campaigns received substantial support from the bar, responded to the criticism. Although the Clinton-Gore tacit "me-too" (but not as much) approach to lawyer-bashing as a campaign tactic may have been good politics, it spoke volumes about the practicing bar's lack of support in society at large.

Although much of the attack on lawyers is ridiculously unjustified,⁴⁴ like

42. For example, counsel for personal injury plaintiffs, defendants, and insurers differ radically in their perceptions regarding claims fraud. See Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 959-966 (1992) (survey of counsel).

43. Notwithstanding a running plaintiff-defendant debate over whether juries are too generous with personal injury awards, a cross-section of the profession appears to agree generally on support for the civil jury and particular suggestions for improving its effectiveness. See AMERICAN BAR ASSOCIATION SECTION ON LITIGATION/BROOKINGS INSTITUTION, *CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM* (1992).

44. The attacks are so unjustified that they have alienated some conservative Republican lawyers who otherwise would have supported the Bush-Quayle ticket but were driven away. See David Margolick, *At the Bar: In Quayle's Home State, a Lawyer and Ex-Backer Doesn't Like the Republican Attacks on the Bar*, N.Y. TIMES, Sept. 25, 1992, at B16 (describing rejection of Quayle by a former supporter over the issue of lawyer-bashing). See also Henry J. Reske, *In Defense of Lawyers: Conservative Judge Challenges Quayle Statistics*, 79 A.B.A. J. 33 (1993) (describing a speech by Second Circuit Judge Roger Miner, a Reagan appointee and conservative previously

all effective political rhetoric it contains a significant kernel of truth. Lawyers have to a significant extent been greedy and self-protective in opposing useful as well as dubious reform efforts. In the modern era of civil rulemaking and litigation reform, lawyers have also shown short-sightedness in their conduct of litigation. Lawyers who engage in obstructionist tactics and the like may gain a short-term advantage in a particular case and may please a client with their "toughness," but seem not to appreciate that such conduct can only hurt lawyers in the long run by making litigation overly expensive, time-consuming, and subject to outcomes owing more to cunning than justice. For example, attorneys have been overly reluctant to explore the voluntary use of alternative dispute resolution (ADR) methods.⁴⁵

When called to account for litigation abuse, perpetrators tend quickly to clothe themselves in lofty rhetoric about the adversary system, zealous representation of clients, and fiduciary duty. A few references to *Queen Caroline's Case* are likely as well.⁴⁶ On occasion, the podium-pounding is justified. The adversary system is to a large extent rooted in a challenge to prevailing power,⁴⁷ embodying the notion that justice will be served best in the long run when counsel are truly independent from the state and even social pariahs are given both the right and the tools to contest against prevailing

mentioned as possible Reagan or Bush Supreme Court appointee, criticizing Quayle's attacks on lawyers, including the Bush Administration's *Agenda for Civil Justice Reform*, authored by the Quayle-headed President's Council on Competitiveness).

45. See Hon. Wayne Brazil, *Should Participation in Court Sponsored ADR Programs Be Mandatory or Voluntary?* (Remarks at AALS Panel Discussion, Jan. 7, 1993) (noting that when forced to try ADR, lawyers are generally pleased with results). Judge Brazil ascribes this in large part to the competitiveness of the adversary system; lawyers are suspicious of an opponent's overtures for voluntary ADR, fearing that the opponent is attempting to gain advantage. In my view, Judge Brazil's observation supports my thesis in Part IV, *infra*, that discovery will be improved by greater supervision more than by new rules.

46. *Queen Caroline's Case*, 2 Brod. and B. 284, 129 Eng. Rep. 976 (1820) involved prosecution of Queen Caroline on a charge of adultery. Her attorney, Lord Henry Brougham, was perfectly aware that the King and others in power wanted a guilty verdict and would not look kindly on those who stood in its way. Nonetheless, he stated at one point in the trial that he had only one duty—zealous representation of the Queen—that must be discharged irrespective of his personal risk: "An advocate, in the discharge of duty, knows but one person in all the world, and that person is his client."

Lord Brougham's assertion of single-minded devotion to the client come-what-may is also generally regarded as a shrewd trial tactic in that it implied that he might raise as a defense the King's previous secret marriage to a Roman Catholic, potentially disrupting the country in further controversy. In any event, the charges against Queen Caroline were dropped. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 248 (1992).

47. See Stephen Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990) (asserting that the adversary system became popular because it allowed zealous representation of litigants and of causes popular with society at large but subject to attack by the British hierarchy).

orthodoxy. So constructed, adversarialism can provide a justification for opposing unfair court orders, rules, or policies. It may even justify inviting and taking contempt citations in order to challenge an injustice.

However, in the ordinary case, it is more than a little difficult to legitimately invoke adversarialism to justify failure to produce requested relevant documents, "scorched earth" discovery strategies,⁴⁸ coaching witnesses, lack of preparation for conferences or trial, or the assertion of marginal to frivolous legal positions. Furthermore, although adversarialism is "hard-wired" into the American legal ethos, so too is duty to the justice system and society. The intellectual underpinnings of modern professional responsibility stressed not only *Queen Caroline*-like adversarialism but also candor to the court and efforts to maintain and enhance the integrity of the system. This included efforts to generally raise public consciousness in pursuit of "civic virtue" and entailed a responsibility to resist client demands for improper behavior.⁴⁹

Undoubtedly, too many lawyers have misunderstood the adversary system as some sort of James Bond-like carte blanche for creating mayhem and waste in litigation, a sort of "license to obstruct, delay, or blackmail." That such conduct, perhaps sufferable in isolation but daunting in its cumulative effect, creates additional pressures on judges and the judicial system states but a truism. What is astonishing is the degree to which lawyers either seem oblivious to this truth or irresponsible in disregarding it.⁵⁰ Not surprisingly, lawyer misconduct undermines the bar's overall credibility with the bench, creating something of a "counselor who cried wolf" problem at rulemaking time. When lawyers recite the mantra "adversary system" in response to proposed litigation reforms, the bench is understandably skeptical.

The same effect can often be found in congressional reaction to the bar's

48. Attorney greed and hyper-adversarialism are often intertwined. As I was writing this, an acquaintance described a recent expert witness deposition in a copyright case, at which the plaintiff was represented by a senior partner in a large law firm backed by two younger lawyers and a legal assistant. The account of the expert's testimony left me with the distinct and firm impression that the four-person, \$500-700 per hour deposition team was excessive.

49. See Pearce, *supra* note 46.

50. As a matter of the black letter law of professional responsibility, extreme lawyer misconduct is, of course, unethical because under both the Code of Professional Responsibility and the Model Rules of Professional Conduct, lawyers must act as "officers of the court," loyal to the justice system as well as zealous advocates of a client. See Pearce, *supra* note 46. See also Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991) (stating that the three core values of modern legal ethics are loyalty to client, confidentiality for client communications, and candor to the court). When in stark conflict, the "republican" aspects of lawyer ethics generally prevail over adversarial imperatives. For example, a lawyer's loyalty to a client does not permit him or her knowingly to assist the client in giving false testimony in order to achieve a better result in litigation.

position on litigation reform, but the story is more complicated. During the past decade or more, the rhetoric of efficiency—reducing disputing costs and delay—has dominated the debate in Congress as well as the courts.⁵¹ Although lawyers may generally have low credibility, even before a body like Congress that is dominated by lawyers, attorneys who invoke the prevailing efficiency rhetoric virtually atone for the sin of being attorneys. Meanwhile, lawyers invoking the rhetoric of adversarialism and justice are viewed as protectionists. For example, hearings on the 1990 Civil Justice Reform Act were a veritable “love feast” between Senate Judiciary Chairman Joseph Biden (D-Del.) and attorneys invoking the efficiency rhetoric consistent with his draft legislation, while those attempting other themes were given polite listen and little more.⁵² The final bill, although revised, suggests that Congress saw objecting lawyers, and judges as well, as crying wolf.⁵³

C. Litigants, Interest Groups, and Think Tanks

The parties to litigation have also tended to adopt narrow, inconsistent, self-centered views of the court system, making claims that occasionally ring true but all too often suffer from the same deficiencies of which they accuse lawyers and judges. For example, litigants in the abstract complain about high trial cost, discovery abuse, and so on. In their own cases, however, clients can take a startlingly obstructionist view toward complying with the opposition’s discovery requests. Similarly, despite abstract concern over high litigation costs, clients in their own cases tend to err dramatically in favor of incurring the legal expense necessary to finance maximum investigation, discovery, pretrial motion practice, and trial combat. The problem can be compounded for commercial defendants, who commence and defend litigation with both tax subsidies (the litigation expenses are deductible as ordinary business expenses) and other people’s money (that of shareholders or insurers rather than management personally). When lobbying for litigation reform, commercial litigants and their surrogates seem to forget that their own indulgence of and financing for conduct to which they object helped fuel the perceived problem.

To the extent that the plaintiff’s trial bar acts as the surrogate for noncorporate litigants (a/k/a human beings), the pattern is largely repeated. The reader of virtually any edition of a trial lawyer’s newsletter is routinely treated to tales of mammoth victory in problematic cases, suggesting to readers that

51. See Brunet, *supra* note 26.

52. See Mullenix, *supra* note 7, at 385-407 (describing congressional reaction hostile to witnesses who are lukewarm on the need to revise litigation to increase speed and lower cost with corresponding hospitality to witnesses who urged greater efficiency in civil litigation).

53. See Lauren Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115 (1991).

counsel has indeed "rung the bell" and scored a coup in fee collection. When these same representatives protest reform efforts in the name of justice for society's downtrodden, the claims ring a bit hollow.

The commercial client community has also been instrumental in altering the terms of the litigation reform debate through its early and consistent support for alternative dispute resolution (ADR) in lieu of litigation. ADR, principally arbitration and mediation but also including hybrids and more trial-like activity such as private judging, appears to have grown even faster than the civil caseload of state and federal courts. Not too surprisingly, commercial clients turned to ADR, particularly arbitration, because it seemed like a means of getting authoritative decisionmaking faster and cheaper than litigation. In particular, pretrial expenses were to be greatly reduced since arbitration usually permits only limited discovery and virtually no significant motion practice, at least not dispositive motion practice.⁵⁴

But in applying ADR in practice, many clients have learned to their dismay that the process remains an adversarial one, with evidence both presented and slanted by counsel. Although some arbitrators are experts in the subject matter of a dispute, active questioners, or both, many arbitrators are no more informed or active than a judge. They also may be considerably more lenient than the judiciary in permitting extensions of time, thereby delaying arbitration hearings and stripping the process of its perceived advantage in speed. Occasionally, arbitrators themselves may be the source of the slowdown. Unlike judges, they have other jobs, jobs from which they may be unwilling to tear themselves away for the benefit of disputants. Adversarial to a fault, some attorneys are quick to take advantage of the situation by making sure that key witnesses are "unavailable" during the rare times when highly valued arbitrators are ready for hearing.

In addition, clients have occasionally discovered that for all its cost and opportunity for strategic behavior, discovery in civil litigation exists for a reason: sometimes the opposition has control of information and will not willingly share it. Even where arbitrators order document exchange, the absence of depositions in arbitration limits each party's ability to ensure that it has actually received all requested documents and further hinders full development of non-documentary information through probing of witnesses. Although skillful counsel can often accomplish this at the arbitration hearing,

54. For additional description of the contrasts between litigation and arbitration, see ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* §§ 14.3, 14.4 (2d ed. 1992); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 84-89 (1992); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990).

time constraints and inability to investigate in response to testimony make arbitration less effective than trial in developing facts. In many cases, of course, this reduced fact development is more than offset by faster decisions, lowered expenses, or more reasonable results. In other cases, however, arbitration may render cheaper but inferior decisions, particularly if some clients or counsel do not play by the rules. Despite what seem to be the clear tradeoffs between arbitration and litigation, the business community continues to believe in ADR with almost religious fervor largely because it is not litigation. Much of the commercial community appears to reflexively hold the view that anything is better than litigation. This shallow satisfaction comes at a price.

The substantive policy interest groups that approach litigation issues from an ideological perspective favoring access to courts, workplace safety, property rights, free speech, or similar causes generally fare better in the area of public debate than the more monetarily suspect business and plaintiff's lawyers groups. Although zealous and occasionally quite successful in fee-shifting litigation, these groups do not collect the large contingency fees so caricatured in the public mind. Although political rhetoric has heated to the point that civil rights and civil liberties groups are now routinely characterized as special interests, substantive legal organizations nonetheless enjoy at least a better image than the plaintiffs' personal injury bar.

Nonetheless, these groups, too, have credibility problems. For example, liberal legal interest groups have tended to oppose the alternative dispute resolution movement on grounds that the decision-making is inferior, overlooking the possibility that nonjudicial decision-makers may bring special expertise to an issue.⁵⁵ Streamlined disputing may also be preferable to some parties, even civil rights or constitutional claimants, despite the reduced opportunity for fact finding and decision according to legal precedent. More important, some critics of ADR seem to forget that one important tenet of the adversary system, and of American society generally, is individual party control of an action. Even bad decisions electing ADR in lieu of litigation are entitled to respect so long as they are made knowingly and voluntarily. On the other side of the political spectrum, many conservative interest groups have their credibility undermined by large commercial funding and the perception that they are front groups for big business.

55. For example, commodity exchanges often provide for mandatory arbitration of contract disputes before either their own tribunals or arbitrators selected under National Grain and Feed Exchange rules. These arbitrators are typically drawn from the trade and have special experience in issues related to delay in delivery, substitutability of crops, excuse of performance and other common issues in such cases. These arbitrators may well render sounder, more predictable decisions than would a lay jury or federal judge.

Law schools and public policy think tanks, such as the Brookings Institution, Rand Corporation, and Heritage Foundation, provide considerable gusts of fresh air and insight to the debate but also often view litigation reform with warped perspective. Many of the policy institutes operate expressly in furtherance of a favored ideology—conservative, liberal, pro-market, pro-business, pro-labor. Although this does not prevent issuance of counter-intuitive findings, which tend to gain credibility within the policymaking establishment and the public because they appear almost as admissions against interest, such findings are the exception rather than the rule. For the most part, conservative and pro-business think tanks find litigation in need of serious repair while liberal or civil rights groups conclude that litigation performs well, at least better than any of the alternatives suggested by conservative groups. Although law school scholarship is less likely to stem from a uniform world view due to the diversity of law school faculty,⁵⁶ individual legal scholars often are stunningly predictable. When told that a certain professor has written an article on a certain issue, one can often accurately predict the article's conclusions on the point before having read it.

But a more serious deficiency than ideological partisanship or pattern often limits the utility of think tank and law school writings: both groups often seem uninformed, even blissfully naive, about the actual operation of litigation in an adversary system. Professors and policy analysts may propose litigation changes that seem useful in the abstract but doomed to failure in operation. This results because of a failure to accurately predict how the proposed changes will actually operate in the hands of lawyers, who hold an economic and professional incentive to prevail in a dispute rather than to serve as perfect experimental groups for the law and policy establishment.

The Brookings Institution report, *Justice for All*,⁵⁷ which provided the main impetus for the 1990 Civil Justice Reform Act, serves as a telling illustration. *Justice for All* argued that increasing costs and delays in civil litigation so threatened the effectiveness of the American institution of civil litigation that dramatic countermeasures were in order. *Justice* suggested individual delay reduction plans, time limitations on discovery, and increased case management efforts. For reasons discussed in Part IV, the infatuation with

56. I acknowledge that law school faculties do, however, have aggregate profiles that differ from one another. For example, the typical legal scholarship emanating from George Mason University is quite different from the prevailing offerings of the State University of New York at Buffalo. My point, however, is that faculty opinion is not uniform at any law school, even those generally identified with a particular approach to legal analysis and scholarship.

57. BROOKINGS INST., *JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION* (1989). But because this report came from a historically liberal think tank, its conservative tone in favor of reining in litigation was accorded substantial credibility.

revulsion directed toward discovery as well as the overall "case management and speed *uber alles*" tone of *Justice* seem to me to betray a deep-rooted underappreciation of the best and worst of American lawyering.⁵⁸

Showing its bad side, American adversarialism strategically manipulates the system, especially when able to take advantage of new, unfamiliar, and untested rules. Showing its good side, American adversarialism fights to the death for the client, even in the face of powerful odds. Should the "delay reduction/case processing" mode be too heavily applied, the procedural breathing room that allows good adversarialism to press its case becomes too constricted.⁵⁹ Thus, the *Justice for All/CJRA* approach may ironically fail to improve efficiency while undermining the benefits promoted by unhurried positive adversarialism that permits counsel to develop facts at length, question witnesses, conduct investigation, monitor developments in the area,⁶⁰ and contest legal issues in depth. Although restrained and prudent implementation of the CJRA should not undermine this activity, many lawyers fear that district courts will over-efficientize case processing in their zeal to show some progress from their newly instituted, ambitious delay reduction plans.⁶¹

D. Congress and the Executive

For most of the twentieth century, Congress has been a reactive participant in litigation policymaking, even when holding an influential role. As previously noted, the mechanics of the Rules Enabling Act mandate that revision of federal rules begin with the judiciary, with proposed rules ultimately being placed

58. In addition, although the Brookings Institution has traditionally been viewed as a liberal think tank, the membership of the task force that produced *Justice for All* was "heavily weighted with corporate and insurance interests." See Mullenix, *supra* note 7, at 389 n.42.

59. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Although Professor Resnik has been criticized for overstating her case that overmanagement and disregard of procedural formality may deprive litigants of rights and discourage fair outcomes, see, e.g., E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986), even critics largely concede the essential truth of her observation.

60. For example, in the infamous Dalkon Shield litigation, defendant manufacturer A.H. Robins Co. was initially successful at trial due to its failure to produce incriminating documents. Years after the controversy first reached court, key facts favorable to plaintiffs emerged. Harried or mass processing of the cases might well have closed the book on the controversy before the damaging facts emerged, altering the ultimate result. See generally RICHARD SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991); SHELDON ENGELMAYER & ROBERT WAGMEN, *LORD'S JUSTICE* (1985). Of course, the ultimate Chapter 11 bankruptcy by Robins and the attendant need to pro-rate claims in accord with the company's resources reveals that eventual success in litigation is not an unalloyed blessing.

61. For example, even sparsely populated districts with no significant backlog have adopted delay reduction plans suggestive of crowded, tardy, urban courts. See Carl Tobias, *Justice Stays Civil in Montana*, LEGAL TIMES, November 25, 1991, at 20. The District of Montana delay reduction plan includes mandatory disclosure, limits on depositions, and interrogatories.

before Congress but slated for adoption unless Congress affirmatively acts to change or thwart the proposal. The reactive mode has usually governed litigation reform outside rulemaking as well. Early in the century, Congress changed the Supreme Court's appellate and certiorari jurisdiction due to the urging of the justices.⁶² In 1988, the High Court's appellate role was eliminated or made virtually discretionary, again as a result of affirmative efforts by the Court.⁶³ Similarly, Congress tends to wait to hear from the judicial community regarding vacancies, salary, working conditions and similar issues, usually reacting in a largely favorable manner so long as the result is not too costly.

In the past twenty years, however, Congress has increasingly shown more activism of its own, particularly when dealing with areas of the law where bench attitudes and action (or inaction) may be affected by self-interest. For example, former Senator Birch Bayh (D-Ind.) and other non-judges were the primary forces behind major changes in the judicial disqualification statutes enacted in 1974.⁶⁴ Perhaps unsurprisingly, the bench did not actively pursue a strengthened, less discretionary disqualification statute. The more recent Biden Bill reflects a similar congressional desire to reform an area of law in which Congress appears to view the judiciary as institutionally compromised because of self-interest. As previously noted, no sitting federal judges were consulted prior to the Act's introduction. Although some judges participated in hearings on the bill, they received a moderately chilly reception. In effect, Congress, particularly Chairman Biden, had determined that swift action was necessary and that the bench was either too indecisive or insufficiently committed to the goals of delay and cost reduction.⁶⁵ In contrast to the Biden Bill on delay reduction, the congressionally driven Bayh Bill on disqualification had a less hurried, more consultative history.⁶⁶

The question, of course, remains as to whether the Biden Bill is merely an aberration in the normally reactive and cooperative relations of bench and Congress or evidence of significant evolution in the relationship. I tend to think

62. See Judiciary Act of 1925, 43 Stat. 936 (1925); ROBERT STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE § 5.1 (5th ed. 1978).

63. See Judicial Improvements Act of 1988, 28 U.S.C. § 2071 (1988); Judicial Improvements Act of 1982, 28 U.S.C. § 2071 (1982).

64. See Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589, 594-96 (1987). The changes brought about by the "Bayh Bill" were in part a response to then-Associate Justice William H. Rehnquist's controversial decision not to disqualify himself from sitting on a case involving Nixon Administration policy, with which he was at least peripherally involved prior to joining the high Court.

65. See Mullenix, *supra* note 7; Robel, *supra* note 53, at 115.

66. See Mullenix, *supra* note 7, at 385-407 (criticizing Biden Bill as hurriedly enacted by special interests without sufficient reflection by Congress).

the latter, at least concerning litigation reform. The years between the Bayh Bill and the Biden Bill saw substantial congressional activity to overturn judicial interpretations of substantive law, particularly in the area of civil rights.⁶⁷ This legislation, all of which I support as a matter of personal policy preference for the law, and which reverses judicial decisions on subjects in which the judiciary is not obviously self-interested, suggests that Congress has generally become more attuned to watching the judiciary's performance, at least on matters of substantive law. As civil rights attorneys know, many of the important issues that prompted legislation, such as the 1991 Civil Rights Act, were arguably procedural as well, dealing with issues such as establishment of a jury-triable claim, proof of discrimination, collateral attack on a consent decree, and the applicable period of limitations.

In areas of judicial administration and litigation practice, it follows that Congress would be inclined toward similar scrutiny but with even less deference to the judiciary.⁶⁸ Although the Biden Bill's aggressively impatient stance toward the judiciary's cleaning of its own house provides a sharp acceleration of the process, it can be viewed as but an extension of a modern trend toward increased legislative activism concerning law and litigation.⁶⁹

In addition, recent years seem to reflect decreased congressional respect for the bench. The sentiment was aptly captured in a conversation I had with one Capitol Hill insider. Although a conscientious advocate of legal reform, he saw the bench at least as much an enemy as an ally. Commenting on judicial disgruntlement over the Biden Bill, he dismissed the criticisms, which means,

67. For example, the Civil Rights Act of 1991, 42 U.S.C. § 1981 (1991), reversed parts of several Supreme Court decisions: *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 493 U.S. 802 (1989); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (U.S. 1990); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

See also The Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (Supp. 1989) (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)); The Handicapped Children's Protection Act of 1986, 20 U.S.C. §§ 1415(e)(4)(B)-(G) (1988) (overturning *Smith v. Robinson*, 468 U.S. 992 (1984)); The Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973 (overturning *City of Mobile v. Bolden*, 446 U.S. 55 (1980)); The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988) (overturning *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)); The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (overturning *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)).

68. Congressional overruling of Supreme Court decisions has undoubtedly been fueled in part by a congressional perception that recent Supreme Court appointees may have assumed office holding an ideological agenda of curtailing the breadth of U.S. civil rights law. Whether these factors make the Court's substantive law jurisprudence less credible to Democrats in Congress than the judiciary's litigation activities generally is a question beyond the scope of this essay.

69. *See Mullenix, supra* note 7, at 376-80 (characterizing the CJRA as an abrupt and major change in inter-branch relations and court administration generally).

of course, that he largely dismisses my criticisms of the CJRA set out in this Essay. He characterized the bench as unhappy unless it has complete control over judicial policymaking, a goal he sees as illegitimate. "What [federal judges] forget is that they are only judges. They are not elected policymakers. Their job is to administer the court system according to the laws made by the elected policymakers."⁷⁰ Put a slightly different way, many in and around Congress think that "court reform [is] a public policy question, not one reserved to judges and lawyers."⁷¹

Senator Biden's former director of the Senate Judiciary Committee staff was no more diplomatic in his written criticism of the judiciary and support of the CJRA.⁷² He drew a distinction between the users of the justice system (the parties) and the legal profession (bench and bar), viewing the former as deserving litigants stymied by shortcomings of the bar in trying cases and the bench in being slow to respond to perceived problems in the litigation system. In making reforms, primary consideration should be given to "users" rather than lawyers. This suffers not only from unusual Pollyannaishness about clients and cynicism about lawyers, but also draws a romantic characterization of Congress that many observers find inaccurate.

To this former staffer and other proponents of the Biden Bill, the bench and bar are narrow and self-interested, while Congress responds quickly to constituents solely on the level of sound policymaking. This vista of legislative Nirvana must come as quite a shock to persons familiar with the public choice literature of the past three decades, which largely argues that legislatures are particularly vulnerable to corruption by interest groups of non-majoritarian but well-organized voters, supporters, and contributors.⁷³ Although these same arguments logically apply to other public actors such as judges and executive officials, the need to seek election and re-election in a system dependent on private fundraising is thought to make legislators particularly vulnerable to interest group distortion. One commentator strongly implied that this occurred

70. Anonymous interview, December 1992.

71. See Robert W. Kastenmaier & Michael J. Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 54, 56 (Robert A. Katzmann ed., 1987).

72. See Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 *LAW & CONTEMP. PROBS.* 105 (1991).

73. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-62 (1991). In addition to this interest group branch of public choice theory, an "Arrow's Theorem" branch suggests that legislative outcomes are often not precisely rational because the imperfections of measuring member sentiment and the agenda-setting control of powerful members (e.g., committee chairs) may result in enactment of some less-favored legislation while more-favored legislation fails to become law.

in bringing about enactment of the CJRA.⁷⁴ Of course, defenders of congressional hegemony not only reject this view but are equally sure that judges and lawyers constitute the problem.

As with bench-bar relations, however, legislative-judicial relations seem to be characterized by the weaker party's exceeding deference. Just as lawyers ultimately bend to judges, judges appear only to be mildly combative with Congress. With respect to the CJRA, for example, the Judicial Conference opposed the bill and succeeded in obtaining some revisions. But as soon as the CJRA became law, the Civil Rules Advisory Committee redoubled its efforts to bring about discovery changes, including the implementation of a disclosure system of information exchange, largely as a means of either pre-empting further congressional action or giving Congress the litigation reform it sought.

To the extent that the cynical view of the judiciary expressed by congressional insiders is common on Capitol Hill, the implications are troubling. First, it glosses over possible constitutional difficulties concerning the meaning of Article III and separation of powers.⁷⁵ Although judges must indeed generally apply the laws as written by Congress, limitless deference in the area for litigation reform would run afoul of the Constitution if it results in the federal judiciary losing its essential character as a co-equal branch of government.⁷⁶ Where the courts are concerned, our tradition is one in which judges are not merely ministerial implementers but often act legitimately as policymakers. For example, a law micro-managing federal courts to the extent of setting time limits on settlement conferences with the judge would seem not only foolish but unconstitutional. Certainly, therefore, a federal bench vested with the power of judicial review is entitled to the less drastic prerogative of a meaningful consultative role in addressing matters of litigation reform. Most troubling, however, is the "who do they think they are?" tone of some comments. Although not immune from criticism, judges deserve substantial respect for both their daily burdens and their historic commitment to improving the judicial system.

More troubling perhaps than frayed relations between the legislature and the judiciary is the congressional failure to receive systematic input from the practicing bar as a whole. To be sure, lawyers in private practice are represented by interest groups in Washington: the American Bar Association (ABA); the American Trial Lawyers Association (ATLA); and similar groups.

74. See Mullenix, *supra* note 7.

75. See *id.* at 424-38.

76. In the realm of substantive law, the federal bench obviously cannot defer from exercising its power of judicial review for cases properly within its jurisdiction. When faced with an unconstitutional law, the court must prevent its operation.

These organizations regularly participate in suggesting or commenting upon changes in the law. But, for the most part, Congress hears only from the profession's elites. The ABA and other bar associations are traditionally led by lawyers affiliated with larger, more prestigious law firms that tend to have a case load and clientele distinct from that of the main street lawyer. These groups and their representatives may well have idiosyncratic views as to pressing litigation problems and possible solutions. Yet, to Congress the views of these spokespersons become the views of the profession. Even ATLA, which styles itself as the champion of downtrodden personal injury victims, tends to be led by the most successful and thus wealthiest lawyers, whose personal injury practices may look nothing like that of a main street lawyer.

Compounding the problem is the recent emergence of possible overrepresentation of a subgroup of private practitioners. Lawyers for the insurance industry and product liability defendants have been at the forefront of the bar's participation in recent litigation policymaking. For example, Aetna Insurance Company counsel testified in favor of the Biden Bill and appears to have been closely involved with the Brookings Institution's *Justice for All* Report. The product liability defense bar was even more visible in recent efforts to thwart the proposed Amended Rule 26 on disclosure. Of the nearly 200 written comments received by the Civil Rules Advisory Committee, nearly a fourth appear to have been authored by manufacturer's counsel or product liability defense counsel. Comments were also offered by their umbrella groups, the American Tort Reform Association (ATRA) and Lawyers for Civil Justice (LCJ). The great similarity of the comments suggests that ATRA or a group member authored "form" or suggested comments that were widely followed by the group's membership.

A narrow picture of the profession can only accentuate a related problem: the probability that congresspersons and staff do not really have a feel for the practical aspects of private lawyering. Although most on Capitol Hill are lawyers, few have had active experience practicing law. Most practiced politics from the outset even if nominally housed in a law firm.⁷⁷ To the extent that members appear to have actual litigation experience, my review of their biographies suggests that this was primarily in criminal law litigation. Without

77. There are, of course, dramatic exceptions. Sen. Howell Heflin (D-Ala.) was a Justice of the Alabama Supreme Court. Democratic Majority Leader George Mitchell (D-Me.) was a federal district judge and a United States Attorney. Sen. Patrick Leahy (D-Vt.) and Sen. Arlen Specter (R-Pa.) were local prosecutors. *But see* Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 90, 92 (Robert A. Katzmann ed., 1987) ("While law remains the most typical postgraduate training for senators and representatives, many of them enter elective office early in their careers and therefore have practiced little or no law.").

denigrating prosecution experience (ex-defenders appear rarely to reach Congress), I can only emphasize that this litigation experience does not tell legislators much about civil litigation issues such as discovery abuse or the net cost of procedural requirements.⁷⁸ It may, however, account for congressional receptiveness to modifications in discovery such as disclosure, which appear to parallel the impact of *Brady v. Maryland* and the Jencks Act in the criminal arena.⁷⁹

Notwithstanding imperfections, however, Congress has been an active and constructive force for improving the law, although in my view it has performed better in areas of substantive law than in litigation procedure. By comparison to the Executive, however, Congress has been positively platonic. Since 1980, the policy arm of the Justice Department has reflected the Reagan and Bush administration priority of enhancing the judicial system for the benefit of business litigants. This has generally put the Justice Department in alliance with business in promoting delay and cost reduction, particularly streamlining of discovery, as the most urgent litigation reform issues.

In 1992, however, the Administration turned positively churlish toward lawyers and the judicial system through release of the report of the Presidential Council on Competitiveness chaired by Vice-President Quayle, entitled *An Agenda for Civil Justice Reform*. Although it contained many useful and noncontroversial suggestions (some were already essentially the status quo), the "Quayle Report" was notable for its anti-lawyer rhetoric and its thin-to-nonexistent empirical support for its more extreme suggestions: liberal rules of litigation are a significant drain on the American economy; punitive damages awards should not exceed the amount of compensatory damages awarded in a case; and the English Rule in which the losing litigant pays the prevailing party's legal fees should be adopted. In addition to its problems of perception, partisanship and accuracy already detailed by others,⁸⁰ the Quayle Report fails to assess the role of the adversary system in modern American law. To an extent, the Quayle Report's complaints may be intertwined with adversarialism. Yet, the Report does not address any attendant need to modify the adversarial system in order to achieve the efficiency goals the Report purports to seek.

78. To state the obvious: government prosecutors normally do not record billable time, nor do they charge fees to clients.

79. *Brady v. Maryland*, 373 U.S. 83 (1963), held that the prosecution's refusal to provide material evidence favorable to the defendant upon request violates due process. The Jencks Act, 18 U.S.C. § 3500 (1970), provides that any statement or report of a witness in a criminal prosecution must be produced if it relates to direct examination testimony of that witness. In actual practice, many prosecutors have a so-called "open file" approach, in which all such data is readily made available to the defendant unless delay is thought necessary to protect the safety of a witness or the integrity of an ongoing investigation.

80. See Reske, *supra* note 44.

III. FIFTY-SEVEN CHANNELS AND VERY LITTLE ON: THE DISTURBING BUT CONTINUING INADEQUACY AND IRRELEVANCE OF EMPIRICAL EVIDENCE

Of course, the Council on Competitiveness was hardly the first law reform effort unhindered by regard for the facts. Although, to paraphrase noted New Jersey Supreme Court Justice Arthur Vanderbilt, law reform efforts require endurance,⁸¹ they historically do not require much in the way of field investigation, data collection, or systematic case study. Usually, anecdotes and personal impression suffice so long as they are generally shared by a sufficient number of allies. As one commentator noted in a different context, "In legal theory, a little fact goes a long way."⁸²

I realize that in this Essay I also rely heavily on personal experience and anecdote, but at least I recognize this limitation and restrict the sweep of my proposals. However, unlike some quarters of the executive branch, Congress, and the judicial establishment, I lack the hubris to argue for immediate implementation of major changes in rules, statutes, or litigation practice without first gathering a modicum of objective empirical support.⁸³ The burden of persuasion—real, objectively verifiable persuasion through solid case studies, aggregate empirical data, experimentation, or powerful argument—should rest upon those who would change the law of procedure. Only where that burden is well shouldered, perhaps even by a policymaking equivalent of the clear and convincing evidence standard, should there be changes in the Federal Rules, revision of Title 28 of the U.S. Code, or the imposition of additional non-judicial work upon the courts, such as the drafting of expense and delay reduction plans.

In a sense, I suggest a little more reverence by legal policymakers for tradition; not traditions of recent vintage such as the 1983 amendments to Rule 11, but to the more venerable traditions of the 1938 Federal Rules and the common law's tacit commitment to the status quo in the form of a rebuttable presumption of continuity. Legal policymakers should be a little more like Edmund Burke and a little less like a modern presidential candidate. They should adhere to tradition until the case for change is well-made rather than leaping forth with newly minted, popular for the moment, but untested proposals.

81. "Judicial reform is not a sport for the short-winded." See ARTHUR VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION XIX* (1949).

82. David Cole, *Against Literalism*, 40 *STAN. L. REV.* 545 (1987) (reviewing JAMES B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* (1985)).

83. This self-professed caution does not, however, deter me much from arguing (see text accompanying notes 100-110, *infra*) for increases in the size of the federal judicial corps, which would certainly have a significant price tag.

I realize that many might dispute this view, asking why the profession should be wedded to the 1938 Federal Rules and their spirit of open access to the courts, when to some extent the 1938 Rules were a happy accident stemming from the vision of Judge Charles Clark and other procedural progressives who happened to then control the policymaking establishment. My response is Burkean: regardless of the accidents of history and the initial assignment of entitlement, we should ordinarily begin from the starting point of the status quo, even if that status quo is not the one the current political majority might have chosen. If the new powers of corporate business interests, lawyer-economists, politicians, and influential contributors and constituents can show that the status quo is seriously flawed, unfair, or illegitimate, they have made a case for change. If they show only that the status quo is imperfect, they should be forced to demonstrate more convincingly the efficacy of any proposed reforms. In my view, the supporters of the CJRA and substantial discovery rules reform have made neither case for change. They certainly have not enlisted any persuasive empirical data in their cause.

For years, scholars have bemoaned the relative dearth of hard data on the performance of the litigation system,⁸⁴ but little changes. For example, more than five years ago, Professor Laurens Walker succinctly restated the case for further empirical research, specifically "limited field experiments," which are more feasible in law than are the true experiments found in the physical sciences,⁸⁵ but little such data has been assembled. However, one silver lining of the CJRA is its potential for providing such a base of comparing different approaches. Unfortunately, the sheer nationwide breadth of the CJRA and the absence of an integrated evaluation process may limit the usefulness of the variegation of local district court Delay Reduction Plans for future study.⁸⁶

Although some very helpful survey research in litigation has occurred,⁸⁷ survey data is generally considered less reliable than experimental observation

84. See, e.g., Michael A. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992); Peter A. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989).

85. See Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988).

86. Nonetheless, despite criticisms directed toward it, the CJRA may well have a significant silver lining should it promote experimentation that is sufficiently well-monitored to enable policymakers to evaluate various proposals. However, for this to occur, legal policymakers must permit sufficient time for evaluation. Ever-changing delay reduction plans and substantial amendments to the Federal Rules during the time of CJRA experimentation may thwart the potential heuristic value of the CJRA.

87. See, e.g., Lauren K. Robel, *The Myth of the Disposable Opinion: Use of Unpublished Opinions and Government Litigants in the United States Courts of Appeal*, 87 MICH. L. REV. 940 (1989).

because of the perceptual biases of even well-intentioned questionnaire respondents. For example, the Federal Judicial Center published a number of studies using either survey questionnaires or collecting data regarding operation of a rule or method.⁸⁸ However, these works do not set up an experimental comparison. A study like this in the area of discovery might tell the reader what has happened in a given district since it adopted a new local rule, but it does not compare the results of random cases having or lacking the new rule.

I reiterate the oft-made point about the non-empiricism of legal investigation and policymaking not simply to echo the chorus of pre-existing criticism, but to focus on the effect of this institutionalized ignorance. Where facts are in short supply, opinion tends to become evidence. As Friedrich Nietzsche once remarked, "Convictions are more dangerous enemies of truth than lies." When reform efforts begin with assertions rather than serious attempts at studied analysis of the problem, the process resembles a political caucus more than a scientific inquiry. To some extent, this is both inevitable and appropriate: administration of the legal system requires value choices at many junctures. But value and policy selection cannot help but be improved and perhaps dramatically altered by better information about the system being governed. Despite this, serious empirical study seems to be a rarity in litigation reform debate. The closest the profession has come is the laudable institution of the public comment and hearing system for the Civil Rules Advisory Committee. Observation of the Committee's recent activities as well as the Judicial Conference's decision not to forward a Proposed Amended Rule 56 to the Supreme Court for consideration⁸⁹ suggest that judges do in fact listen seriously to many of the bar's comments. However, the bar's views are hardly the result of detached,

88. See, e.g., ELIZABETH C. WIGGINS & THOMAS WILLGING, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, (1992); PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY (1978).

89. The Proposed Amended Rule 56 purported merely to codify changes in summary judgment practice stemming from the Supreme Court's important trilogy of 1986 cases: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Ind. Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

However, the draft rule also enacted a number of technical requirements governing the making and format of summary judgment motions that some criticized as more appropriate to local rulemaking or standing orders than to a national code. In addition, many attorneys argued that a rule change only to codify case law was unnecessary and held potential for mischief because it would require interpretation of new language. See, e.g., COMMITTEE ON FEDERAL COURTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMENTS ON PROPOSED AMENDMENTS TO THE FEDERAL CIVIL RULES (Nov. 22, 1991) (submitted to the Advisory Committee); Testimony of Assistant Attorney General Stuart Gerson before the Advisory Committee, Atlanta, Georgia (Feb. 19, 1992). Although the Judicial Conference did not issue a formal opinion explaining its rejection of Proposed Amended Rule 56, it is likely that these types of objections accounted for some of the hesitancy.

fact-based inquiry: they result from cumulative personal experience. This data can be valuable. My point is that it should not be the only or superprimary source of data used by legal policymakers.

IV. DISCOVERY REFORM: MISPERCEIVING THE PROBLEM, BUT THUNDERING TOWARD A SOLUTION

Against this backdrop of significant fragmentation and intra-professional distrust, the rulemaking process has moved with comparative speed toward making substantial changes in pretrial fact development. Since the 1938 Federal Civil Rules established the availability of discovery in all civil actions,⁹⁰ cases have been marked by widespread discovery activity, a phenomenon increased through the liberalizing 1970 amendments to the Rules.⁹¹ Today, the prevailing sentiment appears to view current discovery practice as too much of a good thing, with perceived "discovery abuse" often cited as requiring reform.⁹²

The judicial rulemaking establishment had heard the complaints and begun to move toward revising or restricting discovery when the Biden Bill seemed to increase the perceived urgency of the problem. Although obviously not a discovery practice amendment, the 1983 changes in Rule 11 can also be seen as a response in that they were intended to reduce the number of cases or claims triggering discovery obligations, and were employed by many judges in lieu of Federal Rule of Civil Procedure 37 to sanction discovery motions and objections seen as frivolous.⁹³ In addition, district courts frequently attempted to rein in discovery practice through local rules that, among other things, limit the

90. Prior to 1938, a less-comprehensive form of discovery was available in equity actions, but usually only in the discretion of the court. The prevailing historical view characterizes the 1938 Rules as a dramatic change in the status quo, largely because of liberalized pleading rules and the institution of discovery. See Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1986).

91. The 1970 Amendments broadened the scope of relevant discovery inquiry, codifying the memorable but now oft-criticized phrase that proper discovery included information "relevant to the subject matter" of the litigation (rather than only claims and defenses) and concluding that discovery of a matter inadmissible at trial was apt so long as it was "reasonably calculated to lead to the discovery of admissible evidence." In another important development, the 1970 changes in Rule 34 provided that a party requesting relevant documents no longer needed "good cause" to obtain the documents.

92. See, e.g., *Quayle Report*, *supra* note 32; REPORT OF THE HEARINGS BEFORE THE SENATE JUDICIARY COMMITTEE, THE CIVIL JUSTICE REFORM ACT OF 1990 AND THE JUDICIAL IMPROVEMENTS ACT OF 1990 (Mar. 6 and June 6, 1990); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

93. Current Proposed Amended Rule 11, pending before the Supreme Court, would reverse this practice by providing that Rule 37 (and not Rule 11) is the appropriate sanctions rule for discovery matters.

presumptive number of interrogatories,⁹⁴ restrict use of interrogatories,⁹⁵ or control the order and availability of certain types of interrogatories.⁹⁶ As noted previously, the Biden Bill mandated the adoption by each district court of expense and delay reduction plans and further encouraged early adoption of such plans by offering financial assistance to qualifying "Early Implementation Districts." The Brookings Institution's *Justice for All* report suggested a number of possible discovery reforms to aid delay reduction, as did other sources. The swift adoption of the Biden Bill over judicial objection suggested to the bench that Congress would soon be ready to revise the discovery rules itself if the rulemaking process failed to act.

Despite the bench's overall opposition to the Biden Bill, some judges became zealous allies of the delay reduction cause. For example, the Federal Judicial Center issued a memorandum to judges regarding suggestions for district court implementation of Delay Reduction Plans. In addition to suggesting a disclosure system and presumptive limits on interrogatories and depositions, the memorandum proposed a presumptive limit of two (yes, that's right; *two*) document production requests for each party absent leave of court.

Given the new *Zeitgeist*, it is not surprising that the Advisory Committee did act, continuing ahead with pending discovery reforms that had first surfaced in October 1989 drafts of substantial proposed amendments to Rules 26-37, which were circulated for informal comment.⁹⁷ At its May 1991 meeting, the Advisory Committee released a slightly revised version for public comment, holding hearings in Los Angeles (November 1991) and Atlanta (February 1992). Afterward, the Committee made significant revisions but affirmed support for a package of discovery rules amendments that was forwarded to and approved by the Judicial Conference's Standing Committee on Rules of Practice and

94. See, e.g., C.D. Cal. Local Rule 8.21 (allowing a maximum of 30 interrogatories, including subparts, absent leave of court); S.D. Ohio Local Rule 33.1 (setting forth a presumptive limit of 40 interrogatories).

95. See, e.g., S.D.N.Y. Local Rule 46 (b) (providing that other than specified "identification" interrogatories, interrogatories may only be used at the beginning of a case "if they are a more practical method of obtaining the information sought than a request for production or a deposition").

96. See, e.g., S.D.N.Y. Local Rule 46(c) (requiring that "contention" interrogatories not be served until the conclusion of other discovery).

97. As I understand the Advisory Committee process, the "informal comment" period involves the circulation of a draft to persons or organizations from whom the Advisory Committee would like comment. The potential exclusivity of this list is happily undermined by the traditional Committee and Judicial Conference practice of providing copies of a draft to any party that requests it and accepting written comments from anyone sufficiently interested to submit them. Nonetheless, as a practical matter, many elements of the legal profession are unlikely to find out about a proposed rule change until the formal public comment period, which is announced in legal publications such as the federal system case reporters. Even these, of course, are likely to be missed by many practicing attorneys.

Procedure as well as the Judicial Conference itself. As of this writing, the proposed changes are before the Supreme Court, which is expected to issue them with little change and refer them to Congress where they would then be odds-on favorites to become effective, pursuant to the Rules Enabling Act.⁹⁸

As of the February 1991 draft, the proposed changes were substantial indeed: limiting discovery based on cost-benefit analysis; establishing mandatory disclosure; revising the Rule 26 definition of relevance; expanding expert witness discovery available without leave of court; increasing the explanation required when a party claims privilege; creating a presumptive limit of fifteen interrogatories absent leave of court; creating a presumptive limit on the number (ten) and length (six hours) of oral depositions; and more explicitly using a balancing test in having courts determine whether to permit contested discovery. The Advisory Committee responded to the bar's widespread opposition to the package by holding to the basically broad "related to the subject matter of the disputes" relevance standard, increasing the presumptive limits on interrogatories (to twenty-five) and depositions (ten) (including party witnesses),⁹⁹ as well as revising the new disclosure regime. Under the currently pending proposal, the disclosure obligation is triggered only when the claims at issue have been pleaded "with particularity," a term borrowed from Federal Rule of Civil Procedure 9(b) and presumably subject to equivalent interpretation.¹⁰⁰ Just as important, trial courts may exempt their cases from the new disclosure system by local rule.

Even with the opt-out option, mandatory disclosure poses a significant change in discovery practice. The option was provided in part to avoid rule-making interference with the recently enacted Biden Bill, which had in effect

98. The material before the Court also includes proposed changes in Rules 1, 4 (including a new Rule 4.1), 5, 11, 12, 15, 16, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75 and 76; new approved forms; and amendments to Fed. R. Evid. 101, 705, and 1101. Many of the changes are purely technical (e.g., changing "Magistrate" to "Magistrate Judge"), while others are more substantive and even controversial. Of the nondiscovery changes, the Rule 11 revisions are most debated. Rule 54 and 58 would broaden judicial discretion to certify final judgments in cases where counsel fees remain to be awarded.

99. The Advisory Committee also revised its view on presumptive time limits. Currently, Proposed Amended Rule 30(d) provides no presumptive time limit for a deposition but specifically authorizes district courts to adopt such limits by local rule, cautioning against permitting any such limits to promote unfair tactics by the parties. See *supra* note 9 regarding other aspects of the proposed rules.

100. Of course, one of the problems with invoking the Rule 9(b) standard is its existing wide variance of interpretation. Compare *Denny v. Carey*, 72 F.R.D. 574 (E.D. Pa. 1976) (finding securities fraud claims made with sufficient particularity) with *Denny v. Barber*, 576 F.2d 465 (2d Cir. 1978) (finding insufficient particularity in a case arising out of same subject matter). See also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

mandated local district experimentation with delay reduction. Although many of the districts acting to date have added some type of disclosure mechanism to their delay reduction plans, other districts have rejected disclosure.¹⁰¹ Rather than truncate the congressionally mandated experimentation in progress, the rulemakers established the local option to accommodate the related concerns of separation of powers and experimentation with new devices while continuing to press the case for disclosure.

The proposed disclosure mechanism would require that litigants, at the outset of trial, provide to other parties basic “who, what, where, when” information related to the case: the identities of persons with knowledge including the “subjects of the information”; copies of documents or the location of documents “relevant to disputed facts alleged with particularity in the pleadings”; the computation of claimed damages; and copies of insurance agreements. In addition, closer to trial but at least ninety days before trial, litigants must disclose considerable information about their expert witnesses, including a listing of other cases in which the expert has testified. At least thirty days before trial, litigants must furnish information now commonly subject to judges’ pretrial order requirements: witness information; designation of expert witness testimony by deposition; appropriate identification of each document. The required disclosures must be made in writing, signed, and filed with the court.¹⁰²

Restricting the disclosure mechanism to only those claims pleaded with particularity was designed to prevent disclosure from proving unfair in application to certain parties. In public comments, many defense lawyers, particularly those who had defended product liability or securities fraud claims, argued that extremely vague complaints sufficient to survive dismissal could impose a major disclosure production burden upon a manufacturer where the plaintiff’s claim was based only on conjecture. By requiring particularized pleading as the trigger for disclosure, the Committee attempted to ensure that the disclosure burden would only attach to nonfrivolous claims subject to serious dispute on the merits.

Despite the rulemakers’ creditworthy responsiveness to public comments and their proper respect for a recent legislative enactment, the comparative rush to promote disclosure as an alternative to discovery (by both judicial and congressional elements) proceeds from a flawed premise that results from an underappreciation of the adversary system in practice. The unspoken premise

101. *Compare Expense and Delay Reduction Plan for the Eastern District of New York* (adopting disclosure and presumptive limits on use discovery devices) with *Expense and Delay Reduction Plan for the Southern District of New York* (rejecting disclosure).

102. *See Proposed Amended Rule 26(a).*

behind disclosure posits that counsel and the parties would willingly and efficiently exchange germane information if only the rules were structured to let them. Consequently, achieving reduced friction in discovery requires new rules.¹⁰³

The truth of this premise is highly suspect if not completely wrong. The premise results in part from a mistaken analysis as to causality. To the disclosure proponents, the adversarial character of discovery rules foments excessive combat, resulting in the discovery abuses of both overdiscovery and unwarranted resistance to discovery. In my view, the causality runs exactly in the opposite direction: the adversarial nature of litigation makes any procedural rule vulnerable to strategic behavior. Lawyers want an informational advantage over their opponents; this desire exists independent of any rules or structures for development of facts. Consequently, lawyers acting on behalf of their clients seek more information than warranted by the case or more information than that to which they are entitled. They may also seek informational advantages as something of a security blanket that makes for greater confidence approaching trial or protection against post hoc client complaints should the litigation not turn out well. This same desire for information advantage will lead many lawyers to resist sharing even obviously germane information with opponents.

In my view, lawyers bring this attitude about information to all aspects of litigation. Thus, the discovery rules are not in themselves inefficient but may become so when administered by lawyers operating in an adversarial environment. In short, discovery does not cause problems. Lawyers using discovery cause problems. As a consequence of their temperament, training, and the constraints of the adversary system, lawyers tend to err in the direction of excess discovery for themselves and unwarranted resistance to the discovery of others. When faced with close choices of accommodation and duty to the system versus desire for an information edge and duty to zealously represent the client, most lawyers err in favor of the latter pair of values most of the time. This is not to say that lawyers never cooperate. On the contrary, they cooperate whenever it is in their best interests, which is quite a lot. Thus, lawyers frequently engage in informal exchange of information in order to save expenses for clients. They may even make tradeoffs not necessary under the prevailing law in order to obtain a more desired goal, such as cost savings, faster resolution, stipulations on more important matters, isolation of a key legal issue, and so on. And to state the obvious, rational lawyers will not engage in discovery abuse or its derivatives where it will cost them or their clients more

103. See, e.g., William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (Dec. 1990-Jan. 1991).

than it gains. A rational lawyer will not take a significant risk of disbarment, disgrace, or substantial monetary sanctions unless the payoff from discovery shenanigans is great indeed. Lawyers operating in an adversary system are not expected to be saints, but when the system works well there exist acceptable limits on their capacity to behave as scoundrels.¹⁰⁴

In return for accepting the cost of the occasionally less saintly operation of lawyers, the adversary system nets society certain benefits thought to outweigh the system's potential for improper behavior: an enhanced opportunity for all sides of a controversy to be heard; increased vigilance of and resistance to possible abuses of power, particularly corruption; a sharpened focus on issues of law and policy by those with the most to gain from resolution of these issues; and, not least, improved fact development due to the adversaries' self-interest in ferreting out information. Consequently, the attorney behavior underlying discovery problems cannot be completely decried. To be sure, abusive behavior deserves strict sanction. But to a large extent, attorney friction raising discovery costs and civil litigation delay is an expected cost of doing business under the adversary system.

Those who assume that a disclosure regime will magically overcome the traits of the system and attorneys who practice in it are being unrealistic. Lawyers will try to work the disclosure mechanism just as they have worked the discovery mechanisms for more than fifty years in order to maximize their benefits and those flowing to their clients so long as they can do so within the arguable parameters of the rules. Realistically, they will also knowingly overstep those boundaries if they think the benefits outweigh the costs. Most basic rules of cost-benefit analysis and game theory suggest that lawyers will engage in opportunistic behavior when permitted to do so to their advantage.¹⁰⁵

104. However, these are not perfect limits. One can well imagine a lawyer yielding to the temptation to destroy a clearly relevant document adverse to a lucrative client where the attorney feels relatively safe from detection. To exacerbate this problem, lawyers may well miscalculate the odds of being caught. For example, the document-shredding lawyer may be unaware that a former employee has retained a photocopy or that the client's CEO is about to have a pang of conscience.

105. See John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 579-92 (1989). On game theory generally, see ARINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE* (1991); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1989); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 129 (1990).

Litigation has elements of both cooperation and conflict, making both basic cost-benefit analysis and game theory applicable at different junctures. However, notwithstanding that lawyers will often assume a cooperative posture toward discovery in order to avoid mutual losses (of money, credibility with courts, favor of clients, etc.), the adversary system makes competition and suspicion among litigators sufficiently common that their behavior will often reflect game theory principles. Faced with uncertainty over a foe's likely conduct, the litigator will take steps to protect his or her

The key factor is not the existence of rules governing lawyers.¹⁰⁶ Today, even without applicable disclosure rules, lawyers frequently cooperate in the exchange of information in many, perhaps the majority, of cases.¹⁰⁷ However, where such cooperation is absent under the discovery rules, my posited cause is not the absence of codified disclosure but rather the higher stakes, greater uncertainty, or more complex substantive nature of the cases in question. In these types of cases, lawyers are likely to view the information-gathering function as proprietary regardless of the text of the applicable rules.¹⁰⁸ Rules are subject to manipulation by lawyers to the extent that conscience and opportunity permit. To be kept within the zone of behavior where the pluses of adversarialism outweigh the minuses, lawyers need referees far more than they need new rules.¹⁰⁹ New rules only provide new opportunities for strategic behavior, particularly so until authoritative precedent has narrowed the range of a rule's interpretation.¹¹⁰

interests. Often, this results in excessive discovery or wrongful withholding of information.

106. This is not to say that rules are unimportant. The rule structure helps to define the field upon which litigators compete. See Ayres, *supra* note 105, at 1294; Setear, *supra* note 105, at 579-87. However, my point is that the operation of the rules in practice, particularly their enforcement, is key.

In a quite different prescription for the discovery ailment, Seventh Circuit Judge Frank Easterbrook argues that increased judicial supervision will have negligible impact because the standards of relevancy are too indeterminate to permit sound, predictable, coherent decisionmaking. See Hon. Frank Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 640 (1989) ("[S]upervision by the judge is no panacea . . ."). However, he also argues that changes in the discovery rules will be of no avail. In his view, only changes in substantive law or a variant of fee-shifting can prevent overbroad discovery. *Id.* at 647.

107. For example, the Eastern District of New York's ongoing Discovery Project found in its initial surveys that no formal discovery occurred in approximately 60% of the cases. Apparently in smaller stakes and recurring pattern cases (largely railroad and maritime personal injury in the E.D.N.Y.), counsel had developed an informal version of disclosure. See Hon. Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's "The Barrister and the Bomb,"* 69 B.U. L. REV. 649, 655 (1989).

108. *Accord*, Weinstein, *supra* note 107, at 653-55.

109. See Weinstein, *supra* note 107, at 650, 653 (arguing that stringent supervision, particularly by magistrate judges, is effective in preventing discovery abuses of overdiscovery and stonewalling); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 332-33 (1986). *But see* Easterbrook, *supra* note 105, at 640-42 (arguing that trial judge who will make substantive legal decisions should supervise discovery, that this approach in Northern District of Illinois works better than magistrate judge supervision in Eastern District of New York but reiterating that supervision itself has limited utility).

110. The early experience under the disclosure mechanism of the CJRA expense and delay reduction plan of the Eastern District of New York also reveals another aspect of lawyer culture not fully appreciated by policymakers: the profession's assimilation of new rules is far from swift or uniform. According to members of the E.D.N.Y. CJRA Committee monitoring the CJRA Plan, many lawyers appear completely unaware of the new disclosure rules even though the plan is distributed to all lawyers who file a complaint. In many other instances, lawyers appear to misunderstand the intent of the new rules. In others, they appear to be disregarding the rules. Furthermore, it appears that judges vary widely in the degree to which they require or enforce

By contrast, prompt, available, firm, and predictable enforcement of the rules is likely to keep adversarial lawyering within acceptable bounds.¹¹¹ The great failing of proposed discovery reforms is that they provide new rule-matter without providing any increase in the system's capacity or resolve to enforce new or existing rules. Increased and improved adjudication of discovery matters promises far more improvement in the system than rule revision. Strangely, however, serious efforts to improve discovery adjudication capacity appear completely absent in the chain of events leading to the pending discovery rules. One possible explanation is the politics of money. The bench seems to assume, probably because it has correctly read congressional sentiment, that little or no support exists for significant increases in the number of judges or judicial officers. To the extent that this explains the silence, Congress and other policymakers are being penny-wise and pound-foolish. Although one of the historical attractions of the adversary system is that it lowers the direct governmental costs of running a judicial system,¹¹² the indirect costs of lawyers fees spent on discovery-related matters (and soon to be spent on disclosure-related matters) can no longer be ignored. More vigilant policing of discovery would probably bring a net decrease in litigation costs.¹¹³

But to some extent, the problem is one of prioritization. In fact, proposals for a significant increase in the federal judicial corps are pending in Congress. Most judges, however, appear to view any additional resources as most urgently needed to enable increased and improved consideration of more substantive legal matters such as dispositive pretrial motions and actual trials, as well as increased

compliance with the disclosure mechanism or other aspects of the CJRA plan.

111. I disagree with Judge Easterbrook and others who contend that supervision of discovery is too hopelessly indeterminant to control the problem. Despite the wide discovery latitude accorded under the federal rules, most unbiased observers are capable of separating relevant wheat from excessive or unsupported chaff. For example, lawyers at a deposition often disagree mightily about relevance or other admissibility questions. However, when the deposition is used at trial, judges can make accurate authoritative rulings quite quickly, rulings that are not challenged or that are affirmed on appeal. This suggests to me that the ground rules of both evidence and discovery are more determinant than Easterbrook (who argues for clearer rules, less discretion, and an overall contraction of law and litigation) acknowledges. However, in the absence of authoritative decisionmaking, attorneys can find sufficient indeterminacy to avoid consensus or cooperation when they perceive it to be in their interests.

112. See Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 8 (1992).

113. Several authorities have suggested that the federal bench loses its essential quality and consistency if it expands too greatly. See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990). Although this view may have merit in some contexts, it seems misplaced regarding discovery. For the most part, discovery decisions by courts do not implicate the substantive concerns over uniform federal law and outcome predictability that animate opposition to expanding the federal bench. Although the interlocutory nature of discovery orders makes for less frequent appellate review and consistency resulting from precedent, lawyers become quite aware of the discovery methodology of the local bench and shape their conduct accordingly.

case management efforts. In particular, the daunting criminal docket in urban districts creates substantial demand for more resources directed toward criminal courtroom proceedings such as trials, plea-related proceedings, and sentencing.

In addition, however, the bench's view of the most pressing priorities may result from its own preferences. Judges are notorious for their aversion to taking the time to hear and decide discovery disputes.¹¹⁴ Who can blame them? Deciding whether Smith's letter to Jones is relevant to Johnson's breach of contract claim against Olsen takes time and is unlikely to result in judicial fame, and may play only a minor role in facilitating conclusion of one of the court's many pending cases. By definition, discovery rulings are nondispositive. My point, however, is that true discovery reform is indeed not a sport for the short-winded. By taking discovery seriously, judges will establish an environment where lawyers are more likely to know the limits of acceptable discovery conduct and behave accordingly.¹¹⁵ Within a relatively short time, even slower or less scrupulous counsel will get the word and conduct discovery with less friction and its attendant delay, cost, and occasional injustice.

Unfortunately, however, the rulemaking and litigation policy elite seems to have concluded that judicial resources are better spent on other matters. It has hitched its hope to the possibility that new, less adversarial rules will substantially curb discovery excesses. I remain skeptical. Without increased judicial supervision, there is nothing to suggest that disclosure will operate any better than discovery. In fact, the limited data available (empirical and anecdotal) suggests that the basic information likely to comprise the bulk of disclosure material has not been a large portion of the perceived discovery problem.¹¹⁶

I am also particularly leery of the notion that disputes related to any newly imposed scarcity of resources, such as the presumptive limits on interrogatories and depositions, will be amicably resolved with less friction than would occur if judges consistently gave priority to deciding motions to compel, motions for protective orders, and the like. For example, some proponents of the proposed

114. See Hon. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989) (Comment on Seteur); Louis Harris & Assoc., *Judge's Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Law*, 69 B.U. L. REV. 731 (1989).

115. See Bundy, *supra* note 112, at 11. "When represented parties seek a ruling from the court on a non-frivolous contention, the presumptions of party competence and judicial passivity [underlying the adversary system] would ordinarily seem to dictate that the court should provide that ruling."

116. See, e.g., Weinstein, *supra* note 107; Conversation with Professors Edward Cavanaugh, Reporter, and Margaret A. Berger, Member, E.D.N.Y. Civil Justice Reform Act Implementation Committee.

rules have argued that the presumptive limits on discovery, although clearly unrealistic for a substantial portion of cases, will achieve efficiencies by forcing counsel to negotiate over respective permissible discovery rather than incurring the costs and uncertainty of approaching the court for leave to conduct more interrogatories and depositions. Although this view has the sophistication of acknowledging that rules may have their greatest impact by changing informal behavior rather than being enforced to the letter, it continues the vice of overlooking the necessity of adequate (swift, well-reasoned, fair, predictable) rule enforcement if the rule is to have either the informal or formal intended effect. Without such enforcement, the adversary system, despite its attributes, encourages lawyer brinkmanship on litigation matters.

Related to the overall error of overlooking the importance of adversarialism generally is a failure to appreciate litigation asymmetries and the practicing bar's commitment to taking advantage of them whenever possible. For example, a plaintiff may sue over allegedly defective merchandise that proves less durable than the plaintiff thinks necessary for merchantability. After five or six depositions, plaintiff has zeroed in on defendant's defense: a state-of-the-art type argument based on alleged limitations in any manufacturer's ability to make widgets that last longer than those sold to plaintiff. Because of the technical nature of the defense, plaintiff wishes to depose other manufacturers or persons with similar knowledge in the area but will soon have exhausted the number of depositions presumptively allowed under Proposed Amended Rule 30.

Notwithstanding the new ethos of cooperation predicted by the backers of new Rule 30, many defense counsel will be defiantly uninterested in stipulating that plaintiff may take additional depositions (of "innocent non-parties," no less) and will probably oppose plaintiff's motion for court authority to proceed with more depositions. Although on facts like these the court is likely to permit further depositions, one is hard-pressed to explain how the civil litigation system is improved by this exercise, which would have been unnecessary without new Rule 30.¹¹⁷ Furthermore, in some cases, the court will refuse the additional discovery, which seems erroneous and may even lead to injustice in the outcome of the dispute. At a minimum, our hypothetical plaintiff, denied the additional depositions of "fact" witnesses, would be inclined to place greater reliance on expert witnesses. But proposed changes in Rule 26 and Federal Rule of Evidence 705 suggest that rulemakers view much current use of expert witnesses as problematic and perhaps even a major culprit in fostering inconsistency and unfairness. To the extent that discovery limits encourage more expert witnesses, it again becomes hard to see an obvious net benefit from the proposed changes.

117. Under current Rule 30, there could of course be litigation activity on the point. For example, the defendant could move to limit depositions. Under the facts of the hypothetical, however, a motion and hearing on the matter seems less likely in such a case under the old rule.

In addition, even if the transaction costs of current Rules 30 and 33 are equal to those under new Rules 30 and 33, there is a pronounced shift in the identity of the parties who will bear those costs. Under the proposed new regime, more of the transaction costs would fall upon the party seeking information rather than the party resisting its dissemination. Without doubt, adoption of such a new rule entails a substantial value choice: the decision to assist those resisting information dissemination at the expense of those seeking information. On what basis have rulemakers concluded that more burdens should be shifted toward those seeking information rather than toward those opposing it? Nothing in the proposed new rules even implicitly acknowledges this substantive policy decision, let alone attempts to justify the shift. Presumably, the rulemakers now think that excess information gathering is a bigger problem than inadequate development of information.¹¹⁸ But neither possible problem has been well-defined or calculated and no substantive policy basis has been articulated for making any tradeoff.

Although skeptical, I admit that it remains possible that adoption of disclosure might bring more benefits than detriments. The proposed discovery reforms may be subject to the so-called "Hawthorne effect" that often accompanies adoption of a new system or experiment.¹¹⁹ Because a disclosure mechanism is new, it will probably be more closely watched by judges and may be more vigorously policed than has been the discovery system in recent times.¹²⁰ If I am correct, better judicial supervision will improve civil litigation under any set of rules. By "supervision" I mean attention to the judging function of hearing and deciding issues rather than the notion of supervision through case management alone.

Notwithstanding my skepticism, the disclosure mechanism has the obvious support of a well-respected group of policy analysts and judges, including a few elected officials. And their position is intellectually defensible as well as politically dominant. Second Circuit Judge Ralph K. Winter argues in support

118. See Winter, *supra* note 13, at 263-65 (citing excessive discovery and discovery blackmail as problems but making no mention of the significant problem of lack of disclosure).

119. The Hawthorne effect was identified by researchers who initially set out to measure the effects of improved lighting on productivity in a General Electric factory in Hawthorne, New York. Production lines were divided into those with the current lighting (the control group) and those with better lighting (the experimental group), but all workers apparently realized that they were being studied. Production shot up on all lines, even those with no better illumination. Researchers concluded that subjects who know they are under study attempt to impress the observer with a higher level of performance.

120. Of course, increased attention is not always an unqualified benefit. After the 1983 amendment to Rule 11, some judges began applying the new rule with such a vengeance as to prompt calls for repeal or revision of the stronger sanctions rule. If the bench gives greater focus to pretrial fact development because of new discovery and disclosure rules, this will probably aid litigation but could backfire if the increased activity produces extreme or unsound decisions.

of the disclosure mechanism as a means for streamlining the already existing exchange of basic information.¹²¹ He finds a certain shrillness in lawyers' arguments against disclosure and he is right. Just as the bench has been overly blind to its own complicity in the perceived discovery imbroglio, the bar has not only overlooked its active contribution to the problem but also invoked a conception of the adversary system that is erroneous or easily capable of being misunderstood. However, Judge Winter seems to me to have underestimated the role of adversarialism in the discovery problems he perceives and failed to recognize that the cure lies in adjudication rather than rule reformation. Nonetheless, his inability to be moved by the bar's occasional crocodile tears is understandable.

Many of the bar's comments to the Advisory Committee about disclosure invoked the adversary system, but in doing so tended to trot out a less appetizing version of the system. In effect, the comments suggested that disclosure was wrong because adversarialism entitled lawyers to fight opponents every step of the way in litigation or that the innate adversarialism of lawyers made them congenitally incapable of implementing a disclosure system.¹²² In my view, this version of adversarialism is not accurate. Good adversarial lawyering does not mean fighting like cats and dogs. Fortunately, attorneys are perfectly capable of avoiding such behavior and implementing a "kinder, gentler" mode of adversarialism so long as their activities are effectively supervised. America's adversarial lawyers and its litigation system need more effective officiating far more than they need changes in the civil rules. This proposition should be unsurprising. Even lawyers steeped in and operating under an inquisitorial system remain representatives of clients.¹²³ They will not act as teammates and may often act in derogation of the rules absent the presence of

121. See Winter, *supra* note 13.

122. I am not entirely sure that the attorneys raising the "adversary system defense" to disclosure (and I was one of them on behalf of the Federal Courts Committee of the Association of the Bar of the City of New York) intended their objections to be interpreted in this manner (the Federal Courts Committee, for example, sought to make a more sophisticated argument, although not necessarily the same argument I am now making). However, the objections were not always well-expressed. More important, the rulemakers appear to have perceived the objections as the private bar asserting some sort of innate "right to obstruct" grounded in the adversary system. Obviously, no such prerogative exists, and most attorneys (including those objecting to disclosure) do not argue that it does.

123. By now it is obvious that I am not a romantic fan of the inquisitorial system any more than I am an unqualified exponent of adversarialism. Abuses occur under either regime. For example, despite being in private practice only a short time, I became aware of two instances in which inquisitorial lawyers appeared to have successfully bribed inquisitorial judges in matters connected to a case handled (for the non-bribers) by my former law firm. In my more extensive experience in the adversarial world, I never saw anything close to this degree of corruption.

the neutral and authoritative magistrate.¹²⁴

V. CONCLUSION: THE PROBLEMATIC PATH OF INADEQUATE UNDERSTANDING AND PIECEMEAL REFORM

Although the adversary model of adjudication and non-litigation forms of dispute resolution continue to have a dominant role in framing American litigation, there appears to be an emerging view that “hyperadversarialism”—the rock-‘em, sock-‘em, Rambo-style of trying cases—has become a combative luxury society can no longer afford. Without doubt, attitudes of the public and the profession have evolved in favor of a moderated adversarialism: litigation is seen more as work than war; duty to the justice system must occasionally inhibit use of potentially effective tactics; cooperation often yields greater benefits than unbridled conflict. However, the basic adversary model is far from dead. It continues to dominate even the common forms of ADR. Arbitration can be seen as mere stripped-down litigation. Mediation replaces the judge with a facilitator but the parties still are represented in a bipolar model of dialogue, making their own cases and decisions. Many authorities suggest that American norms favoring individualism and distrusting government power ensure that basic adversarialism will endure¹²⁵ despite calls to emulate the moderated adversarial or “inquisitorial” systems of others.¹²⁶

Continued fealty to basic adversarialism does not, of course, preclude modification of the litigation system in ways that modify both the procedural status quo or traditional notions of appropriate attorney behavior. What I object to is litigation reform that proceeds without self-consciously considering the role of the adversary system from the perspectives of all affected by it. By making unrealistic assumptions about the efficacy of Civil Rules changes or failing to directly modify perceived adversarial excesses, litigation reforms may only increase the net social cost of litigation while undermining the positive attributes that result from adversarialism and civil litigation replete with procedural protections and opportunities to develop the facts at issue.

Before proceeding any further on the overcaffeinated reformist path that has

124. Again, I stress that opponents need not be in perpetual opposition. Lawyers are usually at least civil with one another and frequently cooperate at least enough to settle cases without trial—95% of the time or more according to most estimates. But without the cudgel of the court, “voluntary” settlement would certainly be reduced. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

125. See, e.g., FLEMING JAMES, JR. ET AL, CIVIL PROCEDURE §§ 6.5-6.7 (4th ed. 1992); STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO LITIGATION (1988).

126. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

dominated the past decade, major actors in the reform drama should at least make a conscious effort to move beyond atomized views of one another's concerns. At a minimum, reform initiatives should be temporarily placed on hold while there occur serious efforts to improve empirical knowledge of the area. Upon a more comprehensive and fact-based reflection, the legal profession, or at least those elements that control the litigation reform process, may well conclude that both litigation mechanics and adversarialism require serious revision. I am prepared to agree, but only if there follows a systematic effort to integrate changes in adversarialism with changes in litigation procedure.

For example, if my argument in Part IV of this Essay is correct (that adversary lawyers conducting discovery need a referee more than they need additional rules), the solution may be establishment of a large cadre of Article I "discovery masters" or a sizeable increase in the number of magistrate judges. Although the first response of most policymakers will be to reject this proposal as too expensive, sums used to increase the discovery decisionmaking capacity of the federal courts may well lead to overall social savings by reducing the counsel fees and other costs associated with less supervised dog-eat-dog discovery. Unfortunately, the enduring distortion of human cognitive error that overrates short-term costs and benefits in derogation of the long view probably makes this type of solution impractical, particularly with Congress gripped in anti-tax fervor while simultaneously posturing as an agent for efficiency in changing the judicial system. But proposals like this have no chance of serious consideration unless the policy leaders of litigation reform attempt comprehensive decisionmaking sensitive to all elements of the profession and based on facts rather than wishful supposition.

Perhaps, however, the solution does lie in making attorney conduct of pretrial litigation less confrontational. Perhaps either serious research or actual experience will prove me wrong and suggest the wisdom of disclosure, perhaps even greater disclosure than mandated by Proposed Amended Rule 26. For such a system to have maximum effect, however, rules of professional conduct and disciplinary norms should probably be revised to reflect the shift in emphasis from confrontation and opposition toward cooperation. Without changes in the law and culture of lawyering, even a modified disclosure system cannot work well absent vigorous supervision by the bench. Without broader, more open-minded gestation that appreciates the role of the adversarialism in modern litigation, reform efforts are doomed to disappointment, if not outright failure.¹²⁷ Effective litigation policy requires basic legal "cultural literacy" and

127. For example, the bar and its client interest groups should generally be consulted earlier in the civil rules revision process (and in congressional initiatives as well). Under the current system, a draft proposal with substantial judicial support is put before the bar for public comment or scheduled for hearing. Even if it finds bar comments persuasive, the Advisory Committee or

appropriate respect for the diverse roles and perspectives of the participants, including the much-maligned civil litigator.

Congress may nonetheless be too committed to a proposed draft to make major changes in response to the public comments. Perhaps earlier input from the bar would bring about completely different initiatives of reform or lead policymakers to conclude that letting well enough alone is the best reform.

THE EDWARD A. SEEGERS LECTURE

The late Edward A. Seegers, a former Chicago attorney, was uncommonly faithful and generous in his extended support of Valparaiso University. Through the years he made significant contributions for scholarships and new buildings, and most recently fully endowed a chair—Valparaiso University's first—in honor of his father and mother, Louis and Anna Seegers.

Valparaiso University demonstrated in several ways its profound gratitude to Mr. Seegers. It made him an honorary member of the Alumni Association and, in 1964, awarded him the Lumen Christi medal. He is one of only eighteen recipients of the medal since it was first awarded in 1950. Most recently, the University established the Edward A. Seegers Lectures in his honor.

Thomas L. Shaffer, Professor of Law at Washington and Lee University, delivered the inaugural Seegers Lecture in 1983. He was followed by Harold J. Berman of the Harvard Law School in November 1983. In March 1985, Neil MacCormick, Regius Professor of Public Law at the University of Edinburgh, was the third Seegers Lecturer, and was followed, in 1986, by Eugene V. Rostow, Distinguished Visiting Professor of Law and Diplomacy at the National Defense University in Washington, D.C. Quintin Johnstone, Justus S. Hotchkiss Professor of Law Emeritus of the Yale Law School, presented the fifth Seegers Lecture in February 1988. William L. Twining, Quain Professor of Jurisprudence of University College, London, presented the sixth Seegers Lecture in April 1989, and Robert S. Summers, William G. McRoberts Research Professor of the Cornell University Law School, delivered the seventh Seegers Lecture in 1990. Then, in the spring of 1992, Mark V. Tushnet, Professor of Law at the Georgetown University Law Center, was the eighth Seegers Lecturer.

The 1992-93 academic year was honored with two Seegers Lectures. In the fall of 1992, Richard D. Parker, Professor of Law at Harvard Law School, delivered the ninth Seegers Lecture. The most recent Seegers Lecture was presented by Alfred W. Meyer, the Louis and Anna Seegers Professor of Law at Valparaiso University, in March 1993. Because Professor Meyer lectured on the adjudication versus mediation debate, which is related to the essays in this issue, his lecture is published here. Professor Parker's lecture will be published in the third issue of this Volume.

Professor Meyer received his undergraduate degree from Valparaiso University in 1948. He received a J.D. from Valparaiso University School of Law in 1950 and an LL.M. from Harvard Law School in 1951. After serving for three years in the Army Judge Advocate General Corps, he joined the law faculty at Indiana University—Bloomington, where he taught from 1955 to 1962. He spent the 1962-63 academic year as a Cardozo Fellow at Columbia Law

School. He returned to Valparaiso University on the law faculty in September of 1963, where he has taught ever since. During his tenure at Valparaiso University, Professor Meyer served as Dean from 1969-1977 and as Interim Dean during 1982-1983. He was the founding faculty advisor to the Valparaiso University Law Review. He has been a visiting professor at South Carolina during 1971-1972, at Stetson during 1978-1979, and New York Law School during 1983-1984.

At Valparaiso, Professor Meyer teaches Contracts and Commercial Law, as well as a seminar in Alternative Dispute Resolution. .