

January 1994

## Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure

Stephen N. Subrin

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### Recommended Citation

Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 Fla. L. Rev. 27 (1994).

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# FUDGE POINTS AND THIN ICE IN DISCOVERY REFORM AND THE CASE FOR SELECTIVE SUBSTANCE-SPECIFIC PROCEDURE

*Stephen N. Subrin\**

I.	INTRODUCTION .....	27
II.	DISCOVERY AS CONCEIVED BY THE ORIGINAL FEDERAL RULES' PROMOTERS .....	29
III.	WHERE THE NEW MANDATORY DISCOVERY RULES AND THEIR PROMOTERS FUDGED .....	36
IV.	THE CASE FOR SELECTIVE SUBSTANCE-SPECIFIC PROCEDURE .....	45

## I. INTRODUCTION

Procedural reformers<sup>1</sup> have blind spots to troubling facts or thoughts which interfere with the beauty and logic of their reforms. They need the zeal that comes from assurance to withstand the assault of those who oppose change.<sup>2</sup> To convince others, they make their reforms sound sim-

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\* © 1994 Stephen N. Subrin. Professor Subrin teaches at Northeastern University School of Law and is currently Associate Dean for Academic Affairs. Prior to becoming a law professor in 1970, he was a partner in the Boston firm of Burns & Levinson. This article is an adaptation of an address which the author presented on January 7, 1994 at the annual Association of American Law Schools (AALS) Convention. The address was part of a joint program sponsored by the AALS Section on Civil Procedure and Litigation on the topic *Changing the Rules of Pretrial Fact Disclosure: What Do They Disclose About Litigation and the Legal Profession?*

1. *Editor's Note: THE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS* were originally published in a House Document at H.R. DOC. NO. 74, 103d Cong., 1st Sess. 98 (1993). The House Document appears in its entirety at *AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE*, 146 F.R.D. 401. The *Florida Law Review* has elected to cite to *Federal Rules Decisions* for the sake of efficiency. The *reprinted* in form is used throughout the symposium issue to refer to the original publication of the material in House Document form, however, the citation to H.R. DOC. NO. 74 will appear only in the initial citation to the amendments in each article. Thereafter, the citation will be to *AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE*, 146 F.R.D. 401. As a final note, portions of the material are also in the Interim Edition of the 114th volume of *Supreme Court Reporter*.

2. Judge Charles E. Clark, the Reporter for the initial Advisory Committee that drafted the Federal Rules of Civil Procedure, once pointed out: "[R]eformers must follow their dream and leave compromise to others; else they will soon find out that they have nothing to compromise." Charles E. Clark, *The Federal Rules of Civil Procedure: 1938-1958 Two Decades of the Federal Civil Rules*, 58

ple.<sup>3</sup> They are lawyers as well as reformers, judges, and teachers. They choose the profession because they are adversarial, or they become adversarial as a result of education and the demands of practice. They become propagandists, ignoring or trying to defeat opposition, rather than understanding conflicting views and adjusting their dreams to intrusive reality.

When procedural reformers and commentators on reform write about procedure—and I count myself among them—we display similar proclivities. We must take a position to write effectively. It is difficult to write articles or speeches without a thesis. In articulating the thesis, one tends to break off the rough edges, submerge counter-arguments, and blunt potential opposition by exaggerating opposing claims, ignoring counter-evidence, using feigned accommodation, or writing illogically. Frequently, at key points in our arguments we tend to do a little fudging, particularly at a juncture where the ice is thin.

I have searched for more eloquence, but “fudge points” is the best term I can apply to this phenomenon. “Flies in the ointment” took second place. These fudge points are examined in this article because they reveal aspects of the original Federal Rules governing discovery. These aspects, which are discussed in part II, invited abuse. The fudge points also reveal why the new mandatory discovery rules are in large measure misguided and will be ineffective. This misdirection is discussed in part III. In part IV, I urge, as I have previously, that most cases would benefit from more limited discovery than the original Federal Rules provided. I then explain why many cases which elicit the most discovery and the most discovery problems would be better served by applying procedural rules, including discovery rules, crafted in advance to meet the unique needs of specific case-types.

This is an argument for what I call “selective substance-specific procedure.” The term “nontransubstantive procedure” has previously been used to describe the same concept.<sup>4</sup> The idea is that some procedures would no

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COLUM. L. REV. 435, 448 (1958). Judge Harold R. Medina, who sat on the illustrious Second Circuit Court with Judge Clark, said about him: “There may have been a touch of the spirit of compromise in his make-up, but I never noticed it.” Proceedings in Memoriam, 328 F.2d 5, 9 (1964).

3. Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 372-76 (1990). On the procedural simplicity argument as it relates to the twentieth century movement for uniform federal procedural rules, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 958-59 (1987).

4. *Rules Enabling Act of 1985: Hearing on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 7 (1985) (prepared statement of Professor Stephen B. Burbank). Burbank notes the failure of Congress to advert to the “possible need for specialized procedure . . . when it enacts legislation.” *Id.* at 9. Burbank further proposes that Congress “require a Procedural Impact Statement.” *Id.*

longer cut across substantive case-types. In part IV, I also explain why selective substance-specific procedure does a better job of directly addressing the critical points at which the drafters of the original Federal Rules and the new mandatory discovery rules fudged. At a conceptual level, selective substance-procedure skates on thicker ice than the current procedural regime. Experimentation in the real world of practice will be necessary to test whether the conceptual strength will be borne out.

## II. DISCOVERY AS CONCEIVED BY THE ORIGINAL FEDERAL RULES' PROMOTERS

The movement toward extensive pretrial discovery in civil cases gained momentum in the first third of this century. Two of the important players in the movement were George Ragland, Jr. and Professor Edson R. Sunderland of the University of Michigan Law School. Sunderland was a research associate at Yale Law School when Judge Charles E. Clark, the architect of the Federal Rules, was Dean.<sup>5</sup> Sunderland, like Clark, was a member of the initial Advisory Committee.<sup>6</sup> Sunderland wrote the first draft of the discovery and summary judgment rules that ultimately became law in 1938.<sup>7</sup> Also, to use the words of Professor David L. Shapiro, Sunderland did "the missionary work" on the 1938 pretrial conference rule.<sup>8</sup> Ragland wrote a book entitled *Discovery Before Trial* while working as a research associate at the University of Michigan Law School, where Sunderland taught.<sup>9</sup> The book was published in 1932.<sup>10</sup>

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at 21 n.12; Stephen B. Burbank, *Inter-Jurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 831-32 (1986); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 717 (1988); Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1939-40 (1989) [hereinafter Burbank, *Transformation*]; see also Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473-76 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)).

5. For Clark's contributions to the Federal Rules, see Peter C. Hoffer, *Text, Translation, Context, Conversation, Preliminary Notes for Decoding Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure*, 37 AM. J. LEGAL HIST. 409, 412-39 (1993); Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115 (Peninah Petruck ed., 1991); Subrin, *supra* note 3, at 961-73.

6. Appointment of Comm. to Draft Unified Sys. of Equity & Law Rules, 295 U.S. 774, 775 (1935).

7. For Sunderland's contributions to the Federal Rules, see Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 10 (1959); Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1072 (1955).

8. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1978 (1989).

9. GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* i (1932). On the title page, Ragland is identified as being "of the Chicago Bar" and as a "Research Associate in the Legal Research Institute

Sunderland wrote the Foreword to Ragland's book,<sup>11</sup> and he often relied on Ragland's work.<sup>12</sup>

The idea behind discovery seemed simple to Sunderland and Ragland.<sup>13</sup> Lawyers did not want to disclose information to the other side, particularly facts detrimental to their cases.<sup>14</sup> Lawyers wanted to "hide the ball." The hide the ball instinct was central to the "sporting theory of justice" which Dean Roscoe Pound condemned in the first decade of this century.<sup>15</sup> Ragland and Sunderland found the hide the ball game objectionable on two grounds.

First, hiding the ball impeded early and informed settlement. By sharing information, the lawyers and their clients would discover the real facts; then they would usually settle.<sup>16</sup> Settlement would be prudent, consuming less time and money than a trial.<sup>17</sup> Second, surprise was detrimental to fair, efficient, and focused litigation. With facts known in advance, summary judgment motions could dispose of unsettled cases at an early stage.<sup>18</sup> For surviving cases, discovery would help eliminate indisputable facts and issues, reducing disputes to essentials.<sup>19</sup> Thus, discovery would result in rational and efficient trials.<sup>20</sup>

To achieve the twin goals of enlightened settlement and trial, Sunderland accumulated the several discovery techniques of the various

of the University of Michigan Law School (1930-1931)." *Id.*

10. *Id.*

11. *Id.* at iii-iv.

12. See, e.g., INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE—PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. OCTOBER 6, 7, 8, 1938 AND OF THE SYMPOSIUM AT NEW YORK CITY OCTOBER 17, 18, 19, 1938, at 253-54 (Edward H. Hammond ed., 1939) [hereinafter PROCEEDINGS]; Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 872 n.39 (1933); Edson R. Sunderland, *Trends in Procedural Law*, 1 LA. L. REV. 477, 497 n.37 (1939).

13. RAGLAND, *supra* note 9, at 251-66 (containing Ragland's views on discovery); Edson R. Sunderland, *Improving the Administration of Civil Justice*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 73-76 (1933) [hereinafter Sunderland, *Civil Justice*] (containing one of the briefest and best descriptions I have found of Sunderland's views on discovery). Sunderland discussed pretrial discovery in several writings. See, e.g., PROCEEDINGS, *supra* note 12, at 249-66 (discussing the advantages of pretrial procedures adopted in some states); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 876 (1933); Edson R. Sunderland, *Theory and Practice of Pre-Trial Procedure*, 21 J. AM. JUDICATURE SOC'Y 125, 130 (1937); Edson R. Sunderland, *Trends in Procedural Law*, 1 LA. L. REV. 477, 496-98 (1939).

14. See RAGLAND, *supra* note 9, at 21.

15. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before a Convention of the American Bar Association (Aug. 26, 1906), in *Proceedings in Commemoration of the Address*, 35 F.R.D. 241, 273, 281 (1964).

16. See RAGLAND, *supra* note 9, at 252-54.

17. See, e.g., RAGLAND, *supra* note 9, at 252-55; Sunderland, *Civil Justice*, *supra* note 13, at 75.

18. See, e.g., RAGLAND, *supra* note 9, at 216-26; Sunderland, *Civil Justice*, *supra* note 13, at 74.

19. See RAGLAND, *supra* note 9, at 260.

20. See, e.g., *id.* at 211-15, 252, 260, 263-64; Sunderland, *Civil Justice*, *supra* note 13, at 74, 75.

states which Ragland had described.<sup>21</sup> He discounted the fact that many states had only a few types of discovery and that these types were usually severely restricted.<sup>22</sup> According to Sunderland, there was no such thing as bad discovery borscht.

Four fudge points were inherent in this pretty picture. The points relate to rule, fact, lawyer, and judge. Perhaps this is not surprising since rules, facts, lawyers, and judges are key elements of American civil procedure.

First, the question existed as to what procedural incident would help mold and constrain the litigation. Would the incident occur pretrial or at trial? Historically, the pleadings provided the contours of the litigation.<sup>23</sup> Clark thought pleadings were a waste of time, distrusted procedural line-drawing, and wanted to avoid David Dudley Field's use of the terms "facts" and "causes of action."<sup>24</sup> However, Clark's first draft of a pleading rule required that there be "a 'statement of the acts . . . and occurrences upon which the plaintiff bases his claim or claims for relief.'"<sup>25</sup> The same draft also required that the allegations and denials be verified by the lawyer as true.<sup>26</sup> Clark's first provisions empowered the judge to render an " 'order formulating issues to be tried.'"<sup>27</sup> Each of these attempts at constraint were eliminated for reasons I have described elsewhere.<sup>28</sup>

21. See RAGLAND, *supra* note 9, at 272-391.

22. See, e.g., Sunderland, *Civil Justice*, *supra* note 13, at 75-76. Sunderland concludes, after describing restrictions on discovery throughout the country:

Most of the restrictions upon the free use of discovery are not only unnecessary but cause an enormous amount of trouble to the parties and to the courts in construing and applying them. They are a result of the traditional feeling on the part of lawyers that discovery is a dangerous practice which encourages the production of framed-up cases and of fictitious evidence to meet the facts which the examination has brought out.

The confusing variety of American restrictions and limitations are all intended as safeguards against this supposed danger. But experience has demonstrated that the effect of discovery is quite the reverse, where it is fully available to both parties.

*Id.*

23. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 327-32 (1988); Subrin, *supra* note 3, at 915-18, 934-36.

24. Subrin, *supra* note 5, at 115, 141-42; Subrin, *supra* note 3, at 962-66. Clark was still Dean of the Yale Law School at the time he was drafting the original Federal Rules. See Clark, *supra* note 2, at 435.

25. Subrin, *supra* note 3, at 976 (omission in original) (quoting FED. R. CIV. P. 23 (Tentative Draft No. 1, Oct. 15, 1935)). For a description of the location of the drafts and other documents of the original Advisory Committee, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1132 n.529 (1982).

26. Subrin, *supra* note 3, at 977 (quoting FED. R. CIV. P. 21 (Tentative Draft No. 1, Oct. 15, 1935)).

27. *Id.* at 978 (quoting FED. R. CIV. P. 24 (Tentative Draft No. 3, Mar. 1936)).

28. *Id.* at 976-79.

Having largely given up on pleading rules to structure the legal issues and on pleadings as an occasion for bringing law to bear on facts, the reformers neglected to provide a mechanism for discovery constraint.<sup>29</sup> Early drafts required depositions to be “relevant to the pending cause as shown by the pleadings on file therein,”<sup>30</sup> which was then changed to any matter “which is relevant to the subject matter involved in the pending action.”<sup>31</sup> The latter clause remained, to be followed by the nontest of “reasonably calculated to lead to the discovery of admissible evidence.”<sup>32</sup>

Sunderland knew that eliminating pleadings as a means for structuring the remainder of the law suit could lead to unfocused and unwieldy litigation.<sup>33</sup> He had said as much in the introduction to his common law pleading case book.<sup>34</sup> Sunderland and two other members of the initial Advisory Committee, Professor Wilbur H. Cherry and Senator George Wharton Pepper, knew that eliminating the terms “facts” and “cause of action” from pleading rules merely delayed problems until later in the litigation process.<sup>35</sup> Cherry, for example, was “‘not impressed . . . with the idea that we get away from any particular difficulty by a new set of words.’”<sup>36</sup> Others, such as the scorned Professor O.L. McCaskill,<sup>37</sup> urged that the flexibility of modern procedure “may be carried to such an extreme that our procedural machine will have no stability.”<sup>38</sup>

Proponents of uniform, flexible procedure knew that unlimited discovery rules could lead to unlimited discovery. Lawyers and judges, including members of the Advisory Committee, expressed concern about potential abuse.<sup>39</sup> In 1922, Thomas W. Shelton, the Virginia lawyer who spearheaded the American Bar Association’s campaign for uniform federal rules,<sup>40</sup> wrote an article entitled *Some Plain Talk to Verbose Lawyers*.<sup>41</sup> He noted that “[i]t does not require a retentive memory to recall that the

29. *Id.*

30. Fed. R. Civ. P. 49 (Tentative Draft, pt. 2, Oct. 16, 1935).

31. FED. R. CIV. P. 26(b).

32. *See, e.g.*, FED. R. CIV. P. 26(b)(1).

33. *See* EDSON R. SUNDERLAND, *CASES ON COMMON LAW PLEADING* vi (1932).

34. *Id.*

35. *See* Subrin, *supra* note 3, at 976 & nn.391-92.

36. *Id.* at 976 n.392 (quoting PROCEEDINGS OF MEETING OF ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES 306 (1936) (Cherry’s comments) (omission in original). For a description of these transcripts, see Subrin, *supra* note 3, at 962 n.309.

37. *See* Subrin, *supra* note 3, at 992-94 & n.474 (describing the heated dispute between Clark and McCaskill).

38. O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 620 (1925).

39. Subrin, *supra* note 3, at 977-78.

40. *See* Burbank, *supra* note 25, at 1048-54, 1065-66, 1077, 1081, 1094; Subrin, *supra* note 3, at 948-61.

41. Thomas W. Shelton, *Some Plain Talk to Verbose Lawyers*, 94 CENT. L.J. 439 (1922).

chief complaint against the old equity rules was the costly imposition of lengthy depositions.<sup>42</sup> Others showed concern that discovery might be used as a form of blackmail.<sup>43</sup> Despite these concerns, the sanctions the drafters provided were for failures to respond rather than for over-discovery,<sup>44</sup> perhaps overestimating the utility of the motion for a protective order.<sup>45</sup>

Having first fudged on what aspects of procedure would help focus the litigation and constrain discovery, the reformers fudged a second time on their view of lawyers. They finessed their own skeptical, if not downright hostile, view of both lawyers and their clients. In the same article, Shelton railed against the use of the high cost of printing depositions by “rich corporate interests” to prevent appeals.<sup>46</sup> Shelton also noted that “the incentive in this instance was wickedness—a determination to win, whatever the means to the end.”<sup>47</sup>

More striking is Clark’s own uncomplimentary view of the bar. In an empirical study of Connecticut trial cases published in 1937, Clark confirmed his earlier suspicion that defendants routinely used delay as a litigation tactic.<sup>48</sup> In a 1932 report regarding compensation for automobile accidents, Clark and others severely criticized plaintiffs’ tort lawyers who failed to disclose their fee amounts to clients, coached witnesses in unethical ways, and engaged in “ambulance chasing.”<sup>49</sup> Underlying Sunderland’s discovery proposals was his own firm belief that lawyers

42. *Id.* at 439; see also Thomas W. Shelton, *The Drama of English Procedure*, 17 VA. L. REV. 215, 249 n.79 (1931) (describing proposals to accelerate the pace of litigation in early English law).

43. Subrin, *supra* note 3, at 978 & n.401.

44. See, e.g., PROCEEDINGS, *supra* note 12, at 103, 259 (explaining FED. R. CIV. P. 37 sanctions for failures to answer). The advisory committee notes to the 1983 amendments to Rule 26(a) and (b)(1) and the amendment adding Rule 26(g) explain the need to address “excessive discovery” as well as “evasion or resistance to reasonable discovery requests.” Fed. R. Civ. P. 26 advisory committee’s note, 28 U.S.C. app. (1988).

45. PROCEEDINGS, *supra* note 12, at 99 (explaining that the availability of motions for a protective order under FED. R. CIV. P. 30(b) “gives the court sufficient control, so that the court may make an order to protect the party or a witness from annoyance, embarrassment, or oppression”); see also *id.* at 260 (describing the “unique protective orders for the purpose of preventing abuse of these very liberal rules regarding discovery examinations”). Maybe what the drafters overestimated was the willingness of federal judges to police the discovery process. See Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin’s New-Old Procedure as a Possible Antidote to Dreyfuss’s “Tolstoy Problem,”* 46 FLA. L. REV. 57, 66 (1994).

46. Shelton, *supra* note 41, at 439.

47. *Id.*

48. CHARLES E. CLARK & HARRY SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT: A REPORT OF AN INVESTIGATION OF THE ACTIVITIES OF CERTAIN TRIAL COURTS OF THE STATE 64 (1937).

49. COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 1-3, 35, 38-39 (1932) (explaining the participation of the Yale Law School and Clark).



tended to hide detrimental information and wanted nothing more than “to surprise [the] opponent.”<sup>50</sup> Despite this belief, Sunderland and Ragland were remarkably optimistic, almost giddy, about how simply and successfully full disclosure would take place in the new discovery paradise.<sup>51</sup>

I do not mean to be harsh. I have previously written about the difficulty of creating a wise procedure at any place and at any time,<sup>52</sup> including variables involved other than procedural rules, such as: increases in statutory law, new rights, the expectation for the good life, photocopying machines, and word processors.<sup>53</sup> Nonetheless, given the dearth of restraints on discovery the reformers provided in the Rules, and their own conviction that lawyers will go to great lengths to win and to earn fees, the reformers submerged the obvious possibility that they were opening the door for enormous discovery abuse.

This is not simply hindsight. A final example: In 1936, Judge Edward R. Finch of the New York Court of Appeals criticized the proposed rules, arguing that lawyers would bring cases on mere suspicion, engage in costly fishing expeditions, and force settlements because settling was less expensive than resisting.<sup>54</sup> William DeWitt Mitchell, the extremely able Chairman of the initial Advisory Committee, responded that the proposed discovery rules might, in fact, “offer opportunities to lawyers of low ethical standards” in “large metropolitan areas like New York.”<sup>55</sup> In the rest of the country, however, Mitchell assured, “the rules relating to these subjects are in line with modern enlightened thought on the subject and will not be subjected to abuse.”<sup>56</sup>

A third issue which the reformers fudged was their view of facts. Sunderland and Ragland tended to treat facts relevant to trial as knowable in an absolute sense, static, and inherently limited. In the words of Sunderland, “[d]iscovery procedure serves much the same function in the field of law as the X-ray in the field of medicine and surgery; and if its use can be sufficiently extended and its methods simplified, litigation will

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50. Sunderland, *Civil Justice*, *supra* note 13, at 73-74; Edson R. Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 737-38 (1939).

51. RAGLAND, *supra* note 9, at iii, 251-66; Sunderland, *Civil Justice*, *supra* note 13, at 74-76.

52. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2001, 2045-46, 2051 (1989).

53. Subrin, *supra* note 3, at 912, 925 & n.85.

54. Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 809-10 (1936).

55. William D. Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months—Commencement of Actions—Effect of Findings of Fact in Cases Tried by Court Instead of Jury, Etc.*, 23 A.B.A. J. 966, 969 (1937); *see also* Subrin, *supra* note 3, at 980 (describing this exchange between Finch and Mitchell).

56. Mitchell, *supra* note 55, at 969.

largely cease to be a game of chance."<sup>57</sup> Ragland also includes the X-ray metaphor in his book.<sup>58</sup>

However, Sunderland and Ragland were writing in a legal world in which Pound's views on sociological jurisprudence and the legal realist's views on the indeterminacy of facts were in ascendance.<sup>59</sup> Clark marveled at how the new procedure would permit litigators to enter the New Deal and to amass the information relevant to policymakers.<sup>60</sup> The whole notion of equity procedure, from which the drafters of the Federal Rules liberally borrowed,<sup>61</sup> was to permit the telling of an expanded story which went beyond the bounds of common law writs, or code causes of action and elements.<sup>62</sup> Thus, the drafters were constructing a largely unbounded playing field wherein facts were more like ever-expanding play dough and less like a hardball. The drafters invited lawyers, whom they thought to be wily, unprincipled, and acquisitive, to play the game.

There was a final fudge point. The major controlling force in equity was the Chancellor's almost unbridled, discretionary power.<sup>63</sup> If there was to be order in the potential chaos arising from notice pleading, expanded discovery, and massive joinder of claims and parties, a strong judge would have to impose that order. Clark realized the importance of a strong judge when he included a provision permitting judges to promulgate an "order formulating issues to be tried."<sup>64</sup> The Advisory Committee, and particularly Mitchell, rejected the idea of residing so much managerial control in judges for three reasons: the judges were too busy, the judges would wield too much power, and the judge's actions under the power would normally be unreviewable.<sup>65</sup> Mitchell predicted that "[w]e are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions."<sup>66</sup>

57. Sunderland, *Civil Justice*, *supra* note 13, at 76.

58. RAGLAND, *supra* note 9, at 251. Ragland summarizes some of the views encountered in state field investigations: " 'Litigation is no longer regarded as a game.' 'The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.' " *Id.* (quoting unnamed sources on their views of the effects of discovery on trial).

59. See Subrin, *supra* note 3, at 946-47, 948 nn.234-35, 966 & nn.337-39 (describing the views of Pound, the legal realists, and of Clark).

60. *Id.*

61. Subrin, *supra* note 3, at 922-25, 970-71.

62. F.W. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW* 3-5 (A.H. Chaytor & W.J. Whittaker eds., 1909); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 74-83 (1969); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 688-89 (5th ed. 1956).

63. MAITLAND, *supra* note 62, at 1-9; MILSOM, *supra* note 62, at 79-83; PLUCKNETT, *supra* note 62, at 685-90. For a discussion of the distrust of equity's discretion in America, see Subrin, *supra* note 3, at 926 n.90.

64. See *supra* note 27 and accompanying text.

65. Subrin, *supra* note 3, at 979 & n.408.

66. *Id.* at 978 (quoting PROCEEDINGS OF MEETING OF ADVISORY COMMITTEE ON RULES FOR

Historically, many had feared that unbridled discretionary power of judges in equity was a threat to democratic institutions. For centuries, seven components were known to be inherent in, or concomitant to, equity procedure: (1) an accumulation of unfocused, unmanageable documents; (2) a failure to permit parties and witnesses to speak in open court; (3) the denial of the right to be heard by a jury of one's peers; (4) a deprivation of the citizenry's right to be part of the judicial process; (5) royal-like judges who exercised discretionary power, largely without restraint; (6) interminable delays; and (7) staggering financial costs.<sup>67</sup> Reread *Bleak House*.<sup>68</sup>

At the 1938 Senate hearings that considered postponing the effective date of the newly drafted uniform Federal Rules, a memorandum submitted by Challen B. Ellis spoke of "the tremendous powers of the chancellor [sic] and dangers of abuse," expressing concern that the new rules "practically strike down all the safeguards thrown around the action at law; and, in addition, eliminate many of the safeguards peculiarly appropriate to equity."<sup>69</sup> Kahl K. Spriggs complained that the discovery provisions went well beyond equity and that the rights to a jury trial and to presentation of testimony in open court were in jeopardy.<sup>70</sup> Ellis and Spriggs were both listed as members of the Bar of the District of Columbia.<sup>71</sup>

### III. WHERE THE NEW MANDATORY DISCOVERY RULES AND THEIR PROMOTERS FUDGED

To draw comparisons to the current dialogue—if one can describe lawyers and judges talking past each other as a dialogue—I will concentrate on a portion of the "initial disclosures" required under the new Rule

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CIVIL PROCEDURE OF THE SUPREME COURT OF THE UNITED STATES 739, 750-75 (1936) (statement of Mitchell)).

67. See, e.g., 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 425-28 (7th ed. 1966); PLUCKNETT, *supra* note 62, at 689; R.J. WALKER & M.G. WALKER, THE ENGLISH LEGAL SYSTEM 31 (4th ed. 1976); Charles S. Christopher, Baron Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 524-27 (Association of American Law Schools ed., 1907). For David Dudley Field's descriptions of the abuses of equity and his attempts to curtail them, see Subrin, *supra* note 23, at 336-38. For criticism of trial by oral deposition in the United States, see George P. Dike, *Comments on the Federal Rules For Discovery: A Criticism of Trial by Deposition*, MASS. L.Q., Oct. 1951, at 15, 15-16 (criticizing trial by oral deposition in a speech delivered at the Annual Meeting of the American Bar Association during a symposium on the Federal Rules of Civil Procedure sponsored by the Section of Judicial Administration).

68. CHARLES DICKENS, BLEAK HOUSE (Signet Classic ed. 1964).

69. 83 CONG. REC. 8481-82 (1938).

70. *Id.* at 8480-81.

71. *Id.* at 8480-82.

26(a)(1)(A) and (B).<sup>72</sup> There are other new important discovery rules, but I will stress the language of Rule 26(a)(1)(A) and (B) to illustrate my points. The new Rule 26(a)(1) begins with three escape hatches: stipulation, order, or local rule.<sup>73</sup> Absent an exemption, parties, “without awaiting a discovery request,” are to “provide to other parties” the “name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information” and copies or descriptions of documents and tangible things “in the possession, custody, or control of the party,” where such documents and tangible things are “relevant to disputed facts alleged with particularity in the pleadings.”<sup>74</sup> Since the Advisory Committee notes to these provisions point to specific articles written by Magistrate Wayne Brazil and United States District Court Judge William Schwarzer<sup>75</sup> for the “concepts of imposing a duty of disclosure,”<sup>76</sup> I will primarily look to those articles and a few others by the same authors for comparison to the earlier fudge points.

First, consider the extent to which procedural rules are meant to constrain the litigation process. Since 1983, amendments to the rules have been edging toward a return to the terms “facts” and “causes of action” as a means of providing constraint.<sup>77</sup> Although the pleading rules have not been altered, the 1983 Rule 11 required the attorney, or party, to certify that “to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry [the pleading or other document] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”<sup>78</sup> The once again newly amended Rule 11 has similar wording of “allegations and other

72. See FED. R. CIV. P. 26.

73. FED. R. CIV. P. 26(a)(1).

74. FED. R. CIV. P. 26(a)(1)(A)-(B)

75. William W Schwarzer is now Director of the Federal Judicial Center. FJC DIRECTIONS, Nov. 1991, at 1. Judge Schwarzer will leave the FJC on March 31, 1995 and will return to his judicial career.

76. FED. R. CIV. P. 26(a) advisory committee’s notes. According to the committee’s notes to Rule 26(a), “a major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.” *Id.*; see also Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1348-61 (1978) (setting forth the concepts of imposing a duty of disclosure); William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989) (same).

77. See, e.g., FED. R. CIV. P. 26(a)(1); *supra* notes 70-76 and accompanying text (emphasizing the necessity of particularized facts).

78. Fed. R. Civ. P. 11, 28 U.S.C. app. (1988).

factual contentions hav[ing] evidentiary support.”<sup>79</sup> In other words, the lawyer is required to reasonably inquire into the facts underlying the causes of action prior to commencement of suit.

The new Rule 26 invites parties to allege facts in the pleadings, but the rule allows the parties to choose whether to allege with particularity.<sup>80</sup> By also providing the three escape hatches,<sup>81</sup> the rule continues the old Clarkian disdain, or perhaps creates new-found ambivalence, for pleading rules which are defining in any meaningful way. However, a small portion of the discovery—names of witnesses, “subjects of the information,” and copies or descriptions of documents and things—are tied to “facts alleged with particularity.”<sup>82</sup> The new rules explicitly link pleading specificity to the scope of discovery in a manner which was absent in 1938.

Once again, the reformers tend to discount the cautionary voices—perhaps hundreds in this case—of those whose words interfere with their dream.<sup>83</sup> As many, including former Attorney General and Judge Griffin B. Bell, Chilton Davis Varner, and Hugh Q. Gottschalk, have pointed out, the terms “disputed facts alleged with particularity,” “likely to have discoverable information,” and “relevant to,” are hardly self-defining, particularly during an early stage of the lawsuit.<sup>84</sup> Consequently, lawyers

79. FED. R. CIV. P. 11(b)(3).

80. FED. R. CIV. P. 26(a).

81. See *supra* note 73 and accompanying text.

82. FED. R. CIV. P. 26(a)(1)(A)-(B).

83. Judge Griffin B. Bell has noted that:

The Reporter's Summary of the comments briefly describes over three hundred written submissions on the proposed modification of Rule 26. Of the three hundred, only about one dozen supported the concept of mandatory disclosure proposed in Rule 26(a)(1). The remainder—an unusual coalition of individual practitioners, law firms, scholars, bar associations, plaintiffs' trial lawyer associations, defense lawyers' associations, insurers, public interest groups, federal district judges, and industry—all opposed the Advisory Committee's proposed modification of Rule 26. The litigants themselves, whom the amendment was intended to benefit by reducing costs and delay in discovery, argued that the likely outcome of the rule would instead be *more* cost and delay. They documented a host of practical problems which they predicted would flow from adoption of the disclosure requirement.

Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 28-30 (1992) (footnotes omitted); see also Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9, 19-21 (1994) (discussing the problems with the automatic disclosure provision perceived by many groups in the judicial system).

84. Bell et al., *supra* note 83, at 39-44. For other criticisms of the vagueness of the standards, see *id.* at 30 nn.113-14. Rule 9(b) requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” FED. R. CIV. P. 9(b). Consequently, some caselaw has developed concerning the meaning of the phrase “stated with particularity.” See, e.g., *Ades v. Deloitte & Touche*, 799 F. Supp. 1493, 1498 (S.D.N.Y. 1992). But “circumstances constituting fraud or mistake” will often lend themselves to more agreement about what is a sufficiently particular allegation rather than clarifying how specifically an antitrust violation, discriminatory intent, or the defect in a product must be alleged. Frequently in a fraud case, for instance, there are specific words of misrepresentation that can be identified and alleged and there is a specific date when the

will not know what to produce. Moreover, commentators contend that the vagueness of the rule will lead to overproduction.<sup>85</sup> Schwarzer responds by observing that the allegation with specificity language does not trigger an obligation to produce anything; the language merely triggers disclosure of a limited amount of information.<sup>86</sup> This is true. However, if these aspects of mandatory disclosure reveal so little—names of witnesses, the subjects of their information, and descriptions or copies of documents—how will the automatic disclosure provision materially reduce discovery costs? Virtually the same depositions, interrogatories, and requests for admissions will still take place.

Bell and his coauthors provide an example. If the plaintiff in a products liability case alleges that the defendant's product was placed "into the stream of commerce in a defective condition, unreasonably dangerous for the use of [plaintiff]," the defendant would not know how much information to disclose, given the number of potential defense witnesses, documents, data collections, and tangible things that might be relevant.<sup>87</sup> Schwarzer responds that the plaintiff's allegation was not sufficiently particular.<sup>88</sup> But how can a lawyer know what is particular or specific enough? Even Clark thought that his wide-open, flexible pleading requirements required example forms to aid compliance by lawyers.<sup>89</sup> If specific allegations will now trigger automatic discovery, examples are even more necessary.

Once lawyers know what constitutes a fact alleged with sufficient specificity, they must then decide what individuals are "likely to have discoverable information relevant to" those facts and what constitutes sufficient identification of "the subjects of the information" for each such

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allegedly misleading words were published or spoken. It is important to note that Rule 9(b) also states that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b). This is recognition of the difficulty of pleading particularly in these instances, especially at the commencement of a lawsuit.

85. Bell et al., *supra* note 83, at 43-44.

86. William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery,"* 27 GA. L. REV. 655, 663 (1993).

87. Bell et al., *supra* note 83, at 42 (quoting *Heath v. General Motors Corp.*, 756 F. Supp. 1144, 1145 (S.D. Ind. 1991)).

88. Schwarzer, *supra* note 86, at 661.

89. PROCEEDINGS, *supra* note 12, at 42-45; see also *Experience Under the Federal Rules of Civil Procedure*, Reporter's Summary of Suggestions, Criticisms, and Published Discussions 11-12 (May 1, 1953) (unpublished report, on file with the *Florida Law Review*) (noting the usefulness of illustrative forms in clarifying a standard for pleadings). Clark explains how FED. R. CIV. P. 8(a) avoids the pitfalls arising from the previous use of words such as "facts and [t]he cause of action . . . and by the use of illustrative forms—based to a considerable extent upon precedents going as far back as the common law—it gives the pleader some idea what is desired without visiting upon him or his innocent client harsh penalties for some assumed deviation from an ambiguous standard." *Id.*

individual.<sup>90</sup> The Rules provide neither sample lists nor examples of satisfactory identifications. The resulting lack of guidance to practitioners makes application of the rules difficult.

Bell and his coauthors explain the nondirective and unhelpful nature of the automatic disclosure rules: “[t]he fundamental flaw in [the automatic discovery rule] is that it attempts to define a disclosure standard that will apply to all types of civil litigation, from simple collection cases to patent, securities, and antitrust claims.”<sup>91</sup> The commentators assert that “[i]n complex cases such as product liability actions, toxic tort cases, patent cases, and securities class actions, the potential scope of document disclosure that may be required under such an amorphous standard is virtually unlimited.”<sup>92</sup>

Schwarzer responds that most cases are “small cases,”<sup>93</sup> but even small cases can have over-zealous discovery. However, studies of both federal and state courts show that the bulk of cases do not have much discovery; many cases have no discovery.<sup>94</sup> If these studies are accurate, why should the automatic disclosure rules, which will reduce discovery very little and will cause new interpretive disputes without guidelines to resolve those disputes, apply to all cases? Furthermore, why should the rules require attorney conferences for all cases? Schwarzer’s answer is, in part, that courts can exempt cases.<sup>95</sup> If many districts opt out of the rule (many have opted out already),<sup>96</sup> or if courts exempt many cases, and if

90. FED. R. CIV. P. 26(a)(1)(A).

91. Bell et al., *supra* note 83, at 39.

92. *Id.*

93. Schwarzer, *supra* note 86, at 657. Schwarzer’s definition of “small” in this context is “in the sense that, as a result of excessive discovery activity, the cost of litigation can become disproportionate to the amount at stake.” *Id.* This is a curious definition because, in large cases as well, the cost of litigation can become disproportionate to the amount at stake.

94. See, e.g., David M. Trubek et al., *The Costs of Ordinary Litigation*, UCLA L. REV. 72, 91 (1983). “[T]hese findings confirm the conclusion of an earlier study that even in federal courts discovery is used intensively only in a small fraction of civil lawsuits.” *Id.* at 90. A recent state court discovery study, funded by the State Justice Institute and the Aetna Life and Casualty Foundation, found that across five state courts 42% of the cases had no formal discovery and 37% had three or fewer pieces of discovery. Susan Keilitz et al., *Is Civil Discovery in State Trial Courts Out of Control?*, STATE CT. J., Spring 1993, at 8, 10-11. The mean number of discovery vehicles was 6.4 and the median 4. *Id.* at 10. The authors concluded: “Across the five courts, the level of discovery activity is lower than proponents of discovery reform might expect. . . . Despite the passage of time and the differences between state and federal court litigation, these figures indicate only a slight increase in the 52 percent rate-of-discovery found in federal court cases by the Federal Judicial Center in the late 1970’s.” *Id.* “[T]hose cases with the largest numbers of discovery items are truly exceptions.” *Id.* They add: “Perhaps the most salient observation that can be made from [the NCSC] study is that—for most—civil litigation formal discovery is not out of control.” *Id.* at 15; see also Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432-42 (1994) (analyzing social science findings by the FJC, the Baltimore Discovery case study, and the NCSC study).

95. Schwarzer, *supra* note 86, at 656.

96. Professor Carl Tobias reported to the author, based on his “cursory review of the civil justice

all that is disclosed are names and descriptions, again, where are the savings?

Schwarzer provides another response to Bell's observation that the mandatory discovery rules are too vague because they cover all cases with the same rule. According to Schwarzer, "the federal rules are, and always have been, transubstantive and applicable to all categories of cases."<sup>97</sup> I think Schwarzer's statement misses the point proposed by Bell and his coauthors. The very insistence on covering all cases with the same rule is what requires amorphous language, language which does not offer meaningful guidance to lawyers in any particular type of case. It is this perceived need to cover all cases with one rule which leads to less effective restraints throughout the process. For instance, the new rule presumptively limiting depositions to ten for each side<sup>98</sup> provides no real restraint for the bulk of simple cases which have fewer than ten discovery events of any kind, nor does the new rule provide constraint if the parties stipulate otherwise. The failure to provide guidance for particular types of cases requires judges or magistrates to micro-manage each case, largely on an ad hoc basis.

What is the view of facts evidenced in the new rule? The new rule assumes that cases will include a core number of witnesses, documents, and tangible items and that reasonable lawyers will automatically know who and what those are. The X-ray analogy again comes to mind.<sup>99</sup> However, we should know better. Since 1983, the Federal Rules have acknowledged proportionality—meaning that the amount of discovery should be related<sup>100</sup> to "the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake."<sup>101</sup> Indeed, on December 1, 1993, a heightened proportionality rule

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expense and delay reduction plans, orders issued by numerous courts, and discussions with people tracking civil justice reform," the following approximations: "of the approximately 20 Early Implementation Districts experimenting with disclosure, approximately half have taken action to opt-out, one-fourth seem to be following the Federal Rule, and one-fourth have not taken any action or I just have not learned what they are doing." Interview with Carl Tobias, Professor of Law, University of Montana (Jan. 6, 1994). "[O]f the remaining 60 districts, one-third to one-half of the districts adopted some form of disclosure requirements, most of which vary from the Federal Rule." *Id.* Several other districts opted out completely from the Federal Rule, suspended application of disclosure pending additional study, or opted out for their own variation of disclosure. *Id.* More recent surveys show that only approximately 38 district courts subscribe to the Federal Rules amendment in Rule 26(a)(1), although many districts have adopted variations of the new provisions. Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, 155 F.R.D. 229, 230 (1994).

97. Schwarzer, *supra* note 86, at 656.

98. FED. R. CIV. P. 30(a)(2)(A).

99. *See supra* text accompanying notes 57-58.

100. *See* Fed. R. Civ. P. 26(b)(1), 28 U.S.C. app. (1988).

101. Fed. R. Civ. P. 26(b)(1)(iii), 28 U.S.C. app. (1988). The advisory committee's notes to the 1983 amendments to Rule 26 specifically state that "[t]he elements of Rule 26(b)(1)(iii) address the



was offered. The court may now consider "the importance of the proposed discovery in resolving the issues."<sup>102</sup> Moreover, the newest Advisory Committee's Notes offer another proportionality issue: the parties should craft their automatic disclosure to the degree of fact-particularity.<sup>103</sup> Once again, the Federal Rules provide no guidance as to what the various degrees of specificity are and what degree of disclosure is necessary in various types of cases.

The underlying view of lawyers is very dim. In Schwarzer's article, *The Federal Rules, the Adversary Process, and Discovery Reform*,<sup>104</sup> which the new Rule 26 Advisory Committee's Notes cite, he states that it is the "increasing competitiveness and aggressiveness of the bar and the loosening of professional restraints,"<sup>105</sup> combined with what he calls "[t]he staggering increase in the volume and complexity of cases,"<sup>106</sup> that forces him to reevaluate the adversary process as it relates to discovery, to fully embrace case management, and to urge automatic disclosure.<sup>107</sup> Lawyers, in his view, "often over-discover and over-prepare."<sup>108</sup>

The Advisory Committee also cites Brazil's article attacking adversariness in discovery. The article is scathing in its critique of lawyers' activities in the discovery process.<sup>109</sup> "[A]dversary pressures and competitive economic impulses inevitably work to impair significantly, if not to frustrate completely, the attainment of the discovery system's primary objectives."<sup>110</sup> For Brazil, the proponents of the modern rules of discovery "apparently failed to appreciate how tenaciously litigators would hold to their adversarial ways and the magnitude of the antagonism between the principal purpose of discovery (the ascertainment of truth through disclosure) and the protective and competitive instincts that dominate adversary litigation."<sup>111</sup> He reminds us that "it is the responding attorney who decides what constitutes a doubt" about what is sought, and

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problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake . . . the limitations on a financially weak litigant . . . and the significance of the substantive issues." Fed. R. Civ. P. 26(b) advisory committee's note, 28 U.S.C. app. (1988).

102. FED. R. CIV. P. 26(b)(2)(iii).

103. See FED. R. CIV. P. 26(a) advisory committee's notes ("The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence.").

104. Schwarzer, *supra* note 76.

105. *Id.* at 705.

106. *Id.* at 703.

107. See *id.* at 721-23.

108. *Id.* at 710.

109. See generally Brazil, *supra* note 76 (critiquing the activities of lawyers in the discovery process).

110. *Id.* at 1303.

111. *Id.*

the impulse “is to construe all inquiries and requests as narrowly as possible.”<sup>112</sup> Brazil also recognizes the opposite potential, “[w]hen responding to document production demands, litigators sometimes resort to the obstructive device of burying significant documents in mounds of irrelevant or innocuous materials.”<sup>113</sup> Brazil further notes, “a massive document production forces opponents to spend a great deal of time and money copying and ferreting through the produced papers.”<sup>114</sup>

The new rules seem designed to elicit the abhorrent behavior they seek to curb. The triggering phrase, “disputed facts alleged with particularity,”<sup>115</sup> invites narrowing by those who must interpret it. Moreover, the trigger, when it is pulled, invites the very over-disclosure which some lawyers find attractive. Assume in a products liability case that the plaintiff is precise in saying that the vehicle has a design flaw in its weight and height which causes the vehicle to tip. If the allegation has been sufficiently particular, how far back must the defendant-manufacturer look to find and describe documents? What early designs and discussions are relevant? The witnesses who are believed to have relevant and potentially relevant information or documents are not written in stone.

The sanction under new Rule 37(c)(1) for failing to disclose under new Rule 26(a) is prohibition from using “any witness or information not so disclosed” and “other appropriate sanctions” if the failure was without substantial justification.<sup>116</sup> Automatic disclosure will frequently lead to automatic over-disclosure, which, in turn, will invite, if not force, the opposing party to depose additional witnesses from the disclosure list and to examine a myriad of documents, most of which will be only tangentially relevant.

One point that Brazil, Schwarzer, and the new rules do not fudge is their continued reliance on judges to stand in the place of defined procedure. I wish the commentators and rules reflected a greater sense of doubt. For most of our country’s history, there has been a widely embraced belief that in a democracy it is critical to have judges, particularly life-tenured judges, bound by procedures and subject to laws to avoid both the appearance and reality of arbitrary behavior.<sup>117</sup> Professor Judith Resnik and oth-

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112. *Id.* at 1323.

113. *Id.* at 1324-25.

114. *Id.*

115. FED. R. CIV. P. 26(a)(1)(A).

116. FED. R. CIV. P. 37(c)(1).

117. *See, e.g.*, Subrin, *supra* note 23, at 323 (discussing the views of David Dudley Field). Recall the words of Thomas Shelton in his earlier years:

There is a great deal more in pleading than mere form. It stands . . . as the bulwark of protection between the bench and the litigant; it fixes inviolate limitations within which the judge may rule, making all else *obiter dictum*, and, of equal importance, it confines the

ers have explained the costs to a legal system of ever-increasing case management, including the loss of neutrality in the judicial branch.<sup>118</sup> Professor Richard L. Marcus and others have explained the costs to a legal system of de-emphasizing trials in open court and the value of public adjudication.<sup>119</sup> Others, including myself, have urged the importance of jury trials in civil cases.<sup>120</sup> Those stressing jury trial importance do have allies, including John Adams, Thomas Jefferson, David Dudley Field, Senator Thomas Walsh, and the Constitution of the United States.<sup>121</sup>

In my view, current reformers are paying, and causing others to pay, much too high a price through an attempt to control discovery by adding more layers of attorney obligations, including mandatory lawyer conferences, list-making, series of pretrial conferences, and certificates, and by adding more occasions for ad hoc judicial case management. These additional obligations are endorsed without providing meaningful standards or guidelines for either lawyers or judges to apply. The current reformers argue, in effect, that adversarial lawyers seek decisionmakers who will favor their clients, that most cases settle, in those cases that do settle the judge does not have to decide issues of merit at trial, and that the procedural system encourages lawyer-excess while providing no limits.<sup>122</sup> Therefore, current reformers conclude that it is satisfactory, or even desirable, for judges, who are unbound by procedural rules, to spend an increasing percentage of their time doing ad hoc case management. This case management inevitably forces judges into a more active, participatory role.

However, at least for me, the assertions cut the opposite way. If lawyers attempt to escape judicial neutrality, then it is more important that judges remain steadfastly neutral. If most cases settle, additional levels of required activity and expense make less sense. If lawyers engage in excess, which harms their clients, other citizens, and the judicial process, then it is all the more important for the system to provide preannounced, specific rules to curb the excesses.

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testimony which may be introduced.

Thomas W. Shelton, *Simplification of Legal Procedure—Expediency Must Not Sacrifice Principle*, 71 CENT. L.J. 330, 337 (1910); see also Subrin, *supra* note 3, at 928 & n.106 (viewing the jury as a means of restraining judges).

118. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982).

119. Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 754 (1989).

120. Subrin, *supra* note 3, at 926-28, 999.

121. See, e.g., U.S. CONST. amend. VII; Subrin, *supra* note 3, at 928-29, 937, 998.

122. Schwarzer, *supra* note 76, at 707-12.

#### IV. THE CASE FOR SELECTIVE SUBSTANCE-SPECIFIC PROCEDURE

There is no doubt in my mind that a problem exists with discovery in many cases and that the delay and expense many lawyers inflict in some cases is obscene. Nor do I doubt that capable lawyers on both sides—whether plaintiffs' or defendants'—will try to take advantage of the system to aid their clients; lawyers are paid to aid their clients. Brazil's, in addition to my own, experience as a trial lawyer and my experience as a Reporter for a state Advisory Committee on procedural rules, convinced me long ago that there is abuse in huge cases and that such cases number approximately five to ten percent of the cases commenced.<sup>123</sup> Maybe in some courts there is an even larger percentage of cases which attract unsavory and largely unproductive discovery practices.<sup>124</sup> Methods for reducing wasteful game-playing and for the prompt, inexpensive discovery of basic information would be beneficial in all cases.

I have two main suggestions. First, as I have written elsewhere, if the vast majority of cases were governed by rules that limited the number of interrogatories, allowed two or three brief depositions at most, constrained document production, and set a firm and early trial date—say a year from commencement—there would be as many settlements as occur currently, but at less cost. These measures would further result in increased time for judges to perform traditional judging functions, and at worst, no decrease in justice.<sup>125</sup> The use of presumptive numeric limitations for interroga-

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123. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Practical Problems, and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 792, 846-59 [hereinafter Brazil, *Civil Discovery*] (discussing the nature of tactics); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 238-40; see also Subrin, *supra* note 3, at 911 n.7 (suggesting that over-discovery results in more, but less useful, information); Leonard S. Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A. J. 848, 848-49 (1980) (noting the burden of pretrial discovery as a significant adverse impact on litigation).

124. The Honorable Barefoot Sanders has estimated that:

[T]wo-thirds to three-fourths of our civil cases, probably more, have little or no problem with respect to discovery matters. A relatively few cases require massive and constant intervention; I doubt that the proposed amendments will reduce—in fact, will likely increase—the difficulties which arise in those cases, and may create problems in other civil cases which do not now exist.

A few lawyers overwhelm their opponents with discovery. The problem exists almost exclusively in metropolitan areas. The same lawyers who cause problems now will probably deluge their opponents with paper if the proposed amendments are adopted.

Bell et al., *supra* note 83, at 41 (footnote omitted) (quoting comment from the Honorable Barefoot Sanders, Chief Judge, Northern District of Texas 1 (Dec. 2, 1991)).

125. Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure Be Made More Equitable?*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 761, 786-92 (Stephen Goldstein ed., 1992).

ories and depositions, as in the new rules (putting aside the numbers), makes sense.<sup>126</sup> The new rules on the automatic disclosure of insurance information and damages also make sense.<sup>127</sup> However, I would like more information on whether the new damage disclosure provisions provide sufficient guidance in practice on precisely what lawyers should disclose. I like these new rules to the extent they offer lawyers specific guidance. They will not eliminate interpretive problems, but they provide guidance for lawyers and do not require judges to make ad hoc rulings without rules to guide them.

In other words, we should provide a more constricted presumptive amount of discovery and a short period to a certain trial date in the vast majority of cases. For those cases that tend to be the most prolonged—whether products liability, antitrust, securities, section 1983, employment discrimination, or class action suits—there is often a need for greater discovery and for more control of the discovery process. However, the reformers seem to perpetually run into the same sticking point. It is a point Bell discussed in his article,<sup>128</sup> and about which Burbank<sup>129</sup> and I<sup>130</sup> have written for a number of years. The price of trying to apply the same rules to all cases inevitably leads to general, vague, and flexible rules; such rules provide very little guidance for the bar or bench.

The new Rules 26(a)(1) and (2) are again illustrative of this phenomenon. Notice pleading does not give much guidance for discovery. If one wants a core exchange of information, the parties must know more about the case. Therefore, more specific pleading is necessary. This necessity is the rationale for the “alleged with particularity” language in the new rule.<sup>131</sup> However, one can be more specific in some cases than in others. In a simple automobile accident or breach of contract case, the plaintiff often knows specific facts in advance for each, if not all, elements. If the defendant disputes those facts, a small amount of discovery is desirable and occurs under the present system.

There is an irony here. I know of no evidence showing that discovery is a big problem in these easy cases, or that either party expends much

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126. FED. R. CIV. P. 30(a)(2)(A), 33(a).

127. FED. R. CIV. P. 26(a)(1)(C)-(D).

128. Bell et al., *supra* note 83, at 48-49.

129. See authority cited *supra* note 4.

130. Phyllis T. Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 218, 299-303 (1992); Subrin, *supra* note 52, at 2025-26, 2048-51; Stephen N. Subrin, *Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure*, 73 JUDICATURE 4, 8-9, 47 (1989); Subrin, *supra* note 3, at 977, 985, 991, 995-96; Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981).

131. Bell et al., *supra* note 83, at 37-38.

time or money finding out the core information.<sup>132</sup> It is in cases where the plaintiff has less initial concrete information, such as a design defect, antitrust, or employment discrimination case, that plaintiffs' lawyers cannot allege some of the facts behind the elements with great specificity. The new Rule 11 recognizes the problem, inviting parties to announce when they do not yet have supporting evidentiary proof.<sup>133</sup> Core discovery might be helpful in such a case, yet the opponent need not provide information under the new automatic disclosure rule in such a case. The new rules make discovery mandatory when the parties least need discovery.

Gearing more specific procedural requirements to the most discovery-prone types of cases would help address all four of the fudge points in modern procedure in a more direct and responsible way. It would also take advantage of evolving professional patterns resulting from current federal procedural reform and other causes, such as the growing sophistication of corporate clients. The stress placed on early attorney conferences, early automatic disclosure, and early attempts to precipitate settlement points to front-loading of case preparation. Front-loading, in turn, will require expertise in the lawyer's chosen field. Plaintiffs' lawyers should embrace the idea of pre-announced procedures geared to some types of cases because such procedures should reduce time, delay, and costs for the lawyers and their clients. These savings are particularly valuable to plaintiffs' lawyers in contingent fee cases. Moreover, having predefined norms should reduce the time needed for judges and judge-magistrates to manage cases, freeing them to spend more time hearing cases on the merits—another benefit for plaintiffs and their lawyers.

Defense lawyers are under increasing pressure to predict and reduce costs, both of which are more plausible with substance-specific procedure.<sup>134</sup> Corporations and insurance companies are monitoring attorneys' fees and putting limits on them with considerably more vigor than they did in the past because they are shopping for more economical representation.<sup>135</sup> This should result in a willingness on the part of many defense

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132. See *supra* note 94.

133. FED. R. CIV. P. 11(b)(3).

134. For instance, the United States District Court for the District of Massachusetts adopted an Expense and Delay Reduction Plan, implemented by local rules, which became effective on October 1, 1992, and requires, *inter alia*, "certifications signed by counsel and by an authorized representative of each party affirming that each party and that party's counsel have conferred: (a) with a view to establishing a budget for the costs of conducting the full course—and various alternative courses—of the litigation." MASS. FED. LOC. R. 16.1(D)(3). Unless otherwise ordered, such certifications must be part of a joint statement filed by the parties no later than five business days before a scheduling conference. MASS. FED. LOC. R. 16.1(D). Except for exempted cases, the judge should ordinarily convene a scheduling conference within 90 days of the appearance of the defendant "or the time that is specified in Federal Rule of Civil Procedure 16, if it is shorter." MASS. FED. LOC. R. 16.1(A).

135. Darlene Ricker, *The Vanishing Hourly Fee*, A.B.A. J., Mar. 1994, at 66, 67; Robert I. Weil,

lawyers to cooperate with plaintiffs' lawyers in attempting to mold predetermined, efficient procedures for specific types of cases.

For some categories of cases, such as products liability, antitrust, securities fraud, section 1983, employment discrimination, and malpractice, the amount of disclosure required in pleadings to trigger the exchange of core information should be prescribed in advance. A similar description of the nature of the required core discovery also should be prescribed. Plaintiffs normally know more information with greater specificity in some cases more than in others, and the type of complaint could be geared to that reality. Moreover, defendants would no longer have to guess about the number of years backward they should go, the level of witness whose name they should provide, or the type of documents they should describe or copy.

These rules, tailored to different case-types, should probably be presumptive rules in the sense that either party with good cause can move for changes. Judges should also be able to alter the presumptive rules for good cause on their own initiative. Although cases of certain varieties have predictable, normal characteristics, presumptive rules would permit parties to seek, and judges to order, variations when the case has unique problems. If drafters conclude that lawyers will too frequently seek to escape the presumptive rules, and that this will lead to an undesirable increase in motion practice, then the language can be drafted to dissuade variation. For instance, the drafters could make the rules presumptive except in extraordinary circumstances necessitating a change. If judges in the vast majority of cases stick to the presumptive rules, then over time such judicial conduct should dissuade motions.

I am told by experts in many fields that they have a pretty good idea of the nature of information which is central to their type of case. However, they do need guidance on how far back to go and how wide a net to cast for witnesses. Indeed, lawyers who frequently deal with each other make such exchanges already and mandatory prescheduling order conferences will make such exchanges more frequent.<sup>136</sup>

My second suggestion is this: I propose that groups of plaintiffs' lawyers, defendants' lawyers, judges, law professors, and perhaps clients who have experience in a given case-type meet and negotiate in order to come

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*Insurance Companies and Their Lawyers—The Cost Squeeze*, 32 DEF. L.J. 391, 396-97 (1983); Andrew Blum, *Insurers' Cutbacks Hit Firms*, NAT'L L.J., Nov. 22, 1993, at 1. See generally Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 950-53 (1993) (describing the sources of increased competition in attracting large corporate clients, including greater stakes of legal actions and a more sophisticated clientele).

136. FED. R. CIV. P. 26(f).

up with fair presumptive procedural rules for their types of cases. They should also agree on forms that provide presumptive types of allegations and on descriptions of what a fair disclosure of the subject matter of testimony would be in their type of case. The negotiation participants will have to compromise. Plaintiffs may want the evidence to go back five to ten years while defendants may want to go back only one to three years. However, a norm could be established for the first round of core disclosure. Similarly, there could be norms negotiated for the first round of core discovery, the number of depositions and interrogatories that make sense, the length of time for depositions, the key topics for discovery, the length of time to trial, and the types of information that, if true, the parties should normally admit in response to requests for admission.

Before discussing the known objections to the type of integrated procedure I have described, I will mention some of the procedure's advantages. Consider the four fudge points: the extent to which rules confine and define litigation; the extent to which facts and their relevance are recognized as flexible concepts, requiring some restraint; the degree to which lawyers and their nature are realistically addressed, while still respecting and treating lawyers as professionals; and the degree to which the historic judicial role is altered in order to manage cases. First, substance-specific procedure should permit rulemakers to avoid the necessarily vague standards they must utilize when drafting universal rules for all types of cases. Concentrating on specific case-types should enable the drafters to frame some rules which offer more definition and constraint in advance of litigation, such as allegations deemed specific for the case-type (gauged by what lawyers would normally know at certain stages of the specific type of litigation), normal lengths of time for litigation stages, norms for numbers of depositions and interrogatories, usual types of witnesses and documents to be divulged, and the degree of specificity to be provided regarding witness knowledge. Such presumptive rules should result in more definition and constraint in the process and, in turn, more predictability for clients, lawyers, and judges.

Second, this solution confronts the problem of the expansiveness of potentially relevant evidence. The solution makes choices, recognizing that although more information gathering is always possible, there is a point of diminishing returns. Furthermore, if more information is needed, a party can seek more information for good cause. Third, this solution treats lawyers realistically and civilly in several ways. It brings lawyers into the process of crafting rules with greater definition in the types of cases about which they know the most. The solution also offers lawyers meaningful guidance on what is required in their cases. Rather than cursing lawyers, the solution begins to light a candle. Less amorphous and less flexible rules may reduce the delays and expenses which lawyers can cause. More-



over, if I am correct that many clients are now putting pressure on lawyers to reduce costs,<sup>137</sup> this solution should provide a brake on motions to test or alter the limits contained in presumptive rules.<sup>138</sup> Guesswork and uncertainty provide anxiety for lawyers and increase the occasions for conflict with clients. If a rule states specifically what parties must provide, the lawyer can inform the client and perform the task; the clash between loyalty to client and loyalty to the court is reduced.

Finally, judges can begin to return to their proper roles—deciding, or facilitating the decision of cases on their merits; making decisions about cases that apply to more than the one case that is in front of them; and having rules to guide them in their future decisions. If such presumptive rules do work for at least some types of cases, the litigation system could begin to return to a degree of uniformity among district courts and between the federal and state systems. I do not know why the ability to allege facts with more or less specificity for certain types of cases and the type of core information required to bring the law to bear on those facts, should differ from region to region, state to state, or court to court, unless the substantive law is substantially different. If the substantive law is substantially different in some cases, the rules could be adjusted in those states to take account of known differences.

Some, myself included, have labeled such procedures as I now recommend nontransubstantive<sup>139</sup> because they are no longer the same (albeit amorphous) procedures for all types of substantive cases. It now seems to me that either the term integrative procedure or the term substance-specific procedure is a more inviting phrase. Probably the most severe and the most vocal critics of the idea are Professor Paul D. Carrington,<sup>140</sup> Professor Geoffrey C. Hazard,<sup>141</sup> and most recently, Professor Richard L. Marcus,<sup>142</sup> clearly an estimable group whose skepticism must be seriously considered. Five years ago Carrington wrote *An Exorcism of the*

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137. See *supra* note 135 and accompanying text.

138. I recognize that these same economic constraints may serve to reduce motions testing the limits under the recently adopted federal mandatory discovery rules. However, the mandatory discovery provided in new Rule 26(a)(1) has the disadvantages of the three loopholes and of the amorphous, nondefining language which I discussed previously in this article. See FED. R. CIV. P. 26(a)(1); *supra* part III.

139. See *supra* notes 4, 130; *infra* note 140.

140. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989).

141. See, e.g., Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989).

142. Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993).

*Bogy of Non-Transsubstantive Procedure*,<sup>143</sup> a title not apt to invite friendly, reasoned discourse. However, just as I urge that a dialogue might profitably take place among the judges and lawyers, I urge a bit of open-mindedness on this proposed solution, rather than the deaf ear historically characteristic of procedural reformers.

The first major objection is that those who want some rules crafted for some types of cases would, to use a phrase recently chosen by Marcus, “throw[ ] the baby out with the bathwater.”<sup>144</sup> The argument is that the Federal Rules have largely worked well and the flexibility and open-endedness of transsubstantive rules have accommodated the process to all types of cases.<sup>145</sup> Those who disagree with the proposal I offer here find it especially peculiar that someone like myself, who has written about the importance of procedural and substantive law in vindicating civil rights, does not see the great gains from the uniform, flexible rules.<sup>146</sup> I do see gains. However, I also see that the same system has helped turn courts from a place for public adjudication into a forum where advancing cases to the merits is secondary.<sup>147</sup> The current system has helped turn judges into managers<sup>148</sup> and trial lawyers into discoverers with little sense of destination.<sup>149</sup> There has been a diminution of respect for advocacy,<sup>150</sup> jury trials,<sup>151</sup> and the development of defined rights, or causes of action with known elements, which can be vindicated efficiently and fairly in the courts.<sup>152</sup> Judges have turned against lawyers<sup>153</sup> and lawyers are asked

143. Carrington, *supra* note 140, at 2067.

144. Marcus, *supra* note 142, at 761 (citing STEPHEN B. BURBANK, *RULE 11 IN TRANSITION* 71 (1989)).

145. Carrington, *supra* note 140, at 2072-73, 2079-85; Hazard, *supra* note 141, at 2246-47; Marcus, *supra* note 142, at 776-79.

146. Hazard, *supra* note 141, at 2247.

If it is true that substantive legal change often is accomplished by incremental modification of procedure, it is also true that such change is politically most feasible when the change in procedure is only incremental. In this light, the “trans-substantive” critique of the Federal Rules is politically bizarre if, as is evidently the case, it is voiced from a concern that civil litigation continues to be an important instrument of social reform.

*Id.*

147. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 *JUDICATURE* 256, 261-62 (1986); David Neubauer, *Judicial Role and Case Management*, 4 *JUST. SYS. J.* 223, 227-28 (1978-79).

148. Resnik, *supra* note 118, at 374-80.

149. Bell et al., *supra* note 83, at 11 n.27.

150. The attack is often phrased as an attack on the adversary system or adversariness. See Brazil, *supra* note 76, at 1296-1305; Schwarzer, *supra* note 76, at 703-05. For a discussion of the attack on adversariness and arguments in defense of passionate advocacy on behalf of clients, see STEPHAN A. LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984); STEPHAN A. LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION* (1988).

151. For a description of this trend, see Subrin, *supra* note 3, at 929, 946, 964-69; see also Schwarzer, *supra* note 76, at 708 (discussing the use of jury trials by litigants with weak cases).

152. Subrin, *supra* note 3, at 912 n.15, 913 n.22. Indeed, some judges have used the flexibility of

to turn against their clients.<sup>154</sup> Thus, this wide-open system has had an enormous price tag. Moreover, it is not clear to me that historic equity practice was incapable of creating new law when needed. A balance between equity and the constraint of law is desirable.<sup>155</sup>

The second major objection made to the idea of trying to mesh some of the substance case-types with their own procedures is that it will create another point about which lawyers will argue.<sup>156</sup> To paraphrase Clark, line drawing leads to arguments over lines.<sup>157</sup> However, the arguments are already there, as Brazil,<sup>158</sup> Schwarzer,<sup>159</sup> and many other commentators indicate.<sup>160</sup> Wasteful disputes over discovery already exist because lawyers construe discovery both narrowly and broadly to hide, obscure, and cause delay and expense to the opposing side.<sup>161</sup> If arguments and abuse will occur anyway, it makes more sense to try to eliminate some of the arguments and abuse with clearer guidelines. Such guidelines would channel the arguments into arguments over the question of what procedures make sense in a particular case of a particular case-type, given the norms. It is odd to argue against a procedure because the procedure will cause lawyers to argue over lines. That is what law is about—the attempt to confine reality in order to deal with that reality.<sup>162</sup>

modern American procedure to craft substance-specific rules that have the effect of reducing rights and making it difficult, if not impossible, to vindicate them. *See generally* Baumann et al., *supra* note 130 (discussing the use of procedure to thwart the vindication of rights under Title VII).

153. The history of Rule 11, after its amendment in 1983, comes to mind.

154. Bell et al., *supra* note 83, at 46-48; *see also* Dissenting Statement of Justice Scalia, in H.R. DOC. NO. 74, 103d Cong., 1st Sess. 98 (1993), *reprinted in* AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 511 (1993) [hereinafter AMENDMENTS] (addressing the negative impact of the obligation to disclose information damaging to the client on the attorney-client relationship).

155. MAITLAND, *supra* note 62, at 19.

156. Carrington, *supra* note 140, at 2082-83 (noting that a related concern is that line-drawing can defeat substantive rights); *see also* Marcus, *supra* note 142, at 777-78 (noting that procedure must often take into account substance); Shapiro, *supra* note 8, at 1997 (arguing that increased flexibility and generality may mitigate against threats posed to substantive rights and policy objectives by the Rules).

157. Subrin, *supra* note 5, at 138-42; Subrin, *supra* note 3, at 961-75.

158. Brazil, *Civil Discovery*, *supra* note 123, at 792, 848, 871; Brazil, *supra* note 76, at 1313, 1317, 1322-31.

159. Schwarzer, *supra* note 76, at 713.

160. Bell et al., *supra* note 83, at 11 n.27.

161. *See supra* notes 103-14 and accompanying text.

162. *See* *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971); Subrin, *supra* note 3, at 988. In *Boddie*, Justice Harlan stated:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible. . . . Put more succinctly, it is this injection of the rule of law

A related criticism is that neither I nor others have suggested how to divide the cases. Sometimes a case has many different substances.<sup>163</sup> When this is true, the categorization process may turn out to make attempts to craft and apply large numbers of substance-specific procedures problematic, if not impossible. We will discover whether such categorization is in fact possible and productive when lawyers, judges, teachers, and clients who are specialists in the same field attempt to craft substance-specific procedures and when these procedures are applied in litigation.

Optimistically, there are already some substance-specific procedures<sup>164</sup> and we already label cases. Both federal and state courts require cover sheets which place cases in some major category. For the most part, the lawyers know whether a case covers a product defect, an antitrust violation, a securities dispute, or a section 1983 action.<sup>165</sup> If the presumptive requirements do not work for a case, the parties can individually or jointly ask the judge to decide on different requirements. At least lawyers would have something concrete about which to argue; for example, why one set of presumptive limits and disclosures, or a hybrid, might make the most sense, rather than starting each discussion *de novo*.

The third objection to substance-specific procedure is that, historically, those who have wanted procedural change have had political agendas and as a result, rulemaking will become a nonneutral, political arena.<sup>166</sup> The

that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

*Boddie*, 401 U.S. at 374; *see also* Subrin, *supra* note 23, at 340-43 (describing the tension between strict rules and general principles when formulating procedures).

163. Marcus, *supra* note 142, at 777; Shapiro, *supra* note 8, at 1997; *see also* Carrington, *supra* note 140, at 2081 (discussing the wastefulness of disputes concerning which rule controls). Another related criticism suggests that it is not the substantive law in a case which renders the case more susceptible to being aided by distinct procedures. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211-12 (1989).

164. Subrin, *supra* note 52, at 2026, 2040, 2048; *see also* Baumann et al., *supra* note 130, at 243-52 (describing the specificity requirements in Title VII cases).

165. Indeed, lawyers describe themselves as antitrust lawyers, securities lawyers, negligence or products liability lawyers, civil rights lawyers, and so forth. The American Bar Association and the AALS have sections based on specific areas of the law. My former student, Thomas Main, points out that in some litigation and in some areas of law one is not sure of what the most germane substantive law is until after the pleadings have been filed. Rule 11, though, makes research into the law mandatory prior to filing. *See* FED. R. CIV. P. 11. If the major thrust of a case changes as a result of core discovery or amendment, then at that stage of a case new or additional procedures may have to attach. *See* FED. R. CIV. P. 11(b)-(c) & advisory committee's notes. Since the rules would be presumptive, either party could move for good cause at any time for different procedures. I realize, however, that the more frequently such motions take place, the more my argument for predictability and efficiency loses force.

166. Carrington, *supra* note 140, at 2074-79; Marcus, *supra* note 142, at 771-76. Hazard puts a different spin on the issue of the intersection of politics and procedure. Hazard, *supra* note 141, at 2246. He points out that the flexible, nontransubstantive procedure favored social justice litigation, and suggests that those with less power would have probably fared worse under a substance-specific re-

suggestion that meshing some procedures to certain types of cases will suddenly make the rulemaking process more political does not make sense to me. The current debate over a mild form of mandatory disclosure has already brought plaintiff, defendant, and civil rights groups into the fray. The debate was not a contest over substance-specific procedure. Lawyers can have views about politics, gains for their clients, and gains for themselves, yet they can still act responsibly and fairly in reaching compromises that, on balance, make sense.

During the past twelve years, I have watched lawyers act responsibly on our state advisory rules committee, even when a particular type of case is primarily involved.<sup>167</sup> I have seen lawyers vote for rules which might predictably hurt themselves or their clients. An example is the Massachusetts rule that permits videotaped depositions of experts to be used at trial without prior permission.<sup>168</sup> The debate at committee meetings largely centered on the effect such a rule would have on personal injury cases. The rule has risks for both plaintiffs and defendants, but compromises were worked out. To surface the real agendas of lawyers and lobbying groups, and to consider the effects of procedural rules on specific types of cases and clients, does not mean that there is more or less politics; it means that the debate over rules is more honest and open.<sup>169</sup>

There is the remaining issue of under whose auspices such a meshing of process and substance should take place. This is my place for fudging. The job cannot be done by one committee; the job will need working groups of experts for various types of cases. The American Law Institute, the National Conference of Commissioners on Uniform State Laws, or subcommittees sponsored by the Federal Judicial Conference, the American Bar Association, local bar associations, or Civil Justice Reform advisory committees could bring representatives together to attempt to come up with presumptive procedures for those cases that most need restraints. If the rules make sense, judges and lawyers will be glad to embrace them. Over time, some federal district courts, state courts, or individual judges

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gime. *Id.* at 2246-47. Others have argued that civil rights litigants are no longer faring so well under the current procedural regime. Baumann et al., *supra* note 130, at 252-83; Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181-96 (1989); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1913-23 (1989).

167. From 1982 until 1984, I was the Reporter to the Massachusetts Supreme Judicial Court Advisory Committee on Rules of Civil Procedure. I have recently resigned my position.

168. MASS. R. CIV. P. 30A(m).

169. As Burbank has recently pointed out: "The rulemakers' current strategies of burying their heads, dismissing arguments with which they disagree as special pleading or leaving it for Congress to second-guess them if it chooses to do so on 'political' grounds are hardly satisfactory." Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 849 (1993) (footnote omitted).

will experiment with them. Time will tell—and here is more fudging—whether, when, and how the presumptive procedures should more formally become part of a state's rules or of federal procedure.

This is not some newfangled idea. When he was Reporter to the Advisory Committee, Benjamin Kaplan suggested that the time had come to consider different procedures for different types of cases.<sup>170</sup> Professor Maurice Rosenberg made a similar suggestion.<sup>171</sup> The 1983 Advisory Committee Notes to amended Rule 16 mentioned the possibility of using different types of orders for different types of litigation.<sup>172</sup> Asbestos lawyers, with judicial prodding, have created procedures for the first eighteen months of asbestos cases.<sup>173</sup> On December 1, 1993, several lawyers in upstate New York, on different sides of cases, began discussing how they could find out, in advance, what “sufficiently particular allegations” are, and what discovery the allegations would specifically trigger in various types of cases. The Monroe and Erie County Bar Associations in upstate New York have discussed the possibility of pre-announced, substance-specific procedures.<sup>174</sup>

To my mind, it would be a welcome change to test whether procedure can join with substance to provide more predictable justice. For the federal reformers of the early twentieth century, procedure was analogized to a bridge, an unclogged artery, or a clean pipe through which the substance would just flow, unimpeded by the procedure.<sup>175</sup> This analogy failed in practice. Many cases untouched by procedure turned out to be uncontrolled; the cases took too long and cost too much. To some modern reformers, procedure is a federal magistrate or federal judge turned cop who must, on an ad hoc basis, police each case anew. A system of cops and robbers with the lawyers treated as the criminals leaves the clients in the crossfire.

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170. See Burbank, *Transformation*, *supra* note 4, at 1964-67 (reproducing Kaplan's letter of March 2, 1967 to Dean Acheson, Esq., in the Appendix). Kaplan was a Professor of Law at Harvard Law School, and later became a justice of the Supreme Judicial Court of Massachusetts.

171. Maurice Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243, 248-50 (1984). Although Rosenberg evidently does not favor substance-specific procedures. See Schwarzer, *supra* note 86, at 656-57 (suggesting that “[c]ourts may also establish different tracks for disclosure and discovery in different types of cases, as a number have done in their expense and delay reduction plans under the Civil Justice Reform Act”); *supra* note 163. Schwarzer does not, however, suggest that the tracks should be based on the substantive nature of the cases. Schwarzer, *supra* note 86, at 656-67.

172. FED. R. CIV. P. 16 advisory committee's note.

173. See Case Management Orders Nos. 1, 2, 5, 7, *In re: Western District Asbestos Litigation—Pre-Trial Case Management*, Western District Asbestos Litigation Master File (W.D.N.Y.) (1988-90) (on file with the *Florida Law Review*).

174. Interviews with Matthew F. Belanger, Faraci, Lange, Johns & Schwarz, Rochester, New York (Jan. 4 and Dec. 30, 1994).

175. Subrin, *supra* note 3, at 951 & n.245 (citing THOMAS W. SHELTON, *SPIRIT OF THE COURTS* 53, 58-62, 256 (1918)).

With current procedural uncertainty under elastic rules, amended rules, opted out rules, defaults to rules that no longer exist, local rules, civil justice reform plans, standing orders, new orders, and unpublished orders, perhaps we have pushed chaos theory a bit far. I am suggesting the possibility that some procedural rules, particularly those related to time periods and early core discovery, can be fashioned for some selected case-types that would in fact apply, or at a minimum be available, in every federal district court and in many state courts. The rules would be respectful of lawyers while still recognizing their adversariness. Some of these rules would be more rule-like in that they would be prescriptive, defining, and known in advance. They would, without giant escape hatches, provide for truly mandatory disclosure in some cases. Experimentation along these lines is worth pursuing. The proposal should be tested, not against a perfect procedural world, but against the chaotic, unsatisfactory, current world of litigation.<sup>176</sup>

I am fully aware that it is easier to describe a procedural reform and theorize how it will work than it is to effectuate a reform that will work in reality.<sup>177</sup> Actual judges, lawyers, and clients, with real problems, needs, and agendas, inevitably render reforms in operation less tidy and satisfactory than they looked on the drawing board. Nonetheless, like the reformers I so enjoy writing and talking about, I, too, have a dream. My field, civil procedure, may rediscover law through discovery. We might even find ourselves with provisions that are Federal, Rules, Civil, and Procedure.

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176. I am appreciative of the open-mindedness of Professor Jeffrey Stempel who, in this issue of the *Florida Law Review*, grapples with the proposal, overcomes previous antipathy, and endorses experimentation along the lines I suggest. See Stempel, *supra* note 45, at part III.

177. See *supra* text accompanying notes 3-5 (describing how reformers fudge and tend to ignore legitimate concerns and criticism).