Retooling American Discovery for the Twenty-First Century: Toward a New World Order?

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As this decade began, we were told that we were on the verge of a "new world order" in international relations that would emerge in the wake of the Cold War. In a way, this prediction seemed to usher in an American decade to cap the American Century, with the United States as the only remaining superpower. As the decade and the century come to a close, that promise has become increasingly cloudy. Not only do shining new gains now appear harder to achieve, but muttering about American imperialism has grown.

Since World War II, American civil litigation has seemed to be bent on imperialism, at least where discovery is concerned. To a substantial extent, antagonism toward American discovery probably was prompted by antipathy toward extraterritorial application of

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United States law.[1] Various episodes of expansionism in American law, largely antitrust and securities law, have led to the adoption in many countries of "blocking" statutes designed to frustrate American discovery.[2] Even England, which has its own discovery regime, reportedly championed the inclusion of Article 23 in the Hague Convention on the Taking of Evidence as an escape valve with regard to American document discovery.[3] Indeed, it may well be that resistance to U.S. discovery sometimes functions as a convenient way of escaping the need to justify domestic policies that are challenged under American law.[4]

Whatever the ulterior motives elsewhere, it is clear that America's "unique" discovery apparatus[5] has raised hackles abroad.

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1. Consider Judge Marshall's reasoning in assessing requests by plaintiff Westinghouse for discovery of material located in other countries to support claims it had made in an antitrust suit against foreign defendants:

> The competing interests here display an irreconcilable conflict . . . of national policy. Westinghouse seeks to enforce this nation's antitrust laws against an alleged international marketing arrangement among uranium producers, and to that end has sought documents located in foreign countries where these producers conduct their business. In specific response to this and other litigation in American courts, three foreign governments have enacted nondisclosure legislation which is aimed at nullifying the impact of American antitrust legislation by prohibiting access to those same documents.

In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979); *see also* Laker Airways Ltd. v. Pan Am. World Airways, 607 F. Supp. 324, 327 (S.D.N.Y. 1985) ("The extraterritorial jurisdiction asserted over foreign interests by American antitrust laws has long been a sore point with many foreign governments . . . .").

Professor Lowenfeld has suggested that the negative reactions to American discovery derive force from an even broader objection to United States practices:

> To some extent, conflicts about discovery are a proxy for other differences among legal systems. Foreign parties caught in the web (as they perceive it) of excessive judicial jurisdiction, contingent fees, uncontrolled jury trials, limitless class actions, and punitive or multiple damages, as well as a tort system out of control, tend to attempt to draw the line at extension of discovery beyond the frontiers of the United States.

ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 664 (1993). For a comprehensive analysis of the American approach to whether United States law should apply to conduct outside the territorial borders of the country, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101 (1998).

2. *See generally* LOWENFELD, *supra* note 1, at 698-700; GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 856-71 (3d ed. 1996).

3. *See* BORN, *supra* note 2, at 899.

4. Relating to the Westinghouse litigation, discussed *supra* note 1, Professor Lowenfeld notes that "[p]olitically, it might well be easier to defend one's turf against intrusive American discovery than to defend the secretive uranium cartel and the government's participation in it." LOWENFELD, *supra* note 1, at 734.

5. *See* Geoffrey C. Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1018 (1998) ("The system of pretrial discovery is unique to the United States."). Uniqueness is a somewhat relative term. For example, the oral

The American indifference to the procedural scheme of the Hague Convention[6] suggests that it persists in its Lone Ranger attitude in the area. Pursuant to a statute, American courts even volunteer their good offices to provide evidence-gathering here for use in litigation in the courts of other countries when the courts of those countries would never dream of ordering the same thing on their own soil.[7] Against this background, the prospects for a new world order in civil litigation, at least in regard to discovery, seem dim. At least for the last twenty-five years, however, it has been clear that the bloom is off the rose of broad discovery in the eyes of domestic civil litigation in the United States and real efforts have been made to rein it in here. As this country is now embarked on its third such effort of discovery containment, it seems appropriate to ask whether a corner has been turned that would permit the formulation of such a new world order. The American Law Institute (ALI) has embarked on exploring the overall question in its nascent effort to generate Transnational Rules of Civil Procedure, including discovery provisions.[8]

The traditional reaction to such efforts is that countries differ too much in their procedures for accommodation to be possible, perhaps due to differences in "culture." In 1997, however, Professor Lowenfeld drew on his experience in international private arbitration to urge that the prospects for accommodation are substantial, even with regard to discovery:

> I do not believe that the limits placed in continental Europe (or Latin America) on what Americans call "discovery" is an inevitable by-product of the way judges are selected, or the way the proceedings before the judge (not to say "trial") are conducted. Certainly everything is related to everything else, and if one makes a change in one element of the system, one ought to consider the effects on other aspects of the system. But I believe many elements of civil procedure are portable, that is the experience gained in one jurisdiction can be usefully applied in another.
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> . . . Over time, the better features of American document discovery have become routine [in international arbitration]—i.e., that all of the relevant documents in the parties' possession or control ought to be made available

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deposition has been characterized as "a purely North American phenomenon" because it can be used in Canada as well as the United States. *See* GARRY D. WATSON ET AL., CIVIL LITIGATION: CASES AND MATERIALS (5th ed. forthcoming 1999).

6. *See infra* text accompanying notes 216-223.

7. *See* 28 U.S.C. § 1782 (1998), discussed *infra* text accompanying notes 224-229.

8. *See* TRANSNATIONAL RULES OF CIVIL PROCEDURE INTERIM REVISION (Preliminary Draft No. 1, Mar. 13, 1998). These preliminary undertakings have not been reviewed by the Council of the ALI or voted upon by its membership. For a description of their discovery features, see *infra* note 186. For a critique of these efforts, see Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413 (1998).

> to both sides and to the decision makers, and that the arbitrators ought to have to make each discovery request subject to their order. The contention heard frequently in the past that each side is responsible for proving its own case and that the other has no obligation to help in this process is seldom heard any more.
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> The extravagant aspects of American-style discovery, however, are out: requests for "all documents, correspondence or memoranda . . ." without specification are now rarely seen and never in my experience granted. Discovery from persons not affiliated with the parties is very rare, and the idea that every witness must be deposed, i.e., interrogated by opposing counsel before he or she appears at a hearing,—a standard practice in American civil litigation—has not been adopted in international arbitration.[9]

Perhaps the private can become public, and the pragmatic distillation of the best of different procedural systems might lead to a new world order for official litigation resembling the privately agreed regime described by Professor Lowenfeld. But Professor Hazard, who is involved in the ALI project,[10] has introduced a note of substantial caution with regard to discovery. He recognizes that the practice of judicial gathering of evidence to compile the dossier in civil law countries is "functionally similar" to pretrial discovery,[11] but sees this functional similarity as overshadowed by a fundamental dissonance because the historical tradition in the civil law countries that the judiciary should control fact-gathering conflicts with the American commitment to a party's right to broad discovery free of judicial oversight:

> [R]ecognizing in a party a *right* to require production of evidence, as distinct from a party's right to ask the *court* to require production of evidence, violates the constitutional principle of adjudication in the civil law system.
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> On the other hand, the concept that a party has such a right—a right not dependent upon judicial discretion—has become fundamental and perhaps nearly constitutional in the modern American scheme of civil litigation.[12]

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9. Andreas Lowenfeld, *Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 652-54 (1997).

10. *See supra* text accompanying note 8. Professor Hazard is co-Reporter, with Professor Michelle Taruffo of the University of Pavia, of the project.

11. *See* Hazard, *supra* note 5, at 1017.

12. *See id.* at 1024. For further discussion, see BORN, *supra* note 2, at 847 (many countries see discovery without judicial supervision as an infringement of judicial sovereignty); MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 99 (1986) [hereinafter FACES OF JUSTICE] ("In common law systems, the parties perform a number of activities that are intrinsic to the office of the judge on the Continent.").

As he has reaffirmed concerning the U.S. approach in another article: "Broad discovery is thus not a mere procedural rule. Rather it has become, at least in our era, a procedural institution perhaps of virtually constitutional foundation."[13] In this view, reconciliation of the varying attitudes toward discovery requires one to overcome a virtual constitutional confrontation.

From the perspective of one involved in current United States discovery reform, this Essay assesses the possibility that recent American developments could usher in an era of greater accommodation. It begins by sketching the major trends of this century's discovery revolution in the United States, and then turns to the efforts to constrain discovery that have characterized the past twenty-five years of American rule revision. Against that background, it chronicles the most recent American reform episode to date.

With the past and present described, the Essay concludes that this country still provides, as a matter of right, discovery opportunities that the rest of the world would view as unduly intrusive, or at least "extravagant" in terms of the emerging international arbitral consensus that Professor Lowenfeld described. Drawing on models suggested by Professor Damaska a dozen years ago, the Essay explains the American persistence in broad party-controlled discovery not only in terms of the overall operation of pretrial practice in this country but, equally significant, as an important feature of the "policy implementation" that private civil litigation accomplishes in the United States. If the new world order awaits official American abandonment of broad discovery, then it will not soon arrive.

But that is only half the story. To American eyes, Professor Lowenfeld's description is more telling for its contrast to the traditional way of handling fact-gathering in systems not developed from the Anglo-American mold. Although there are some familiar and peculiarly American reasons why things are not likely to change dramatically in this country, the rest of the world needs to understand why the American observer is perplexed at the willingness in other countries to countenance what seems to us a remarkable indifference to getting out the truth in civil litigation. Perhaps those also are best thought of as "cultural," but Professor Lowenfeld's experiences

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13. Geoffrey C. Hazard, *From Whom No Secrets Are Kept*, 76 TEX. L. REV. 1665, 1694 (1998); *see also* David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 745 (1986) ("limitations on the plaintiff's discovery rights due to the foreign location of witnesses or documents are likely to seem in the United States as violations of basic concepts of procedural justice").

suggest that they are not. To the contrary, the development of American "style" discovery in international arbitration suggests that the impulse toward fact development crosses borders. Competing considerations regarding the overall organization of civil litigation and the nature of legal rules—the "cultural" aspects—may outweigh these tendencies, but it seems unlikely that a new world order will emerge that shifts to the continental view of civil discovery.

I. AMERICA'S TWENTIETH-CENTURY EMBRACE OF BROAD PARTY-CONTROLLED DISCOVERY

For most of this century, American procedural reform has supported the view of one of its mid-century advocates that "as procedure develops the advance is from rigidity to flexibility."[14] The 1938 adoption of the Federal Rules of Civil Procedure, which Professor Subrin has aptly described as the triumph of equity's relaxed procedures over the strictures of common law practice,[15] particularly embodied this impulse.

A. The "Discovery Revolution"

In the Anglo-American tradition, discovery finds its origins at equity, so it is not surprising that the triumph of equity included a discovery component that significantly expanded upon former practice. However, that break with the past can be overstated. Even before 1938, some American states had developed innovative discovery techniques.[16] To foreign eyes, these prior provisions might seem intrusive indeed; as early as the 1870s American discovery efforts provoked formal German diplomatic notes of protest.[17] But until Professor Subrin revisited the history recently, it has not been

14. ROBERT W. MILLAR, CIVIL PROCEDURE IN THE TRIAL COURT IN HISTORICAL PERSPECTIVE 5 (1952).

15. *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter Subrin, *Conquest of Equity*] (describing the extent to which provisions of Federal Rules were modeled on equity rather than common law, which was considerably stricter in its precepts).

16. Since 1938, many states have formally adopted the Federal Rules, including the discovery provisions, as their rules for state court practice. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

17. *See* BORN, *supra* note 2, at 849 (describing German protests of 1874).

clear how genuinely revolutionary the overall package adopted in 1938 really was.[18]

Before 1938, American discovery opportunities were spotty and incomplete. The antipathy toward "fishing expeditions" that still moves the rest of the world was widely embraced by American courts. Thus, in 1911 the United States Supreme Court denounced as a "fishing bill" any effort by a party "to pry into the case of his adversary to learn its strength or weakness."[19] In federal court before 1938, even the limited discovery allowed by some states was commonly not available because various restrictive federal provisions were found to occupy the area and preclude application of the state practices.[20]

The engine for changing this situation was the Rules Enabling Act, adopted by Congress in 1934, which authorized the Supreme Court to adopt rules of practice and procedure for use in all federal courts.[21] But there was no consideration of discovery during the long debate about whether to adopt a national procedural code (an undertaking at reconciliation of differing state practices somewhat resembling efforts now to assemble a uniform set of transnational procedures),[22] and the Federal Rules' drafters were not even sure at first whether discovery was included in their charge.[23]

The framers wrote boldly on this relatively blank slate. As Professor Subrin explains, the initial draft put out for public comment "included every type of discovery that was known in the United States and probably England up to that time."[24] He elaborates:

> If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules, but . . . no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated

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18. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 734, 736 (1998) [hereinafter Subrin, *Historical Background*].

19. Carpenter v. Winn, 331 U.S. 533, 540 (1911). For another example of this attitude, see *In re* Abeles, 12 Kan. 451, 453 (1874), in which Justice David Brewer (later to serve on the United States Supreme Court) denounced as a "fishing expedition" any effort to ascertain the other side's testimony. For an argument against these views, see Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933). Note that Sunderland was the person who drafted the Federal Rules regarding discovery later in the 1930s.

20. *See* Subrin, *Historical Background*, *supra* note 18, at 698-701.

21. See 28 U.S.C. § 2072 for the current version of the Act.

22. *See* Subrin, *Historical Background*, *supra* note 18, at 692-94.

23. *See id.* at 717 (describing first meeting of the committee assigned the task to draft the new rules, which concluded that discovery was a topic on which they were to develop national procedures).

24. *Id.* at 718.

> features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.[25]

The framers knew that what they were doing was unprecedented,[26] and that such an expansion presented risks of misuse,[27] but they were circumspect in describing the radical characteristics of their package when it was aired for public comment and congressional review, suggesting instead that it was a modest incremental step from existing practices.[28] Perhaps this was due in part to the fact that the chairman of the Advisory Committee "had developed both the enthusiasm and the drive of a crusader" to have the committee's work adopted.[29]

Whether the framers truly foresaw all the far-reaching consequences of their reforms is debatable. Certainly, some developments that had a bearing on the growing importance of civil litigation in this country could only have been indistinct possibilities to them. Innovations in technology—the use of the jet plane for commercial flight, expanded telephone communication, the development of the photocopier and the computer—profoundly increased the importance of discovery and facilitated the development of "national" litigation practices. Substantive developments, and the emergence of "public law" litigation in this country, accentuated the importance of civil litigation in ways that might well have been unforeseen in 1938. Economic concentration also magnified the possible importance of civil litigation, as mass-distributed products might inflict injuries on many and increasingly huge commercial entities began to resort to the courts to settle their differences. But to the extent they could foresee these developments, the framers would not have been dismayed by them. The chief reporter, for example, was a proponent of the use of litigation to affect social practices.[30]

The discovery edifice the framers initially constructed also had safeguards. In particular, document discovery was only available if a judge so ordered, a feature that would seem congenial to those in a

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25. *Id.* at 719.

26. *See id.* ("Sunderland [the drafter of these provisions] told the Advisory Committee that he did not have precedent for the combination of liberalized discovery that he had drafted.").

27. *See id.* at 721-22 (chronicling discussions in Advisory Committee meetings about the risks of untrammelled discovery).

28. *See id.* at 725-26.

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

30. *See* Subrin, *Conquest of Equity*, *supra* note 15, at 966 (describing Charles Clark as a reformer oriented toward accomplishing social rearrangement through law).

civil law setting.[31] Over the ensuing decades, however, these restraints were removed. In 1946, the Rules were amended to make it clear that even inadmissible material was discoverable so long as the discovery was "reasonably calculated to lead to the discovery of admissible evidence."[32] In 1970, a major renovation of the Rules was undertaken and the requirement of prior judicial approval for document discovery was removed, in large part because it was very rarely invoked even though it was included in the Rules.[33]

Whether or not the framers' initial attitude was as revolutionary as the consequences seem to have been, the federal courts crossed a watershed in attitudes rather quickly. By 1946, an eminent judge of the Third Circuit recognized that "[t]he Rules probably go further than any State practice,"[34] and by the 1950s the chief Reporter of the Federal Rules celebrated the achievements of the drafter of the discovery rules by observing that "[t]he system thus envisaged . . . had no counterpart at the time he proposed it."[35] More significantly, in 1946 the Supreme Court laid to rest the old concern about "fishing expeditions:"

> No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.[36]

Twenty years later, the survey of federal discovery practices performed in connection with the 1970 amendments to the discovery rules concluded that "[d]iscovery has become an integral part of litigation."[37]

B. The Post-1970 Effort at Containment

Perhaps every action invites a reaction. Certainly there was a reaction to the procedural relaxation effected by the Federal Rules. By the mid 1970s, this reaction had achieved considerable

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31. As reported in a survey of federal discovery practices thirty years ago, "[i]nspections [of documents] had always been strictly regulated by the court and the potential for invasion of files had always been refused" until the 1946 revisions of the rules described below in text. WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 33 (1968).

32. This language is now found at the end of FED. R. CIV. P. 26(b)(1).

33. *See* Amendments to the Federal Rules of Civil Procedure, 48 F.R.D. 487, 527 (1970) (reporting that survey contained in GLASER, *supra* note 31, indicated that only 25% of documents productions involved a court order).

34. Hickman v. Taylor, 153 F.2d 212, 216 (3d Cir. 1945), *aff'd*, 329 U.S. 495 (1946).

35. Clark, *supra* note 29, at 11.

36. *See Hickman*, 329 U.S. at 507.

37. GLASER, *supra* note 31, at 51.

momentum, and much of that momentum focused on discovery.[38] The first episode of reform included changes to the Federal Rules in 1980 and 1983. These were partly precipitated by proposals from a special committee of the American Bar Association calling for narrowing the scope of discovery, setting a numerical limit on interrogatories and directing judges to hold a discovery conference to review and control discovery if one of the parties so desired.[39] After flirting with these ideas,[40] the Advisory Committee essentially focused on enhancing judicial responsibility to oversee litigation, with special emphasis on discovery and sanctions for litigation misconduct.[41] Not only did the package of reforms include the discovery conference, it also provided that signing discovery requests or responses certified that they were justified[42] and directed judges to curtail discovery that was disproportionate.[43] More generally, the amendments required judges to undertake some managerial action in most cases, and prompted them to do much more than that.

At face value, these changes seem to go a good way toward prompting a judicial role in connection with discovery that resembles the judicial involvement in civil law countries, but this appearance is deceiving. For one thing, even managerial judges did not necessarily view their role as riding herd over discovery. As one astute judge put it while these rule amendments were under consideration, an American jurist simply could not do that due to lack of familiarity

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38. *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) [hereinafter Marcus, *Discovery Containment*].

39. *See* Special Committee on Abuse of Discovery: Report to the Bench and Bar, 92 F.R.D. 137 (1977) (describing and justifying proposed changes).

40. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613 (1978) (proposing all three changes sought by the ABA committee, along with others); Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979) (removing proposals to narrow the scope of discovery and limit the number of interrogatories).

41. *See generally* Richard L. Marcus, *Reducing Cost and Delay: The Potential Impact of the 1983 Amendments to the Federal Rules of Civil Procedure*, 63 JUDICATURE 363 (1983).

42. FED. R. CIV. P. 26(g).

43. These provisions, now contained in FED. R. CIV. P. 26(b)(2), state:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules or by any local rule shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery to resolving the issues.

with the case.[44] Perhaps largely for this reason, the "proportionality" provisions[45] were something of a dud. The Reporter who drafted the changes touted them as a "180 degree" change in orientation about discovery,[46] but the amendment "seems to have created only a ripple in the case law, although some courts now acknowledge that it is clearer than it was before that they should take responsibility for the amount of discovery in the cases they manage."[47] Perhaps these results reflect a change in the attitudes of judges. By 1983, the Federal Rules and their broad discovery provisions had been in effect for forty-five years, and more than thirty-five years had passed since the Supreme Court declared that fishing expeditions were authorized under them.[48] New rule provisions could not undo existing habits and expectations.

Additional aggressive changes occurred in 1993. Reinforcing the constraint orientation of the prior set of revisions, the 1993 amendments imposed numerical limits on depositions and interrogatories.[49] These amendments also involved the judge more at the outset of discovery by imposing a moratorium on formal discovery until the parties had met and fashioned a discovery plan and requiring that they submit this plan to the judge,[50] who was already directed (by the 1983 amendments) to enter an order limiting the time for discovery.[51]

The 1993 amendments also included a feature that looks like existing document discovery in England—a new "initial disclosure" duty to reveal the identity of witnesses and a listing of documents that have information relevant to disputed issues alleged with particularity

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44. As the judge explained: "It's very difficult for the judge to ask, 'Well, you're spending too much time with John Jones, Sales Vice-President for the company. Why are you spending so much time with a salesman?' He can't know why you're spending so much time with him; he can't know that much about your case." Patrick G. Higginbotham, *Discovery Management Considerations in Antitrust Cases*, 51 ANTITRUST 231, 236 (1982). Judge Higginbotham later became the Chair of the Advisory Committee on the Civil Rules. *See infra* text accompanying note 197.

45. *See supra* note 43 and accompanying text.

46. *See* ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32-33 (1984).

47. 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2008.1, at 121 (2d ed. 1994).

48. *See supra* text accompanying note 36.

49. *See* FED. R. CIV. P. 30(a)(2)(A) (no more than ten depositions per side); FED. R. CIV. P. 33(a) (no more than 25 interrogatories per party).

50. *See* FED. R. CIV. P. 26(d), 26(f).

51. *See* FED. R. CIV. P. 16(b)(3).

in the pleadings.[52] When this proposal was first made, it provoked a huge reaction in the bar.[53] In light of this outburst, the rulemakers decided to authorize district courts to decide not to conform to the national scheme if they so preferred. As a result, such a confusing welter of disclosure regimes developed across the country that the Federal Judicial Center tried to keep them straight in an annual publication.[54] In large measure, that disuniformity prompted the current third round of proposed discovery amendments.

II. THE CURRENT EFFORT TO RETOOL FEDERAL DISCOVERY FOR THE TWENTY-FIRST CENTURY

Nobody seriously thought that the 1993 compromise, with its "opt out" provisions, would remain in effect for the long term. One could argue for a longer period of experimentation, but the centrifugal forces of local autonomy might prove harder to corral the longer they were granted free rein. Moreover, a parallel development—the experiment ordered by Congress under the 1990 Civil Justice Reform Act (CJRA)[55]—was drawing to a close, and the Judicial Conference directed the Advisory Committee on Civil Rules to review the initial disclosure provisions with specific attention to issues of national uniformity.[56]

In October 1996, the Advisory Committee launched a comprehensive review of the federal discovery rules that was to be overseen by a Discovery Subcommittee. No feature of discovery was off the table in this review, and the effort was not limited to determining whether there was "abuse." Instead, its orientation was guided by three questions posed by the Chairman of the whole Committee:

1. When fully used, is the discovery process too expensive for what it contributes to the dispute resolution process?

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52. *See* FED. R. CIV. P. 26(a)(1)(A) & (B).

53. For a description of these events, see Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 805-12 (1993).

54. *See, e.g.*, DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (FJC, Mar. 30, 1998).

55. Civil Justice Reform Act of 1990, 104 Stat. 5089 (1990). This statute directed each of the 94 federal district courts in the country to develop a plan for cost and delay reduction. Many of these plans included features also under consideration for inclusion in the national rules. Under direction from Congress, the Rand Corporation was retained to study the results of these efforts. For a description of some of the results of Rand's study, see *infra* text accompanying notes 64-68.

56. Judicial Conference, Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques, 175 F.R.D. 62, 98 (1997).

2. Are there rule changes that can be made which might reduce the cost and delay of discovery without undermining a policy of full disclosure?

3. Should the federal rules for discovery, applying to cases involving national substantive law and procedure, as well as to cases involving state law, be made uniform throughout the United States?[57]

With this commission, the Subcommittee surveyed the landscape.

A. Building An Information Base

Ideally, a committee that drafts procedural rules is all-knowing, but recently Advisory Committee discovery reform initiatives have been criticized for lacking a sufficient factual basis.[58] Actually, most procedural reform in America (and probably elsewhere) has been based on armchair empiricism; the framers of the original Federal Rules of Civil Procedure had little more to support their innovations than intuition. Indeed, one must recognize the limits of traditional social science empiricism, which hardly exhausts the information that can be important in deciding on procedural reforms.

In the 1960s, a very extensive study was done to provide information about the revamping of the discovery rules that was accomplished in the 1970 amendments.[59] In the 1970s, the Chair of the Advisory Committee ruefully concluded that there was no money to undertake a similar effort to gauge the need for the changes proposed to rein in discovery then.[60]

The current discovery reform enterprise proceeded with considerable input of various types. One source was opinion information from prominent and experienced lawyers, whom the Committee consulted in two conferences on discovery.[61] Another was

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57. *See* Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Alicemarie H. Stotler, Chair, Committee on Rules of Practice and Procedure, 181 F.R.D. 24, 25 (1998) [hereinafter Niemeyer Memorandum].

58. *See, e.g.*, Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841 (1993) (saying that the rulemakers' "studied indifference to empirical questions" put their work at risk of being overridden in Congress); Linda Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 816-17 n.114, 820-21 (1991) (upbraiding the Advisory Committee for its indifference to gathering empirical information on experiences with initial disclosure while considering that innovation).

59. This study was done by Columbia University. The results are reported in detail in GLASER, *supra* note 31.

60. *See* Letter from Hon. Walter Mansfield to John P. Frank, June 29, 1978, *quoted in* Marcus, *Discovery Containment*, *supra* note 38, at 779 n.164.

61. This effort is sketched in David F. Levi & Richard L. Marcus, *Once More Into the Breach: More Reforms for the Federal Discovery Rules?*, 37 JUDGES' J. 9 (Spring 1998).

contained in written recommendations from a variety of bar groups about possible changes to the rules.[62] Although it is not possible to summarize all the comments, some themes stand out. Many lawyers decried the cost of document discovery, particularly in what they labeled "one-way discovery" cases—those in which one side has a lot of information and the other side has little or none. Other lawyers cautioned, however, that they confronted "dump truck" tactics during document discovery when their opponents delivered undifferentiated masses of material consisting largely of things they had not requested. In addition, many lawyers bemoaned the duration of oral depositions; one said that "some lawyers spend half a day clearing their throats" with purposeless background questioning.[63]

Beyond this experiential advice, the Committee had statistical information from two sources. First, the Rand Corporation developed data on 12,000 cases filed in federal court in 1991 and 1993 in order to assess the effect of the Civil Justice Reform Act.[64] Rand found that early judicial management of litigation significantly reduced case duration, particularly if a trial date was set early, but that it also increased overall litigation expenses.[65] Setting a short discovery cutoff significantly reduced both litigation duration and litigation cost.[66] Accordingly, Rand endorsed a program including (1) early judicial management, (2) setting the trial date early, and (3) reducing the time to the discovery cutoff.[67] Although this study did not focus primarily on discovery problems and reforms, Rand performed further analysis of the data to determine what insights it could offer regarding discovery reforms.[68]

The Federal Judiciary Center (FJC) undertook a survey for the Committee in 1997 of 1,000 recently closed federal court cases

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62. These groups included the ABA Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America, the Defense Research Institute, the Product Liability Advisory Council, and Trial Lawyers for Public Justice. The written reports of these groups will be included in the materials being prepared for the Advisory Committee reflecting its study of discovery issues.

63. This comment was made during the Discover Subcommittee's conference in San Francisco in January, 1997, by a prominent San Francisco lawyer. See Levi & Marcus, *supra* note 61, at 59 n.10, for a list of lawyers participating.

64. For a description of this Act, see *supra* note 55.

65. *See* JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (EXECUTIVE SUMMARY) 14 (1997).

66. *See id.* at 16.

67. *See id.* at 26.

68. The results of this further analysis are contained in James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998) [hereinafter Kakalik, *Discovery Management*].

specifically keyed to discovery issues.[69] The cases were selected randomly, but cases unlikely to have discovery were screened out.[70] This survey was limited to cases in federal court, which might involve larger stakes than civil litigation generally in this country.[71] It was also limited to attorney responses as opposed to obtaining the views of clients.

The FJC study did not show a strong need for dramatic change. It indicated that, at the median, discovery expenditures totaled three percent of the amount at stake in the litigation,[72] and that discovery expenditures constituted about half of the litigation costs at the median.[73] Given the screening done to exclude a substantial proportion of all federal court cases from the sample, this level of expenditure does not seem arresting, although for cases at the highest level of expenditure the costs were high.[74] The majority of attorneys said that the level of expenditure on discovery in the case was about right, and of those who thought it was not, more felt it was too low rather than too high.[75] More than two-thirds of the responding attorneys felt that discovery produced about the right amount of information.[76]

Although the main concern about costs that was voiced by the lawyers consulted by the Committee was document production, and although document production is the most common form of discovery,[77] according to the FJC survey depositions were much more costly, costing about twice as much as document production in an average case.[78] This ratio held true at the ninety-fifth percentile,[79] and document discovery cost plaintiffs about the same percentage of their

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69. *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 (1998).

70. *See id.* at 595 (identifying the categories of cases excluded as unlikely to have discovery).

71. For cases filed in federal court on the grounds of diversity of citizenship of the parties, there must be at least $75,000 in controversy. *See* 28 U.S.C. § 1332 (1998). For cases filed in federal court on the ground that the claim raises a federal question, there is no such requirement. *See id.* § 1331 (1998).

72. *See* Willging, *supra* note 69, at 549, tbl. 6.

73. *See id.* at 548, tbl. 4.

74. For the ninety-fifth percentile, discovery costs constituted 32% of the amount at stake and constituted 90% of the cost of litigation. *See id.* at 548-49, tbls. 4, 6.

75. *See id.* at 551, tbl. 8.

76. *See id.* at 552, tbl. 9.

77. *See id.* at 545, tbl. 2 (document production obtained in 84% of studied cases).

78. *See id.*, at 575, tbl. 27 (reporting that depositions cost about 30% of discovery expenditures while document production cost about 16%).

79. *See id.* at 577, tbl. 28.

discovery expenses as it cost defendants at the median.[80] The survey did confirm, however, that document production was the type of discovery that generated the most problems.[81]

The FJC survey did not provide strong support for the notion that discovery disproportionately burdens defendants. Indeed, at the ninety-fifth percentile of discovery cost, these costs were reportedly fifty percent higher for plaintiffs than for defendants.[82] Furthermore, plaintiffs' lawyers' estimates of unnecessary discovery costs were twice as high as defendants' lawyers.[83] The problems that the lawyers identified usually occurred in "contentious" cases, and there was considerable variation in level of expenditure by type of case.[84] Document production, an area of prime concern, cost plaintiffs and defendants about the same amount.[85]

Overall, these results indicate that a cross-section of American lawyers using the federal courts regularly find that discovery works in a relatively satisfactory manner. Moreover, the survey indicated that although the 1993 amendments had only a modest effect, it was usually the sort of effect desired by the rulemakers. Of course, from the perspective of the rest of the world that may merely show that American lawyers who were raised in the United States system of broad discovery have grown to accept what they have found. Yet even these lawyers were not satisfied with the status quo; approximately 80% thought that the rules should be changed to improve discovery practice.[86] The clear winner in lawyer sentiment was an increase in judicial regulation of discovery, something that might hearten European eyes.[87]

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80. *See id.* at 575, tbl. 27.

81. *See id.* at 574 ("Document discovery . . . generated the highest rate of reported problems.").

82. *See id.* at 548, tbl. 3.

83. *See id.* at 556, tbl. 12. This ratio is found at both the median and the ninety-fifth percentile. It should be noted, however, that it is quite possible that plaintiffs' lawyers, as a group, are less enthusiastic about large-scale discovery than defense counsel, and that they are therefore quicker to characterize discovery costs as excessive.

84. *See id.* at 578-79, tbls. 29-31.

85. *See id.* at 525, tbl. 17. It should be noted, however, that the FJC survey did not include client costs of assembling documents for production, which may be substantial in some cases but not reflected in the lawyer costs that were covered in the survey.

86. *See id.* at 584-92. Lawyers disagreed on when changes should be made and which changes would be best.

87. *See id.* at 587, tbl. 36.

B. The Current Package of Amendment Proposals

Armed with this input, the Advisory Committee considered a broad array of possible rule changes.[88] After considerable study, the Committee reported a package of proposed amendments with quite a number of rule changes, but the most important focused on five topics:

1. Restoring national uniformity: From the perspective of most other nations, the idea that the American federal courts deviate significantly from one another in their procedures may seem odd, but the United States reality has involved national uniformity only since the Federal Rules were adopted in 1938,[89] and local deviations from the national scheme have afflicted it almost from the outset.[90] The strength of the national rule scheme was strained near the breaking point by the controversy surrounding mandatory initial disclosure[91] and the simultaneous experimentation in various districts authorized by the Civil Justice Reform Act.

The current amendment package represents a strong endorsement of national uniformity. The impulse behind this effort goes beyond an abstract commitment to the concept of uniformity and recognizes that lawyers and clients can be seriously frustrated by disparities in practice from one federal court to another.[92] Beyond these points, the effort recognizes that even though the ambit of local autonomy was officially limited to certain topics, the very invitation to deviate from the national scheme could invite more expansive parochialism.[93]

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88. Many of these ideas are collected in a memorandum I wrote to the Advisory Committee which should be included in the compiled materials on the discovery amendments. *See* Memorandum from Rick Marcus, Special Reporter, to Advisory Committee on Civil Rules (Sept. 16, 1997). This memorandum is on file with the agenda materials for the October 1997 meeting of the Advisory Committee on Civil Rules. These files are kept by the Rules Committee Support Office.

89. For a discussion of the debate behind that shift to national uniformity, see Subrin, *Conquest of Equity*, *supra* note 15; also see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (detailing the adoption of the Act that authorized the adoption of nationally uniform procedures for the federal courts).

90. *See generally* 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3152 (2d ed. 1997).

91. *See supra* text accompanying notes 52-53.

92. As the Committee Note accompanying the draft amendments says, "[M]any lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. Clients can be bewildered by the conflicting obligations they face when sued in different districts." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 18, 72 (1998) [hereinafter Preliminary Draft].

93. *See* Niemeyer Memorandum, *supra* note 57, at 30:

> There is another consequence of local autonomy. It entrenches local folkways and increases resistance to "outside" interference. The longer local rules are allowed to persist, the more difficulty it will be to restore any semblance of national uniformity.

Should this effort not succeed, the whole fabric of the national rule scheme might be compromised.

2. Removing the "heartburn" from initial disclosure: As noted above,[94] the controversy over the adoption of mandatory initial disclosure in 1993 was probably the most vigorous in the history of the Federal Rules. Although opponents had a variety of grounds for opposing the addition of this new requirement, a constant refrain was the belief of many lawyers that forcing them to reveal harmful information without a formal discovery request, contravened the credo of the advocate in America. For those who have existed for a long time with such duties, this objection may seem curious. Indeed, a similar obligation has been imposed as a matter of constitutional law on prosecutors in this country for a long time.[95] But the American vigor in protecting the criminal defendant exceeds that of Europe,[96] and there is no traditional obligation to protect the rights of the opponent in civil cases.

The empirical data compiled to assist the Advisory Committee provided considerable, if not compelling, support for the utility of the new disclosure requirement in those places where it has been employed.[97] However, insistence on the existing provision might

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> The taste for independence provided by local rules also seems at times to encourage adoption of practices that are not consistent with the national rules. Expert witness disclosure under Rule 26(a)(2) and pretrial disclosure under Rule 26(a)(3) provide illustrations. Although these paragraphs do not authorize departure by local rule, the most recent Federal Judicial Center study of disclosure practices shows that a dozen districts have opted out of these disclosure requirements.

94. *See supra* text accompanying notes 52-53.

95. *See* Brady v. Maryland, 373 U.S. 83 (1963) (prosecutors are constitutionally obliged to disclose any exculpatory information in their files to defendants).

96. *See, e.g.*, MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 111-12 (1997) [hereinafter EVIDENCE LAW].

97. The Rand Corporation study of the Civil Justice Reform Act (CJRA) experience included consideration of the early disclosure programs implemented in some courts, but Rand did not find, to the $p = 0.05$ level it thought sufficient for statistical certainty, that disclosure reduced cost or duration of litigation. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 64-67 (1996). Rand did find that attorney work hours were lower in the two districts it studied that required disclosures of unfavorable information, but that the *p*-value for this difference was 0.06, and it noted that "[t]his is a large effect but not significant at the $p = 0.05$ level." *Id.* at 201-02. None of the districts Rand studied actually had disclosure rules identical with Rule 26(a)(1) as eventually adopted in 1993, and the Rand researchers acknowledged in a later examination of their data that "the 'empirical' story of the effects of Rule 26(a)(1) remains to be told." Kakalik, *Discovery Management*, *supra* note 68, at 658.

The FJC survey approached the issues differently from Rand, focusing on specific cases rather than district-wide characteristics. Using lawyers' reports about the effect of initial disclosure (rather than trying to measure actual lawyer hours), the FJC found that in many cases initial disclosure under had no reported effect. Where lawyers reported an effect, however, it was predominantly of the sort intended by the drafters (i.e., reducing costs, duration of litigation,

imperil the effort to achieve national uniformity. Accordingly, "the Committee chose not to attempt any judgment on the desirability of Rule 26(a)(1) as it now stands,"[98] and instead has proposed that the disclosure requirement be limited to favorable information.[99] The proposed amendments also accomplish some additional adjustments in the initial disclosure provision.[100]

One consequence worth noting, should this change be adopted, is that it would lessen any impulse that might exist to substitute disclosure for formal discovery (as opposed to deferring the latter until after the former). When the initial disclosure proposal was under consideration in 1991-93, there were some who saw it as a harbinger of the elimination of formal discovery,[101] perhaps leaving something akin to the current English method. Whether or not something of the sort might have become attractive, the revised disclosure scheme contemplated under the current proposed amendment would hardly suffice because it is limited to information favorable to the disclosing party.

3. Revising the scope of party-controlled discovery: For over twenty years there have been proposals to change the Federal Rules' description of the scope of discovery by removing one phrase currently used—"relevant to the subject matter involved in the pending action."[102] This package of amendments revives that proposal but in a format that is different from those advanced before. Rather than curtailing the scope of discovery, it revises the scope of party-controlled discovery to material "relevant to the claim or defense of any party." For good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the

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amount of discovery, and the number of discovery disputes, while increasing prospects for settlement and the litigants' sense of fairness). *See* Willging, *supra* note 69, at 563, tbl. 17.

98. Niemeyer Memorandum, *supra* note 57, at 30.

99. *See* Preliminary Draft, *supra* note 92, at 57-61. The proposed amendment's formulation of this revised requirement is that a party must disclose material "supporting its claims or defenses." *Id.* Because there was uncertainty about the best locution, the Committee has also invited public comment on providing instead that a party must disclose any material that it "may use to support its claims or defenses." Niemeyer Memorandum, *supra* note 57, at 31.

100. Thus, it excludes specified "low end" cases from the requirement and allows any party who objects to disclosure to present its objections to the judge before disclosure must occur, directing that the judge determine whether disclosure should be required. In addition, addressing an oversight in the current rule, the amendment provides for later-added parties. *See* Preliminary Draft, *supra* note 92, at 59-61.

101. "Some observers of civil litigation believe that discovery rights will be taken from lawyers within the next decade or two, to be replaced by a system of standard disclosures." Wauchop v. Dominos, 143 F.R.D. 199, 200 (N.D. Ind. 1992).

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

action. In addition, there are amendments designed to ensure that scope limitations are taken seriously.[103]

The actual impact of this change, if adopted, is not certain. The Committee Note candidly acknowledges that "[t]he dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be determined with precision."[104] But the change should prompt greater attention to what is actually asserted in the pleadings; the Note goes on to admonish that the change "signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings."[105] Beyond that, the need for an order to obtain the most expansive discovery responds to the broad desire in the profession for judicial oversight.[106]

4. Authorizing cost-bearing for disproportionate document discovery: As noted above,[107] the 1983 amendments directed the judge to limit disproportionate discovery but this amendment has not accomplished its promise. Although the authority to forbid would seem to include the authority to allow only on payment of the resulting disproportionate costs, it was thought that the rules should say so specifically, at least with respect to document discovery, and the amendments propose doing so.[108]

It should be noted that this is *not* a general rule of cost shifting in discovery, which is addressed below.[109] It is contingent, instead, on an initial determination by the court that the proportionality limitations have been exceeded.[110] Moreover, if cost-bearing is ultimately adopted it may be applied to all discovery devices rather than

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103. Thus, the final sentence of the current rule is to be amended to provide that only relevant information can be discovered although inadmissible, and the proportionality limitations, *see supra* note 43, are explicitly invoked. *See* Preliminary Draft, *supra* note 92, at 64-65.

104. Preliminary Draft, *supra* note 92, at 79.

105. *Id.* The final sentence of current Rule 26(b)(1) would be amended to make clear that only relevant information is discoverable, though inadmissible, and a new sentence would be added invoking the proportionality provisions of Rule 26(b)(2). *See id.* at 65.

106. As the Chairman of the Advisory Committee put it, the new structure of the relevance provision "is calculated to force judicial supervision of the problem cases that need judicial supervision." Niemeyer Memorandum, *supra* note 57, at 33.

107. *See supra* notes 44-47 and accompanying text.

108. *See* Preliminary Draft, *supra* note 92, at 87-89.

109. *See infra* text accompanying notes 128-141.

110. "It is not expected that this cost-bearing provision would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2)." Preliminary Draft, *supra* note 92, at 90.

document discovery alone.[111] This authority is also limited to reasonable expenses, and party resources are also a pertinent consideration.[112]

5. Durational limitation on depositions: In 1991, the Advisory Committee proposed a presumptive limitation of depositions to six hours,[113] but it later decided not to adhere to this proposal.[114] The current package includes a different proposal—limiting all depositions to one day of seven hours absent court order or agreement of the parties and the witness.[115]

Of necessity any precise durational limitation (like numerical limitations on depositions and interrogatories) is in some senses arbitrary, and the objective is to avoid unreasonable rigidity. At the same time, the limitation should prompt lawyers to curtail lengthy background inquiry and get to the issues of the case.[116] Judges, presumably, will not look kindly on requests to extend the time where the time already expended has not been used wisely. Indeed, even in the absence of an explicit limitation, such circumstances would provide grounds for limiting the length of a deposition.[117]

6. Future course of the present package: As of this writing,[118] the present package of discovery amendments is in the process of public comment and further Committee review. The public comment

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111. The Committee has invited public comment on an alternative formulation that would make this authority explicit in the general provision of FED. R. CIV. P. 26(b)(2). *See* Niemeyer Memorandum, *supra* note 57, at 37-38.

112. "In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery." Committee Note, Preliminary Draft, *supra* note 92, at 91.

113. The proposal then read: "Unless otherwise authorized by the court or agreed to by the parties, actual examination of the deponent on the record shall be limited to six hours." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 111 (1991).

114. See Marcus, *Discovery Containment*, *supra* note 38, at 767 n.111 for information on the reasons not to pursue the limitation at that time.

115. *See* Preliminary Draft, *supra* note 92, at 83. The witness-approval requirement might be removed from the final rule if the deposition limitation is adopted.

116. Experienced lawyers told the Committee that wasteful questioning on peripheral matters was far too common.

117. *See* FED. R. CIV. P. 26(b)(2)(ii) (directing the court to limit discovery if "the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought").

118. This Article was prepared initially for presentation on Oct. 30, 1998, at the meeting of the International Association of Procedural Law at Tulane Law School. The final version of the Article was prepared thereafter, but before the Advisory Committee's consideration of these amendments was completed.

phase runs through February 1, 1999,[119] and the Advisory Committee then will need to reconsider the proposed changes in light of the comments received. That review may yield final proposed amendments in time for submission to the Standing Committee on Rules of Practice and Procedure at its mid-year 1999 meeting. Should that body approve the amendments, they would be submitted to the Judicial Conference in September 1999. With Judicial Conference approval, the package would be ready for submission to the Supreme Court and, if adopted by the Court, would probably take effect on December 1, 2000 unless Congress acted to alter them or the effective date.[120]

7. Possible changes still under study by the Advisory Committee: The Discovery Subcommittee has not been discharged, and it still has before it at least three ideas that were proposed but not yet acted upon. These are: (1) adopting some procedure to ease the burden presently caused by the risk of privilege waiver in connection with document production;[121] (2) generating pattern discovery for certain types of cases; and (3) adopting a presumptive time limitation for document production so that a party need not search back more than seven years before the events underlying the suit.

C. The Paths Not Taken

The Advisory Committee had a wide range of possible amendments before it, but the package it actually recommended is relatively cautious and narrow. Since proposals passed over on one occasion sometimes find favor on later occasions, it is worthwhile cataloging some of the directions that were not taken.

1. Revising the pleading rules: To a considerable extent, the breadth of American discovery is linked to the laxness of the rules regarding pleading; if the pleadings were as complete as they must be in many European countries, the impulse toward expansive discovery might abate. For a variety of reasons, including the breadth of discovery, the federal courts have on occasion tightened up the pleading requirements.[122] The Supreme Court, however, has recently

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119. This Article was written before the comment phase ended even though it is likely to reach print afterwards.

120. *See* 28 U.S.C. § 2074 (setting forth schedule for review of proposed amendments by Congress).

121. *See* Niemeyer Memorandum, *supra* note 57, at 39 (mentioning this as a possible subject of future action).

122. *See generally* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (examining the evolution of demanding pleading requirements under the current Federal Rules).

voiced continued approval for a lax construction of those rules,[123] and the Advisory Committee has since then given some thought to modifying the pleading rules to tighten up their requirements.[124] At the same time, there has been a continuous effort to bolster the district court's authority to regulate and refine cases through pretrial orders, including efforts to identify and focus the issues.

During the consideration of discovery, Judge Robert Keeton, a former Chair of the Standing Committee on Rules of Practice and Procedure, made a detailed proposal for bolstering the issue delineation activities of courts before discovery is undertaken.[125] This impulse was reflected in the 1977 proposal from the ABA Section of Litigation to narrow the scope of discovery, for it urged that the scope be defined in terms of the issues involved in the litigation rather than the claims or defenses.[126]

The rules already contain considerable authority for judges to supervise litigation,[127] and devising a workable regime that calls for more is extremely challenging. Moreover, it is not clear that successful efforts of this sort would eliminate the difficulties with discovery that currently have been identified. Accordingly, the possibility of reconsidering the pleading rules was put off until another day.

2. Cost shifting: As all are aware, the United States operates under the American Rule (known to some as the "only in America" rule[128]) that usually requires each party to pay its own litigation costs,

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123. *See* Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (rejecting a heightened pleading requirement imposed by the United States Court of Appeals for the Fifth Circuit on claims against municipalities because it was not consistent with the relaxed provisions of the Rules). *But see* Crawford-El v. Britton, 118 S. Ct. 1584, 1596-97 (1998) (suggesting that on occasion lower courts may require a reply pursuant to FED. R. CIV. P. 7 to bolster the pleadings).

124. *See* Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1751-52 (1998) (describing recent actions regarding pleading requirements by Advisory Committee).

125. Memorandum from Robert E. Keeton to Civil Rules Advisory Committee (Sept. 26, 1997) (on file with author and also the Rules Committee Support Office) (observing that issue formulation should be central to management of litigation and proposing a three-page addition of rule language to foster clarification of the issues involved in the litigation).

126. The Section of Litigation proposal was that discovery be limited to material "relevant to the issues raised by the claims or defenses of any party." Special Committee on Abuse of Discovery, *Report to the Bench and Bar*, 92 F.R.D. 137, 157 (1977).

127. *See* FED. R. CIV. P. 16 (authorizing action on a wide range of topics at pretrial conferences).

128. *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS 918 (1986) (commenting that "[t]he rule could be fittingly described as the 'only in America' rule").

win or lose.[129] Even though this rule is peculiar to this country, the United States has shown no immediate enthusiasm for falling into step with the rest of the world. To the contrary, serious studies recommend that the country persist in its view[130] because of the risk that general fee-shifting would unduly deter the assertion of claims by those of limited means, and would also encourage unrestrained spending on litigation once initiated. Experiences in other countries provide some support for these misgivings.[131] The adjustments that have been made have been in specific statutes that generally have been interpreted to target areas where the legislature wants to facilitate the assertion of certain claims.[132] Moreover, there are serious questions about the authority of the rulemakers to alter these arrangements by rule.[133]

Against this background, it should be apparent that routine cost-shifting would be an extremely controversial issue, and it is raised here as a purely academic matter only because it is a proposed

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129. *See* FED. R. CIV. P. 54(d)(1) (providing that the prevailing party shall recover costs of suit, but costs are limited and do not include most substantial costs incurred by litigants).

130. *See, e.g.*, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 105 (1990) (recommending against adoption of a loser-pays fee shifting provision as a matter of federal law).

131. In England, for example, Lord Woolf's recent study of civil litigation found that costs far exceeded the stakes in many cases, particularly those of lower economic value. *See Access to Justice: Report of Lord Chancellor on the Civil Justice System in England and Wales* (Final Report) 17 (1996) [hereinafter *Access to Justice* (Final Report)]. An English commentator notes that the indemnity system at work in that country reinforces the urge to spend on litigation in a significant number of cases:

> [O]nce it is clear that a dispute is destined to go all the way to trial, the indemnity principle tends to erode resistance to costs. . . . Indeed, a point may come where the parties would have reason to persist with investment in litigation, not so much for the sake of a favorable judgment on the merits as for the purpose of recovering the money already expended in the dispute, which may well outstrip the value of the subject-matter in issue.

Adrian Zuckerman, *Lord Woolf's Access to Justice: Plus Ca Change . . .* , 59 MOD. L. REV. 773, 778 (1996).

132. For example, in Title VII employment discrimination cases the fee-shifting provision is worded in a bilateral way (inviting fee awards to successful plaintiffs and defendants) but has been interpreted in a pro-plaintiff way. *Compare* Newman v. Piggie Park Enter., Inc., 390 U.S. 400 (1978) (prevailing plaintiffs should normally receive attorneys' fees award), *with* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (prevailing defendants may recover fees only when plaintiff's suit is "frivolous, unreasonable, or without foundation"). In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Court deviated from this sort of interpretation when faced with the fee-shifting provision of the Copyright Act and held that it afforded defendants an equal opportunity to recover their fees. It explained that "in the civil rights context, impecunious 'private attorney general' plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees." *Id.* at 524.

133. *Cf.* Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1988) (exploring limitations on power of rulemakers to direct attorney fee shifting in connection with rule about offers of judgment).

antidote frequently suggested by those from other countries. At least as an initial matter, one might distinguish between certain discovery expenses and other litigation costs. Even though the American Rule means that each litigant must bear the cost of preparing its own case, it arguably need not follow that a party should also bear the cost of responding to the other side's discovery, thereby assisting in preparing the other side's case. Yet the current American arrangement, in essence, requires a party to subsidize its opponent's litigation preparation.

At least with regard to discovery from nonparties, the U.S. has exhibited some uneasiness about imposing such a duty to subsidize on noncombatants.[134] One might argue that a similar solicitude is warranted with regard to the parties because many discovery demands seem cheap to initiate but expensive to satisfy. This is a feature of the "one-way discovery" issue mentioned above.[135] In order to overcome this incentive to over-discovery, some American economists have proposed that each party be required to internalize the entire discovery cost, including the costs of responding, that results from its discovery forays.[136]

The Advisory Committee has not pursued this idea, however, and it is not likely to do so. In part, that is because such an effort would raise difficult questions of its own power.[137] There are also considerable practical and incentive difficulties that would attend such a change. How readily can a court determine the reasonable cost of responding to a discovery request, for example? On that question, one must keep in mind the assertions that certain parties engage in "dump truck" responses to discovery that inflict undifferentiated

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134. For example, in *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364 (9th Cir. 1982), nonparties were subpoenaed to produce documents in connection with an antitrust suit. To comply, they hired lawyers, had thousands of boxes of documents reviewed, and eventually 17 of their officers and employees were deposed over a period of more than 80 days. *See id.* at 366. They then asked for $2.3 million to compensate them for the cost of responding to this discovery. *See id.* The district judge refused, but the court of appeals reversed, reasoning as follows:

> Although party witnesses must generally bear the burden of discovery costs, the rationale for the general rule is inapplicable where the discovery demands are made on nonparties. Nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of the costs of a litigation to which they were not a party.

Id. at 371. Since this decision, the rule regarding subpoenas on nonparty witnesses has been amended to strengthen protections for them against overreaching by the parties. *See* FED. R. CIV. P. 45(c).

135. *See supra* text accompanying notes 62-63.

136. *See* Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61 (1995).

137. *See supra* note 132 and accompanying text.

masses of material on opponents. In addition, one can imagine the difficulty in assessing the cost to a litigant of responding to other forms of discovery. For example, how much should Microsoft be compensated for having Bill Gates tied up in a deposition for a day? Admittedly, the "proportionality" provisions currently in the Rules[138] call for some consideration of the cost of responding, but that inquiry should operate at a considerably different level of detail.

More basically, however, there is very considerable reason for resistance to the proposition that parties should be required to bear their opponents' response costs. For one thing, response activity frequently becomes an integral part of the party's own trial preparation; sitting through the deposition of her own witnesses is often an important educational experience for a lawyer. Even defense lawyers who spoke to the Committee were quite cautious about the concept. The economists noted above define discovery that does not promise to yield material valuable enough to offset all discovery expenses (including response costs) as "abusive,"[139] but it is unlikely that many others would share this view.[140] The actual provisions of the Federal Rule regarding proportionality[141] are different. Although suggesting that discovery can be constrained on grounds of proportionality may seem a move in the direction of requiring litigants to internalize all discovery costs, then, the current package does not come close to that position. The cost-bearing proposal it makes, conditioned upon a determination that the existing proportionality rule has been exceeded and not requiring that all (or any) costs be shifted, is quite different.

3. Discovery cutoffs: The one "win/win" technique that the Rand study of the CJRA identified was setting early discovery cutoffs and also an early trial date,[142] and the Judicial Conference commended that topic to the Advisory Committee for its

138. *See supra* note 43.

139. *See* Cooter & Rubinfeld, *supra* note 136, at 62-64.

140. Professor Hay has argued, for example, that even from an economic analysis this standard for discovery abuse probably would not yield a socially desirable level of discovery. He reasons that, even if measurable, the value of discovery to parties is an insufficient proxy for its value to society in some cases. *See* Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481 (1994); *see also* Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465 (1994) (questioning assumptions of this economic analysis of discovery and raising doubts about implementation).

141. *See supra* note 43.

142. *See supra* text accompanying notes 64-67.

consideration.[143] The amendment package includes nothing along these lines.

There are at least two explanations for this omission. First, the empirical picture has been complicated considerably by the FJC's data, which failed to confirm a correlation between imposing an early discovery cutoff and cost or time savings,[144] so the promised payoff became uncertain.

Second, there appeared to be insurmountable practical difficulties in improving the current rules on this score. At present, the rules direct that a judge set a schedule early in the case including a cutoff date for discovery.[145] The alternatives, then, were to require that a trial date be set in the same fashion, or to specify an actual discovery cutoff period in the national rule that all courts had to use in all cases. The former appeared impossible because the docket conditions in some districts would make setting a realistic trial date early in the case unrealistic. The latter, therefore, seemed counterproductive because a "one size fits all" approach would not work and requiring a discovery cutoff in the absence of a firm trial date could do more harm than good.[146]

4. Discovery confidentiality: For more than a decade, a controversy has swirled around the subject of litigation confidentiality.[147] The controversy has other aspects, but most prominently focuses on access by nonparties to material obtained through discovery but subject to a protective order. In the eyes of some American courts, all discovery should be treated as public in the same way that a trial is public.[148] Indeed, there were even judicial suggestions that it was proper to file a lawsuit to obtain discovery rather than any other relief.[149] To non-American eyes already uneasy

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143. Judicial Conference of the United States, The Civil Justice Reform Act of 1990—Final Report, 175 F.R.D. 62, 83-84 (recommending consideration of whether Rule 16 should be amended to require the court to set a trial date and also recommending continued study of specific time limitations for discovery).

144. *See* Willging, *supra* note 69, at 581 (recognizing conflict with Rand findings).

145. *See* FED. R. CIV. P. 16(b)(3) (directing court to enter a scheduling order within 120 days of case filing that limits the time to complete discovery).

146. *See* BROOKINGS INSTITUTION, JUSTICE FOR ALL 15 (1989) ("the early completion of discovery can be counterproductive if the trial is then long delayed").

147. For background, see Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 [hereinafter Marcus, *Discovery Confidentiality*]; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

148. *See e.g.*, A.T.&T. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979) ("pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings").

149. Consider the following views of the United States Court of Appeals for the Seventh Circuit:

with broad American discovery, these concepts must be very unsettling.

The constitutional argument for unlimited access to discovery materials was scotched by a 1984 Supreme Court decision,[150] but the debate has not ended. Legislation has been adopted in a number of states limiting the power of courts to restrict access to material turned over through discovery[151] and bills have been introduced in Congress to accomplish similar objectives.[152] In general, this legislation stresses the possible utility of information obtained through discovery in revealing risks to public health.

At the rulemaking level, the Advisory Committee circulated a proposal to amend the protective order rule to address some of these concerns in 1993,[153] but the Judicial Conference declined to adopt that proposed amendment.[154] After considering the issue further, the Committee decided in March 1998, that it would not propose any further changes to the protective order rule[155] and the matter remains in the legislative arena.

5. Electronic materials: At the cutting edge of discovery concerns of the American bar, are the difficulties and challenges that attend discovery of material stored in electronic form by computers. This concern emerged forcefully from the Committee's 1997 interactions with lawyers and it has found expression in the legal literature. From a European perspective, it may be of particular interest in part because such materials, particularly e-mail and other interaction via the Internet, could complicate the question of where

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> [M]any important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. . . . Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept form the public.

Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

150. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (holding that a protective order supported by good cause does not violate the First Amendment protections for freedom of speech even though it limits discussion of the materials covered).

151. For discussion of these statutes, see RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 575-76 (3d ed. 1998).

152. *See, e.g.*, Sunshine in Litigation Act of 1997, S. 225, 105th Cong., 1st Sess. (Jan. 28, 1997) (limiting authority of courts to issue protective orders in circumstances where public health or safety are supposedly involved).

153. Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and Federal Rules of Evidence, 150 F.R.D. 323, 383-87 (1993).

154. *See* Linda Greenhouse, *Judicial Conference Rejects More Secrecy in Civil Court*, N.Y. TIMES, Mar. 15, 1995 (reporting action of Judicial Conference).

155. *See* Minutes, Civil Rules Advisory Committee, March 16-17, 1998, at 38-39 (on file with author and with Rules Committee Support Office).

"documents" are located for purposes of blocking statutes and the like.

On the purely domestic front, the starting point is that in 1970 Rule 34 was amended to include electronically stored material within the definition of documents for purposes of discovery.[156] By 1980, a district judge foresaw that "by the year 2000 virtually all data will be stored in some form of computer memory."[157] What he may not have foreseen is that paper would become passe; estimates by the 1990s were that some thirty percent of electronic business information is never put into hard copy form.[158] Discovery of electronically stored information has, therefore, become a necessity in many types of litigation.

Moreover, material of this sort may become peculiarly forceful evidence in the era of e-mail and voice mail. It seems that many who use these devices incorrectly believe that their words are entirely private. "Because e-mail seems to disappear after it is read, senders often memorialize information that, in most cases, would not be written down or distributed in an office memorandum."[159] Thus, in one sexual discrimination case, the plaintiff was able to bolster her claim by obtaining several sexually explicit e-mail messages from her supervisor.[160]

Besides being extremely candid, perhaps offhand and foolish, such communications are durable and often exist in many places. An e-mail message, for example, may pass through several servers en route, and a copy may be retained in each of them. Similarly, backup copies of e-mail or voice mail messages may be maintained. And they exist for a long time. Whatever the expectation of the user, the "delete" function of a personal computer or voice mail system does not necessarily cause the impulses in question to be destroyed; it merely frees up space on the computer's disk for other uses.[161] When or whether it is put to other uses depends on later events. As a

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156. *See* FED. R. CIV. P. 34(a) (documents include "data complications from which information can be obtained").

157. National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980).

158. *See* James H.A. Pooley & David M. Shaw, *Finding What's Out There: Technical and Legal Aspects of Discovery*, 4 TEX. INTELL. PROP. L.J. 57, 58 (1995).

159. Debra S. Katz & Alan R. Kabat, *Electronic Discovery in Employment Discrimination Cases*, TRIAL, Dec. 1998, at 28.

160. *See* Strauss v. Microsoft Corp., 91 Civ. 5928 1995 WL 326492, at *4 (S.D.N.Y. 1995).

161. *See* Douglas A. Cawley, *Deleted But Not Removed: Whether You Want to Get Your Hands on E-Mail, Voice Mail, or the Files on a Floppy Disk, Don't Forget to Look for Erased Files That Can Take on a Whole New Life of Discovery*, LEGAL TIMES, July 21, 1997, at S34.

consequence, American lawyers have realized that pursuing electronic materials through discovery is extremely important.[162]

This constellation of developments has raised questions about whether special provision should be made for discovery of electronic materials. The task of searching "deleted" material could be quite substantial, although in general computers are supposed to ease search burdens.[163] The propriety of treating material that a party reasonably believes has been discarded as nonetheless still available for discovery might be debated. So also might issues about disclosure of trade secrets that could result if a party sought production of information in computerized form.[164]

For the present, these issues are not before the Advisory Committee because they have been assigned to another Judicial Conference committee.[165] For the future, however, it is likely that they will need to be confronted elsewhere as well as in this country.

III. TOWARD A NEW WORLD ORDER?

Venturing into comparative law is risky for the uninitiated, but the question whether current developments in discovery in America hold the seed for some rapprochement with the rest of the world on this topic requires such an effort. If so, that might be in keeping with

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162. *See, e.g.*, James A. Marcellino & Anthony A. Bongiorno, *E-Mail is Hottest Topic in Discovery Disputes*, NAT. L.J., Nov. 3, 1997, at B10.

163. In *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94C 897, 1995 WL 360526, at *1 (N.D. Ill. 1995), one defendant objected to searching some 30 million pages of e-mail messages that were on backup tapes to determine what materials related to the suit might be found there. Noting that the search burden was due in part to this defendant's choice of software, and that other defendants did not complain about the search burden, the court ordered discovery. *See id.* at 3.

Twenty years ago, the United States Supreme Court noted that searching computerized records may often be easier than searching other records:

> [A]lthough it may be expensive to retrieve information stored on computers when no program yet exists for the particular job, there is no reason to think that the same information could be extracted any less expensively if the records were kept in less modern forms. Indeed, one might expect the reverse to be true, for otherwise computers would not have gained such widespread use in the storing and handling of information.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 362 (1978). Indeed, it has been suggested that, because a computer can search records more easily, discovery that would be too burdensome in the absence of computerized records should be ordered when the records are kept on computer. *See* WILLIAM W. SCHWARZER, LYNN H. PASAHOW & JAMES B. LEWIS, CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE I-23 (Prentice Hall Law & Business, 2d ed. 1994).

164. *See* SCHWARZER, *supra* note 163, at 6-32 to 6-33.

165. The Standing Committee on Rules of Practice and Procedure has a Technology Subcommittee that is considering these and other questions pertinent to recent technological innovation.

the thrust of American procedural innovation this century, which substantially unified the disparate states of the union through the influence of the Federal Rules.[166]

Viewed from abroad, the modest current package of American discovery reforms must look like rearranging the deck chairs on the Titanic, especially given the unrestricted nature of the initial inquiry into the possible need for change.[167] This Essay thus speaks of "retooling" the current provisions, suggesting that only modest changes are meant. Surely the rest of the world would be surprised to learn that this set of proposed amendments has been labeled "revolutionary" by a member of the Standing Committee on Rules of Practice and Procedure.[168] But taking this package as the most recent phase of the discovery containment effort of the last quarter century, shows that considerable change has occurred. At least from an American perspective, the cumulative effect of the changes that have been made already move well beyond mere tinkering.[169]

Moreover, these changes have many earmarks of a shift toward the practices of the rest of the world in managing fact-gathering for civil litigation. Thus, both the occasions for and extent of judicial control of discovery have been fortified. The parties are not to embark on formal discovery until they have devised a discovery plan and that is to be submitted to the judge for approval. The judge is to disallow disproportionate discovery. Unless the judge orders otherwise, the parties are subject to numerical limitations on interrogatories and depositions and a durational limitation on depositions has been proposed. The proposed revision of the scope of discovery ties it more closely to the claims and defenses made in the pleadings. Overall, the thrust is toward containing the cost of discovery, not just dealing with misconduct. In sum, it could be said that America is finally eliminating the "extravagant" features of

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166. *See* Hazard, *supra* note 13, at 1669 (noting that Rules Enabling Act process promoted uniformity of procedure in states with very different systems, including the civil law system of Louisiana).

167. *See supra* text accompanying note 57.

168. *See* Minutes, Committee on Rules of Practice and Procedure, Meeting of June 18-19, 1998, (on file at Rules Committee Support Office) at 23:

> One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions.

169. *See* Marcus, *Discovery Containment*, *supra* note 38, at 783 (cataloguing these changes and concluding that they collectively constitute more than mere tinkering).

discovery, opening the way to accommodation with the practices of the rest of the world.

Similar curtailment may be under way in other Anglo-American countries. In England, Lord Woolf's recent study suggested that litigation in that country is more expensive than anywhere else, with the possible exception of California.[170] This cost was fueled by a number of things, and one of the solutions he proposed was to curtail discovery. Indeed, should this effort not succeed, he suggested that discovery might be eliminated entirely in some lower value cases.[171] Regarding documents, for example, Lord Woolf proposes that parties not be taxed considerably in searching for pertinent materials.[172] Although it is unclear whether these proposals will be implemented,[173] the tenor seems reminiscent of the American experience. The impulse to curtail discovery in the Anglo-American world is not universal, however; it appears that Canada continues to expand its discovery opportunities.[174] Nonetheless, the overall trend seems to be toward caution and control.

Is there any correlative movement in the direction of greater discovery in the countries that have heretofore deplored and forbidden it? At least in some countries there seems to have been none.[175] But

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170. *See* RT. HON. LORD WOOLF, ACCESS TO JUSTICE (Interim Report) 11-12 (1995).

171. For "fast track" cases (those not exceeding 10,000 pounds), Lord Woolf admonishes that "[i]t has to be recognized that the alternative to my proposal would be to dispense with disclosure altogether (like the continental systems) or to limit initial disclosure to documents on which a party intended to rely." RT. HON. LORD WOOLF, ACCESS TO JUSTICE (Final Report) 126 (1996).

172. In lower value cases, he proposes that they be handled on a "fast track," Lord Woolf would limit disclosure to the documents that the disclosing party would rely on in support of its contentions and "adverse documents of which a party is aware." *Id.* at 124. Recognizing that thus limiting document discovery will not sufficiently curtail costs if a party has to search through all its documents to respond, Lord Woolf adds that the obligation "should apply only to relevant documents of which a party is aware at the time when the obligation to disclose arises," although he notes that "this is the most difficult aspect of my proposals in practice." *Id.* at 125. Going beyond this disclosure would be by court order only. *See id.* at 125. In higher value cases, it appears that broader document discovery would be authorized, but nonetheless that it would be subject to much more stringent judicial control than in the U.S. *See id.* ch. 5 (describing the "multi-track" treatment).

173. *See* Michael Zander, *The Woolf Report: Forwards or Backwards for the New Lord Chancellor?*, 16 CIVIL JUST. Q. 208 (1997) (noting that "implementation of the Woolf project appears to have almost universal support including, so far as one can tell, that of the senior judiciary, the Bar Council, and the Law Society as well as both the lay and the legal press").

174. *See* 3 GARRY D. WATSON, HOMLESTED AND WATSON: ONTARIO CIVIL PROCEDURE § 6, at 31 (1998) (describing Canadian civil procedure reform movement that began in the late 1960s and involved expansion of discovery to include the examination of non-parties and discovery of the identity of witnesses).

175. *See* DAMASKA, EVIDENCE LAW, *supra* note 96, at 115 n.80 (reporting that in 1990 the German Federal Supreme Court rejected proposals for a general right to obtain information from the adversary in civil litigation).

there are some indications there may be movement of this sort. In 1988, the Netherlands adopted a new Evidence Act affording some opportunities for discovery.[176] In 1996, Japan adopted a new Civil Procedure Code that somewhat expanded the opportunity to obtain document discovery.[177] Although the former Japanese code required the requesting party to identify a requested document by title, the new code provides that if it is difficult to identify the title or substance of the document, it is sufficient for the party making the request to do so in a way that notifies the responding party which document is meant.[178] In addition, there is a provision for an exchange of inquiries and documents between the parties without court intervention.[179] These developments are slim reeds to construct a sense of movement in the civil law world toward acceptance of discovery that contains elements similar to the U.S. model. Indeed, we are told that in Japan "[a]n American type 'discovery' was advocated by some academics and lawyers throughout the period but this was strongly opposed by industry and the government and the adoption of a general discovery was abandoned at an early stage."[180]

Efforts at formulating a combined procedure do not look too impressive even in the area of international commercial arbitration, the area invoked by Professor Lowenfeld.[181] The International Commerce Commission (ICC) has adopted new Rules of Arbitration, but "[u]nlike in common law proceedings, a party has no right to discovery of documents in an ICC arbitration."[182] To the contrary, Art. 20(1) of the new arbitration rules provides that the arbitral tribunal is to establish the facts "by all appropriate means," language "deliberately chosen by its drafters in order to avoid imposing the procedural practices of any particular legal system on the participants."[183] If anything, it appears that the objective of these new Rules is to prompt arbitrators of a common law bent to forgo their usual habits.[184] "[I]t is often repeated that there is no place in

176. *See* JAN M. HEBLEY, THE NETHERLANDS CIVIL EVIDENCE ACT 1988 (1992).

177. *See* Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997); Karen L. Hagberg et al., *New Japanese Procedure Expands Discovery*, NAT'L, Sept. 14, 1998, at C7.

178. *See* Hagberg, *supra* note 177, at C8.

179. *See id.* at C9.

180. Taniguchi, *supra* note 177, at 776.

181. *See supra* text accompanying note 9.

182. *See* YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 261 (1998).

183. *Id.* at 252.

184. Thus, the rules "do assume that the Arbitral Tribunal will play a more active role in managing and conducting the proceedings than might once have been the custom in common law

international arbitration for the so-called 'fishing expedition.'"[185] Although the initial drafts of the possible Transnational Rules of Civil Procedure being explored by the ALI include somewhat more dynamic discovery provisions,[186] it is hard to see that the rest of the world has moved much toward discovery of the American mold.

The question, then, is whether the American version has really changed into something akin to the Continental one. Judge Edwards has suggested that, in some regards, the more vigorous attitudes of American judges in some cases do show a considerable move in that direction.[187] Moreover, in a well-known article, Professor Langbein has urged that there is "a fundamental distinction between fact-gathering and the rest of civil litigation," and that the American courts could properly emulate the Continental handling of evidence gathering without seriously compromising the adversary system.[188]

With all due respect to these eminent gentlemen, I cannot find the seeds of any such dramatic reorientation in American judicial activity in the changes to date or those proposed. It is true that these developments incorporate the judge more into activities previously left entirely to the lawyers, and that the determination whether this change has crossed the line into the "inquisitorial" mode is necessarily a matter of judgment. It is also true that the increasingly managerial style of American judges can be questioned on the ground that it endows them with too much power and threatens their impartiality.[189] But the current reality, albeit different from the past, is worlds away from the Continental practice.

Even though American judges do take responsibility more often to curtail what they view as extravagant discovery, they hardly undertake with any frequency to supplant the parties as the procurers

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jurisdictions. But even in those jurisdictions, arbitrators are being urged to become more involved in directing the proceedings. . . ." *Id.* at 253.

185. *Id.* at 261.

186. *See* TRANSNATIONAL RULES OF CIVIL PROCEDURE (Preliminary Draft No. 1, Mar. 13, 1998). The draft does permit a party to demand disclosure of any relevant information. *See id.* at Rule 12. But it does not appear to contemplate routine depositions, and also requires the plaintiff (and other parties) to provide a statement of claims, including all supporting documents, that is much more extensive than would be required in a federal court in the U.S. *See id.* at Rule 8. It does not seem that the rules would contemplate discovery on an American scale even though (if adopted by other countries) they might expand the discovery available there.

187. *See* Harry T. Edwards, *Comments on Mirjan Damaska's of Evidentiary Transplants*, 45 AM. J. COMP. L. 853, 856-57 (1997) (noting that many U.S. judges are already aggressive in gathering evidence).

188. *See* John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 843 (1985).

189. The classic statement of these objections is Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

of evidence. Certainly nothing in the recent or current proposals for curtailing discovery suggests such an effort. To the contrary, the American judge is still, as Judge Frankel said more than twenty years ago, a "blind and blundering intruder" when she tries to become involved in the facts of the case.[190] Indeed, since Judge Frankel's comments, caseload growth and increased enthusiasm for criminal prosecution (which uses up judicial energy otherwise available for civil cases) have left American judges with less capacity to undertake the factual development of civil litigation. They can hardly undertake to police the discovery activities of the lawyers who are gathering evidence. As one judge explained in 1985:

> The discovery system depends absolutely on good faith and common sense from counsel. The courts, sorely pressed by demands to try cases promptly and rule thoughtfully on potentially case-dispositive motions, simply do not have the resources to police closely the operation of the discovery process. The whole system of civil adjudication would ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.[191]

Whether or not all Continental systems have the judicial capacity to undertake adequate factual development,[192] it should be apparent that American courts do not.

Even were the judicial capacity problem somehow solved, it is unlikely that the American system would readily retreat from the premise of a party's right to conduct discovery. To explain that conclusion, it is useful to invoke and invert the theoretical analysis offered by Professor Damaska in his 1986 book *The Faces of Justice and State Authority*.[193] One of the aims of that book was that "connections be established between the design of legal proceedings and dominant views on the role of government in society."[194] To that end, Damaska posited two fundamental orientations of government in society, the "policy-implementing state," which articulates and actively pursues a vision of the good, and the "reactive state," which takes a minimalist role and seeks only to serve as a resolver of disputes. The former sort of state, Damaska posited, would incline toward designing its legal apparatus with control lodged in a

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190. *See* Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975).

191. In re Convergent Tech. Sec. Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985).

192. *See* Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 AM. J. COMP. L. 657, 660 (1997) (reporting that one reason for delay in Italian courts is "a chronic shortage of judicial manpower").

193. *See* DAMASKA, FACES OF JUSTICE, *supra* note 12.

194. *Id.* at 10.

hierarchical judicial bureaucracy like that found in many Continental countries. The reactive state, on the other hand, would adopt a judicial system much like that of the United States, with principal reliance on coequal and coordinate trial level judges.

Damaska was careful to warn against expecting the existing systems of Europe and the United States always to fit the models he proposed[195] and he viewed party control over the issues involved as more important than control over procuring evidence.[196] Nonetheless, on the specific point at hand, the difference between the United States and the Continental methods of proof gathering identifies a key reason why American discovery now is unlikely to be revised in a way that would remove the Continental objection to party control, for the reactive state's organizational arrangements seem to have served American policy-implementing goals. As Judge Patrick Higginbotham, former Chair of the Advisory Committee, put it:

> Congress has elected to use the private suit, private attorney-general as an enforcing mechanism for the antitrust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. *Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress*.[197]

In a way, the blocking statute phenomenon[198] recognizes this reality; preventing American discovery is a way of frustrating what may seem to be an extravagant extraterritorial effort to enforce American law. But the main importance of discovery in America is in domestic litigation, and it is for domestic cases that it was designed.

Perhaps in other societies governmental agents sufficiently enforce such measures, but in the United States their success has been spotty. For example, a recent study explored the relative failure of public enforcement of civil rights compared to private enforcement.[199]

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195. Thus, he cautioned:

> So, the analytical scheme opens the possibility of finding some conflict-solving features in Europe that are missing from Anglo-American jurisdictions, and some policy-implementing features of the latter that are absent from European law. In brief, characteristics of the two archetypes should not be understood as repositories of essential facets of *existing* procedures in civil- and common-law countries.

Id. at 12.

196. *See id.* at 120.

197. *See* Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997) (emphasis added).

198. *See supra* text accompanying note 2.

199. *See* Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Unemployment*, 45 U.C.L.A. L. REV. 1401 (1998). Selmi reports that "the government has failed to play a strong role as an enforcement vehicle for civil rights" while

Dean Carrington has thus noted that "discovery is the American alternative to the administrative state," and emphasized its effectiveness:

> Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.[200]

As noted above,[201] American judges are simply not equipped to take up this slack. Even were that difficulty solved, Professor Langbein's proposition that fact-gathering is fundamentally different from other litigation activities looks quite dubious in light of its centrality to the enforcement of American law.

The centrality of discovery is also reflected in other aspects of American litigation. Some have suggested that broad discovery has affected the contours of American law,[202] but that conclusion seems dubious if it means that evidence unearthed in discovery has prompted judges to modify legal rules.[203] For purposes of effectuation, however, discovery, particularly document discovery, is essential to American law by providing proof for claims based on established legal rules. Thus, in ordering discovery even though the materials sought were located abroad, a leading American judge said that "the heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case."[204] This reality is evidenced by the American concern with destruction of documents. The fact that some may be tempted to purge their files[205] is evidence of this reality and the importance of Dean Carrington's

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"private attorneys have been responsible for the vast majority of important civil rights cases." *Id.* at 1403. For example, since the 1991 amendments to Title VII, suits by private plaintiffs outnumber government suits by 100 to 1. *Id.* at 1435-38.

200. *See* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

201. *See supra* text accompanying note 191.

202. *See* Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981) (arguing that "developments in areas such as products liability, employment discrimination, and consumer protection have been the result at least partly of broad-ranging discovery provisions").

203. *See* Marcus, *Discovery Containment*, *supra* note 38, at 749-52 (examining the theory and finding it impossible to prove).

204. In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1155 (N.D. Ill. 1979).

205. *See, e.g.*, Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472 (S.D. Fla. 1984), *aff'd in part, rev'd in part*, 775 F.2d 1440 (11th Cir. 1985) (flight test supervisor of defendant directed "purge" of department's files whose stated purpose was "the elimination of documents that might be detrimental to Piper in a law suit").

observations.[206] So also is the observation that evidence destruction itself is likely to be so explosive in the eyes of a jury that, even if it is entirely legal it should be undertaken only with "one of those rare documents so damaging that is discovery would equal unconditional surrender."[207] Even more telling in this regard is the ongoing debate about whether materials unearthed in litigation must be made public or at least available to governmental regulatory agencies.[208] This argument can be resisted forcefully on the ground that private litigation is not an adjunct to public enforcement and that public agencies have adequate resources to gather information for themselves.[209] But the fact that it has been made and persists is testimony of the American embrace of broad discovery. As Professor Damaska notes:

> Developments in Anglo-American countries also suggest a parallel between oscillations in the scope of discovery and changing views on the mission of government. . . . [C]ivil procedure came increasingly to be regarded as an instrument for instituting social reform or for challenging existing institutional practices, so that the objectives of civil litigation became complex and multiple. A source of possible confusion was thus created; effective tools of partisan investigation were developed with an eye toward litigation as an instrument of "public policy."[210]

This is the sense in which discovery might be said, as Professor Hazard has put it,[211] to have assumed a quasi-constitutional importance in America. That attitude appears to color the approach American judges bring to their confrontations with the attitudes toward discovery of other countries. American practice once deferred to the legal regimes of other countries,[212] but in 1957 the Supreme Court authorized American federal courts to order production even in the face of a foreign prohibition.[213] That case involved a strong American interest in the enforcement of its laws,[214] and the Court

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206. *See supra* text accompanying note 200.

207. *See* Lawrence B. Solum & Stephen J. Marzen, *Destruction of Evidence*, 16 LITIG. 11, 13 (Fall 1989).

208. *See supra* text accompanying notes 147-155.

209. *See, e.g.*, Marcus, *Discovery Confidentiality*, *supra* note 147, at 480-81.

210. *See* DAMASKA, FACES OF JUSTICE, *supra* note 12, at 133.

211. *See supra* text accompanying notes 12-13.

212. *See* BORN, *supra* note 2, at 871 (describing reluctance of U.S. courts under the Restatement of Conflicts of Law to direct acts (such as complying with discovery) that are forbidden by the local law of the country in which they are to be done).

213. Société Internationale v. Rogers, 357 U.S. 197 (1957).

214. Plaintiff sued claiming that assets seized under the Trading with the Enemy Act during World War II should be returned to it. *See id.* at 198-99. The Government claimed that plaintiff was actually the creature of I.G. Farbenindustrie, an enemy national during the war. *See id.* The discovery dispute arose from the Government's demand for documents that allegedly

emphasized those interests in upholding the power to order discovery.[215]

When the United States later instigated the drafting of the Hague Convention for Taking Evidence, other countries might have taken this as a step toward supplanting American discovery forays with the Convention's provisions. But despite the dissenters' argument that it was an "affront" to the other nations that ratified the Convention,[216] the Supreme Court held in its 1987 *Aerospatiale* decision that the Convention did not preclude resort to ordinary American discovery, or even that there routinely should be an initial effort to use the Convention before resort to American discovery.[217] The Court did admonish the lower courts to give weight to comity considerations in deciding whether to proceed with discovery under the Federal Rules, but it declined to "articulate specific rules to guide this delicate task of adjudication."[218] Since then, the lower courts have generally placed the burden on those urging resort to the Convention[219] and appear to assume that Convention procedures will be less effective than American discovery.[220] Much as this might be seen as "unwillingness to upset the uniformity of domestic law in the interest of international uniformity,"[221] it also emphasizes the centrality of discovery to the American world view. Thus, when it was proposed that the Federal Rules be amended to require resort first to the Convention,[222] this provoked strong opposition and was abandoned.[223]

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would show that plaintiff was controlled by I.G. Farben. *See id.* at 199-200. Plaintiff relied on Swiss banking secrecy laws in resisting production, although it tried to get permission from Swiss authorities to turn over the materials. *See id.* at 200. The Court recognized that "the problem before us requires consideration of the policies underlying the Trading with the Enemy Act . . . [for] it certainly is open to the Government to show that petitioner itself is the captive of interests whose direct ownership would bar recovery." *Id.* at 204.

215. The Court reasoned that allowing an exemption from discovery due to the limits of Swiss law "would undermine congressional policies made explicit in the 1941 amendments [to the Trading with the Enemy Act], and invite efforts to place ownership of American assets in persons or firms whose sovereign assures secrecy of records." *Id.* at 205.

216. Société Nationale Industriele Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 547 (1987) (Blackmun, J., concurring in part and dissenting in part).

217. *See id.* at 533-46.

218. *Id.* at 546.

219. *See* Gary B. Born & Scott Honig, *Comity and the Lower Courts Post-Aerospatiale Applications of the Hague Evidence Convention*, 24 INT'L L. 393, 401 (1990).

220. *See id.* at 403.

221. Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 4-5 (1998).

222. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 127 F.R.D. 237, 318-21 (1989).

223. *See* RUSSELL WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION 129 (2d ed. 1997).

American discovery emerges, in American eyes, as critical to enforcing American claims.

Similarly revealing of American attitudes toward discovery is the statute[224] that affords litigants with cases in the courts of other countries "special assistance in obtaining evidence in the United States."[225] Given the ancillary role such discovery forays play, and the possible incentive the statute provides foreigners to initiate litigation in this country, one might expect the American courts to be parsimonious in ordering such discovery. But they have not, and have often refused even to be concerned with whether the discovery would be allowed in the country in which the actual litigation is proceeding.[226] Far from recognizing the visceral opposition party-controlled discovery would provoke in other countries, the United States Court of Appeals for the Second Circuit has held that consideration of this factor is simply improper when an American court is asked to order ancillary discovery there.[227] Certainly this approach saves American judges from resolving potentially difficult problems about the actual scope of foreign discovery provisions,[228] but it also betrays a certain enthusiasm for American discovery as a benefit to be conferred on the rest of the world.[229]

From an American perspective, one might say that the interaction of these two regimes (the Hague Convention and the American statute regarding litigants with cases in other countries) is entirely even-handed. Litigants in American courts have a choice between the

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224. 28 U.S.C. § 1782. This statute was passed the same year that the U.S. became a member of the Hague Conference. *See Aerospatiale*, 482 U.S. at 529.

225. *Aerospatiale*, 482 U.S. at 529.

226. *See In re* Bayer AG, 146 F.3d 188 (3d Cir. 1998) (holding that discoverability in the foreign court is not crucial to discovery in America under § 1782); *In re* Metallgesellschaft AG, 121 F.3d 7 (2d Cir. 1997) (holding refusal to authorize discovery in America on the ground that the information sought was not discoverable under German law was error). Some courts, however, do seem to require that the material sought be discoverable in the court where the litigation is pending. *See In re* Application of Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1991).

227. In *In re The Matter of the Application of Europmep, S.A.*, 51 F.3d 1095 (2d Cir. 1995), the district court declined to order American discovery partly because doing so might be "an unwarranted intrusion into France's system of evidence gathering." *Id.* at 1098. Concluding that the attitude of the foreign court would preclude discovery only if there were "authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782," the appellate court held that this deference was wrong. *Id.* at 1100.

228. *See* Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 235 (1994) (arguing that requiring such a determination would often lead to "an unduly expensive and time-consuming fight about foreign law").

229. It should be noted, however, that an American court has discretion under section 1782 to limit or condition discovery in this country to avoid unfairness to litigants subjected to that discovery. But this might simply lead to a requirement that the non-American litigant consent to comparable discovery.

Federal Rules and the Convention and litigants in the courts of other countries do also because the statute allows them to pursue American discovery here.[230]

The willingness of American courts to entertain discovery requests for use in courts that would themselves forbid the discovery efforts may seem to make them officious intermeddlers, but the indifference of European systems to factual development in civil cases is perplexing to American eyes. As Professor Damaska has recognized, Continental civil procedure exhibits "a considerable degree of tolerance—almost an insouciance, to common law eyes—for the incompleteness of evidentiary material."[231] Assigning fact gathering to the judge does not solve this problem; "the protagonist who tends to monopolize fact gathering—the judge—is not really very energetic or resolute in his probing. His exercise of his near-monopoly power to develop evidence seems lazy."[232] In the Anglo-American mode, by way of contrast, "[b]ecause processes of proof are propelled by the parties' self-interest, there is no lack of incentive for energetic evidentiary action."[233]

Damaska offers two types of explanations for this divergence between the common law and the Continental systems. One is that protections of privacy are taken more seriously on the Continent than in America, at least where civil proceedings are concerned.[234] This explanation tends toward emphasizing the "cultural" divide; as he also notes, "Anglo-American lawyers wonder whether the largesse of continental law can be maintained without serious harm to the interests of justice."[235] Certainly this orientation seems strange to American ears. Our Fifth Amendment does apply to compelled testimony in civil as well as criminal cases,[236] but it provides no

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230. This insight was suggested by my colleague Bill Dodge.

231. Mirjan R. Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 843 (1997) [hereinafter *Evidentiary Transplants*]. In the same vein, in his most recent book Professor Damaska notes that in the Continental system there is "a relative indifference to the completeness of the evidentiary material submitted to the court." DAMASKA, EVIDENCE LAW, *supra* note 96, at 114.

232. Damaska, *Evidentiary Transplants*, *supra* note 231, at 844.

233. DAMASKA, FACES OF JUSTICE, *supra* note 12, at 122.

234. *See* Damaska, *Evidentiary Transplants*, *supra* note 231, at 842 ("Generally speaking, continental legal systems manifest a far greater sensitivity in civil than in criminal procedure to the protection of values that complicate the search for truth and inevitably reduce the completeness of the data-base for decision.").

235. *Id.* at 848.

236. *See* McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (holding that the Fifth Amendment privilege applies to civil and criminal actions). *See generally* Robert Heidt, *The Conjurer's Circle: The Fifth Amendment in Civil Litigation*, 91 YALE L.J. 1062 (1982).

ground for refusing to produce documentary material.[237] The European solicitude for the confidentiality of business information is particularly perplexing to Americans, for the debate in this country is whether such information is even eligible for a protective order which limits its use to the litigation at hand.[238] As Damaska recognizes, this Continental orientation is essentially ideological; it is a holdover of 19th century laissez faire philosophy.[239]

This explanation connects to the second explanation Damaska offers—historical evolution. The Continental procedure drew its sources from canon law practices, but owing to the nineteenth century ascendancy of the laissez faire dispute resolution model, "[t]he earlier emphasis of Roman-canonical authorities on the discovery of truth was greatly weakened."[240] Indeed, the discovery practices at equity can be traced to canon law antecedents; as we have seen, equity provided the historical source for American discovery.[241] Obviously, the American history has been different; particularly in the twentieth century it has involved an increasing emphasis on civil litigation as a method of enforcing public values. On a larger plane, America has also seen a profound political shift epitomized by the New Deal toward noncriminal governmental action to achieve regulatory purposes. Although this shift has certainly produced a reaction in the last twenty years, it remains a vital force in many areas.

In sum, this comparison of American and Continental attitudes toward discovery reveals a rather deep divide that goes beyond merely working off some of the rough edges of the American model before it is imported onto the Continent or transferring the Continental approach to the United States with a bit of jazzing up. A few words should also be said about the more "logistical" aspects of discovery in American civil litigation. Although these considerations are of a different order, they are nonetheless important.

To a significant extent, the American system of civil justice has come to rely on broad discovery for efficient functioning. Although the early hope that discovery would narrow the issues has not been realized, it seems clear that discovery has become essential to effective settlement discussions. Some countries may comfortably

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237. *See* Fisher v. United States, 425 U.S. 391 (1976) (holding that a subpoena for documents does not raise Fifth Amendment issues even though the documents themselves may incriminate).

238. *See* Marcus, *Discovery Confidentiality*, *supra* note 147 (discussing this debate).

239. *See* DAMASKA, FACES OF JUSTICE, *supra* note 12, at 132.

240. *Id.* at 209.

241. *See supra* text accompanying notes 15-16.

contemplate trying a high percentage of all civil cases that are filed, but that would not work here. Moreover, as the alternative dispute resolution movement that has gained such force in this country over the last twenty years has shown, there may often be positive values for the parties in settling rather than fighting to the finish.

Broad discovery is also central to the way in which American courts manage cases. Although these judges do not undertake to gather evidence, they expect parties to do so, and to complete the process in a timely fashion. That is the predicate for the discovery cutoff idea[242] and it also underlies the requirement that parties provide a detailed list of all the evidence they will use at trial a considerable amount of time in advance.[243] Indeed, the single continuous trial mandates some discovery in advance.[244] Of course, the single continuous trial that lies at the emotional heart of American civil litigation is much less important to most actual cases, since they rarely reach trial.[245] But depositions may offer a substitute testimonial event and American lawyers are therefore reconsidering their traditional attitude that a deposition witness should be instructed to be uncommunicative, sometimes deciding that the deposition witness should "show her stuff"[246] in order to influence settlement negotiations. Furthermore, trial is not the only route to a judicial decision of the case. Summary judgment has grown in importance since the Supreme Court appeared to endorse more vigorous use of the device in 1986[247] and the courts are increasingly impatient with requests that summary judgment decisions be delayed while the opposing party pursues further discovery or investigation.[248] Thus,

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242. *See supra* text accompanying notes 142-146.

243. *See* FED. R. CIV. P. 26(a)(3) (requiring that the parties identify witnesses and documents that they will use, and that before the trial starts their opponents commit to whether they will oppose introduction of the evidence thus identified).

244. "Where trials are of the day-in-court variety, some prior discovery seems absolutely necessary to reduce procedural ambush to a level compatible with notions of fair contest." DAMASKA, FACES OF JUSTICE, *supra* note 12, at 131.

245. For discussion of these issues, see Richard L. Marcus, *Completing Equity's Conquest? The Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989).

246. *See* James W. McElhaney, *Should You Hide the Flag?*, A.B.A. J., Oct. 1998, at 74 (counseling that it may pay to reveal case strengths during a deposition because this is the only occasion when witnesses will ordinarily testify and it pays to make it clear how strong they can be).

247. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'").

248. FED. R. CIV. P. 56(f) permits a party opposing a motion for summary judgment to submit an affidavit stating that the decision should be postponed to permit it to develop more

abolishing party control of discovery would have reverberations throughout the fabric of American pretrial procedure.

Finally, it seems legitimate to mention a more speculative possible ground for favoring considerable party latitude in conducting discovery—satisfaction with the litigation process itself. Over the last quarter century, substantial research has been done on "procedural justice."[249] This research has examined whether procedures leave the litigants satisfied with their brush with the litigation system. From this perspective, there are at least two arguments for suspecting that party-controlled discovery would enhance satisfaction with litigation. One is that being able to make the other side answer questions and provide documentary information is likely to be satisfying to the suspicious even if the material thus garnered does not vindicate the party's suspicions. Even the President of the United States can be required to answer deposition questions in a suit by a private litigant. The second is that in a system where most cases are not tried, the parties' willingness to settle, and their confidence that settlements reasonably reflect the merits of their case, may depend on their ability to procure information through discovery.

Whether these procedural justice justifications for American discovery are warranted is beyond the scope of this Article. As Professor Chase has noted, there are reportedly cultural differences on these subjects between people in different countries.[250] But there are also studies that show cross-national agreement about the desirability of litigant control of litigation processes,[251] and other indications that Europeans might actually favor some greater ability to control their cases.[252]

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material, but courts may be quite demanding as they assess such affidavits. The Unites States Court of Appeals for the Second Circuit, for example, explained that "[t]he affidavit must include the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant has made to obtain these facts; and why these efforts were unsuccessful." Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994).

249. For a survey of this research, see E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

250. *See* Oscar Chase, *Some Observations on the Cultural Dimensions of Civil Procedure Reform*, 45 AM. J. COMP. L. 861, 864-65 (1997) (citing LIND & TYLER, *supra* note 249, at 233).

251. *See* LIND & TYLER, *supra* note 249, at 33-34 (citing such studies); *see also* Stephen LaTour et al., *Procedure: Transnational Procedure and Preferences*, 86 YALE L.J. 258 (1976) (describing experiment conducted in Chapel Hill, North Carolina, and Hamburg, Germany, which found that both groups favored party control of presentation of evidence).

252. Consider the following description of litigation in France:

> [T]he lack of procedural details at the hearing and during the preparatory phase has the effect of disappointing certain litigants who need to feel that their case has been sufficiently aired in a public court hearing. This is particularly true in accident cases,

IV. CONCLUSION

This Article began by invoking the view of some outside this country that American discovery constitutes a form of imperialism. When it is linked to the extraterritorial assertion of American substantive law, that is an understandable reaction. But even in this era of increased international interdependence, most American lawsuits are strictly domestic affairs and United States discovery is calibrated for those cases, not the occasional suit with international aspects. Accordingly, it is the domestic function of broad discovery, not the international complications it sometimes causes, that should occupy our attention.

The focus of this Article is whether a reconciliation of the American attitude toward discovery and that of the rest of the world might result from current trends in American reform. Any conclusion must be tentative, but the centrality of discovery to the operation of American civil litigation suggests that there will not soon be a shift toward depriving the parties of substantial control over fact-development. Professor Lowenfeld suggests that the willingness of some parties to private international arbitration to employ a moderate version of document discovery may signal greater flexibility on the Continental side.[253] It appears unlikely, however, that the American version of official discovery will soon retreat to those contours, and the current initiatives certainly do not contemplate similar limitations.

The future is difficult to predict, however, and the present is fluid as well. Certainly the mid-century American enthusiasm for interventionist governmental action has abated; the New Deal has been pronounced dead for civil procedure as well as other governmental activities.[254] Equally certain, judicial activism has

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> for example, where victims often unrealistically expect to receive some king of amends for their suffering from the mere fact of a court hearing. When the court case is the result of any kind of drama which bereaves or harms a legal entity or individual materially or emotionally, the French civil judicial system does not always give the impression that Justice has been done.
>
> The same applies to cases in which simple declarations recorded in writing by lawyers do not constitute sufficient proof, and the testimony of witnesses would reveal the truth of the matter. The French Civil Code does provide that civil courts can order an investigation, but these provisions are never implemented, other than in a few rare divorce cases.

Daniel S. Lariviere, *Overview of the Problems of French Civil Procedure*, 45 AM. J. COMP. L. 737, 744-45 (1997).

253. *See supra* text accompanying note 9.

254. *See* Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269 (1997) (examining the decline of the New Deal model of rulemaking, not the content of the rules themselves).

fallen into disrepute in high political circles, although the version of activism that most concerns us here—active regulation of the behavior of litigants in preparing their cases—has achieved political popularity even as other forms are denounced.

In these fluid circumstances, it is hazardous to make predictions, but some seem safe. One is that concern with discovery will not go away either in America or on the Continent. Though the current set of proposed amendments to American discovery is not so consciously temporary as the ones adopted in 1993, it would be arrogant to assume that the current package embodies the final solution to the discovery problem. Another is that the level of societal commitment to civil litigation as a policy implementation device will also continue to be debated. That orientation of American law constitutes a primary reason for concluding that recalibration of discovery here does not embrace a Continental model even though it is intended to prompt more judicial oversight. But the very notion of public interest litigation is hard to define[255] and there are indications that, in some sectors the pendulum is swinging away from the wholehearted embrace of policy implementation by private civil litigation.[256]

As this debate evolves, however, the dominant American conception of civil procedure is still the one Professor Damaska identified with the policy-implementing state procedure as the Handmaid of Justice.[257] A related issue for purposes of discovery reform is the constitutionally mandated[258] single continuous trial, with all the pretrial procedural baggage that it implies. As much as some procedural attributes may be portable, broad discovery is unlikely to be detached from these uniquely American features. Although the debate thus permits arguments at the level of Professor Lowenfeld's observations, that certain discovery is "extravagant," it does not

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255. *See generally* Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 668-75 (1987) (exploring question whether product liability litigation should be considered "public interest" litigation).

256. The prime example is probably securities fraud litigation. In 1995, Congress enacted the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995), to curtail what it perceived to be abuses by lawyers prosecuting such suits. In 1998, it passed another bill to clean up problems that it felt had resulted from gaps in the first bill. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat. 3227 (1998).

257. *See* DAMASKA, FACES OF JUSTICE, *supra* note 12, at 148 (stating that in the activist state "procedure is basically a handmaiden of substantive law"). This was the exact image adopted by Charles Clark, the Reporter of the committee that drafted the original Federal Rules of Civil Procedure, to promote his vision. *See* Charles Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938). It was also embraced by other mid-century American civil procedure scholars. *See* MILLAR, *supra* note 14, at 4 ("In the household of the law, procedure ceases to be the materfamilias and is now the handmaiden.").

258. *See* U.S. CONST. amend. VII (preserving the right to trial by jury).

permit argument at the level identified by Professor Hazard. Given the centrality of discovery in America, "extravagant" is almost certainly going to mean something very different here for a long time. The recent American reforms thus differ profoundly from the attitudes of the rest of the world, even though they share a common spirit of concern with over-discovery. Hence, a new world order that fits the American reality and also commands the respect of the rest of the industrialized world is probably a thing of the remote future so far as discovery is concerned.