

# A Proposal to End Discovery Abuse

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## INTRODUCTION

When commentators, lawyers, judges, politicians, businesspeople—anyone really—are looking to heap abuse on part of the civil process, they complain about discovery. But in truth, civil discovery is treated cruelly and often misunderstood. This is the case for two reasons. First, we do not know much about what actually happens in civil discovery in different types of cases. As a result, people seem to fill in the gaps of knowledge with their priors, which are, in turn, dependent on a few examples that loom large in their imaginations. Whatever limited reliable evidence about discovery we do have—and it is indeed very limited—is too often ignored in favor of reflexive vilification. Second, critics rarely consider the public benefits of discovery or its positive externalities, instead focusing mostly on its private, largely monetary costs and benefits.<sup>1</sup> The only way to prevent

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1. See Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) (“Private litigants do in America much of what is done in other industrial states by public officers working

discovery from being abused is to know more about it and to evaluate its full costs and benefits. This Article proposes a modest change to litigation practice to help scholars, judges, and policymakers learn the truth about discovery. I propose that every discovery request be entered in the court docket. Given electronic filing, courts and litigants will incur few costs from this change, and researchers can analyze the information collected to determine the extent of discovery use and abuse.

This Article proceeds in four parts. Part I will evaluate the three core allegations against discovery: (i) that parties use discovery to raise rivals' costs so that they can increase the value of settlement, (ii) that parties use discovery to go on fishing expeditions without a solid basis in fact, and (iii) that information asymmetry is not a sufficient reason to allow discovery. As we will see, these complaints are interlinked, especially the latter two, which both concern uncertainty. Part II will discuss some of the benefits of discovery. Part III will describe the resistance to empirical evidence available about discovery and the limitations of that evidence. This Part points out that most of the evidence used to criticize discovery is based on surveys of lawyers either overseeing or litigating cases, and that much of this survey evidence is unreliable. The reason people rely on survey evidence is that the use of discovery is not tracked. Accordingly, Part IV will propose a solution to the empirical problem: track the use of discovery tools in the federal courts. This is relatively easy to do. Much like nutritionists' advice to patients that they keep a food diary, tracking discovery will allow us both to find out how it is used (how much chocolate cake litigants are eating) and to help litigants make better choices (choose carrots instead of cake).<sup>2</sup>

## I. THE ALLEGATIONS AGAINST DISCOVERY

This Part considers three criticisms of discovery, a short catalogue of some of the ways discovery is abused, and related issues. I begin by discussing the phenomenon of raising rivals' costs, the main concern that seems to have spurred the recent changes to the discovery rules. These changes put, front and center, a proportionality

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within an administrative bureaucracy.”); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 35 (1994) (“Clark marveled at how the new procedure would permit litigators to enter the New Deal and to amass the information relevant to policymakers.”).

2. See Miranda Hitti, *Keeping Food Diary Helps Lose Weight*, WEBMD (July 8, 2008), <http://www.webmd.com/diet/news/20080708/keeping-food-diary-helps-lose-weight> [<https://perma.cc/VQ2E-7ZEE>] (citing Jack. F. Hollis et al., *Weight Loss During the Intensive Intervention Phase of the Weight-Loss Maintenance Trial*, 35 AM. J. PREVENTIVE MED. 118 (2008)).

requirement, which had been in the rules but was not particularly influential.<sup>3</sup>

A second concern, which has received less attention, is uncertainty in discovery. This concern surfaces in two arguments. The first is that parties go on fishing expeditions to find out information that may or may not exist, raising costs needlessly. These are “known unknowns” or, in some cases, “unknown unknowns.”<sup>4</sup> The second argument is that uncertainty may exist only on one side because there are information asymmetries. These are secrets. It is in the interest of the party who holds secrets to make the discovery request seem like a fishing expedition when, in fact, it is a request for information that the party would prefer not to disclose. For this reason, parties’ representations regarding the validity of their opponents’ discovery requests should generally be considered unreliable.

### A. Raising Rivals’ Costs

In his well-known commentary titled *Discovery as Abuse*, Judge Frank Easterbrook posited that litigants use discovery in order to increase costs to their opponents.<sup>5</sup> By increasing costs (or threatening to), litigants can raise the amount at which it is worthwhile for their opponent to settle. This is because “[a]ll of the models of settlement imply that parties divide between them the gains from avoiding litigation.”<sup>6</sup> The value of settlement is equal to the estimated cost of litigating to completion plus the predicted value of the underlying claim. If a claim is worth \$100 and its likelihood of success is fifty percent, then \$50 is an appropriate settlement amount. If a claim is worth \$100, the likelihood of success is fifty percent, and the cost of litigating to completion is \$100, the claim is worth somewhere between

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3. FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment.

4. This phrase is taken from a press conference given by Donald Rumsfeld in 2002. He stated:

The message is that there are no knowns. There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don’t know. But there are also unknown unknowns. There are things we do not know we don’t know. So when we do the best we can and we pull all this information together, and we then say well that’s basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns. It sounds like a riddle. It isn’t a riddle. It is a very serious, important matter.

Donald Rumsfeld, U.S. Sec’y of Def., Department of Defense News Briefing (June 6, 2002), <http://www.nato.int/docu/speech/2002/s020606g.htm> [<https://perma.cc/FL6J-WQJT>].

5. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 637 (1989).

6. *Id.* at 636.

\$50 and \$150. If an opponent can credibly threaten to increase the litigation costs to \$150, the range of settlement value also rises.

According to Judge Easterbrook, it is easy for rivals to increase costs because district courts exercise little oversight of discovery.<sup>7</sup> There was no empirical basis for thinking this claim was true in 1989, when Judge Easterbrook published his article, and he cites none. And there was no basis for thinking that district court judges did not control discovery in 2007, when the U.S. Supreme Court cited Judge Easterbrook for this proposition in *Bell Atlantic Corp. v. Twombly*.<sup>8</sup> Nevertheless, Judge Easterbrook's assertion was used to support the contention that the pleadings doctrine needed to be tightened to prevent discovery abuses that would result in defendants settling "anemic" cases.<sup>9</sup> In the follow-on case, *Ashcroft v. Iqbal*, the Supreme Court rejected the lower courts' attempts to show that they could manage discovery and prevent needlessly raising rivals' costs, again citing to Judge Easterbrook's statement without further inquiry or empirical support.<sup>10</sup> We could use a little more evidence-based procedure.

What the Supreme Court failed to note was that increasing rivals' costs is a tactic that can be used by both sides. The Court was only concerned with the effect of discovery on defendants,<sup>11</sup> but both sides can raise costs. Surely, a plaintiff in a discrimination suit can raise costs by asking the defendant-employer for email correspondence that will be voluminous and costly to produce.<sup>12</sup> But just as easily, a defendant can raise costs by seeking a psychological or physical evaluation of the plaintiff and her private email correspondence.<sup>13</sup> Or a defendant can raise costs by asking for reimbursement for excessive information-technology work that made the emails available to be produced. Both requests may be arguably permissible in that they are "relevant to any party's claim or defense," and both may even be "proportional to the needs of the case," depending on how the judge interprets the "importance of the issues at stake in the action" and other

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7. *Id.* at 638.

8. 550 U.S. 544, 559 (2007).

9. *Id.* ("[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery . . .").

10. 556 U.S. 662, 684–86 (2009).

11. *Id.*

12. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411–12 (7th Cir. 2010) (Posner, J., dissenting in part) (reasoning that the plaintiff's ability to raise costs on the defendant by seeking electronic discovery justifies a higher pleading standard).

13. For example, in one recent case, a magistrate judge limited the defendant's ability to obtain the plaintiff's social-media posts in native file format, which would have given the defendant access to certain metadata. The plaintiff had provided the posts in PDF format. *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices & Prods. Liab. Litig.*, No. 1:14-ml-2570-RLY-TAB, 2017 BL 326237, at \*3–4 (S.D. Ind. Sept. 15, 2017).

factors.<sup>14</sup> The bottom line is that this tactic may pressure either side to settle, depending on the relative resources of the parties.<sup>15</sup> The system may even create incentives for both sides to increase rivals' costs.

Although not strictly raising *rivals'* costs, one additional consideration needs to be taken into account: the calculation of lawyers' fees, especially when lawyers are paid by the hour. As one defense lawyer told researchers, "There's an element of the lawyers . . . do[ing] more than necessary. They staff up a case beyond its needs, for example, sending two or more lawyers to attend a deposition or any other proceeding."<sup>16</sup> A plaintiffs' lawyer explained, "We have a saying in the plaintiffs' bar that 'You have to feed the tiger first'" before defendant attorneys will settle a case.<sup>17</sup> To the extent that the litigation budget is separate from the budget for settling a case, a general counsel ("GC") may find it easy to approve additional discovery expenditures, even when they needlessly increase the costs of the suit. It seems unlikely that anything can be done by regulators or rulemakers to reduce the incentives of defense lawyers to grandstand or of GCs to use their litigation budgets to raise rivals' costs.

How often is it the case that parties increase costs without a likely benefit, just to raise the value of settlement or, worse yet, the costs to their own client? We do not know. Reports from parties themselves will always be biased on this matter, and most of the available studies rely on surveys that are unreliable for the same reasons. At the same time, as we shall see, the extant studies based on surveys indicate that discovery is proportional to the value of the case and that, overall, this proportion is relatively small. This indicates that it is unlikely that raising rivals' costs is a problem in the run of cases. And that insight, in turn, requires us to consider to what minority of cases this analysis applies and whether it is possible to isolate that minority and legislate only with respect to the cases that raise the problem.

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14. See FED. R. CIV. P. 26(b)(1).

15. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 *BUFF. L. REV.* 1369, 1398 (2006) ("Party capacity to litigate not only affects the outcome of individual cases, but shapes the judicial agenda."); Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95, 120–21 (1974) ("[T]he broader the delegation to the parties, the greater the advantage conferred on the wealthier, more experienced and better organized party." (footnote omitted)); see also THOMAS E. WILLGING & EMERY G. LEE III, *FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION* 10 (2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv3.pdf> [<https://perma.cc/J6LV-GMKG>] ("Our interviews suggest that part of the variation in cost might be explained by the resources or size of the party and the character and specialized experience of the attorneys.").

16. WILLGING & LEE, *supra* note 15, at 10.

17. *Id.*

*B. Uncertainty: Fishing Expeditions and Information Asymmetry*

A second concern about discovery is the problem of uncertainty. If we knew what information existed, then it would be possible to analyze the value of that information to the litigants and society, then weigh that value against the cost of producing that information. Analysts could determine whether a litigant was merely trying to raise rivals' costs or had a valid reason for requesting the information. Similarly, analysts could evaluate whether the request was proportional to the needs of the litigation, as required by the rules.<sup>18</sup> Here some examples are helpful.

In the early 1990s, a group of children injured by an *Escherichia coli* contamination of unpasteurized apple juice sued the juice manufacturer.<sup>19</sup> As it turned out, some months before the outbreak, the manufacturer had been inspected by the U.S. military in connection with the potential sale of its juice in commissaries.<sup>20</sup> In its letter to the juice manufacturer, the Army wrote, "We reviewed the deficiencies noted in the report, which our inspector discussed with you at the time of the inspection. As a result, we determined that your plant sanitation program does not adequately assure product wholesomeness for military consumers."<sup>21</sup> The company did not disclose this letter as part of discovery in the lawsuit brought by the injured children.<sup>22</sup> The lawyer representing the children learned of the letter's existence from an anonymous voicemail and filed a FOIA request with the Army.<sup>23</sup> Further discovery uncovered emails that proved that the juice company considered testing its finished products for pathogens after it received the letter from the Army; however, it decided not to because it was worried the data would lead to bad publicity.<sup>24</sup> The emails were written in early September 1996.<sup>25</sup> One child died and at least twenty-five were hospitalized in November of that year.<sup>26</sup>

This is not only a case of a very bad actor, both in terms of the underlying wrongdoing and litigation conduct, but also an example of the problem of unknowns—how is a lawyer litigating a case such as this

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

19. Bill Marler, *Another Lesson Learned the Hard Way: Odwalla E. Coli Outbreak 1996*, MARLER CLARK: MARLER BLOG (Jan. 23, 2013), <https://www.marlerblog.com/legal-cases/another-lesson-learned-the-hard-way-odwalla-e-coli-outbreak-1996/> [<https://perma.cc/P344-M8B9>].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

supposed to know that there is a smoking-gun letter in the defendant's files? Or that this same letter might be obtained from a third party? Sometimes parties have experience with institutions and know that certain types of records are kept as part of routine business. Other times whistleblowers or third parties either point to the existence of information or maintain it themselves. It would be useful to know, for example, how often discovery requests are made of third parties, especially regulatory agencies, and how often judges rule that litigants should look beyond the parties to the litigation to obtain information.

Is it common for a defendant to have access to relevant, even critical, information and keep it a secret? A study published in 1980 found that almost all litigants settled cases without revealing “arguably significant” information.<sup>27</sup> Perhaps this was an admission against interest, which should be relied upon; perhaps it was gloating and should be discounted. The discovery rules in 1980 were much more generous than they are today. Accordingly, there is even more reason to worry about undisclosed information—the known unknowns. The truth is, there is no good quantitative data, and there is unlikely to be. Qualitative data could and should be gathered, but there are no recent studies. There are, however, case studies pointing to likely problems.<sup>28</sup>

A recent Supreme Court decision overturning sanctions for blatant discovery abuse seems likely to exacerbate any existing tendency to withhold discoverable information in violation of the rules.<sup>29</sup> A family sued manufacturer Goodyear Tire, alleging that one of its tire models was prone to separation and blowouts when driven on the highway.<sup>30</sup> The plaintiffs asked for the results from tests of the tire that Goodyear had conducted; the company did not provide these and, according to the trial court, misled the court about their existence.<sup>31</sup> Every judge that reviewed the case agreed that Goodyear had withheld evidence that it should have released. Sometime after the case had settled, the plaintiffs' lawyer learned that there were, in fact, such test

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27. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 5 AM. B. FOUND. RES. J. 787, 819 (1980) (reporting that ninety-five percent of lawyers had worked on cases that settled without opposing counsel learning of “arguably significant” information in a deposition).

28. See Jeffrey W. Stempel, *Asymmetry and Adequacy in Discovery Incentives: The Discouraging Implications of Haeger v. Goodyear*, 51 AKRON L. REV. 639 (2017).

29. See *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186, 1190 (2017) (limiting attorney's fees sanctions to those incurred because of the discovery misconduct); see also Stempel, *supra* note 28, at 657–61 (analyzing *Goodyear*).

30. *Goodyear*, 137 S. Ct. at 1184; see also Dennis Wagner, *Judge: Goodyear Deceptive in Defense of Flaws in Tire*, ARIZ. REPUBLIC (Sept. 3, 2015, 8:56 AM), <https://www.azcentral.com/story/news/arizona/investigations/2015/09/03/goodyear-deadly-tirescoverup/71618544> [<http://perma.cc/B529-PQRJ>] (discussing specific design flaws in tires).

31. Stempel, *supra* note 28, at 649.

results. He read about them in a media account of a different trial in which this evidence was introduced.<sup>32</sup> The subsequent suit for sanctions resulted in a Supreme Court decision that entitled the plaintiffs only to the fees engendered by their attempts to obtain discovery (such as the cost of bringing a motion to compel).<sup>33</sup> Relative to the potential costs of producing highly damaging information and the benefits of hiding such information, this sanction is insufficient.

A second example is more recent and comes from the litigation surrounding defective ignition switches in Cobalt cars, manufactured by General Motors (“GM”). This story concerns unknown unknowns. Several wrongful death lawsuits had been filed against GM, alleging that a defect in the Cobalt car had caused the car to shut down while driving, resulting in a crash in which the airbags did not deploy (airbags will not deploy when the car is not on).<sup>34</sup> The company’s lawyers largely discounted the threat of this litigation, and the internal investigation into the defect was slow.<sup>35</sup> The part causing the defect, the ignition switch, was identified, but the company did not understand why it was defective.<sup>36</sup> Ultimately, one of the plaintiffs’ experts determined why the ignition switch was faulty.<sup>37</sup> It would have been impossible to know, at the start of the litigation, that the expert inspection would yield answers to questions GM itself had not yet answered. Yet under restrictive discovery rules, the plaintiffs’ expert might not have been allowed to access the information she needed in order to make her assessment.

There are many other such stories in products liability litigation and beyond. In most of the stories that are publicly available, pushing in discovery actually resulted in the information ultimately being released, either in the litigation or in another case. But we do not know the stories in which the information was never released, for obvious reasons. What these stories teach us is that information is sometimes hidden. Sometimes it is kept a secret. Sometimes decisionmakers do not know information that they should. Other times information is available but is not salient to decisionmakers until after an accident happens. Information can be hidden by defendants or by plaintiffs. And this information is often crucial not only to the litigants themselves but

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32. *Goodyear*, 137 S. Ct. at 1184.

33. *Id.* at 1186.

34. *See generally* ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS (2014), <http://www.beasleyallen.com/webfiles/valukas-report-on-gm-redacted.pdf> [<https://perma.cc/FM34-7PH2>].

35. *Id.* at 102–15.

36. *Id.* at 161–80.

37. *Id.* at 180–82.



also to the public because regulations change in response to the information obtained in litigation and its accompanying publicity. An honest analysis of the costs and benefits of discovery must deal with these issues—that is, the fact that crucial hidden information is often revealed as a direct result of civil discovery.

## II. THE BENEFITS OF DISCOVERY

Discovery serves two purposes. First, it provides the parties with information that will assist them in presenting their claims or defenses to the court.<sup>38</sup> Second, discovery yields information that the public and regulators can use to better prevent future misconduct.<sup>39</sup> One might characterize the second purpose as derivative of the first—that is, the information produced to support claims or defenses often is also useful to regulators. As Paul Carrington, who has been a reporter to the Rules Committee, wrote, “We should keep clearly in mind that discovery is the American alternative to the administrative state. . . . Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy.”<sup>40</sup> Whether this devolution of enforcement to private actors is ideal from a social-welfare point of view is beyond the scope of this Article, but given the current preference for a less robust administrative state, this is part of the regulatory landscape.<sup>41</sup>

The best way to understand the importance of discovery is to consider what happens when a company reasonably believes that it can delay or even prevent discovery entirely. The following story illustrates how important discovery is to the deterrent capacity of tort law. It is

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38. Parties may request “any nonprivileged matter that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1). This provision limits the requests to those “proportional to the needs of the case.” *Id.* This latter language could be read to constrict the role of discovery in revealing information also relevant to the public and the administrative state; however, the factors for the court’s consideration in making this judgment include things such as “the importance of the issues at stake” and the “likely benefit” of discovery as compared to its cost and expense, which could be read to encompass benefits to the public. *Id.* Indeed, the note to the rule recognizes that the case may “seek[ ] to vindicate vitally important personal or public values” and that this should be taken into account in determining the scope of discovery. *Id.* advisory committee’s note to 2015 amendment.

39. In this way, discovery is not unlike tort law, which has both an individual compensatory purpose and a collective deterrent purpose. For an argument about the relationship between these two purposes of tort law, see Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 404–09 (2012).

40. Carrington, *supra* note 1, at 54.

41. See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 34–41 (2017) (reviewing three mechanisms of regulation: by agency, by government lawsuits, and by private lawsuits). Although the book praises litigation, it does so within the confines of the extant system, which prefers a rather anemic administrative state relative to other nations to whom American politicians compare our country.

what one might call a worst-case scenario. How representative is this story? At the moment, there is no way to know. And, indeed, I recognize that by telling such stories, I am relying on anecdotes rather than data to make my case. The last Part of this Article proposes a way to understand the actual contours of discovery. This story, therefore, is merely illustrative of what is sometimes the case, although nobody knows how often.

In 1984, DuPont executives attended a meeting in Delaware in which they reviewed a careful cost-benefit analysis regarding a highly toxic chemical called C8, which was used in the process of making Teflon.<sup>42</sup> They knew that C8 “does not break down in the environment, accumulates in human blood, travels from pregnant mothers to their babies, and seeps into local drinking water supplies.”<sup>43</sup> The company’s legal and medical teams recommended that the company stop using C8—instead, the executives doubled its usage.<sup>44</sup> The company protected its employees, not allowing female employees of child-bearing age to come into contact with it, for example, but allowed the chemical to contaminate the water near the company’s West Virginia plant.<sup>45</sup> Approximately 3,500 people who lived in the area were ultimately diagnosed with diseases linked to C8.<sup>46</sup>

Why did DuPont, a company with a reputation for environmental responsibility, do this? Because they counted on their ability to minimize or, at least, delay their risk of liability by keeping this information hidden.<sup>47</sup> And they were right. An analysis of the costs and benefits of C8, even after the company paid fines and tort judgments, found that the benefits to DuPont of continuing to produce the chemical far outweighed the money DuPont paid out, largely (but not only) because the company was able to delay the day of reckoning

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42. Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The DuPont Case 2* (Nat’l Bureau of Econ. Research, Working Paper No. 23866, 2017).

43. *Id.*

44. *Id.*

45. *Id.* at 6–10.

46. *Id.* at 7.

47. “By controlling information, DuPont was able to co-opt regulators, delay enforcement, and limit the ability of academics or journalists to chime in.” *Id.* at 4. The authors add, “Companies face incentives to suppress potentially damaging information, so as to keep the plaintiff lawyers away.” *Id.* at 21. An important question is whether the tort system creates an incentive for companies to hide wrongdoing and whether, in addition to sticks, the system should adopt carrots to encourage companies to take remedial measures to avoid liability. The current system favors secrets and delay over remediation. See Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 820–21 (1997) (“Defense lawyers tout the effectiveness of ignorance of long-term product effects as a defense to litigation, and this advice appears to be followed, in some cases successfully.” (footnote omitted)).

for so long.<sup>48</sup> But those benefits to the company did not outweigh the costs imposed on third parties: the health costs, the pain and suffering of cancer victims, and the longer-term costs to the environment.<sup>49</sup> All of this would have been different had the company not managed to evade discovery for so long. Its ability to continue producing harm (some of it irreparable) would have been curtailed, and its costs would have increased, because it would not be discounting the potential liability over a twenty-to-thirty-year period.

As a counterpoint, consider the story of the fast-food hamburger chain that was sued by a number of families in the early 1990s after undercooked hamburgers poisoned their children with *E. coli*.<sup>50</sup> Discovery in that litigation showed that the company ignored the danger. Although it was widely known in the scientific community that *E. coli* in ground meat was potentially deadly, this fact was published in the press prior to the outbreak, and the company was aware that it should have been cooking meat at a higher temperature based on local health regulations.<sup>51</sup> Ultimately, the company paid \$98 million to the families and restructured its entire operation from purchasing to preparation.<sup>52</sup> None of this would have happened but for discovery and accompanying litigation exposure. Similarly, as described in the previous Part, there is evidence that GM would not have discovered the extent of the risk from defective ignition switches, or the root cause of the problem, except through litigation and especially one of the plaintiffs' experts.<sup>53</sup>

### III. EMPIRICAL EVIDENCE ABOUT DISCOVERY

Reviewing the available data on civil discovery, it is hard to conclude that discovery is really a significant problem in the federal courts.<sup>54</sup> Yet criticisms of discovery continue to be levied despite the

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48. The researchers found that, setting the reputational costs at zero, the company stood to gain \$1.1 billion in profits if it continued to manufacture the toxin, whereas it faced fines and costs of only \$100 million at present value in 1984, when the decision was made. Shapira & Zingales, *supra* note 42, at 2, 16–17.

49. *Id.* at 14–15.

50. JEFF BENEDICT, POISONED: THE TRUE STORY OF THE DEADLY *E. COLI* OUTBREAK THAT CHANGED THE WAY AMERICANS EAT (2011); *see also* LAHAV, *supra* note 41, at 49–50 (pointing to *E. coli* litigation as an effective regulator in lieu of weak government regulation).

51. BENEDICT, *supra* note 50, at 258–61.

52. *Id.* at 290.

53. VALUKAS, *supra* note 34, at 180–82.

54. *See* CORINA D. GERETY & BRITTANY K.T. KAUFFMAN, INST. OF THE ADVANCEMENT OF THE AM. LEGAL SYS., SUMMARY OF EMPIRICAL RESEARCH ON THE CIVIL JUSTICE PROCESS: 2008–2013, at 9–28 (2014), [http://iaals.du.edu/sites/default/files/documents/publications/summary\\_of\\_empirical\\_research\\_on\\_the\\_civil\\_justice\\_process\\_2008-2013.pdf](http://iaals.du.edu/sites/default/files/documents/publications/summary_of_empirical_research_on_the_civil_justice_process_2008-2013.pdf) [<https://perma.cc/K74Y-SCYC>]

best empirical evidence to the contrary.<sup>55</sup> In reforming discovery in 2015, the Rules Committee largely ignored the empirical evidence in favor of “lawyers’ normative assessments of the overall system.”<sup>56</sup> And, in his *2015 Year-End Report on the Federal Judiciary*, Chief Justice Roberts highlighted the importance of discovery reforms without reference to any empirical findings.<sup>57</sup> Lawyer perceptions persist despite significant evidence to the contrary—evidence that has been available for years. For example, an American Trial Lawyer survey in 2008 found that eighty-five percent of respondents believed that “litigation in general and discovery in particular are too expensive.”<sup>58</sup> This raises an important psychological question: Why do high-level participants in the system ignore empirical data that does not fit with their priors?<sup>59</sup> Is it even possible to have an empirically based law of procedure in light of the obstinate power of anecdote over data? This Part will first review the best available data, then consider the implications of the limits of scientific knowledge about the civil justice system.

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(reviewing existing studies). I only address the federal judicial system; we know even less about the state courts, even though the vast majority of cases brought in the United States are filed there. Some interesting work is being done on state court discovery reforms. See, e.g., NAT’L CTR. FOR STATE COURTS, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (2015), [https://www.ncsc.org/~media/files/pdf/topics/civil%20procedure/utah%20rule%2026%20evaluation%20final%20report\(2015\).ashx](https://www.ncsc.org/~media/files/pdf/topics/civil%20procedure/utah%20rule%2026%20evaluation%20final%20report(2015).ashx) [https://perma.cc/L8ZY-TYC6]. Revisions in Utah included setting discovery tiers for cases with different amounts in controversy. *Id.* at iii. Researchers found that these reforms increased the settlement rate and decreased the time to final disposition. *Id.* at iv. It is unclear what effect the reforms had on other factors, such as information that might be of public concern or settlements under conditions of limited information.

55. It seems this has been true forever. See, e.g., Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1881 (1989) (“The much criticized discovery function and class action remain together the scourge of corporate and governmental malefactors.”); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (describing and disputing the perception of widespread discovery abuse).

56. Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1054 (2016).

57. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–7, 10–11 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [https://perma.cc/XM8Z-T469].

58. AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT 4 (2008), [http://iaals.du.edu/sites/default/files/documents/publications/interim\\_report\\_final\\_for\\_web.pdf](http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf) [https://perma.cc/V4VZ-JNXD].

59. See Lonny Hoffman, *Examining the Empirical Case for Discovery Reform in Texas*, 58 S. TEX. L. REV. 209, 221 (2016) (“It is sobering to reflect on how policy debates are often conducted with little regard for the actual facts.”); Maurice Rosenberg, *The Impact of Procedure-Impact Studies in the Administration of Justice*, LAW & CONTEMP. PROBS., Summer 1988, at 13, 29 (“Data have great trouble piercing made-up minds. Some judges and lawyers believe there are only two kinds of research findings: those they intuitively agree with (“That’s obvious!”); and those they intuitively disagree with (“That’s wrong!”).”).

The best available recent study was conducted by the Federal Judicial Center (“FJC”) in the run up to the discovery amendments of 2015.<sup>60</sup> This was a survey of two thousand lawyers who had recently litigated cases in the federal courts. Instead of asking these lawyers how they perceived discovery generally, the researchers asked lawyers about the most recent federal lawsuit they litigated. The main findings were that (i) discovery is more or less proportional to the value of the underlying case, (ii) discovery is slightly costlier for defendants than plaintiffs, and (iii) discovery costs are low except for the ninety-fifth percentile of cases and above. In other words, most litigation sees little discovery. For example, the researchers found that the median discovery costs were \$15,000 for plaintiffs and \$20,000 for defendants.<sup>61</sup> Discovery costs for plaintiffs were about 1.6 percent of the stakes and for defendants about 3.3 percent of the stakes.<sup>62</sup> So defendants pay more for discovery, but the cost of discovery as a percentage of the stakes is not a large. These data indicate that plaintiffs are not very successful at raising rivals’ costs to an extent that would drive settlement offers up appreciably.

Further, discovery costs were about the same in 2009 as they were in 1997, adjusted for inflation—a surprising finding considering the rising costs of legal services over this same period.<sup>63</sup> Electronic discovery also does not have much of an impact. The study found that only five to ten percent of attorney time spent on discovery was spent specifically on electronic discovery.<sup>64</sup> The FJC researchers also found that the drivers of higher discovery costs were largely what one would expect: higher stakes and factual complexity.<sup>65</sup>

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60. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Oct. 2009), <https://www.fjc.gov/sites/default/files/materials/08/CivilRulesSurvey2009.pdf> [<https://perma.cc/N7T5-FQP2>] [hereinafter PRELIMINARY REPORT]; see also EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (Mar. 2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv1.pdf> [<https://perma.cc/78WY-VZHM>] [hereinafter MULTIVARIATE ANALYSIS].

61. PRELIMINARY REPORT, *supra* note 60, at 35–36.

62. *Id.* at 42.

63. *Id.* at 36; see Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1192 (2016) (“[O]ur existing approaches to regulating the American legal profession increase costs, decrease access, stifle innovation, and do little to protect the interests of those who need or use legal services.”); see also MULTIVARIATE ANALYSIS, *supra* note 60, at 6, 8 (demonstrating that the size of the firm affects costs for both plaintiffs and defendants).

64. PRELIMINARY REPORT, *supra* note 60, at 40 (“The median estimate of electronic discovery costs as a percentage of discovery costs in cases with an electronic discovery request was 5 percent for plaintiff attorneys and 10 percent for defendant attorneys.”).

65. MULTIVARIATE ANALYSIS, *supra* note 60, at 5–7. Lee and Willging found that each 1% increase in stakes resulted in a 0.25% increase in costs for both plaintiffs and defendants, and that

That there is ordinarily little discovery is supported by older studies as well. For example, a 1998 study found that “the majority of the civil cases have either no discovery or limited discovery.”<sup>66</sup> In those cases where there was discovery, it took up about twenty-five percent of lawyer time on the case as a whole.<sup>67</sup>

In high-stakes litigation, the story is different. The discovery costs reported by the FJC in cases at the ninety-fifth percentile were much higher than the median.<sup>68</sup> But pure costs do not help much in evaluating whether discovery is too much, too little, or just right. Consider the patent litigation between Apple and Samsung. The lawsuit apparently cost a total of approximately \$1 billion for both parties.<sup>69</sup> This is an enormous amount of money but is also the rough equivalent of two weeks of iPhone sales at the time the litigation was conducted.<sup>70</sup> It appears that the cost of the entire litigation, not only discovery, was proportional to the monetary value of the case.<sup>71</sup> These high costs are consistent with empirical findings in intellectual property cases more generally; the FJC researchers found that intellectual property cases reported sixty-two percent higher discovery costs than the baseline.<sup>72</sup>

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each one-unit increase in complexity, on a seven-point scale, resulted in an 11% increase in costs for plaintiffs and a 13% increase for defendants. *Id.*

66. James S. Kakalic et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 623 (1998).

67. *Id.* at 637.

68. PRELIMINARY REPORT, *supra* note 60, at 35–36. Another survey confirms that the costs of litigation holds are similarly felt in a small number of costly cases. See William H.J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 CATH. U. L. REV. 867, 893–94 (2015) (“For companies of all sizes, the costs in lost employee time are significant.”). That survey was commissioned by a trade group in an attempt to influence discovery reforms. See *id.* at 880–81. It does not evaluate the relationship between the costs of litigation holds and social welfare.

69. Kurt Eichenwald, *The Great Smartphone War*, VANITY FAIR (May 3, 2014, 9:45 AM), <http://www.vanityfair.com/news/business/2014/06/apple-samsung-smartphone-patent-war> [<https://perma.cc/ZX7L-5MBQ>] (describing the costs of this litigation); Dimitra Kessenides, *When Apple and Samsung Fight, the Lawyers Win*, BLOOMBERG BUSINESSWEEK (Dec. 9, 2013, 3:41 PM), <http://www.bloomberg.com/bw/articles/2013-12-09/apple-samsung-patent-wars-mean-millions-for-lawyers> [<https://perma.cc/52JW-E32T>].

70. Kessenides, *supra* note 69.

71. From a social-welfare perspective, was this the best use of these funds? As Mark Lemley, the leading patent scholar, told a journalist, “[I]t’s not clear what good it does society to have them spend a billion dollars suing each other.” *Id.* But this evaluation depends on what Apple and Samsung would have done with this money otherwise, and we do not know the answer to that question. Perhaps they could have invented an even better electronic gadget or given a larger dividend to their shareholders, but it is almost certain that they would not have used it to find a cure for cancer. One lawyer explained to the FJC researchers the relationship between litigation costs and the stakes of litigation: in pharmaceutical cases, reportedly, companies “are willing to put down up to \$20 million for the right to sell a drug for \$1 billion.” WILLGING & LEE, *supra* note 15, at 8.

72. MULTIVARIATE ANALYSIS, *supra* note 60, at 8.

In sum, the empirical evidence based on surveys of lawyers responding to queries about specific cases indicates that there is not a lot of discovery in the median and that what discovery is conducted is proportional to the value of the case. However, in the highest-value cases, there is significant discovery, and the higher the case value (and the more complex the case), the higher the discovery costs will be. This makes sense and is not a flaw of discovery but rather a characteristic of the problems the court system is asked to solve and the structure of the profession that is charged with solving them.<sup>73</sup>

We saw at the start of this Part that the dominant narrative that discovery is disproportionately expensive is very sticky. What is to be done? The system would likely benefit from studies of the mechanisms at work, despite the resistance to empirical evidence in procedural rulemaking.<sup>74</sup> In a field devoted to reason, it is unacceptable to rest decisions that affect litigants, regulators, and the health and safety of many people on anecdotes or assumptions. Researchers must therefore continue to push for what Professor Gillian Hadfield calls a “public health” approach to law.<sup>75</sup> Access to better data, as discussed in the following Part, will help answer many questions about how the rules we already have work. For example, how often do litigants use boilerplate documents (either requests or responses) in discovery?<sup>76</sup>

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73. To accuse the civil justice system of being at fault for these phenomena is a mistake. Due process requires a meaningful opportunity to be heard, which, in turn, requires giving both sides an opportunity to develop their evidence for presentation at trial. Things of value—and I include due process in this category—are often costly. Although it is said that the best things in life are free, litigation is something that occurs when things have gone wrong. It is a social good but not something in which most people relish engaging. At the same time, the structure of the legal profession plays a significant part in the problems with the civil justice system, of which discovery is but a very small part. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1695 (2008) (“The entropic growth in the complexity of law and legal procedures, rooted in the traditional practices of lawyerly reasoning and dispute resolution, is the primary driver of increased costs.” (footnote omitted)).

74. Cultural cognition may be one promising avenue for further study. See Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1083 (2006) (explaining cultural cognition as it applies to an individual’s decisionmaking). A recent study found that judges are able to neutrally apply the law even when faced with culturally divisive matters. Dan M. Kahan et al., “Ideology” or “Situation Sense”? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 355 (2016).

75. Gillian K. Hadfield, *Judging Science: An Essay on the Unscientific Basis of Beliefs About the Impact of Legal Rules on Science and the Need for Better Data About Law*, 14 J.L. & POL’Y 137, 163 (2006). Why judges cannot turn this same neutrality on their evaluation of the system of which they are a part is a question worth studying further.

76. See Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 684 n.2 (2017) (noting that while there are no empirical studies on the use of boilerplate documents, it is the authors’ experience that these documents are ubiquitous).

What is the level of motion practice accompanying discovery, and in what types of cases? Do individual judges' rules affect the rate of discovery disputes? Does discovery promote settlement?<sup>77</sup>

#### IV. A PROPOSAL: DISCOVERY DOCKETING

If there is general agreement that good policy (and that is what discovery is—a form of social policy that impacts individual litigants and our collective health and safety) should be based on empirical evidence rather than conjecture, then the next step is to increase knowledge about how discovery works. Getting data at the moment is extremely difficult because discovery proceeds outside the courts unless there is a dispute between the parties about its scope or propriety.<sup>78</sup>

But it would be (relatively) easy to change all that with a requirement that litigants file discovery requests and responses with the court. With the advent of electronic docketing, this should not be very difficult, time consuming, or draining on judicial and administrative resources. But it will require judicial cooperation. It might begin as a pilot project in a few districts, which might provide enough information for a reliable study. The following should be included in these filings:

- Initial disclosures under Rules 26(a)(1)(A), 26(a)(2)(A) and 26(a)(3)(A) should be entered as “Discovery—[Party] Initial Disclosure.” This may be provided in the form of a cover letter to the actual disclosures, listing which categories are included and what documents are attached. The attachments themselves need not be filed.
- All supplemental disclosures under Rule 26(e) should be entered, and a cover letter to the actual disclosures should list which categories are included and documents attached, all entered into the docket as “Discovery—[Party] Supplemental Disclosure.”
- Notice of depositions served under Rules 27(a)(2), 30(b)(1)–(6), and 31(a)(3) and follow-up letters on the length and date(s) of

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77. See Kuo-Chang Huang, *Does Discovery Promote Settlement? An Empirical Answer*, 6 J. EMPIRICAL LEGAL STUD. 241, 275 (2009) (finding that permitting discovery promoted settlement in the Taiwanese legal system).

78. See, e.g., FED. R. CIV. P. 26(c)(1) (allowing a party who seeks protection from discovery requests to do so by motion); FED. R. CIV. P. 34(a) (allowing a party to serve a document request on another party without requiring court approval); see also Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 1014 (2018) (“The default in ordinary civil litigation thus remains a regime of party-driven discovery and settlement, with only the prospect of more significant judicial involvement lurking in the background.”).



each deposition should be entered into the docket as “Discovery—[Party] Deposition.”

- All stipulations about discovery procedure entered into pursuant to Rule 29 should be entered into the docket as “Discovery—Stipulation.”
- All interrogatories served pursuant to Rule 33(a) and responses served pursuant to Rules 33(b) or (d) should be entered into the docket as “Discovery—[Party] Interrogatory” and “Discovery—[Party] Interrogatory Response,” respectively.
- All requests for the production of documents served pursuant to Rule 34(a) and responses and objections under Rule 34(b)(2) should be entered into the docket as “Discovery—[Party] Document Request” and “Discovery—[Party] Document Request Response,” respectively.
- All amended requests for production of documents and responses should be entered into the docket as “Discovery—[Party] Amended Document Request” and “Discovery—[Party] Amended Document Request Response,” respectively.
- All requests for physical and mental examinations and responses to those requests pursuant to Rule 35 should be entered into the docket as “Discovery—[Party] Rule 35 Request” and “Discovery—[Party] Rule 35 Request Response,” respectively.
- All requests for admission pursuant to Rule 36(a) and responses or objections should be entered into the docket as “Discovery—[Party] Request to Admit” and “Discovery—[Party] Request to Admit Response,” respectively.
- All motions to compel discovery and responses should be entered into the docket as “Discovery—[Party] Motion to Compel” and “Discovery—[Party] Motion to Compel Response,” respectively.

A model standing order can be found in the Appendix at the end of this Article. As most of the items listed are produced in any event in connection with discovery, filing them should not increase the hours lawyers spend on discovery. Indeed, nearly all filings listed are documents that lawyers already serve on one another in discovery; the innovation here is to file them with the court. The only requirement above that would add work beyond what lawyers already do is the letter describing the date and length of depositions conducted. I anticipate that drafting such a letter (which can be done by a paralegal) should not take more than five to ten minutes per deposition and therefore

would not be a serious imposition. The main concern for litigants is that confidential information might be made public, and this can be addressed through ordinary confidentiality orders, as illustrated in the model order. The main concern for researchers is that in order for the data to be useful, they must be able to access it, and the relevant filings must be consistently coded. A district interested in adopting this proposal can grant researchers free access to the electronic filing system used by the federal courts, Public Access to Court Electronic Records (commonly known as “PACER”), to facilitate this research.

Why should judges sign on to this idea? In the short term, it is likely that requiring lawyers to file discovery requests will change lawyer behavior for the better.<sup>79</sup> It is one thing to serve and withdraw a request when the other party complains; it is quite another thing to file it with the court and know that the judge may look at it. While this proposal assumes that judges will not frequently look at these filings, it becomes possible once a request is filed, and the possibility of being watched may have the effect of cabining the most expansive or outrageous requests or responses. I predict that the possibility of being observed would limit only the most abusive requests or responses; this is because lawyers are path dependent and unlikely to change behavior that is considered to be standard in the profession, absent some robust intervention. On the other hand, it is possible that parties will move to a more informal system in order to avoid filing their requests. They may exchange requests by letter or conference call initially, determine their disagreements, and only then propound formal discovery requests. Lawyers may not move to a more informal system, however, so long as no penalty is associated with propounding discovery requests.

A second reason for judges to adopt this recommendation is to expand knowledge of the court system. This is an end in itself and has the potential to produce better procedures to the benefit of judges, litigants, and the general public. If discovery requests were available, researchers could use them to provide descriptive statistics about discovery that do not currently exist. For example, researchers could determine how often initial discovery is submitted and how robust these exchanges are; how often initial discovery is supplemented; how many iterations of requests are exchanged before a motion to compel is filed in document or other discovery; how many depositions are noticed; the length of depositions; the number of interrogatories; the extent to which answers to discovery requests delay the production of documents; how

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79. This predicted result is analogous to the “Hawthorne effect,” which describes “changes in behavior attributable to the knowledge by individuals that they are experimental subjects—rather than to the substance of the experimental manipulation.” Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 950 (2011).

often boilerplate objections to discovery are used and in what types of cases; how these vary across judges and districts; and more.

What kinds of studies could be done with this information? If discovery requests were available, researchers could determine in what proportion of cases discovery requests were made (and of what type) and could analyze requests based on type of defendant (institutional or individual), type of plaintiff, and type of case. For example, the number of depositions permitted without court approval is ten.<sup>80</sup> How many depositions are in fact conducted and in what types of cases? How often do litigants seek permission to take additional (or longer) depositions? Does the presence of an institutional plaintiff or defendant change the number of depositions? Are these requests symmetrical between parties? With detailed data on the timing and “size” of discovery requests (and their costs), it should be possible to detect the existence of strategic behavior.<sup>81</sup>

Similarly, we know that in some cases, document discovery is requested of third parties. How often does this occur and in what context? How often do judges order litigants to seek information from third parties rather than from their adversary, and what cost does this impose on others?

Numbers of cases in which there were disagreements about discovery, even if there were no motions to compel, could be ascertained. What is the ratio of motions to compel to discovery requests filed in a given case? How often do parties dispute discovery requests short of filing motions to compel? How many times do parties file discovery requests that are not adequately answered before turning to the court for assistance? Does this change based on type of case, size of law firm, or other factors that can be objectively determined?

There are limits to what empirical studies can tell us. For example, the question of whether there is too much or too little discovery (in general or in a given case) is a normative one that depends on values, not on objective data. Whether the litigation costs (including discovery) are too high in a case depends on how one values the process and the result. Even assuming that there is general agreement that the law should be enforced, there may be differences of opinion regarding, for example, how much error the system should tolerate and whether error that results from inability to obtain information should be treated

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80. FED. R. CIV. P. 30(a)(2)(A)(i).

81. For an example from a different context with rich data (online auctions), see Benjamin Edelman & Michael Ostrovsky, *Strategic Bidder Behavior in Sponsored Search Auctions*, 43 DECISION SUPPORT SYS. 192 (2007), <https://web.stanford.edu/~ost/papers/cycling.pdf> [<https://perma.cc/PGA9-AAE6>].

differently than other types of error.<sup>82</sup> There may also be differences in the way we value different rights. Perhaps the interest in bodily integrity that is often the subject of tort cases is valued differently than the dignity of a due process case.<sup>83</sup> There may also be disagreement as to whether the value to third parties from discovery, such as the value added when information produces regulatory change, should be considered in determining the benefits. Another key difficulty in creating a proper cost-benefit analysis is that the benefits of discovery (or lack thereof) are easier to calculate ex post, once we know what has been discovered or hidden away, but the costs are easier to calculate ex ante and tend to be the focus of discourse. That is, I may know that it will cost the company  $n$  dollars to produce information, but I cannot predict, until after the suit, whether the benefits of discovery are greater or less than  $n$ . But a first step toward answering these normative questions and determining the usefulness of information obtained in different types of cases is to evaluate how much discovery actually happens and how much discovery is resisted. Without that information, any position on the costs and benefits of discovery is suspect.

#### CONCLUSION

The purpose of civil discovery is to produce transparency in each side's case, both to help in fairly resolving the dispute at hand and to provide important regulatory information for observers, be they future defendants, regulators, or consumers. More transparency is needed to allow researchers to investigate how civil discovery works, how much there is, and what its benefits are. The misperceptions, lack of knowledge, and assumptions about the scope and costs of discovery stand in the way of making real progress in how to manage civil litigation and whether reform is needed at all. Instead of operating based on prior experiences or surveys, courts should start collecting hard data on discovery that can inform these debates and lead to more evidence-based procedure.

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82. For a discussion of the relative values of risk of error versus additional process, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Mashaw's discussion is equally applicable to civil procedure as administrative hearings, as the trade-offs are very similar.

83. *Cf. Carey v. Piphus*, 435 U.S. 247, 248 (1978) (holding that the violation of a due process right as a dignitary offense does not entitle the victim to damages and that "in the absence of proof of actual injury, the students are entitled to recover only nominal damages").

## APPENDIX: MODEL DISCOVERY DOCKETING ORDER

## 1. The Court's Requirements for Discovery Docketing

In order to assist in the study of the federal court system and particularly the use of discovery, all discovery requests and exchanges listed below shall be filed electronically.

A. The following discovery requests and responses must be filed electronically, subject to subsection (1)(B).

1. Initial disclosures under Rules 26(a)(1)(A), 26(a)(2)(A), and 26(a)(3)(A) shall be entered as "Discovery—[Party] Initial Disclosure." This may be provided in the form of a cover letter to the actual disclosures, listing which categories are included and what documents are attached. The attachments themselves need not be filed.
2. All supplemental disclosures under Rule 26(e) shall be entered, and a cover letter to the actual disclosures shall list which categories are included and documents attached, all entered into the docket as "Discovery—[Party] Supplemental Disclosure."
3. Notice of depositions served under Rules 27(a)(2), 30(b)(1)–(6), and 31(a)(3) and follow-up letters on the length and date(s) of each deposition shall be entered into the docket as "Discovery—[Party] Deposition."
4. All stipulations about discovery procedure entered into pursuant to Rule 29 shall be entered into the docket as "Discovery—Stipulation."
5. All interrogatories served pursuant to Rule 33(a) and responses served pursuant to Rules 33(b) or (d) shall be entered into the docket as "Discovery—[Party] Interrogatory" and "Discovery—[Party] Interrogatory Response," respectively.
6. All requests for the production of documents served pursuant to Rule 34(a) and responses and objections under Rule 34(b)(2) shall be entered into the docket as "Discovery—

[Party] Document Request” and “Discovery—[Party] Document Request Response,” respectively.

7. All amended requests for production of documents and responses shall be entered into the docket as “Discovery—[Party] Amended Document Request” and “Discovery—[Party] Amended Document Request Response,” respectively.
  8. All requests for physical and mental examinations and responses to those requests pursuant to Rule 35 shall be entered into the docket as “Discovery—[Party] Rule 35 Request” and “Discovery—[Party] Rule 35 Request Response,” respectively.
  9. All requests for admission pursuant to Rule 36(a) and responses or objections shall be entered into the docket as “Discovery—[Party] Request to Admit” and “Discovery—[Party] Request to Admit Response,” respectively.
  10. All motions to compel discovery and responses shall be entered into the docket as “Discovery—[Party] Motion to Compel” and “Discovery—[Party] Motion to Compel Response,” respectively.
- B. Parties may request that information filed pursuant to (1)(A) be redacted and/or filed under seal by letter brief, which shall be entered into the docket as “Discovery—Confidentiality.” Such requests are subject to the same rules as any other requests for sealing court records.