

June 2018

# Still a Failure: Broad Pretrial Discovery and the Superficial 2015 Amendments

George Shepherd

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>



Part of the [Civil Procedure Commons](#)

---

## Recommended Citation

Shepherd, George (2017) "Still a Failure: Broad Pretrial Discovery and the Superficial 2015 Amendments," *Akron Law Review*: Vol. 51 : Iss. 3 , Article 8.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol51/iss3/8>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

**STILL A FAILURE:  
BROAD PRETRIAL DISCOVERY AND THE SUPERFICIAL  
2015 AMENDMENTS**

*George Shepherd\**

I.	Introduction .....	817
II.	An Experiment Fails from the Beginning.....	821
	A. New System .....	822
	B. The New Discovery Rules and the Transformation of Litigation.....	823
	C. Continual Tinkering with a Flawed System.....	825
	D. The Supreme Court Eliminates Discovery in Many Cases .....	829
	E. The Ineffectual 2015 Amendments.....	833
	F. Continuing Major Harms .....	835
	1. Broad Discovery’s Impacts on Legal Costs and Outcomes. ....	835
	2. Discovery Harms Legal Culture and Relationships.....	842
	G. Discovery is Inconsistent with the Adversary System.....	844
	H. Discovery Violates Norms of Privacy .....	848
III.	Ending the Failed Experiment .....	851
IV.	Conclusion .....	855

I. INTRODUCTION

The 2015 amendments to the Federal Rules of Civil Procedure (FRCP) were an attempt to control excessive discovery. Faced with increasing amounts of discovery in some cases, especially electronically stored information (ESI), the rules now beg litigants and judges to do

---

\* Professor of Law, Emory University School of Law. I thank seminar participants at Emory University School of Law and George Washington University Law School for helpful comments.

better. One of the main changes to discovery is the new language in Rule 1 that makes it clear that the litigants, not just the judge, have the responsibility to behave in a way that leads to just, speedy, and inexpensive litigation.<sup>1</sup> The other main discovery-related change is that Rule 26 now states explicitly that the amount of discovery should be “proportional to the needs of the case.”<sup>2</sup>

These changes are meek and ineffectual. As to the changes in Rule 1, before the change, it was already clear that securing the just, speedy, and inexpensive determination of a case was the responsibility of both judge and litigant. Indeed, it is impossible to think of anyone else whose responsibility it might have been. As to the changes to Rule 26, since 2000, Rule 26 already had made clear that proportionality was required.<sup>3</sup> All that the 2015 amendment did was to move the proportionality requirement to a different part of Rule 26, and make it even more explicit. These changes have done little to control excess discovery. As we will see, excessive discovery is a deep, fundamental flaw. The 2015 amendments are utterly insufficient to cure it. They are like placing a band aid on the arm of a person with lung cancer; they will do nothing to cure the illness.

Broad discovery harms the litigation process like a cancer.<sup>4</sup> The discovery provisions in the 1938 FRCP, and thereafter in most states’ procedural codes, were a grand experiment. But the last seven decades have shown that, even by the FRCP’s own standards, they are a failure. They have not led to the “just, speedy, and inexpensive determination of every action,” as Rule 1 promised.<sup>5</sup> Instead, discovery is avoided in most cases and ruins many of the rest. Most litigants choose to make their cases discovery-free, finding the process unnecessary, unhelpful, and even harmful.

In contrast, broad discovery has transformed the most important cases: those with the most at stake, addressing society’s most crucial issues and involving the best, highest-paid lawyers. These cases now last

---

1. Rule 1 now provides that “[t]hese rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1 (emphasis added).

2. FED. R. CIV. P. 26(b)(1).

3. The earlier version of the rules prohibited discovery if “the burden or expense of the proposed discovery outweighs its likely benefit,” requiring that discovery be proportional, but not using that word. FED. R. CIV. P. 26(b)(2)(C)(iii) (2014).

4. Much commentary in this Article is based on the author’s earlier work in George B. Shepherd, *Failed Experiment: Twombly, Iqbal, and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465 (2016).

5. FED. R. CIV. P. 1.

longer and cost more to litigate. They settle less, requiring more trials and consuming more judicial resources.<sup>6</sup>

And the harms that discovery causes have become more acute as discovery of ESI has become more important. For example, with a single document request, a litigant can force an adversary to produce millions of pages of the adversary's electronically-stored private information.<sup>7</sup>

There is no reason to conclude that all of this time and expense leads to more justice. Discovery is a powerful weapon for imposing expense and difficulty on an adversary. Plaintiffs and defendants with frivolous cases often use discovery, or the threat of it, to coerce settlements. Defendants escape liability by imposing oppressive, intrusive discovery requests.

The discovery process has made many lawyers wealthy. Because cases last longer and settle less, more lawyers are needed. Each additional dollar of cost that discovery imposes on litigants is another dollar for a lawyer.

However, broad discovery has otherwise deeply harmed the practice of law. Elite lawyers now devote themselves almost completely to discovery and other motions based upon it, such as summary judgment motions. This work, although lucrative, is often boring drudgery. Moreover, the use of broad discovery caused the profession to switch from fixed-fee billing to hourly billing.<sup>8</sup> As this author has explored elsewhere, the switch has harmed the legal profession deeply.

Discovery is against human nature, and it violates norms of privacy. People in the United States expect privacy, especially from their government. Indeed, the Fourth and Fourteenth Amendments to the Constitution have been interpreted as creating certain rights to privacy. The government may not intrude into a citizen's private decisions about contraception, abortion, or homosexual sex.<sup>9</sup> And yet the FRCP permit a government agency—the courts—and a government official—the judge—to intrude into a citizen's most private matters merely because the citizen has sued or been sued.

---

6. See *infra* Section II(F)(1).

7. Martha J. Dawson & Bree Kelly, *The Next Generation: Upgrading Proportionality for a New Paradigm*, DEF. COUNS. J. 434, 437-38 (2015) (noting that Microsoft reports the average amount of pages of discovery documents involved in the average case was more than 59 million).

8. See George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91 (1999).

9. See *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), *Lawrence v. Texas*, 539 U.S. 558 (2003), which all interpret the 14th Amendment to create a right to privacy surrounding these activities.

Because broad discovery is against human nature, litigants who receive discovery requests resist them compulsively. This leads to endless cycles of evasions and motions to compel. Broad discovery is like prohibition. Citizens tend to like both privacy and alcohol. Any attempt to intrude on either privacy or drinking leads to resistance and unhappiness. Because it violated ingrained human preferences, prohibition was a failure. For similar reasons, so too is broad discovery.

Broad discovery should be eliminated. It is a failure and has been so ever since it began in 1938. The rest of the world recognizes this; no other country has copied the United States' approach.<sup>10</sup> Moreover, almost from the start, discovery's flaws have been recognized, with bar committees, scholars, and courts pointing out discovery's harmful effects and proposing changes.<sup>11</sup> Some of the most recent criticism of discovery came from the Supreme Court through its decisions in *Bell Atlantic Corp. v. Twombly*<sup>12</sup> and *Ashcroft v. Iqbal*.<sup>13</sup> Likewise, the 2015 FRCP amendments made further adjustments. However, they achieved little improvement.

Although the diagnosis has been correct, the modest treatments that have been continually implemented have achieved little. The correct cure is simple. Broad discovery is a disease that should be eliminated completely.

Both the legal profession and society at large would be better off without broad discovery. The cost of litigation would decline substantially. Cases would settle more frequently and quicker. Parties would no longer be able to use discovery as a weapon to achieve unfair results. Fewer frivolous suits would result in lucrative settlements. Corporate defendants would no longer be able to stonewall by asserting large, intrusive discovery requests.

Although many lawyers might lose their jobs as litigation becomes quicker and easier, the displaced lawyers would be free to pursue careers that contribute more to society's well-being.

---

10. See Karin Retzer & Michael Miller, *Mind the Gap: U.S. Discovery Demands versus EU Data Protection, Privacy & Security Law Report*, 10 PRIVACY & SEC. L. REP. 886 (2011), <http://media.mofo.com/files/Uploads/Images/110601-US-Discovery-Demands-versus-EU-Data-Protection.pdf> [<http://perma.cc/D8D8-H54E>] (noting Europe, in particular, takes a skeptical view of the U.S. discovery process, as a direct challenge to individual privacy; the European Union adopted the European Privacy Directive and several European states adopted "blocking statutes" with the specific goal of limiting the reach of discovery requests from U.S. courts).

11. See, e.g., Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989); Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513 (2010).

12. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

13. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The elimination of broad discovery is not a risky, fringe proposal. Instead, the current U.S. system is the extreme outlier. Eliminating broad discovery would return the United States to the mainstream with almost every other country. As in other countries, discovery should be strictly limited and allowed only in exceptional circumstances.<sup>14</sup>

The Supreme Court has recently expressed similar concerns about the discovery process and, even more importantly, has eliminated discovery in some cases.<sup>15</sup> The decisions in *Twombly* and *Iqbal* nominally addressed issues of pleading.<sup>16</sup> However, like the analysis in this Article, their focus was on the harms of the discovery process.<sup>17</sup> Moreover, just as this Article proposes, the decisions eliminate discovery in some cases; the decisions require early dismissal of certain cases that might otherwise lead to broad discovery.

The proposal in this Article safely builds on the *Twombly* and *Iqbal* decisions by proposing elimination of broad discovery in all cases, rather than just some. The decisions moved in the right direction, but did not go far enough. Instead, broad discovery should be eliminated completely.

This Article proceeds as follows. Section II discusses the history of discovery and its many harmful impacts. Section II also discusses attempts over many decades to fix the system by tinkering with the discovery rules, as well as making changes judicially, as in *Twombly* and *Iqbal*, and in the 2015 FRCP amendments. Section III describes how eliminating broad discovery would provide many benefits and little harm.

## II. AN EXPERIMENT FAILS FROM THE BEGINNING

The discovery provisions of the FRCP created a new experimental system that had not been tried anywhere else. The new discovery rules transformed the practice of law. However, almost immediately, critics began to note the system's basic flaws. A wide array of fixes have been proposed and adopted.<sup>18</sup> However, these fixes have not worked. Discovery still imposes many harms.

---

14. See Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 764 (2003).

15. See, e.g., *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

16. See, e.g., *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

17. See, e.g., *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

18. See, e.g., Easterbrook, *supra* note 11; Netzorg & Kern, *supra* note 11.

### A *New System*

The drafters of the discovery provisions of the FRCP knew that their new system was revolutionary and unprecedented.<sup>19</sup> Although some state courts offered isolated discovery opportunities, no state combined them together as did the FRCP. Moreover, many of the state provisions that did exist could not take effect because courts held that federal provisions with no discovery occupied the field, precluding application of the state provisions.<sup>20</sup>

The new federal discovery rules were a complete list of all discovery devices that were available in any state and in Great Britain.<sup>21</sup> The methods now include: required initial disclosures,<sup>22</sup> depositions by oral examination,<sup>23</sup> depositions by written questions,<sup>24</sup> interrogatories,<sup>25</sup> production of documents and things,<sup>26</sup> medical examinations,<sup>27</sup> and requests for admission.<sup>28</sup>

The approach was revolutionary not only because of the number of discovery devices that were now available, but also because of how easily the devices could be invoked. At the same time, the rules that permitted the discovery devices also permitted what is called “notice pleading.”<sup>29</sup> A plaintiff could file a complaint, survive a motion to dismiss, and be permitted to use the discovery devices by providing a complaint that offered merely “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>30</sup> Later courts interpreted this to mean that the complaint could include only the simplest conclusory summary of the plaintiff’s differences with the defendants, and needed to include few, if any, facts.<sup>31</sup> Accordingly, a plaintiff can commence a case with few, or

19. See Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 158-59 (1999) (noting that the new discovery provisions were genuinely unprecedented); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 734, 736 (1998) (describing the 1938 “discovery revolution”).

20. Marcus, *supra* note 19, at 159; Subrin, *supra* note 19, at 698-701.

21. Marcus, *supra* note 19, at 159; Subrin, *supra* note 19, at 718-19.

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

23. FED. R. CIV. P. 30.

24. FED. R. CIV. P. 31.

25. FED. R. CIV. P. 33.

26. FED. R. CIV. P. 34.

27. FED. R. CIV. P. 35.

28. FED. R. CIV. P. 36.

29. *Pleading*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A system of defining and narrowing the issues in a lawsuit whereby the parties file formal documents alleging their respective positions.”).

30. FED. R. CIV. P. 8(a)(2).

31. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

no, facts in hand and instead attempt to gather facts during the discovery process.

The framers knew that their approach was unprecedented.<sup>32</sup> Moreover, they knew that such broad discovery created dangerous risks of abuse.<sup>33</sup> However, as the chief reporter for the FRCP, Charles Clark, later noted, the chairman of the Advisory Committee on these provisions, Edson Sunderland, “had developed both the enthusiasm and the drive of a crusader” to have the discovery provisions adopted.<sup>34</sup> Indeed, Sunderland had for years argued in print that broad discovery should be permitted.<sup>35</sup> Accordingly, in public hearings on the provisions, the committee did not focus on the provisions’ revolutionary nature, instead suggesting that the changes were merely incremental.<sup>36</sup>

Later courts recognized the new rules’ revolutionary nature. For example, in the famous *Hickman v. Taylor* case, the Third Circuit noted in 1945 that “[t]he rules probably go further than any State practice.”<sup>37</sup> Similarly, the FRCP’s chief reporter noted, in 1959: “The system thus envisaged . . . had no counterpart at the time [Edson Sunderland] proposed it.”<sup>38</sup>

#### B. *The New Discovery Rules and the Transformation of Litigation*

Before 1938, federal courts denounced any attempt to require disclosure of the adversary’s case or evidence as improper “fishing expeditions.”<sup>39</sup> By 1946, the new FRCP’s discovery rules had converted these attitudes completely. In the appeal of *Hickman v. Taylor*, the Supreme Court stated: “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his or her opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”<sup>40</sup>

The new provisions for wide-open discovery created both opportunities and incentives. First, the new rules greatly expanded

---

32. Marcus, *supra* note 19, at 160; Subrin, *supra* note 19, at 734, 736.

33. Marcus, *supra* note 19, at 160; Subrin, *supra* note 19, at 719.

34. Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 9 (1959).

35. See generally Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933).

36. Marcus, *supra* note 19, at 160; Subrin, *supra* note 19, at 725-26.

37. *Hickman v. Taylor*, 153 F.2d 212, 216 (3d Cir. 1945), *aff’d*, 329 U.S. 495 (1947).

38. Clark, *supra* note 34, at 11.

39. See *Carpenter v. Winn*, 331 U.S. 533, 540 (1911).

40. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

litigants' opportunities to obtain information from their adversaries.<sup>41</sup> Second, the new rules created an incentive for lawyers to use discovery, not only to obtain useful information, but also to gain tactical advantage by imposing large discovery costs on their adversaries. Conducting discovery became expensive, both for the party who sought discovery and for the party who responded to the discovery request.<sup>42</sup>

As lawyers exploited the new opportunities for broad discovery, the discovery process transformed the practice of law.<sup>43</sup> Maurice Rosenberg, one of the leading experts on the FRCP and litigation procedure, has noted that "[n]o change in litigation practice resulting from the Rules has had as great an impact as the liberalization of pretrial discovery."<sup>44</sup> Although some cases had little discovery, in a substantial fraction of cases, the use of discovery quickly exploded and, as Rosenberg has noted, discovery "expanded from a useful tool to a combination lawyer's industry and litigator's religion."<sup>45</sup> Before 1938, lawyers who conducted lawsuits were called "trial lawyers." After the growth of discovery shifted the focus from trial to expanded pretrial proceedings, trial lawyers began to be called "litigators."<sup>46</sup> For most, "trial lawyer" was no longer an accurate title. Even in the small minority of cases in which trials occurred,<sup>47</sup> the trials were now often preceded by long periods of intense pretrial maneuvering.<sup>48</sup>

Broad discovery's impact on the profession grew greater as state after state began to copy the new federal system,<sup>49</sup> and as lawyers gradually began to adjust their professional behavior to the new discovery environment.<sup>50</sup> Even after a jurisdiction adopted wide-open discovery, it could take years for lawyers to learn to exploit fully the opportunities that discovery offered both to obtain information and to seek strategic advantage.

---

41. See FED. R. CIV. P. 26-37.

42. See George B. Shepherd, A Theoretical Model of the Pretrial Litigation Process and Discovery (Sept. 16, 1998) (unpublished manuscript) (on file with author).

43. See generally Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197 (1989).

44. *Id.* at 2203.

45. *Id.*

46. *Id.*

47. See WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 97-98 (Russell Sage Found. 1968).

48. See Rosenberg, *supra* note 43, at 2203-04.

49. See Shepherd, *supra* note 4, at 469.

50. Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—'Much Ado About Nothing?'*, 46 HASTINGS L.J. 679, 695-96 (1995).

### C. *Continual Tinkering with a Flawed System*

Almost immediately after 1938, lawyers and commentators began to note the new system's flaws.<sup>51</sup> Initially, the focus was on how broad discovery in federal and state litigation caused litigation costs to grow quickly.<sup>52</sup> Discovery costs soon began to consume more than one-third of the average case's litigation costs.<sup>53</sup> In the decade after 1938, testimony before Congress and a cascade of articles criticized the new discovery rules.<sup>54</sup>

Among other concerns, a frequent complaint was discovery's great expense.<sup>55</sup> For example, in 1951, an official for the federal courts wrote:

Today, after thirteen years of experience under liberal discovery rules, complaints are heard. It is said: (1) That discovery is expensive and time consuming out of proportion to benefits; that depositions last weeks, interrogatories and admissions cover thousands of items, and motions to produce call for tons of documents.<sup>56</sup>

Similarly, the report from an extensive 1954 investigation concluded:

[T]he average practitioner, in addition to being saddled with such overhead expenses as rising costs of office rents and clerical help, must cope with increased court costs, filing fees and lengthy pre-trial examinations . . . which are generally required in all negligence actions, regardless of the nature of the injury or the amount of the probable recovery.<sup>57</sup>

Cost increases that resulted from wide-open discovery were not limited to increases in pretrial costs. In addition, discovery both reduced

51. For a list of some of the early articles that criticized discovery, see William H. Speck, *The Use of Discovery in United States District Courts*, 60 *YALE L.J.* 1132, 1133 n.3 (1951).

52. See *id.* at 1132.

53. See GLASER, *supra* note 47, at 179.

54. See Speck, *supra* note 51, at 1133 n.3.

55. *Id.* at 1132.

56. *Id.* Another survey described lawyers' common complaints about discovery, one of which was, "[l]itigation is more expensive and takes more time than formerly, because of the great amount of work and documentation introduced by discovery." GLASER, *supra* note 47, at 36.

57. Louis P. Contiguglia & Cornelius E. Sorapure, Jr., *Lawyer's Tightrope—Use and Abuse of Fees*, 41 *CORNELL L.Q.* 683, 701 (1956). Likewise, a 1957 article in the *ABA Journal* on the new pretrial discovery rules noted:

Even though the Rules specifically provide protective measures against abuse, embarrassment and undue annoyance, nevertheless not only our own observations but the reported cases demonstrate the terrific time, expense and effort which can be, and are to a significant extent, the results of the procedure outlined in these Rules.

Clyde A. Armstrong, *The Use of Pretrial and Discovery Rules: Expedition and Economy in Federal Civil Cases*, 43 *AM. B. ASS'N J.* 693, 694 (1957).

the frequency of settlement and caused trial costs other than discovery to increase.<sup>58</sup> The drafters of the FRCP had predicted that, although discovery would impose some additional cost before trial, total costs would decline because discovery would cause more cases to settle.<sup>59</sup>

The prediction was wrong. Both earlier and recent studies demonstrate that discovery did not produce a higher proportion of settlements than would occur without discovery.<sup>60</sup> Instead, at the same time that discovery increased pretrial costs, it *decreased* the settlement rate, caused trials to become *longer*, and failed to reduce surprise at trial.<sup>61</sup> Scholars have developed various theories about why discovery deters settlement, including the explanation that discovery appears to create more disagreements than it resolves.<sup>62</sup> Moreover, it appears that once litigants have spent large amounts on discovery, litigants have psychological difficulty in letting go and settling, even when it is in their financial interest to do so.<sup>63</sup>

Whatever the reasons, the bar recognized that discovery caused total litigation costs to increase.<sup>64</sup> The following conclusion from a 1951 American Bar Association (ABA) survey was typical:

Discovery does not appear to have been successful in speeding the disposition of cases, for instead the courts seem to have taken over a larger share of the burden of investigation. A comparison between cases with and without discovery in Chicago and Maryland disclosed that discovery is associated both with the cases which take longer to dispose of and with cases which more often go to trial.<sup>65</sup>

---

58. See GLASER, *supra* note 47 at 97-98, 101, 107; see also Rosenberg, *supra* note 43, at 2204; Speck, *supra* note 51, at 1152, 1155; Maurice Rosenberg, Changes Ahead in Fed. Pretrial Discovery, 45 F.R.D. 479, 489 (1968). For a review of various empirical studies, see Sorenson, *supra* note 50, at 706-10 (1995).

59. See GLASER, *supra* note 47 at 9-12; Rosenberg, *supra* note 43, at 2204-05.

60. See sources cited *supra* note 58.

61. See sources cited *supra* note 58.

62. A survey of discovery practice concluded: "Discovery gives the attacking party more confidence in raising his price for a settlement, but this often has the unintended effect of carrying the case closer to trial." GLASER, *supra* note 47, at 97. Glaser concluded that discovery leads to new disagreements between the litigants, rather than resolving disagreements. See *id.* at 91-101; see also generally Rosenberg, *supra* note 43, at 2204 (arguing discovery raises more new factual issues than it resolves); Shepherd, *supra* note 42 (noting the discovery rules establish incentives that induce a litigation arms race and deter settlement).

63. Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753, 753 (1995) (recognizing discovery increases pretrial expenses and psychological studies indicate that people decline to settle after they have incurred great expense).

64. See Speck, *supra* note 51, at 1154-55.

65. *Id.* at 1155.

Likewise, a lawyer from Indiana compared practice in federal court with practice in state court, where discovery was prohibited, and noted, “[o]ur office files for federal cases are from two to three times as thick as those for comparable cases in state courts . . . .”<sup>66</sup> Addressing the problems “of the tremendous expense, effort and time which can be required of parties involved in litigation,” a law firm partner from Pittsburgh wrote in the *ABA Journal* in 1957 that “it seems clearly evident that in many respects the procedure provided for in the Rules has aggravated rather than alleviated them.”<sup>67</sup> A decade later, a survey indicated that discovery costs made up 19%-36% of litigation costs.<sup>68</sup>

The new wide-open discovery substantially increased costs in another way: by increasing uncertainty.<sup>69</sup> After broad discovery was introduced, a lawyer was much less certain about the time and expense that a case would require to litigate.<sup>70</sup> Such uncertainty is a real cost. Indeed, the insurance industry is based on people’s willingness to pay to eliminate such risk.

Although discovery caused litigation costs to increase greatly in some cases, it caused little increase in others.<sup>71</sup> Large average discovery costs hid wide variation in discovery costs in individual cases.<sup>72</sup> A survey in 1951 noted many complaints “[t]hat discovery is expensive and time consuming.”<sup>73</sup> However, the survey also noted the wide variation in discovery amounts. Some cases had voluminous discovery, but some had little.<sup>74</sup> Indeed, both this 1951 survey and another survey from the same year noted that no discovery occurred in more than half of the cases filed.<sup>75</sup> Likewise, a survey of discovery costs in the early 1960s showed that average discovery expenses were substantial.<sup>76</sup> However, the variation among individual cases was broad. Again, some cases had no discovery, in others it was moderate, and in some it was substantial.<sup>77</sup> A decade later, surveys continued to show that no discovery occurred in

---

66. GLASER, *supra* note 47, at 162.

67. Armstrong, *supra* note 57, at 695.

68. Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 780 (2010).

69. See generally George B. Shepherd, *An Empirical Study of the Economics of Pretrial Discovery*, 19 INT’L REV. L. & ECON. 245, 253-55 (1999).

70. See generally *id.*

71. See Speck, *supra* note 51, at 1150.

72. See *id.*

73. *Id.* at 1132.

74. See *id.* at 1150.

75. See *id.* at 1134; The Practical Operation of Fed. Discovery, 12 F.R.D. 131, 133 (1952).

76. See GLASER, *supra* note 47, at 179.

77. See *id.* at 164-66.

more than half of cases, and that in cases with discovery, the amount of discovery varied widely.<sup>78</sup>

What followed over the coming years was continued dissatisfaction with the discovery process interspersed approximately once per decade with modest reform attempts.<sup>79</sup> Dissatisfaction in the late 1950s and early 1960s led to funding of a large study of discovery practices in the mid-1960s.<sup>80</sup> This in turn led to modest amendments in 1970.<sup>81</sup>

After another decade of continued dissatisfaction, additional amendments occurred in 1980 and 1983.<sup>82</sup> The new changes required additional judicial supervision of discovery.<sup>83</sup> A discovery conference was now required, signing of discovery requests now certified that such requests were necessary, and judges were to impose time limits for discovery and stop discovery that was disproportionate.<sup>84</sup>

The changes helped little.<sup>85</sup> Judges refused or were unable to both police discovery effectively and to make the disproportionality decisions.<sup>86</sup> The decades since 1938 in which judges had been required to intervene little in discovery had created habits that were hard to break.<sup>87</sup> In addition, judges felt that they lacked sufficient information about cases to decide whether discovery requests were proportionate.<sup>88</sup> Thus, as Richard Marcus noted, the changes “were something of a dud.”<sup>89</sup>

After another decade of dissatisfaction, the federal discovery provisions received seemingly important new changes in 1993.<sup>90</sup> There were numerical limits on depositions, moratoriums on discovery until the

78. See PAUL R. CONNALLY ET AL., FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY 28-29 (1978), [http://www.fjc.gov/public/pdf.nsf/lookup/jcclpdis.pdf/\\$file/jcclpdis.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/jcclpdis.pdf/$file/jcclpdis.pdf) [<http://perma.cc/TWT8-Q33P>]; see also Jeffrey J. Mayer, *Prescribing Cooperation: The Mandatory Pretrial Disclosure Requirement of Proposed Rules 26 and 37 of the Federal Rules of Civil Procedure*, 12 REV. LITIG. 77, 87-88 n.19 (1992); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1434-35, 1441-42 (1994).

79. See GLASER, *supra* note 47, at 26-37.

80. *Id.*

81. Marcus, *supra* note 19, at 161.

82. See generally Amendments to the Fed. Rules of Civil Procedure, 85 F.R.D. 521 (1980); Amendments to the Fed. Rules of Civil Procedure, 97 F.R.D. 165 (1983).

83. See generally Amendments to the Fed. Rules of Civil Procedure, 85 F.R.D. 521; Amendments to the Fed. Rules of Civil Procedure, 97 F.R.D. 165.

84. See generally Amendments to the Fed. Rules of Civil Procedure, 85 F.R.D. 521; Amendments to the Fed. Rules of Civil Procedure, 97 F.R.D. 165.

85. Marcus, *supra* note 19, at 162-63.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 163.

90. Amendments to the Fed. Rules of Civil Procedure, 146 F.R.D. 401 (1993).

parties met and submitted a discovery plan to the judge, and most controversially, mandatory initial disclosures of relevant witnesses and documents.<sup>91</sup>

After additional discontent, especially with mandatory initial disclosures, additional changes occurred in 2000.<sup>92</sup> The rules limited mandatory disclosure to documents that supported a party's claims or defenses.<sup>93</sup> In addition, the changes narrowed the scope of discovery modestly.<sup>94</sup>

Despite discovery causing lawyers continual irritation, it produced one great benefit for the profession. Discovery has eventually led to increases in lawyers' incomes and the hiring of more lawyers; which occurred once discovery caused the profession to switch to hourly billing in the late 1960s and early 1970s. The combination of discovery and hourly billing was a bonanza for lawyers.<sup>95</sup>

Some additional changes then occurred, first by the Supreme Court's judicial intervention, and then by amendments to the FRCP in 2015.

#### D. *The Supreme Court Eliminates Discovery in Many Cases*

In two decisions from 2007 and 2009, the Supreme Court recognized that the decades of tinkering with the rules had not worked.<sup>96</sup> Despite all of the rule changes, discovery abuse was still pervasive. So, the Supreme Court effectively eliminated discovery in many cases.<sup>97</sup> It did so not by changing the discovery rules, but by changing the pleading rules to make it much more difficult for a plaintiff to survive a motion to dismiss for failure to state a claim.<sup>98</sup> For these cases, the decisions effectively eliminated discovery.<sup>99</sup>

In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Supreme Court abandoned the notice-pleading standard that had existed for more than half a century.<sup>100</sup> The notice-pleading standard was one of the two columns that supported the system for broad discovery; in many cases,

---

91. Marcus, *supra* note 19, at 163-64.

92. Amendments to the Fed. Rules of Civil Procedure, 192 F.R.D. 340 (2000).

93. *Id.*

94. Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 80-82 (2000).

95. See Shepherd & Cloud, *supra* note 8.

96. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

97. See generally *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

98. See generally *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

99. See generally *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

100. See generally *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

discovery was broad only because the combination of notice pleading and the discovery rules permitted discovery.

Notice pleading and the discovery rules would combine to produce broad discovery in two steps. First, notice pleading would permit a complaint to survive until the discovery process began.<sup>101</sup> Until the two decisions, a plaintiff was permitted to file a complaint that provided the defendant with nothing but minimal notice about the nature of the plaintiff's claims against the defendant.<sup>102</sup> A complaint with few, or no, facts would usually survive a motion to dismiss.

Second, when the motion to dismiss had been surmounted, the plaintiff could move on to conduct discovery.<sup>103</sup> The broad discovery rules would then become important, permitting the plaintiff to obtain broad categories of information, including, perhaps, the facts that were necessary to support the allegations in the complaint.

In sum, before the decisions, the combination of notice pleading and the discovery rules meant that a plaintiff whose complaint contained few facts could conduct discovery. Indeed, the system permitted plaintiffs to use discovery to find the facts to support the complaint. As the Court noted in *Hickman v. Taylor* in 1947, the new system that the FRCP created was designed to permit a plaintiff to file a conclusory complaint now, and then find the facts to support the complaint later in discovery.<sup>104</sup> The Court stated, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."<sup>105</sup> The combination of notice pleading and the discovery rules opened the discovery floodgates.

*Twombly* and *Iqbal* have now, in many instances, closed these floodgates, eliminating discovery in some cases. No longer are fishing expeditions allowed. The plaintiff must now have facts in hand at the time of filing the complaint. The plaintiff may no longer file the complaint first and then use the discovery process to find facts later.

In the two decisions, the Court made it much more difficult for a plaintiff's complaint to survive a motion to dismiss and therefore much more difficult for a plaintiff to be able to proceed far enough in the case to be permitted to conduct discovery. That is, the decisions' effect is to shut off many plaintiffs from access to the discovery process. The two

---

101. See generally *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

102. See generally *Conley v. Gibson*, 355 U.S. 41 (1957); *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

103. See generally *Conley*, 355 U.S. 41; *Dioguardi*, 139 F.2d 774.

104. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

105. *Id.*

decisions have, in many cases, eliminated discovery just as effectively as would a revision to the FRCP that eliminated depositions, interrogatories, or requests for production.

The facts of *Twombly* are simple. The plaintiff alleged that the defendants had conspired to violate antitrust laws.<sup>106</sup> However, the plaintiff's complaint lacked any direct evidence that the defendants had conspired together.<sup>107</sup> Instead, the plaintiff hoped to acquire such evidence during the case's discovery process.<sup>108</sup> That is, the case would have been just the sort of "fishing expedition" that the Court in *Hickman* in 1947 had said was permitted under the system of notice pleading and broad discovery.<sup>109</sup>

The Court's analysis proceeded as follows. First, the Court recognized that earlier attempts, noted above, to control and reduce discovery had failed.<sup>110</sup> For example, the Court wrote that increased judicial supervision of the discovery process was no solution stating:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.<sup>111</sup>

Quoting at length from an article by a federal judge that indicated that better judicial case management could not reduce discovery abuse, the Court noted, "[g]iven the system that we have, the hope of effective judicial supervision is slim."<sup>112</sup>

Likewise, the Court indicated that discovery abuse could not be eliminated by either increased use of summary judgment or improved jury instructions:<sup>113</sup> "It is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judgment stage,' much less 'lucid instructions to juries.'"<sup>114</sup>

Instead, even with better case management, better summary judgment practice, and improved jury instructions, unscrupulous plaintiffs with frivolous cases could still extort large settlements by threatening to

---

106. *Twombly*, 550 U.S. at 544.

107. *Id.* at 564.

108. *Id.* at 559.

109. *Hickman*, 329 U.S. at 507.

110. *Twombly*, 550 U.S. at 544.

111. *Id.* at 559.

112. *See id.* at 597 (quoting Easterbrook, *supra* note 11, at 638-39).

113. *Id.* at 569-70.

114. *Id.* at 559.

impose discovery expense. The Court noted that, even with the new approaches to control discovery abuse, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”<sup>115</sup>

The Court then reached its striking conclusion: to eliminate the possibility of discovery abuse, it was necessary to tighten the pleading standard—here for pleading conspiracy under § 1 of the Sherman Antitrust Act.<sup>116</sup> The Court indicated that “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.”<sup>117</sup> Cases that failed to achieve this pleading standard would be dismissed and prohibited from continuing on to the next stage where discovery was allowed.<sup>118</sup> That is, a case would now be dismissed if a plaintiff’s only route to success was through a discovery fishing expedition.

The later decision in *Iqbal* made clear that the new pleading standard applied generally and not just to antitrust cases.<sup>119</sup> Although the opinions in *Twombly* and *Iqbal* did not purport to change interpretation of the specific discovery rules—Rules 31 through 36 of the FRCP—they had the same impact in many cases as if the Court had revoked the rules. In many cases in which discovery would have been available before the decisions, discovery is now no longer available; the plaintiff’s complaint must now be dismissed before the case reaches the discovery phase.

*Twombly* and *Iqbal* represent a fundamental rejection of the discovery system that the FRCP established in 1938 and that the Court had protected for seven decades. Concluding that the existing system created inefficiencies and abuse, and that other judicial and legislative attempts at cures had failed, the Court stopped merely tinkering. Instead, it eliminated discovery for many cases. The decisions represent a fundamental reduction in the number and type of cases in which discovery is available.

The Court did exactly what this Article proposes, except the Court eliminated discovery for only some cases. The only difference between this Article’s proposal and the Court’s resolution of *Twombly* and *Iqbal*:

---

115. *Id.*

116. *Id.* at 556.

117. *Id.* at 559 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

118. *See id.* at 569-70.

119. *See generally* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

this Article suggests that reform should go further and eliminate broad discovery in all cases, not just in some of them.

*E. The Ineffectual 2015 Amendments*

In 2015, the FRCP were tinkered with some more. Recognizing that discovery was still often excessive and subject to abuse, the rules were amended in two main ways. First, Rule 1 was amended to make clear that both the judge and the litigants were responsible for ensuring that a case proceeded without abuse, including discovery abuse. Before, Rule 1 had read: “These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>120</sup> The 2015 amendments added a few words to make clear that the people who were required to do the construing and administering were the judge and litigants. Rule 1 now provides that “[t]hese rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>121</sup>

This amendment does little, if anything. Without the amendments, it was already clear that the people who were responsible for obtaining just, speedy, and inexpensive determination were the judge and litigants. When the original formulation indicated that the rules “should be construed and administered” to require justice, speed, and efficiency, it was clear that this meant that the judge was to interpret the rules to foster these goals, and that the judge was to “administer” the rules so as to impose these requirements on the litigants. The task of “construing” is the judge’s. And the people to whom the judge “administers” are the litigants.

The new words add nothing. Before the 2015 amendments, it was clear that the rules demanded that the judge require the parties to litigate so as to achieve justice, speed, and efficiency. After the amendments, the rules indicated exactly the same thing, except with added redundant language.

The 2015 amendments’ second main alteration was to include in the specification of the scope of allowable discovery that any discovery be:

proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely

---

120. FED. R. CIV. P. 1 (2014).

121. FED. R. CIV. P. 1 (emphasis added).

benefit.<sup>122</sup>

At first glance, this might seem to be a major new limit on the scope of discovery. However, that impression is incorrect. The preexisting version of the rules already contained almost all of this language, only in a different, less-central section. The rules prohibited discovery if “the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>123</sup> That is, even before 2015, the rules required proportionality—that cost did not outweigh benefit. The innovation of the 2015 provision was to use the word “proportional.” However, even before 2015, the proportionality requirement already existed, just without using the word “proportional.”

Moreover, other than the phrase including “proportional,” the old wording was very similar to the new. The old wording was:

[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.<sup>124</sup>

As can be seen, the new wording is very similar to the old wording above.

The 2015 revisions placed this paragraph in a more central position, as part of the definition of the scope of discovery, rather than in a separate section. But this should make little difference to the limitations that the paragraph imposes. The paragraph imposes the same requirements, regardless of whether it is moved a half a page from its original position.

The revisions, then, do little except add the word “proportional” to a preexisting paragraph that already implies a proportionality requirement, and then move the paragraph to a more central position in the definition of scope of discovery. The 2015 revision does not change the rules, but instead just moves them around.

In most every situation, outcomes would be the same under the old version as under the new. For example, suppose that a lawsuit had modest stakes of \$50,000, but a litigant was proposing to take ten depositions, which would cost each litigant \$5,000 in attorney’s fees and expenses for each deposition. The depositions would be prohibited under the 2015

---

122. FED. R. CIV. P. 26(b)(1).

123. FED. R. CIV. P. 26(b)(2)(C)(iii) (2014).

124. FED. R. CIV. P. 26(b)(2)(C)(iii) (2014).

amendments, because the large expense of the depositions was not “proportional to the needs of the case.”

But the depositions would also have been prohibited before 2015, because “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, [and] the amount in controversy.”<sup>125</sup>

#### F. Continuing Major Harms

Despite the continued tinkering at the system’s edges in the 2015 amendments, and despite the changes from *Twombly* and *Iqbal*, the system’s fundamental structure remains intact. Just as before, litigants in many cases can demand large amounts of information from their adversaries and impose large costs. Discovery still imposes the harms about which lawyers and litigants began to complain immediately after 1938. Indeed, changing technology, especially information that is now available in electronic form, has caused the harms to worsen.<sup>126</sup>

There are two reasons why the system does not provoke complete outrage. First, lawyers often benefit from discovery because it increases their incomes, although at their clients’ expense. Second, the system has existed for so long that most have gotten used to it. Almost nobody is alive who remembers life in the United States without discovery. Familiarity has deadened almost everyone to its obvious flaws.

The following are discovery’s impacts. They are mainly harmful. There are two main categories: effects on legal costs and outcomes and effects on legal culture and relationships.

##### 1. Broad Discovery’s Impacts on Legal Costs and Outcomes

Discovery has increased litigation costs. A large study by the Federal Judicial Center examined more than 1,000 cases in federal court in case categories that would tend to have at least some discovery.<sup>127</sup> The results indicate that discovery consumes approximately half of all litigation expenditures for the median case.<sup>128</sup>

---

125. FED. R. CIV. P. 26(b)(2)(C)(iii) (2014).

126. See generally Ryan J. Reaves, *The Dangers of E-Discovery and the New Federal Rules of Civil Procedure*, 3 OKLA. J.L. & TECH. 32 (2007).

127. See Thomas W. Willging et al., *An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 528 (1998).

128. See *id.* at 531; see also Marcus, *supra* note 19, at 167.

In absolute terms, the amounts that discovery consumes are large.<sup>129</sup> The study indicated that discovery, in the median case, consumed approximately 3% of the stakes.<sup>130</sup> That is, in a case with stakes of \$10 million, direct discovery expense would be more than \$300,000. Other earlier studies have produced similar estimates as to both relative and absolute expenses for discovery.<sup>131</sup>

These expenses did not include the costs to the client of disruption from discovery. For example, not included were the costs of company employees' identifying responsive documents. Nor did they include the large costs of the disruption when officers, directors, and other employees must be prepared for and attend depositions. Even apart from the direct legal fees for discovery, the discovery process in substantial litigation can paralyze a company. Although discovery's indirect costs are impossible to measure with accuracy, indirect costs may often exceed the direct costs for attorney's fees.

Such costs might be acceptable if they achieved anything beneficial. However, all of the expense and disruption appears to be counterproductive. For example, a major benefit that the drafters promised for the 1938 federal discovery provisions was that discovery would promote quick settlement.<sup>132</sup> The rules would force each litigant to put his or her cards on the table.<sup>133</sup> When the litigants could see the relative strengths of their position and their adversary's position, cases would quickly settle.<sup>134</sup> Indeed, the new discovery provisions would do much of the work in achieving the "just, speedy, and inexpensive determination of every action," as the drafters promised in their new Rule 1.<sup>135</sup>

The predictions have been wrong. As already mentioned, both earlier and recent studies indicate that rather than increasing the settlement rate, discovery has reduced it.<sup>136</sup>

Because discovery makes the litigation process inefficient and consumes so much additional lawyer time, it has increased lawyers' incomes and led to the hiring of many additional lawyers.<sup>137</sup> But the high incomes for a large population of lawyers is at society's expense. Incomes and employment would increase in the nuclear power industry, at least in

---

129. Willging et al., *supra* note 127, at 548-49.

130. *See id.* at 549; Marcus, *supra* note 19, at 167.

131. *See generally* GLASER, *supra* note 47.

132. *See* Marcus, *supra* note 19, at 170 n.97.

133. *Id.*

134. *Id.*

135. FED. R. CIV. P. 1.

136. *See* sources cited *supra* note 57.

137. Shepherd & Cloud, *supra* note 8, at 135.

the short run, if the industry purposefully caused a meltdown. Indeed, higher incomes and employment for lawyers is one of discovery's harms, not a benefit.<sup>138</sup> That lawyers benefit from the waste that discovery causes does not change the fact of the waste.

Moreover, even if one looks only at discovery's impacts on the legal profession—as this Article does in the next section—rather than appropriately on its impact on society as a whole, the other harms that discovery causes more than overwhelm the possible financial benefit that discovery has provided to the profession. The profession, not just society as a whole, is worse off with discovery.

Although discovery is expensive, disruptive, and decreases the settlement rate, it might nonetheless be worthwhile if it produced outcomes with more justice. Occasionally, discovery achieves this goal.<sup>139</sup> For example, plaintiffs in a products liability case may discover the smoking-gun document that establishes the defendant's liability.<sup>140</sup> For example in *Grimshaw v. Ford*, the plaintiff obtained discovery of an internal Ford document that indicated that the company had, in deciding not to install a cheap safety device, balanced the cost of the device against the value of the lives that might be saved.<sup>141</sup> Likewise, in a U.S. Department of Justice antitrust suit against Microsoft, the government obtained many of Bill Gates's and other executives' internal emails in which they indicated their intention to squash the competition.<sup>142</sup>

However, the discovery process often produces injustice instead. Eventually, plaintiffs started to win cases against tobacco companies in part because of internal company documents—although the documents were often obtained by leaks from employees rather than through the discovery process.<sup>143</sup> However, a major tool that tobacco companies had successfully used for decades to fend off tobacco plaintiffs was discovery.<sup>144</sup> The companies would bury tobacco plaintiffs in intrusive, expensive discovery requests about the plaintiffs' personal history—such as inquiries into plaintiffs' earlier use of illegal drugs—while at the same time resisting the plaintiffs' discovery requests doggedly.<sup>145</sup>

---

138. *Id.* at 162.

139. *See generally* *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981).

140. *See generally id.*

141. *Id.* at 800.

142. Ellen Neuborne, *Microsoft's Teflon Bill*, BLOOMBERG (Nov. 30, 1998), [www.businessweek.com/1998/48/b3606125.htm](http://www.businessweek.com/1998/48/b3606125.htm) [http://perma.cc/B482-WKU6].

143. *See generally* *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481 (D. Kan. 1997).

144. Milo Geyelin & Ann Davis, *Tobacco: A Vast Trove of Tobacco Documents Opens Up—Tobacco Foes Target Role of Lawyers*, WALL ST. J. (Apr. 23, 1998), at B1.

145. *Id.*

Likewise, defendants in cases involving birth defects and illnesses from birth control devices and drugs used during pregnancy would intimidate plaintiffs with massive discovery requests.<sup>146</sup> The requests would seek disclosure of plaintiffs' sex histories and other embarrassing information.<sup>147</sup> The broad scope of discovery would permit intrusion into these areas, even though the information that was sought was barely relevant. Intimidated and outspent in a litigation war of attrition, the plaintiffs would often abandon the cases or settle cheaply.<sup>148</sup>

In many cases, discovery is not a weapon for justice, but for injustice. Indeed, studies show that litigants frequently use discovery not legitimately to obtain necessary information.<sup>149</sup> Instead, they impose discovery requests strategically to impose costs.<sup>150</sup> Some cases descend into discovery wars of attrition with each litigant attempting to use discovery requests to exhaust the adversary.

No data exists on the relative sizes of the groups of cases where discovery promotes justice rather than deters it. This author's own experience in litigation, augmented by discussions from many other experienced litigators, is that only rarely does discovery produce the smoking-gun document that makes a difference to a case's outcome. Rarely does such a smoking gun exist. If it does exist, photocopy technology often causes it to exist not only in the defendant's internal files, but also in external sources such as the files of lawyers, accountants, or disgruntled employees. In this way, that document would be available even without discovery.

Discovery's usual impact is to either achieve the same result as would have occurred without discovery with much more trouble and expense, or to distort the result away from justice with just as much trouble and expense. A litigation partner in the large law firm of Debevoise & Plimpton while discussing foreign legal systems without discovery noted:

There may be a few smoking guns (more likely, water pistols) that are not unearthed, and perhaps even a few truly meritorious suits that do not succeed. But it is extremely doubtful that these few exceptions justify the overwhelming burdens and abuses wrought by our current system of

---

146. MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* (Pantheon 1985).

147. *Id.*

148. Information about defense tactics of defendants mentioned in these paragraphs comes, in part, from the personal experiences of the author.

149. *See* Shepherd, *supra* note 69, at 251.

150. *Id.*

pretrial practice and discovery.<sup>151</sup>

Indeed, corporations and wealthy people may use the threat of discovery to intimidate potential litigants into refraining even from filing suit. For decades, many potential tobacco plaintiffs would not sue because they foresaw the discovery barrage that the tobacco companies and their legions of lawyers would throw at them if they did.<sup>152</sup> Indeed, that was one of the tobacco industry's main tactics: deter additional lawsuits by litigating each one that was filed in the most expensive, scorched-earth way possible.<sup>153</sup> A main way of imposing the expense was through discovery.<sup>154</sup>

Litigants make the decision whether to sue in the shadow of the discovery process. It is certain that many lawsuits with strong merits that would otherwise succeed are never filed because of the discovery process.

Opportunities for litigants to impose costs and intimidate have further increased in the past two decades as discovery of electronic information has begun.<sup>155</sup> A corporate defendant will fear a request for all of the company's emails relating to a certain issue. The review of this mass of material for privilege and relevance would be expensive and time-consuming.

By increasing litigation's costs and the uncertainty of these costs, wide-open discovery has restricted access to legal services for some of society's most vulnerable groups. Both the increase in litigation costs and the increased uncertainty raises the effective price of litigating a case. Those with the least wealth are least able to pay the higher price. By increasing litigation's costs, broad discovery effectively denies these vulnerable groups recourse to lawyers, the courts, and justice.

Moreover, wide-open discovery increases litigation's effective cost most for those who are risk averse and who are thus most sensitive to the risk from discovery.<sup>156</sup> These tend to be small businesses and individuals with few assets, for whom the risk of an unexpectedly large legal bill is unbearable.<sup>157</sup> In contrast, large corporations and wealthy individuals tend

---

151. Loren Kieve, *Discovery Reform*, 77 AM. B. ASS'N J. 79, 81 (1991).

152. See generally Christine Hatfield, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525 (1996).

153. *Id.* at 558-60.

154. *Id.*

155. Lance Shapiro, *E-Discovery: Bargaining Bytes for Settlement*, 27 GEO. J. LEGAL ETHICS 887, 887-88 (2014).

156. See Shepherd & Cloud, *supra* note 8, at 103-04.

157. *Id.*

to be less risk averse.<sup>158</sup> In this sense, wide-open discovery weighs the scales of justice against small businesses and poor individuals and in favor of large corporations and the wealthy.<sup>159</sup>

This is true for both potential plaintiffs and defendants. Discovery's expense and uncertainty prevented some plaintiffs from asserting valid claims. For example, a plaintiff who, before the introduction of wide-open discovery, might have sued his or her landlord for illegally failing to maintain his or her apartment now may be unable to afford to sue. Under hourly billing, the potential plaintiff expects even this small case to require a prohibitive number of expensive hours of attorney time, many for discovery. Moreover, although the case might settle quicker than expected, there is also a substantial possibility that litigation costs would explode and drain the plaintiff's assets. Unable to bear discovery's expense or risk, the potential plaintiff may not assert his or her rights. Similarly, the plaintiff is unable to obtain representation on a contingency or at an affordable fixed fee because discovery has increased both the expected cost and the cost uncertainty that attorneys must cover. So, plaintiff's contingency lawyers refuse cases that, absent discovery, they would have accepted. Or if fixed-fee representation is available, its price is prohibitive.

Conversely, the cost and uncertainty of broad discovery prevented some defendants from obtaining representation to defend against invalid claims. Some defendants may settle even invalid claims for substantial sums because the settlement sums are cheaper than the large new costs that discovery imposes.

Defenders of the discovery process proclaim as a main argument in favor of the process that most cases have no discovery.<sup>160</sup> That many litigants avoid the discovery process is not evidence that the process functions well. To the contrary, it supports the conclusion that the system functions poorly. If the discovery process was so wonderful, then half of the litigants would not, in effect, choose to opt out of it. Moreover, if discovery was eliminated, these litigants would not miss it at all; indeed, they have taken matters into their own hands and eliminated it in their own

---

158. *Id.*

159. *Id.*

160. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 308 (2002). For example, Stephen Subrin argued:

What neither foreign commentators on American discovery nor homegrown conservative critics tend to mention is the extensive empirical research in our country demonstrating that in many American civil cases, often approaching fifty percent, there is no discovery, and in most of the remainder of the cases there is remarkably little.

*Id.*

cases themselves. That most potential users of discovery avoid it may suggest that something about discovery is very wrong.

Litigants' decision not to use discovery can be explained in two ways, neither of which indicates that the discovery process functions well.

First, some cases may have such small stakes or clear evidence that discovery is not worth its substantial time, expense, and disruption. This is not evidence that the discovery process works well. Instead, it shows that discovery is too expensive, time-consuming, and disruptive for most cases.

Second, even if a litigant's case has large stakes and important factual disputes, the litigant nonetheless may seek no discovery for fear that doing so will trigger the adversary to impose expensive discovery requests on the litigant. Empirical studies show an important influence on the amount of discovery that a litigant seeks is the amount his or her adversary seeks, regardless of the litigant's real need for information.<sup>161</sup> A litigant may fear that conducting any discovery will induce the adversary to strike back in kind, triggering an expensive discovery war of attrition.<sup>162</sup> Experienced lawyers and their clients have seen too many other cases in which discovery and its expense have spun out of control.<sup>163</sup> Like the United States and Soviet Union with their missiles pointed at each other during the Cold War, an equilibrium results in some cases in which neither party conducts discovery.

This explanation again demonstrates a basic flaw in the discovery process: it can be used not only to obtain information, but also to impose costs and disruption on the adversary. The fact that in many cases these threats balance out to the point that both litigants are intimidated into conducting no discovery shows only that discovery creates a fear of mutual assured destruction, not that the discovery process is a good idea.

*Twombly* and *Iqbal* have eliminated some of the harms from discovery.<sup>164</sup> But they have not eliminated all of them. For example, suppose that a case survives to the discovery phase because the complaint offers sufficient facts to satisfy the new pleading standard. Both the plaintiff and defendant may then seek to gain advantage by conducting abusive discovery. Full elimination of discovery's dangers can be achieved only by eliminating discovery completely.

---

161. See Shepherd, *Empirical Study*, *supra* note 69, at 251.

162. *Id.*

163. See, e.g., *id.*

164. See generally *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Moreover, the uneven prohibition of discovery that *Twombly* and *Iqbal* imposed is not ideal. The two cases eliminate potentially abusive discovery by plaintiffs in some cases, but not by defendants. It would be better to eliminate broad discovery for all parties evenhandedly.

## 2. Discovery Harms Legal Culture and Relationships

Broad discovery not only increases expense and warps case outcomes, it also corrodes both the practice of law and relationships between lawyers and clients.

First, the discovery process is intensely boring. It requires both the creation of mountains of paper and tedious attention to detail. It is not much of an overstatement to assert that it has ruined the practice of law. Before discovery came to dominate litigation, the day-to-day activity in litigation was much more fun.<sup>165</sup> Regardless of their pay, trial lawyers, as they were called then, could enjoy their jobs.<sup>166</sup> People who were not in it solely for the money would become lawyers.<sup>167</sup> Many lawyers recall a golden era of litigation that ended, perhaps without coincidence, just as discovery became dominant.<sup>168</sup>

Now, in contrast, discovery has made much of litigation so tedious that many litigators, as they are now called, conclude that the only reason to do it is for the high pay.<sup>169</sup> In recent decades, lawyers' pay at the top firms has increased at the same time that the lawyers in them have become more miserable.<sup>170</sup> Associate turnover at the best firms has reached stunning levels, often 20% per year.<sup>171</sup> A typical first-year associate is a smart idealist who has learned all about lawyers' being statesmen in a noble profession.<sup>172</sup> Often within a year, the associate is crushed into

---

165. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 20-21 (1st ed. 1994).

166. *Id.*

167. *Id.* at 22-23.

168. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 32-36 (Univ. of Chi. Press 1991); GLENDON, *supra* note 165, at 17-39; ANTHONY T. KRONMAN, *THE LOST LAWYER* 291-92 (Harvard Univ. Press 1993); WILLIAM G. ROSS, *THE HONEST HOUR* 5-6 (Carolina Acad. Press 1996). Alternately, it might be that lawyers of any given era always tend to believe that the previous generation of lawyers was more moral. For example, during the 1930s—the supposed golden age—many lawyers proclaimed vigorously that moral standards had fallen precipitously compared to the previous generation. See, e.g., George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2117-19 (1998).

169. GLENDON, *supra* note 165, at 25-26.

170. GALANTER & PALAY, *supra* note 168, at 34-36.

171. See Paul Oyer & Scott Schaefer, *What Drives Turnover and Layoffs at Large Law Firms?*, GEO. U. (2010), [www.law.georgetown.edu/academics/centers-institutes/legal-profession/documents/upload/Conference-Papers-March-23-oyerlayoffs.pdf](http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/documents/upload/Conference-Papers-March-23-oyerlayoffs.pdf) [<http://perma.cc/T7WD-6ZFY>].

172. GALANTER & PALAY, *supra* note 168, at 36.

disillusioned depression by the tedious, wasteful reality of big-firm discovery practice.<sup>173</sup> Contributing to the demoralization is the growing understanding that much of the discovery contributes little to justice and is used to intimidate adversaries or pad legal bills.

The associate may look longingly at friends who work in practices that include little discovery, such as criminal prosecution or criminal defense, smaller-scale litigation with individual clients, or other work for state and local government.

Second, broad discovery injures the relationship between lawyer and client. So-called “principal-agent conflicts” exist and create opportunities for abuse when an agent who has authority to make decisions on a principal’s behalf has different incentives than the principal. For example, much waste may exist in the medical profession because doctors often have broad discretion to decide what procedures and medications to use, but insurance companies pay for them.

The discovery process has worsened the principal-agent conflict between lawyers and clients substantially because it provides lawyers with broad new discretion to spend large amounts of their clients’ money. Before 1938, there was little that a dishonest trial lawyer could do to pad her bills.<sup>174</sup> The tasks in a case were relatively set and straightforward.<sup>175</sup> Moreover, litigators were generally paid fixed fees rather than billing by the hour.<sup>176</sup>

However, broad discovery’s introduction gave lawyers broad new opportunities for exploiting their clients. As lawyers began to be paid by the hour, an unscrupulous lawyer could conduct excessive discovery to increase his or her income. A client would have little choice but to accept the lawyer’s decision about the appropriate discovery level, even though the client would know that his or her attorney had an incentive and opportunity to cheat. Some attorneys undoubtedly did cheat; some could not resist an open cookie jar.

The result was a new mistrust of lawyers.<sup>177</sup> The rise of broad discovery occurred at the same time that both the supposed golden age for lawyers ended and public perceptions of lawyers declined.<sup>178</sup> Indeed, lawyers now rank near the bottom of polls on the public’s perceptions of

---

173. *See id.*

174. *See* ROSS, *supra* note 168, at 14-25.

175. Shepherd & Cloud, *supra* note 8, 120-26.

176. *Id.*

177. *See Honesty/Ethics in Professions*, GALLUP (Dec. 2014), <http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx?version=print> [<http://perma.cc/26FP-RFL6>].

178. *Id.*

ethical behavior, along with insurance salesmen and car salesmen.<sup>179</sup> In all of these professions, customers must rely on expert professionals for information in situations in which the expert's interests conflict with the interests of the individual. Perhaps absent discovery, lawyers would be perceived more like members of professions for which the public has greater trust.<sup>180</sup>

Third, broad discovery rots relationships among lawyers. Because the amount of discovery to conduct is within each opposing litigant's discretion, a danger exists in every case that the adversary will perceive any discovery request from a litigant as too much.<sup>181</sup> If the adversary is paying his or her attorney on a contingency, then the expense of responding to the discovery request comes straight out of the attorney's wallet. It is no surprise that surveys show that, in high proportions of cases, at least one litigant believes the adversary is conducting excessive discovery.<sup>182</sup>

Moreover, in addition to creating the possibility of incorrect perceptions of discovery excess, the discovery process creates new opportunities for unscrupulous lawyers actually to oppress their colleagues and gain unfair advantage.<sup>183</sup> The introduction of discovery into litigation is like the introduction of the machine gun onto the battlefield. In the wrong hands, the new weapon creates many new opportunities for litigation mayhem and destruction.

The hurt and mistrust among lawyers that the discovery process creates infects their relationships outside the courtroom. Lawyers now view themselves less as part of a cohesive, proud profession and more as lone gladiators, mistrustful of the knife in the back from a colleague.<sup>184</sup>

### *G. Discovery is Inconsistent with the Adversary System*

The discovery process can function fairly and efficiently only if the litigants cooperate with each other. They must not seek to gain unfair advantage by seeking excessive discovery, or by resisting valid discovery inappropriately.

But it is so tempting to seek large amounts of discovery. By doing so, they hope to gain advantage by imposing costs on their adversaries. It is so tempting to seek five depositions when one would do. It is so

---

179. *Id.*

180. *Id.*

181. *See, e.g.*, *Changes Ahead in Fed. Pretrial Discovery*, 45 F.R.D. 479, 489 (1968).

182. *Id.*

183. *Id.*

184. *See* GLENDON, *supra* note 165, at 36-38.

tempting to propound large numbers of interrogatories when a small number would be sufficient. It is so tempting to seek large amounts of documents when there is really only need for a few.

The excessive discovery may not only help the lawyer's client by imposing costs on the adversary. In addition, the excessive discovery helps the lawyer; a lawyer who is paid by the hour can bill more hours by conducting more discovery.

Likewise, it is tempting for a litigant to resist all of the adversary's attempts to obtain discovery, even the adversary's discovery attempts that are appropriate and valid. The litigant may seek a protective order even against an appropriate deposition. The litigant may assert shaky claims of privilege and work product against appropriate interrogatories. Faced with valid requests for production, the litigant may refuse to produce responsive documents, asserting weak claims of work product.

As with seeking excessive discovery, the excessive resistance to the adversary's discovery helps both the client and lawyer. The client benefits because the excessive resistance imposes costs on the adversary, intimidating the adversary in a discovery war of attrition. The resistance also benefits the lawyer, because the resistance allows the lawyer to bill more hours, dream up creative claims of privilege and work product, and draft motions for protective orders.

These incentives for litigation excess are not unique to the discovery process. A quick look at the docket sheet for any case with large stakes shows many litigation events with dubious support. For example, any experienced lawyer knows that a plaintiff's lawyer will routinely file not only strong claims, but also accompanying claims that are weak.

Likewise, defense lawyers will file weak motions to dismiss and summary judgment motions. Indeed, at the law firm where I began practice, junior associates were initially all given a securities claim to defend. The supervising senior attorney instructed us all immediately to file a large discovery request, a motion to dismiss, and a summary judgment motion. This was the advice for every one of these securities claims, regardless of the stakes, and regardless of the merits of an individual case. The supervising attorney indicated that these three devices would intimidate the plaintiff, and show the plaintiff that we would be tough.

But the level of expense that a litigant can impose through excess discovery activity is much greater than can be imposed through weak claims or through meritless motions to dismiss or for summary judgment. A meritless motion to dismiss or for summary judgment might take a few

weeks of attorney time to fend off. In contrast, excessive discovery can consume years.

The courts deal with both weak claims by plaintiffs and weak motions to dismiss and weak summary judgment motions within the adversary system. Through decisions such as *Twombly* and *Iqbal*, judges are trained to dismiss weak claims quickly and efficiently. *Celotex* is another decision that helps judges dismiss certain claims quickly; a plaintiff's claim will be dismissed on summary judgment unless the plaintiff has facts to support it.<sup>185</sup> Likewise, appellate decisions teach judges how to deal quickly and efficiently with both weak motions to dismiss and weak summary judgment motions. Examples of such doctrines in summary judgment are those that instruct the judge to assume that the jury will believe the witnesses of the nonmoving party.<sup>186</sup>

But in dealing with weak claims and weak motions to dismiss and for summary judgment, the system does not, in practice, require litigants to abandon our litigation system's adversarial nature. Plaintiffs routinely file weak claims, and judges just as routinely dismiss them. Defendants routinely file weak motions to dismiss and for summary judgment. Judges routinely dismiss the motions. The adversarial system is tasked with dealing with the weak claims and motions. Lawyers, representing their clients vigorously, are permitted to file weak claims and weak motions. The system then offers means for the claims and motions to be dismissed. As in organized sports such as football, rules are established subject to which the participants are permitted to try their hardest—to represent their clients vigorously.<sup>187</sup>

Except for in the area of discovery, adversarial, self-interested litigation effort is assumed to produce a good outcome. The litigants' butting heads in self-interested combat will produce efficient justice. This is the whole basis of the U.S. adversarial system.<sup>188</sup> Lawyers' vigorous representation of their clients, within the rules, is to be encouraged, because it will lead to a just efficient outcome.

Discovery is different. The rules permit the various discovery devices, but then they exhort the litigants to restrain themselves in using them. For example, even if a discovery device would otherwise be

---

185. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

186. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, Part II(A) (1986).

187. *See* MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE (AM. BAR ASS'N 2015) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

188. *See* Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147 (2002).

allowed in a case, the device is discouraged unless it is “proportional,” or if “the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>189</sup> In addition, in deciding whether to use a discovery device, the litigant is asked to consider “the parties’ resources.”<sup>190</sup> Apparently, the rules would smile on a litigant conducting a given discovery method against a wealthy adversary, but would discourage the litigant from using exactly the same method in exactly the same case, except that the adversary was less wealthy.

That is, unlike in the rest of the litigation process, litigants conducting discovery are asked not to litigate with full vigor. The litigant cannot merely use discovery vigorously, as long as specific rules for specific discovery devices are obeyed. Instead, the litigant is asked to consider factors other than their client’s interests. It is like a football player being asked not to try their hardest, to not tackle hard in an unimportant game, or in a game where the opponent has a lower budget to pay their players.

Discovery is inconsistent with the normal adversarial process. In areas other than discovery, litigants are permitted and encouraged to litigate vigorously. Indeed, a lawyer may have an ethical duty to represent her client with vigor; a lawyer who did not represent her client vigorously would be shirking her duty to her client. However, in discovery, the normal vigor is forbidden. In this one area, lawyers are expected to consider factors other than their client’s interests.

The conflict between lawyer’s instinct to vigorously represent her client and the rules’ requirement that the lawyer ignore their client’s interests and do only “proportionate” discovery leads to inconsistent amounts of discovery even in cases with similar characteristics. In some cases, lawyers give in to their traditional instincts to consider only their client’s interests in deciding their amount of discovery; they do a large amount of discovery if it benefits their clients. In other cases, the lawyers observe the proportionality guidance, doing less discovery than the amount that would maximize benefit to their clients.

This outcome is harmful for three reasons. First, like cases are not litigated similarly. In some cases, much discovery occurs. In other similar cases, little does. Litigation expense is high in some cases, but low in other similar cases.<sup>191</sup> Because the amount of discovery can alter a case’s outcome, outcomes will be different even in identical cases.

---

189. FED. R. CIV. P. 26(b)(1).

190. *Id.*

191. See Shepherd & Cloud, *supra* note 8, at 126.

Second, the outcome is harmful because it creates stressful internal conflicts for lawyers. The rules require the lawyer to pursue two objectives simultaneously: choose the discovery amount that allows the attorney to represent her client with utmost vigor and choose a discovery amount that is “proportional.” These two objectives conflict, stressing the lawyer; attempting to serve two masters’ conflicting directives causes anxiety.

Asking a lawyer both to represent their client with vigor and also conduct only proportional and restrained discovery is against human nature. It is like sending a warrior into battle with a savage weapon, but then requiring them to be gentle in using it.

Third, the system causes conflict and suspicion among lawyers. Lawyers who focus on the proportionality objective resent lawyers who ignore proportionality and instead focus on vigorously representing their clients. The lawyers who focus on proportionality view those who do not as gaining an unfair advantage. They view the other lawyers the same way a drug-free professional bicyclist would view other bicyclists who use performance-enhancing drugs.

#### *H. Discovery Violates Norms of Privacy*

Broad discovery violates norms of privacy. Before 1938, a societal expectation existed that things said or written in privacy would remain private.<sup>192</sup> It is human nature to demand a zone of privacy. Indeed, the U.S. Constitution enshrines privacy as a fundamental right.<sup>193</sup> People in the United States expect privacy, especially from intrusions by their government. Indeed, outside of the discovery process, the Fourth and Fourteenth Amendments to the Constitution have been interpreted as creating certain rights to privacy. The government may not intrude into a citizen’s private decisions about contraception, abortion, or homosexual sex.<sup>194</sup>

The normal right to privacy that U.S. citizens enjoy does not exist during the litigation process. The FRCP permit a government agency—the courts—and a government official—the judge—to intrude into a citizen’s most private matters, merely because the citizen has sued or been

---

192. See generally Amendments to the Fed. Rules of Civil Procedure, 48 F.R.D. 487 (1970).

193. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003).

194. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Lawrence v. Texas*, 539 U.S. 558 (2003), which all interpret the 14th Amendment to create a right to privacy surrounding these activities.

sued. In effect, the rules indicate that, by being involved in a lawsuit, the parties forfeit their privacy rights.

This forfeiture is broad. The scope of discovery is immense. The adversary can obtain from the party any relevant information that is not privileged and not work product.<sup>195</sup> Relevance is interpreted broadly to include any material that could matter at all to the litigation, even just a tiny bit.<sup>196</sup>

Likewise, privileges apply only to small categories of communications, such as those between lawyer and client. Moreover, privileges are interpreted narrowly.<sup>197</sup>

Accordingly, the courts routinely allow deeply intrusive discovery, violating the deeply-held privacy norm. The adversary can require the litigant to provide stunningly personal and private information. Many private discussions and written communications are unprivileged and discoverable.<sup>198</sup> For example, those who have not become deadened to the system may often be shocked that a litigant may obtain copies of almost all of a corporation's private emails.<sup>199</sup> In the Microsoft antitrust case, the government's most powerful evidence was informal internal emails between Microsoft's top leadership.<sup>200</sup> Likewise discoverable—for example in a divorce proceeding—are the contents of an individual's computer, including the embarrassing websites that the person has visited and love letters that the person has received.<sup>201</sup>

The adversary is even allowed to intrude into the litigant's bedroom, with the litigant sometimes being required to disclose intimate details of their sexual practices. For example, in cases where women have alleged that they were injured and rendered infertile by dangerous morning-sickness drugs or defective birth control devices, defendants have been permitted to compel the plaintiffs to reveal the identities of all of their prior sexual partners, and whether the sexual partners had sexually-transmitted diseases.<sup>202</sup>

---

195. FED. R. CIV. P. 26.

196. See FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

197. See, e.g., *United States v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990).

198. See, e.g., *United States v. Microsoft, Co.*, 253 F.3d 34, 76 (D.C. Cir. 2001).

199. *Id.*

200. *Id.*

201. See, e.g., *Byrne v. Byrne*, 650 N.Y.S.2d 499, 500 (App. Div. 1996).

202. Richard Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991).

So, we have seen that, by being involved in a lawsuit, the litigants forfeit their rights to privacy. This is not a voluntary waiver. Instead, this is an involuntary forfeiture. It is easy to see that forfeiture is involuntary for the defendant. The defendant is a party to the litigation against her will: she is a party only because the plaintiff sued her.

Similarly, the plaintiff's waiver is effectively involuntary. The plaintiff/victim must sue the defendant only because the defendant injured her, whether through tort or breach of contract. However, the defendant's act of injuring the victim was beyond the plaintiff's control; the victim did not ask to be injured. The victim is forced to sue only because of what the defendant did, which is beyond the victim's control. Both the plaintiff and the defendant are parties only because of the other's independent conduct. The defendant is a party because the plaintiff sued the defendant. The plaintiff is a party because the defendant injured the plaintiff. Nonetheless, their participation in the lawsuit, although involuntary, forfeits their normal rights to privacy.

People from other countries are shocked at U.S. discovery's intrusiveness. People with whom this author has spoken who lived in former East Germany remember vividly the deadening horror of the fear that the secret police were monitoring their private lives. They view discovery's intrusiveness as similar. Both the secret police in former East Germany and courts in the United States have invaded citizens' most private domains. People in Europe remember too well the degree to which the Nazi government controlled the population in part by reaching deeply into people's private lives. Indeed, for oppressive governments, knowledge of people's private information is often power.

In many other countries, recent history offers dramatic examples of horrid leaders preserving power by violating privacy. That is one important reason why almost all other countries have rejected the U.S. system of broad discovery.<sup>203</sup> Government spying by discovery resembles too closely other sinister forms of government spying.

Something important is lost when private individuals may not communicate in private without the constant threat that government agents—and that is what the courts are—will listen in. If everyone were not so accustomed to discovery's intrusiveness, everyone would see more clearly that the discovery process brings the United States frighteningly

---

203. See *infra* Section III.

close to the world in George Orwell's *1984*.<sup>204</sup> Only here, Big Brother is a court enforcing an order compelling discovery.<sup>205</sup>

The United States is alone in allowing the courts to intrude in this way into privacy.<sup>206</sup> For example, European legal systems are motivated much more deeply by an underlying expectation of the privacy of both personal and business information.<sup>207</sup>

The dissonance between citizens' expectations of privacy and the discovery process's violations of these privacy norms lead to many of the discovery system's troubles. Because broad discovery grinds against human nature, litigants who receive discovery requests often resist them compulsively. This leads to endless cycles of evasions and motions to compel. Broad discovery is like 1920s prohibition. Citizens tend to like both privacy and alcohol. Any attempt to intrude on either privacy or drinking leads to resistance and unhappiness. Because it violated ingrained human preferences, prohibition was a failure. Likewise, broad discovery is a failure because it violates important privacy norms.

### III. ENDING THE FAILED EXPERIMENT

As discussed in this Article, broad discovery has inflicted substantial injuries on society and the legal profession, with very few benefits. The cure is clear: remove the discovery cancer.<sup>208</sup>

The world would be a better place without broad discovery. Indeed, the absence of broad discovery has already improved conditions in all other parts of the world except the United States; wide-open discovery exists only here.<sup>209</sup> The United States should respect the combined and consistent judgment of every other country that broad discovery is bad policy. Confronted with strong evidence of discovery's harms, the United States should cease asserting that it knows better than everyone else.

Although it would be best to eliminate U.S.-style broad discovery, strictly-limited discovery might appropriately remain available in exceptional circumstances. For example, the United States might model reforms on the present systems in Britain, Europe, or Japan.<sup>210</sup> In these

---

204. GEORGE ORWELL, 1984 (Signet Classic Pub. 1949).

205. *See generally id.*

206. *See, e.g.,* Marcus, *supra* note 19, at 193.

207. *Id.* at 193-94.

208. A brief earlier essay also called for elimination of broad discovery. Kieve, *supra* note 151. Other scholars have contrasted the U.S. discovery process with that in other countries, but not called for its elimination. *See, e.g.,* Subrin, *supra* note 160.

209. *See* Marcus, *supra* note 19, at 154-55.

210. For a description of these systems, *see generally* Burkhard Bastuck & Burkard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 609 (1994);

systems, litigants may sometimes obtain limited discovery after convincing a judge of exceptional need.<sup>211</sup> Often, discovery that takes place is conducted by the judge, not by the litigants.<sup>212</sup> The modest variations in the world's countries with limited discovery provide a perfect natural experiment for selecting the best approach. Recommending the details of the best new system is a topic for future research.

One might fear that individual plaintiffs suing large organizations would be unable to obtain the secret internal documents that would be necessary to prove liability. However, in general, broad discovery harms the individual litigant rather than helping him. As already discussed, cases where discovery produces a smoking gun are rare. It is probable that more often, discovery is now used as a weapon by the large organizations to gain unfair advantage over the individual litigant.

Moreover, the problem of secret internal documents may be reduced, if not eliminated, by altering burdens of proof. For example, Germany and many other countries impose strict liability on defendants in most product liability suits.<sup>213</sup> In suits where a negligence rule still applies, many countries' courts do not require the plaintiff to prove the defendant's negligence.<sup>214</sup> Instead, they shift the burden of proof to the defendant to rebut a presumption of fault.<sup>215</sup> Unless the defendant successfully carries the burden, the plaintiff wins the suit, but without requiring discovery.<sup>216</sup> Moreover, in these other systems, there is no opportunity for the defendant to use discovery to intimidate.

Burdens could be shifted similarly in other areas in which defendants might have sole access to important evidence. For example, in a suit for fraud against a large organization, the U.S. system requires the plaintiff to produce evidence that the defendant knew of a statement's falsity. Before *Twombly* and *Iqbal*, the plaintiff could attempt to obtain such information through discovery of the defendant's internal documents. An alternative would be to shift the burden of proof: once the plaintiff proves falsity, the

---

Benjamin Kaplan et al., *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193 (1958); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Marcus, *supra* note 19; Itsuko Mori, *The Difference Between U.S. Discovery and Japanese Taking of Evidence*, 23 INT'L LAW. 3 (1989); Craig P. Wagnild, *Civil Law Discovery in Japan: A comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1 (2002).

211. See generally sources cited *supra* note 206.

212. See generally sources cited *supra* note 206.

213. See Reimann, *supra* note 14, at 764; Hans Claudius Taschner, *Harmonization of Product Liability Law in the European Community*, 34 TEX. INT'L L.J. 21, 25-27 (1999).

214. See Reimann, *supra* note 14, at 790-91; Taschner, *supra* note 213, at 27-28.

215. See Reimann, *supra* note 14, at 790-91; Taschner, *supra* note 213, at 27-28.

216. See Reimann, *supra* note 14, at 790-91; Taschner, *supra* note 213, at 27-28.

defendant would have the burden to prove the absence of knowledge of falsity.

One need not speculate about whether eliminating broad discovery would function well. The system proposed in this Article already works well in scores of other countries. As Professor Subrin has noted about many U.S. commentators' skepticism about various aspects of the U.S. discovery system, "[t]his skepticism has to be heightened when one looks at civil discovery in the rest of the world, where civilizations seemed to have survived quite well without American discovery."<sup>217</sup>

Indeed, admittedly inexact bottom-line indicators of legal systems' relative effectiveness suggest that systems without broad discovery perform no worse than, and perhaps better than, the U.S. system. For example, one important underlying goal of a liability system is to deter injurious conduct.<sup>218</sup> Even without broad discovery, the German system appears to compare favorably with the U.S. system. The automobile accidental death rate in Germany is less than half the U.S. rate.<sup>219</sup> Although this data ignores other important influences on death rates, it suggests that the absence of broad discovery in Germany is not inducing Germans and German automobile manufacturers to run amok in creating dangerous automobiles.

As discussed elsewhere, the elimination of broad discovery would also permit many clients and lawyers to abandon both hourly billing and to avoid all of the problems that it causes.<sup>220</sup>

Elimination of broad discovery might require modest changes in other parts of the legal system. As others have noted, other parts of the system are premised on the existence of broad discovery.<sup>221</sup> For example, because the U.S. system of notice pleading often requires little detail in plaintiffs' complaints, an important means for defendants to learn of plaintiffs' specific assertions is through discovery. Thus, the elimination of discovery might need to be accompanied by a requirement of greater specificity in pleadings. This would not be a new or unfamiliar requirement. Instead it would merely extend to all cases the present

217. Subrin, *supra* note 160, at 301.

218. *See generally* Taschner, *supra* note 213.

219. *Road Traffic Deaths Data by Country*, WORLD HEALTH ORG., <http://apps.who.int/gho/data/node.main.A997?lang=en> [<https://perma.cc/K8ZG-WYP3>] (last visited on Mar. 6, 2018).

220. Shepherd & Cloud, *supra* note 8.

221. *See, e.g.*, Marcus, *supra* note 19, at 156; Subrin, *supra* note 160, at 308-10; *see generally* Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998).

requirements of FRCP 9(b) that fraud be pled with particularity.<sup>222</sup> *Twombly* and *Iqbal* are already nudging the litigation system in this direction.<sup>223</sup>

One might also need to hire more judges. A possible objection to eliminating broad discovery is that it would place excessive reliance on judges to gather information—if rules were also changed to permit judges, instead of litigants, to conduct more fact-finding, as in many legal European systems.<sup>224</sup> Unlike European judges, the argument goes, U.S. judges are unaccustomed and unfit to administer the gathering of information.<sup>225</sup> Moreover, they are often already overwhelmed by heavy caseloads, especially their criminal dockets.<sup>226</sup>

This problem might be solved by hiring more judges. However, even if the United States hired no new judges and the existing judges remained resistant to administering discovery closely, the system would merely suffer from many of the same problems as European courts. European judges also tend to be lazy in their fact gathering.<sup>227</sup> Instead, European courts demonstrate “a considerable degree of tolerance—almost insouciance, to common law eyes—for the incompleteness of evidentiary material.”<sup>228</sup>

Instead, European systems rely on litigants to assemble their own information from their own sources, rather than relying on the adversary for information.<sup>229</sup> In situations where only the adversary often has information, the systems tend to shift the burden to the adversary, rather than requiring the adversary to produce information.<sup>230</sup>

A final impact of the elimination of broad discovery would be that many litigators would lose their jobs. The cuts would be especially great in big firms, where the cases that spawn profuse discovery are litigated.

It is possible that this may already be happening after *Twombly* and *Iqbal*. The two decisions have inevitably caused some cases to be dismissed and others not to be filed in the first place. Both developments reduce the need for plaintiffs’ lawyers and defense lawyers. It may be that the reduction in legal employment over recent years was due not only to

---

222. FED. R. CIV. P. 9(b).

223. See *supra* Section II(D).

224. See generally sources cited *supra* note 206.

225. Hazard, *supra* note 221, at 1021-22.

226. See Marcus, *supra* note 19, at 187.

227. See *id.* at 193.

228. *Id.* (citing Mirjan R. Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 843 (1997)).

229. See generally Subrin, *supra* note 160.

230. See generally *id.*

the general recession that the economy suffered. In addition, *Twombly* and *Iqbal* may have contributed to the decline in employment for both plaintiffs' and defense lawyers by reducing both the number of cases that are filed and the amount of discovery that is conducted.

The reduction in employment would be a good development. Some of society's smartest, hardest-working people would switch from lives devoted to counterproductive, wasteful discovery to other productive, helpful careers. That the legal profession in many other countries is smaller helps, not harms, these countries.

#### IV. CONCLUSION

The provisions for broad discovery in the FRCP have failed since they were adopted in 1938. The system began to fail from the beginning and has continued to fail. It has dramatically increased litigation's cost and pain, with few balancing benefits.

Broad discovery should be eliminated, returning the United States to the sensible approach of the rest of the world. The Supreme Court's decisions in *Twombly* and *Iqbal* correctly focus on the dangers of discovery abuse and they appropriately require dismissal of some cases that would otherwise become fishing expeditions.<sup>231</sup> The 2015 FRCP amendments are ineffectual tinkering. Reform beyond this is needed. Broad discovery should be completely eliminated.

---

231. See generally *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).