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The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?

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ARTICLE

THE DECLINE OF CIVIL JURY TRIALS: A POSITIVE DEVELOPMENT, MYTH, OR THE END OF JUSTICE AS WE NOW KNOW IT?

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I. INTRODUCTION

I will not detail here the charts and graphs documenting the plummeting percentages of civil cases that were actually tried before a jury. Although the figures vary somewhat and different studies use different years for their comparison purposes, it is widely acknowledged that the percentage of federal civil cases currently disposed of by a judgment at trial is about 1.2%.[1] The percentage of jury trials in the state courts is similar.[2] But what are we to do with these numbers? The answer could vary from panic, to ignore, to celebrate. I will advocate here that the decline in the number of jury trials is not the end of our judicial system or our democracy. I will argue, however, that if we value an open and transparent judicial system that provides for the participation of ordinary citizens in the process of adjudication, reform of our current litigation system is imperative.

Some commentators have conflated the power and role of the jury in criminal and civil cases.[3] This paper will discuss the declining jury trial

1. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–63 tbl.1 (2004) (exhibiting the decline in jury trial dispositions over time).

2. *See id.* at 460 ("The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur."); *see also* Mark Curriden, *Civil Jury Trials Plummet in Texas*, DALL. MORNING NEWS (Apr. 2, 2012, 11:23 PM), http://www.dallasnews.com/business/headlines/20120402-civil-jury-trials-plummet-in-texas.ece (highlighting the one-third decrease in the number of jury trials conducted in Texas state courts since 1996, against the increase in the number of lawsuits filed during that same time period).

3. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 521 (1997) (juxtaposing the elements of civil and criminal trials and concluding that both should require a twelve person jury); *see also* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 729 (1993)

only in the context of civil cases. The Sixth Amendment's right to a jury trial in a criminal case is truly the people's "vital check against the wrongful exercise of power by the State and its prosecutors."[4]

However, before we get to the potential fixes, we need to review whether a 1.2% jury trial occurrence is inherently unhealthy, and assess what factors have caused the decline of civil jury trials.[5]

II. 1.2%—TOO HOT, TOO COLD, JUST RIGHT?

It is generally assumed that in the late 1960s, 11.5% of federal civil filings progressed to a trial by jury.[6] Again, because record keeping has not always been consistent, precise numbers are difficult to come by.[7] In 2009, that number dropped to 1.2%.[8] In the interim, we have had an

("In defining the jury's constitutional authority, we should integrate our analyses of the civil and criminal contexts.").

4. Powers v. Ohio, 499 U.S. 400, 411 (1991); *see* U.S. CONST. amend. VI (interpreting the constitutional right afforded).

5. This paper will not address how the jury system can be administratively and procedurally strengthened. For example, to minimize inconvenience to jurors, the American Bar Association has advocated minimizing jury wait time, increasing juror pay, and reimbursing expenses for lunch and parking. *See* A.B.A., PRINCIPLES FOR JURIES AND JURY TRIALS 4–5 (2005). In addition, the A.B.A. Jury Project advocates allowing jurors to take notes during a trial and direct written questions to witnesses. All of these proposals merit serious consideration. Furthermore, this paper will not address the failure rates of citizens to respond to a jury summons or any racial, age, or economic disparities in the jury panels. Nevertheless, to those who bemoan the decline of civil jury trials: who are the jurors who are assessing the evidence and serving as the conscience of the community? *See* Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 321 (2005) (emphasizing the power and role of the American jury in weighing evidence and representing the conscience of the community).

6. Jeffrey E. Bigman, *Who Will Try a Case in 2023?*, 32 TRIAL ADVOC. Q. 1, 1 (2013).

7. One author quantifies just how much civil jury trials have diminished over time:

> By 1940, the proportion of cases tried declined to 15.2%. In 1952, the figure was 12%; in 1972, 9.1%; in 1982, 6.1%; in 1992, 3.5%. By the year 2002, only 1.8% of federal civil filings terminated in trials of any sort, and only 1.2% in jury trials. At the state level, where most civil litigation takes place, trials as a percentage of dispositions declined by half between 1992 and 2005 in the nation's seventy-five most populous counties. Jury trials in 2002 constituted less than one percent (0.6%) of all state court dispositions. Thus, in American civil justice, we have gone from a world in which trials, typically jury trials, were routine, to a world in which trials have become "vanishingly rare."

John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (footnotes omitted).

8. Ashby Jones, *Why Have Federal Civil Jury Trials Basically Disappeared?*, WALL ST. J. L. BLOG (Sept. 21, 2010, 10:35 AM), http://blogs.wsj.com/law/2010/09/21/why-have-federal-civil-jury-trials-basically-disappeared/.

increase in population, an increase in the number of lawyers, and an increase in the number of civil case filings.[9]

Given the above, a number of commentators have expressed alarm that the political and socializing role of the jury will be lost.[10] Many of these commentators will reference *Democracy in America* by Alexis de Tocqueville in support of their argument that the decline of jury trials must be reversed.[11] There is no doubt de Tocqueville admired the role of juries.[12] However, as with the writings of all great thinkers, everyone can find a sentence in de Tocqueville's works to support his or her theory.

Here is the quotation I have selected—de Tocqueville praises the jury system for being:

> a free school, always open, where each juror comes to be instructed about his rights, where he enters into daily communication with the most learned and most enlightened members of the upper classes, where the laws are taught to him in a practical way, and are put within the reach of his intelligence by the efforts of the lawyers, the advice of the judge[,] and the very passions of the parties.[13]

He then states: "I do not know if the jury is useful to those who have legal proceedings, but I am sure that it is very useful to those who judge them. I regard it as one of the most effective means that a society can use

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9. The U.S. population in 1960 was 179,323,175. CENSUSSCOPE, www.censusscope.org/us/chart_popl.html (last visited Nov. 22, 2013). The U.S. population in 2012 was estimated to be 313,914,040. *Id.* In 1960, federal private civil filings in the federal district courts totaled 38,444. FEDERAL JUDICIAL CTR., www.fjc.gov/history/caseload.nsf/page/caseloads_private_civil (last visited Nov. 22, 2013). In 2010, that number increased to 239,858. *Id.*

10. *See* Guy Harrison, *If We Looked Up and There Was No Jury*, 66 TEX. B.J. 294, 294 (2003) ("All citizens, but especially those of our profession, should be on guard against and of great suspicion about anything, be it legislation or business practice, that chips away at the great institution: the jury."); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 619 (1993) (addressing the ramifications of limiting or removing the power and role of juries in the American judicial system).

11. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 604–05 (1993) ("In *Democracy in America*, de Tocqueville concluded that the American jury was a fundamentally 'political institution' the primary function of which was to place political power in the hands of the governed.").

12. *See* William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 31 (2003) ("Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville so elegantly put it, '[t]he jury system . . . [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."); B. Lynn Winmill, *To My Russian Colleagues*, 45 ADVOC. 8, 10 (2002) ("In de Tocqueville's view, the American jury system played a critical role in creating public respect and support for the judiciary and the rule of law.").

13. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 448 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010).

for the education of the people."[14] He concludes his chapter by stating: "Thus the jury, which is the most energetic means to make the people rule, is also the most effective means to teach them to rule."[15]

De Tocqueville was very impressed with the educational role jury service can provide.[16] Given the limited ability most individuals had at that time in obtaining a formal education, de Tocqueville opined that jury service would be invaluable as an inclusionary device into participatory democracy.[17]

But what did he mean by the sentence, "I do not know if the jury is useful to those who have legal proceedings"?[18] Was he conceding that trial by jury is not the only means to adjudicate disputes? He certainly believed in the role of the jury as a check on the judicial and legislative branches.[19]

Those who agree that the jury is also a political institution will oftentimes cite the following passage from de Tocqueville:

> When . . . the jury is extended to civil affairs, its application comes into view at every moment; then it touches all interests; each person comes to contribute to its action; in this way it enters into the customs of life; it bends the human spirit to its forms and merges so to speak with the very idea of justice.[20]

But if we are concerned with the demise of the jury as a political institution, and the decline of jury trials in civil cases, shouldn't we be asking what types of cases were being tried in the 1960s when the jury trial percentage was 11%? What types of cases are being tried today? More importantly, shouldn't we be asking what important constitutional or

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14. *Id.*

15. *Id.* at 450.

16. *See* Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, 78 N.Y. ST. B.J. 10, 14 (2006) (concluding that de Toqueville valued the experience of the juror as both educational and satisfying).

17. *See* William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 31 (2003) (emphasizing the importance of including the many, rather than limiting sovereignty to the few).

18. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 448 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010).

19. *See, e.g.*, Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy, The Majority Will, Individual Rights, Federalism, Religion, Civic Associations, and Originalist Constitutional Theory*, 59 ME. L. REV. 35, 37 (2007) (asserting that de Tocqueville's views on American democracy strongly support the idea of the judiciary as a check against undue concentration of power in the other branches of government); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 380 (2005) (using de Toqueville's work to bolster her argument that the jury serves as a check against empowering the legislative or executive branches of government).

20. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 447 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010).

policy-making cases were tried before juries 40 years ago, and are we still presenting these types of cases to juries today? If not, why? Again, largely because of the lack of reliable records, good research and analysis of these questions is wanting.

Below is a summary of jury trials as a percentage of total dispositions by type of case.[21] Unfortunately, the breakdown of case type is not very specific.

	1962	**2002**
Torts	11.6%	1.6%
Torts, diversity	14.8%	2.3%
Contracts	2.0%	1.0%
Contracts, diversity	6.2%	1.5%
Prisoner	0.0%	0.5%
Civil rights	3.5%	3.0%
Labor	1.3%[22]	0.4%
I.P.	0.4%	2.4%

Based upon this data, it appears that the decline of jury trials is more evident in tort, contract, and labor cases. I argue that given statutory changes in these areas of the law, and the ability of litigants to fully discover the strengths and weaknesses of their case prior to trial, these declining numbers are not as disturbing as they may initially appear.

Let us turn to some of the factors that may be leading to these declining percentages.

III. POTENTIAL CONTRIBUTING FACTORS TO THE DECLINE OF JURY TRIALS

There is no simple explanation for how we have come to the point that only about 1.2% of civil cases culminate in a jury trial.[23] It is likely that

21. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–63 (2004) (relying upon data from the annual reports of the Administrative Office of the U.S. Courts, Table C-4).

22. This percentage is intriguing. Jury trials in employment discrimination cases were not authorized by statute until 1991 pursuant to the Civil Rights Act of 1991. 42 U.S.C. § 1981(c) (2006). Accordingly, it is uncertain what type of cases this percentage is referencing.

23. *See* Ashby Jones, *Why Have Federal Civil Jury Trials Basically Disappeared?*, WALL ST. J. L. BLOG (Sept. 21, 2010, 10:35 AM), http://blogs.wsj.com/law/2010/09/21/why-have-federal-civil-jury-trials-basically-disappeared/ (listing nine reasons for the decline of civil trials); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (setting out the percentage of current civil jury trials).

there are a number of factors that contribute in differing ways and degrees. It should be noted, however, that I am merely stating a number—a percentage of the civil cases that are currently being tried before a jury. At the end of this paper, I will argue that if the percentage of cases is indeed unduly small, serious reform of our procedural rules will be needed. However, an analysis of the potential factors contributing to the vanishing jury trial is needed.

A. *Tort Reform and Caps on Compensatory and Punitive Damages*

In our governmental system, legislators pass laws and high courts determine the constitutionality of the laws that are challenged.[24] The reality is that state legislatures and the United States Congress have passed a number of laws that have the effect of limiting the number of cases that can be filed and restricting the amount of compensatory and punitive damages that can be awarded.[25] Most of these statutes have been found constitutional.[26]

The net result of these laws, as far as jury trials are concerned, is that parties can more readily determine the monetary value of their cases.[27] If a case is subject to some monetary cap, the only variable becomes the likelihood of establishing liability.[28] Plaintiff's counsel, faced with the considerations of possibly not establishing liability, the expense of experts and other court costs, and an inability to pierce a statutory monetary cap, can hardly be faulted for settling a case on agreeable terms.

Yet, some view the decline of civil jury trials as problematic because it interferes with the concept of a democratic courthouse. Paul D. Carrington states:

> In criminal law, the jury had sometimes performed the function of nullifying oppressive laws imposed by the Crown. In democratic America, it was still thought necessary to frustrate corrupt or otherwise ill-motivated prosecutions. . . . In these respects, the jury serves much the same purpose

24. U.S. CONST. arts. I, III.

25. *See* 3 CHARLES A. PALMER, STEIN ON PERSONAL INJURY DAMAGES §§ 19:1–19:2, at 19-2–19-4 (Gerald W. Boston ed., 3d ed. 1997) (detailing the effect that congress and state legislatures have had upon the amount of damages that can be awarded in a civil trial).

26. *See id.* § 19:7, at 19-18 (examining decisions upholding the constitutionality of certain damage limiting statutes).

27. *See* Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 324–25 (1998) (explaining how caps limit sanctions to a predictable amount).

28. *See* Terry Carter, *New Laws and Med-Mal Damage Caps Devastate Plaintiff and Defense Firms Alike*, 92 A.B.A. J. 30, 34–36 (2006) (describing how plaintiffs' lawyers only take those cases where liability is clear).

> as the separation of powers among the three branches of government. Indeed it constitutes yet another separation of power, this within the judicial branch.
>
> In its role in civil proceedings, the jury performs a comparable function by rendering the legislators who make the controlling law doubly accountable to the people, who first elect their lawmakers and are then called to administer the laws those representatives make. Law departing too far from the common understanding, from common sense, or from commonly shared moral values tends to be modified in its enforcement by civil juries to fit common habits of mind.[29]

I am unsure what to make of a call for nullification of state or federal law as a basis for more jury trials. It still remains the duty of a trial judge to grant motions for judgment as a matter of law or motions for new trial when required by law, and it remains the duty of an appellate court to review any jury verdict under the appropriate standard of review.[30] Accordingly, I cannot support the theory of jury nullification as a cure for the declining number of jury trials.[31] The current reality is that if you are dissatisfied with the laws that the legislative branches are enacting, you need to engage the legislative process, lobby to modify or defeat a proposed bill, support another candidate at election time, or stand for legislative office yourself.

B. *Judges As Case Managers*

Beyond just addressing motions for judgment as a matter of law or motions for directed verdict, some commentators argue that rather than presiding over cases and trials, trial judges have come to view their role as a case manager.[32] This moniker is used to criticize judges who seek

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29. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 85 (2003) (footnotes omitted).

30. FED. R. CIV. P. 50, 59.

31. In addition to affecting the principle that we are a nation ruled by law—not men—jury nullification has sometimes revealed a dark underside. In a criminal case, future Justice Hugo Black represented a Klan member accused of killing a Catholic priest, who had married the Defendant's daughter to a Puerto Rican. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 57–58 (2010). Quoting from a Klan prayer, Black asked the jury to absolve the defendant by reason of insanity. *Id.* "In an act of irreversible nullification, [the jury] substituted its own verdict of not guilty by reason of self-defense." *Id.*

32. *See* E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308–09 (1986) (discussing the managerial function of being a judge); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (coining the phrase "managerial judges"); *see also* Walter E. Hoffman, *Foreword* to the DISTRICT COURT STUDIES PROJECT, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS, FED. JUDICIAL CTR. (1977), *available at*

prompt disposition by way of mandatory settlement conferences, mandatory mediations, or repeated admonitions to settle.[33]

Professor Judith Resnik's February 2000 law review article undertakes a critical analysis of managerial judges.[34] In this article, she essentially states that "the federal judiciary has adopted an anti-adjudication and pro-settlement agenda."[35] Professor Resnik raises some valid concerns about case management.[36] In some respects, however, Professor Resnik merely appears to bemoan the fact that the judiciary is not more active in its adjudicatory work.[37]

In her paper, Professor Resnik recalls a federal district judge stating that 92% of cases were disposed of without a trial and that "he regarded the eight percent trial rate as evidence of 'lawyers' failure."'[38] I do not agree with that judge's statement. The function of a trial judge is to adjudicate cases. That said, there is nothing wrong with the parties reaching a voluntary settlement after they have duly considered the factual and legal merits of their case.

So, what is the managerial role of the trial judge? At a recent judicial training program I attended, lawyers on the panel unanimously stated that active, hands-on participation by the trial judge is necessary to control discovery costs and the costs of motion practice. The lawyers pleaded for

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http://www.fjc.gov/public/pdf.nsf/lookup/csmgctmg.pdf/$file/csmgctmg.pdf (disclosing why it is important to effectively manage cases); *The Elements of Case Management: A Pocket Guide for Judges*, FED. JUDICIAL CTR. (2006), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/elemen02.pdf/ $file/ elemen02.pdf (instructing judges on the basics of case management).

33. *See, e.g.*, E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 314 (1986) (arguing that the managerial judge forces parties to settle).

34. Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929 (2000) (explaining how and why judges redefined their duties).

35. *Id.* at 995.

36. When I initially drafted this paper, I had just attended a judicial training program where three hours were devoted to the topic of case management.

37. Professor Resnik critiques the federal judiciary:

> Rather than act like another federal agency, the life-tenured judiciary should develop norms to reflect its specific institutional character as a branch of government charged with adjudication, lacking a majoritarian mandate, and without means of recall. After a century of invention, the suggestion here is for more. The federal judiciary might take on ambitions as bold for the new century as it achieved during the last. Instead of conforming to bureaucratic form, the judiciary could adopt a more cacophonous route, mimicking common law methods of decision making so that its adjudicatory work could drive its bureaucratic functions, rather than permitting its bureaucratic postures to overwhelm its particular contribution and its constitutional *raison d'être*—adjudication.

Judith Resnik, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 933 (2000).

38. *Id.* at 925.

in-person Rule 16[39] conferences with a judge, active participation by the judge in limiting the number of depositions, and the scheduling of hearings prior to a motion being filed to delineate the scope of any motion contemplated.

Judges are getting hit from both sides. One side is critical, claiming that judges are merely lazy and unwilling to try cases, or have abdicated their constitutional obligations.[40] The other side argues that the costs of litigation are excessive, and the adversarial nature of today's legal practice and posturing for demanding clients requires managerial judges to control the fight.[41] I concede that judges unwilling to try a case do exist, but these judges constitute a small percentage of the judiciary. As I will detail below, procedural reform of the discovery process and motion practice is needed to reduce litigation costs and scale back the necessity of judges as case managers.[42]

C. *Trial by Paper*

Trial by paper is not a new phenomenon. Indeed, English common law carefully controlled what a jury could hear.[43] An early evaluation of the pleadings determined whether a case turned on a question of fact or law.[44]

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39. A Federal Rule of Civil Procedure 16 pre-trial conference may be held by the trial court at the early stages of litigation for such purposes as: "(1) expediting disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating settlement." FED. R. CIV. P. 16(a).

40. *See* E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 314 (1986) (suggesting that judges are making decisions based on discretion rather than merits); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 397–98 (1982) (criticizing "lazy" judges for spending little time on their cases).

41. *See* E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309–310 (1986) (analyzing the growing caseload and related concerns).

42. Two commentators argue that a "Reappearing Judge," one who engages in active interchanges with counsel, rather than dealing with paper behind chambers, would increase a judge's "bench presence" and the likelihood of trial. Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849, 852 (2013). These commentators argue that "robust Rule 16 conferences, conducting pre-motion conferences for discovery disputes and summary-judgment motions, and hearing oral argument on dispositive or other important motions . . . are all platforms for interaction that take far less time and can be far more informative than the formal exchange of written motions and briefs." *Id.* The problem I see with this thesis is that the commentators do not call for any substantive revision of motion practice. The commentators acknowledge that litigants cannot be foreclosed from filing dispositive motions, and they acknowledge that costs are a major impediment to cases going to trial, but they advocate a solution that requires attorneys to be present for more hearings and "prepared to interact." *Id.* Rather than avoiding the crippling costs that drive parties to settlement, this proposal would merely add to the costs.

43. *See* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 316 (1973) (explaining how juries were handpicked for a specific case).

I have already made a reference to motion practice. In the federal courts, the Supreme Court of the United States has encouraged the filing of motions to dismiss for failure to state a claim upon which relief can be granted.[45] Apparently concerned about too many meritless claims and discovery burdens upon a defendant, the Supreme Court enhanced the pleading requirements in a complaint beyond those historically required under Federal Rule of Civil Procedure 8.[46] *Bell Atlantic Corp. v. Twombly*[47] and *Ashcroft v. Iqbal*[48] have not caused a large number of cases to be immediately dismissed. *Twombly* and *Iqbal*, however, have added to the costs of litigation and contribute to the delay in cases being heard. Discovery is oftentimes stayed while the motion to dismiss is pending. Most judges, if required to grant the motion to dismiss, will do so without prejudice to allow for the filing of an amended complaint in an attempt to cure any deficiencies.[49]

An additional major cost is the filing of a motion for summary judgment and responsive briefs. Pursuant to Federal Rule of Civil Procedure 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[50]

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; . . . .[51]

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44. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 527 (2012) (describing the initial pleading state).

45. *See* Ashcroft v. Iqbal, 556 U.S. 662, 664–65 (2009) (determining that the plaintiff's claims were deficient under *Twombly*, and choosing to not limit *Twombly*'s interpretation of Rule 8 to antitrust cases); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548–49 (2007) (dismissing an antitrust complaint that alleged an agreement in conclusory terms based upon information and belief).

46. *See* Alexander A. Reinert, *The Costs Of Heightened Pleading*, 86 IND. L.J. 119, 130–31 (2011) (opining that the Supreme Court expressed concern that "liberal pleading rules, combined with expansive discovery, would pressure defendants to settle weak or meritless cases" (citing *Twombly*, 550 U.S. at 548–49)).

47. Bell Atl. Corp v. Twombly, 550 U.S. 544 (2007).

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

49. *See* Zanze v. Snelling Servs., LLC, 412 F. App'x 994, 996 (9th Cir. 2011) ("Although Zanze's second, fourth, fifth, and ninth claims were properly dismissed, we hold that the district court abused its discretion in denying leave to amend these claims, because it is not clear that these claims could not be saved by amendment.").

50. FED. R. CIV. P. 56(a).

51. *Id.* R. 56(c)(1)(A).

Needless to say, the cost of gathering enough summary judgment evidence to either move or defend a dispositive motion is high.[52] Then the costs of research and briefing must be added.[53] I will concede that far too many motions for summary judgment are filed.[54] In addition, there is a failure by litigants and their counsel to consider whether the costs associated with the filing of a motion for summary judgment exceed the cost of merely proceeding to trial.[55]

There are, of course, various benefits to the Rule 56 practice. It provides "fact clarification," allowing the parties to assess their legal posture, and it eliminates unnecessary claims so that the jury's time and attention are focused.[56] Accordingly, I do not favor the abolition of Rule 56. Its overuse, however, must be curtailed.

Finally, the procedural obstacles posed by class certifications and *Daubert*[57]—hearings to determine the admissibility of expert evidence—further add to the costs and uncertainties.[58]

52. *Cf.* Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 892–93 (2009) (noting that discovery costs compromise half of litigation costs); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 548 (2013) ("[T]he proportion of litigation expenses attributable to discovery is typically fairly close to 50% . . . .").

53. *Cf.* D. Theodore Rave, Comment, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 903 (2006) (stating that summary judgments are not generally granted until discovery has transpired (citing Ala. Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co., 606 F.2d 602, 609 (5th Cir. 1979))); David M. Trubek et al., *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) (noting that pretrial actions are more common than going to trial).

54. *See* Prof'l Managers, Inc. v. Fawer, 799 F.2d 218, 221 (5th Cir. 1986) (asserting that motions for summary judgment have been misused as a device for discovery). *But cf.* David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1388 (2010) (explaining that in a traditional summary judgment, the concern to address is whether there exists any genuine issue with respect to a material fact in the case).

55. *See* D. Theodore Rave, Comment, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 890 (2006) (noting that while a trial has a big impact on the cost incurred by the government, the litigant is affected less; however, with motions for summary judgment, the impact on the cost to the litigant is much larger).

56. *See* Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 690–91 (2012) (stating that "fact clarification" assists the parties by eliminating meritless lawsuits and wasting the courts' time).

57. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

58. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 313–14 (2013) (citing *Daubert*, 509 U.S. at 589, 597) (noting that class action certifications and the ruling in *Daubert* impose an extra burden on parties that increases cost and uncertainties).

D. *Trial by Paper—Again*

Lynne Liberato and Kent Rutter recently published *Reasons for Reversal in The Texas Courts of Appeals.*[59] Their study found that the Texas statewide reversal rate for 2010–2011 judgments on jury verdicts was 34%.[60] The most common reason for reversal was that the evidence was legally insufficient to support the verdict.[61] The authors also noted that plaintiffs in tort and Deceptive Trade Practices-Consumer Protection Act (DTPA) cases "did not fare well on appeal."[62] In light of these statistics, some commentators have noted that counsel for plaintiffs are hesitant to turn down a settlement offer.[63]

E. *Mediation*

Many commentators have noted how mediation has helped parties to a civil lawsuit achieve a settlement of their disputes.[64] Some commentators, however, lament that the embrace of and deference to mediators is another component of the marginalization of the jury.[65] Professor Welsh acknowledges that "[n]o doubt, some mediation sessions result in creative resolutions that reflect the particular needs, abilities, and preferences of parties."[66] She, however, finds fault with the mediation process for focusing less "on empowering citizens" and focusing more on "forcing these citizens to confront and become reconciled to the legal, bargaining[,] and transactional norms of the courthouse."[67] She further refers to

59. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993 (2012).

60. *Id.* at 997; *cf.* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131 (2009) (noting that in a study of employment discrimination cases, two Cornell professors have concluded that "defendants in the federal courts of appeals have managed over the years to reverse forty-one percent of their trial losses in employment discrimination cases, while plaintiffs manage only a nine percent reversal rate").

61. Lynne Liberato & Kent Rutter, *Reasons for Reversal in The Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 1002–03 (2012).

62. *Id.* at 1017 (referring to a chart illustrating reversal rates for tort and DTPA judgments: "when the plaintiff prevailed in the trial court and the defendant appealed, the reversal rate was almost half—49%").

63. *See id.* (stating that when defendants appeal decisions in tort and DTPA cases, these judgments are often reversed, thereby indicating that the plaintiff loses at the appellate level).

64. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 3 (1994) (noting that many legal scholars have gathered a better understanding of the effects mediation has on a lawsuit aside from merely settling).

65. *See* Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 132–34 (2004) (determining that mediation is a "potent tool for winnowing the number of cases reaching juries for disposition").

66. *Id.* at 136.

67. *Id.* at 137.

mediators who engage in "coercive and/or biased behaviors."[68] She goes on to state that the "courts' delegation of the settlement function to mediators is marred by the same coupling of deference and lack of real accountability that characterizes the courts' delegation of adjudicative functions to administrative and arbitral forums."[69] Finally, she concludes by calling for courts to end mandatory mediation.[70]

There is much to address here. First, by and large, the anecdotal evidence in Texas is that mediators here are fair, thoughtful, and impartial.[71] There are, of course, the stories of a mediator rushing the parties to settlement or inappropriately favoring one party over another, but those stories are isolated and aberrational.

Some lawyers object to mediation as unnecessary. They argue that good lawyers can evaluate their own cases and communicate to their clients the strengths and weaknesses of their case.[72] I agree with that statement; however, there are a number of cases where, because of lawyer posturing, client difficulties, or raw emotion, engagement in a voluntary, non-binding mediation is helpful.[73] I say this not because I want the case to go away, but because parties who know the strengths and weaknesses of their case are in the best position to determine if a voluntary settlement is a reasonable course of action. In addition, mediations oftentimes can create unique dispute resolution solutions that cannot be replicated in court (e.g., letters of apology, non-disparagement agreements, neutral or positive letters of reference for future employment purposes, modifications to a contractual agreement).[74] Although I am not a proponent of mandatory mediation sessions, on occasion there is value to ordering parties to mediation even though one party may initially believe the mediation

68. *See id.* at 140 (acknowledging that most of these mediators are not acting aggressively enough to meet the courts' standards in regard to the allegations that they are acting in a coercive or biased manner).

69. *Id.*

70. *See id.* at 143–44 (determining that the judicial system should be wary of changing the system to require mediation).

71. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 29–32 (1994) (explaining that most mediators strive to satisfy unmet needs and reduce suffering).

72. *See id.* at 39–40 (opining that some evidence illustrates that mediators concentrate on solutions that may frustrate a party's needs).

73. *See id.* at 89 ("From this starting point of relative self-absorption, parties achieve recognition in mediation when they voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party . . . .").

74. *See id.* at 65 ("[M]ediators direct their moves primarily toward the creation and acceptance of settlement terms that solve problems.").

session will not be helpful. Group dynamics and the presence of a neutral third-party can cause parties to reevaluate their initial positions.[75]

Abraham Lincoln wrote, "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time."[76] I cannot accept the proposition that parties resolving their dispute in a voluntary mediation somehow marginalizes the judicial system or the role of the jury.

F. *Jury Waivers*

In 2004, the Supreme Court of Texas expressly approved the use of pre-dispute contractual jury waivers.[77] Some commentators call this decision another blow to the fundamental right to a jury trial.[78] Many parties demanding pre-dispute contractual jury waivers are highly skeptical of juries. I argue that the complaints of additional expenses associated with a jury trial and stories of "runaway juries" are for the most part outdated. As noted above, statutory changes and developments in Texas law have largely corrected any aberrant "runaway" jury award. As to the extra expenses associated with a jury trial, the vast majority of legal expenses are accumulated during the discovery phase.[79]

Given the legal imprimatur bestowed upon jury waivers, I will note that there are some positive attributes of jury waivers vis-à-vis arbitration agreements. Jury waivers provide that a trial will be to the bench and allow for the continuing development of precedent regarding discovery, pre-trial, evidentiary, and post-trial issues.[80] In addition, jury waivers, as opposed

75. *See id.* at 67 ("In mediation, there is a documented tendency for the third party to drop certain types of issues and thus influence the way problems typically get defined.").

76. ABRAHAM LINCOLN'S NOTES FOR A LAW LECTURE (July 1, 1850) (unpublished manuscript), *available at* http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm.

77. *See In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 140 (Tex. 2004) (holding that contractual jury waivers are enforceable agreements).

78. *See* Grafton Partners v. Superior Court, 116 P.3d 479, 491–92 (Cal. 2005) (acknowledging that California does not necessarily enforce pre-dispute, contractual jury waivers); Brian S. Thomley, Comment, *Nothing is Sacred: Why Georgia and California Cannot Bar Contractual Jury Waivers in Federal Court*, 12 CHAP. L. REV. 127, 137 (2008) (suggesting that some courts would rather preserve jury trials and disregard jury waivers).

79. *See* Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 NAT'L CTR. FOR STATE COURTS CIVIL LITIGATION COST MODEL 1, 7 (2013), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (determining that the discovery process is the second-most time-consuming aspect of a litigated case).

80. *See* Chester S. Chuang, *Assigning the Burden of Proof in Contractual Jury Waiver Challenges: How Valuable Is Your Right to a Jury Trial?*, 10 EMP. RTS. & EMP. POL'Y J. 205, 211 (2006) (contending that, in comparison with the burdens associated with jury trials, the benefits of contractual jury waivers include time and cost savings for both the client and attorney); *see also* Brian D. Weber, *Contractual*

to arbitration agreements, allow for public disclosure of the lawsuit and a trial open to the public.[81]

G. *Arbitration*

An analysis of binding arbitration agreements as a contributing factor to the decline of jury trials is also difficult to undertake. No doubt, a number of cases are not even filed once counsel becomes aware that there is a binding arbitration agreement at issue. Therefore, an analysis of how arbitration affects the percentage of cases filed that are heard by a jury is already problematic.

Arbitration has always been touted as a less expensive and speedier resolution method.[82] In complex cases, the appointment of an arbitrator or arbitrators with special expertise in the field at issue is perceived as an additional benefit.[83]

Anecdotal evidence indicates that the average arbitration proceeding is no longer less expensive than a traditional judicial proceeding.[84] The cost associated with discovery practice has crept into today's arbitration proceedings.[85] In addition, many arbitrators are ill-equipped or reluctant to engage in curbing the discovery wars.[86] Paying one arbitrator or a

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Waivers of a Right to Jury Trial—Another Option, 53 CLEV. ST. L. REV. 717, 730–32 (2006) (opining that both parties benefit from jury waivers in two ways: having an impartial judge, and increased transparency from a court's public opinion).

81. *See* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 18 CHI.-KENT L. REV. 463, 466 (2006) (stating that arbitration, unlike litigation, is secretive); *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1086 (2000) (noting that parties choose arbitration over trials when privacy is a concern).

82. *See* James A. Pikl, *Arbitration and the DTPA*, 26 TEX. TECH L. REV. 881, 895 (1995) ("[I]t is difficult to imagine how a party could prove that going to arbitration was a 'detriment' since the procedure is usually faster, cheaper, more private, and (potentially) allows better remedies than traditional litigation.").

83. *See* Eliot G. Disner, *The Importance of Subject-Matter Expertise in Antitrust Arbitration*, 59 DISP. RESOL. J. 39, 39 (2004) (illustrating the benefits of an arbitrator with special expertise in the area of antitrust law); J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?*, 24 NEW. ENG. L. REV. 389, 394 (1989) (contending that proceedings with an arbitrator possessing special expertise are more effective than those with a judge).

84. *See* BETTE J. ROTH ET AL, THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 3:11 (2012) (critiquing the traditional notion that arbitration is more efficient than litigation).

85. *See id.* (citing the "overuse of discovery in arbitration" as the reason for the loss of "traditional advantages of being faster and less expensive").

86. *See, e.g.*, Odfjell ASA v. Celanese AG, 328 F. Supp. 2d 505, 507 (S.D. N.Y. 2004) ("Arbitration, which began as a quick and cheap alternative to litigation, is increasingly becoming slower and more expensive than the system it was designed to displace, and permitting pre-hearing discovery of non-parties would only make it more so").

panel of three for an extended hearing quickly adds to the expense.[87] An additional hidden expense is the lack of a right to appeal. Absent "manifest disregard of the law,"[88] arbitral awards are not appealable.[89] Furthermore, the parties cannot avail themselves of a motion for summary judgment to end any claim that lacks a factual or legal basis.[90]

Given the weaknesses noted above, it is somewhat perplexing that U.S. businesses have not resorted more to the use of pre-dispute contractual jury waivers discussed above. They would retain their ability to file dispositive motions, avoid a jury, and preserve the ability to file an appeal in the appropriate court of appeal.[91]

It appears that the preference for arbitration stems more from fear of a public trial and jury, rather than any belief that parties are merely migrating to the most economically efficient delivery system. The argument goes that the jury is "a sort of 'black box' into which various versions of the facts are dumped and from which an unpredictable answer rolls out."[92]

Given tort reform, case law defining the evidence necessary to recover for mental anguish awards, and statutory caps on punitive damages, proponents of arbitration appear to be more concerned with keeping their disputes private and out of the public's attention.[93] I believe it is time to

87. *See, e.g.*, Gary Grenley, *Weigh Cost of Arbitration As Carefully As the Cost of a Trial*, PORTLAND BUS. J. (Sep 28, 2008, 9:00 PM), http://www.bizjournals.com/portland/stories/2008/09/29/focus7.html (revealing that hiring an arbitrator may be as expensive as hiring an attorney).

88. *See* Hall St. Assocs. LLC v. Mattel Inc., 552 U.S. 576, 584 (2008) (the manifest disregard doctrine considers whether an arbitrator ignored law that was well-defined, explicit, and clearly applicable). Since 2008, the U.S. Circuit Courts of Appeals have remained divided over whether the manifest disregard doctrine survives. Some circuits view *Hall Street* as eliminating manifest disregard, while others believe manifest disregard survives as "judicial gloss" on sections nine through eleven of the Federal Arbitration Act. It is already exceedingly difficult to overturn an arbitral award based upon manifest disregard. If the manifest disregard doctrine has fallen, the bases for overturning an arbitral award will be further curtailed.

89. *See* Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1, 1 (2009), http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/the-mess-of-manifest-disregard/ (showing that manifest disregard creates an exception to arbitral awards).

90. *See, e.g.*, ROBERT C. PRATHER & JOE L. COPE, TEXAS PRACTICE GUIDE ALTERNATIVE DISPUTE RESOLUTION § 7:8 (2012) ("Sometimes, one of the parties may make a motion to dismiss, for summary judgment or for some other dispositive motion. Usually, such motions are denied or carried to the actual hearing.").

91. *See, e.g.*, Bonfield v. AAMCO Transmissions, Inc., 717 F. Supp 589, 594 (N.D. Ill. 1989) (upholding the availability to waive your right to trial by jury in a contractual jury waiver); *see also* Nicole Mitchell, Note, *Pre-Dispute Contractual Jury Waivers: The New Arbitration in Texas? A Case Note on* In Re Prudential Insurance Company of America, 58 BAYLOR L. REV. 244, 245 (2006) (identifying a pre-dispute contractual jury waiver as a means of waiving your right to trial by jury).

92. Frederic N. Smalkin & Frederic N.C. Smalkin, *The Market for Justice, the "Litigation Explosion," and the "Verdict Bubble": A Closer Look at Vanishing Trials*, 1 FED. CTS. L. REV. 417, 431 (2006).

93. *See* Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-*

reassess the economic-savings argument advanced by proponents of arbitration.

A major obstacle to an adequate assessment of arbitration is the lack of transparency. Unlike courthouse litigation, there is no mechanism to determine what kinds of arbitration claims are filed, the identities of the claimants and respondents, whether the claimants are successful, the kinds of awards made, how long it takes before claims are resolved, how much is charged in administrative and arbitrator fees, and whether the claims are settled before any hearings or awards.[94] Because these statistics are not publicly available, any claim that arbitration is faster and less expensive sounds like puffery.

Furthermore, the lack of transparency also makes suspect the claim that arbitration is an adequate alternative to an American judicial proceeding.[95] Workers and consumers are unable to intelligently evaluate the employers they work for and the businesses they patronize. Government officials charged with overseeing health, safety, employment, and corporate boardroom behavior are kept in the dark regarding claims filed and issues presented.

Now, in fairness to those advancing arbitration, an additional argument appears to be that outlier jury verdicts, even if later reduced, produce inefficient results. They argue that aberrant verdicts raise the dynamics of settlements and establish "subliminal benchmarks for future jurors."[96] Perhaps the solution to these concerns lies with an instruction to the jury that in no event can its punitive damage award surpass the statutory cap.

I do not advocate a wholesale disapproval of arbitration. Arbitration

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Sided Arbitration Clauses Within Contracts of Adhesion, 91 NEB. L. REV. 666, 667 (2013) (stressing that those who choose arbitration do so to enjoy the benefit of privacy); Bradley Dillon-Coffman, Comment, *Revising the Revision: Procedural Alternatives to the Arbitration Fairness Act*, 57 UCLA L. REV. 1095, 1104 (2010) ("[T]he private nature of the arbitral forum works to the advantage of both businesses and employees/consumers.").

94. *See* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 430–31 (2004) (asserting that arbitration and arbitrators are not held to the same standards as courthouse litigation); Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 688 (2013) ("[T]he use of arbitration erodes common law and the need for transparency as arbitration awards generally remain confidential and unpublished.").

95. *See* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 428 (2004) (identifying lack of transparency as a major concern with regard to arbitration); Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 687 (2013) ("[A]rbitration lacks transparency and arbitrators lack independence.").

96. Frederic N. Smalkin & Frederic N.C. Smalkin, *The Market for Justice, the "Litigation Explosion," and the "Verdict Bubble": A Closer Look at Vanishing Trials*, 1 FED. CTS. L. REV. 417, 433 (2006).

agreements reached by equal parties in bargained-for agreements are reasonable. In addition, if after the complaint or petition has been filed in court, the parties voluntarily agree to proceed before an arbitrator, and the award is later reduced to a public judgment, that approach also appears reasonable.

H. *Discovery Costs*

There was a time when juries were selected in a relatively small jurisdiction where it was expected that they already knew many of the facts in a case.[97] Accordingly, the early common law did not provide for pre-trial depositions or the production of documents.[98] Subsequently, when jurors no longer possessed intimate knowledge of some cases, investigation of the facts in a case occurred during the trial with the examination of non-party witnesses.[99] "A litigant was powerless to locate or force production of documentary evidence that was in the hands of an opponent or a third party. There was no opportunity to examine an uncooperative or adverse witness in advance of trial, and no opportunity ever to examine an opposing party."[100] These deficiencies were addressed with the adoption of the Federal Rules of Civil Procedure in 1938.[101]

Today it is well accepted that the costs associated with discovery are a significant portion of the total costs of litigation.[102] Most analyses do not take into account the costs associated with the time litigants must devote to document production, deposition preparation, and appearance at the actual deposition. In addition to the financial expense, discovery has extended the time between preparation of a case and trial.[103] The costs now associated with identifying, reviewing, and redacting for privilege

97. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 528 (2012) ("[I]n the twelfth and thirteenth centuries, jurors were drawn from the close vicinity to the events giving rise to the dispute . . . .").

98. *See id.* at 531 (reviewing the old common law practice of not allowing parties to examine opposing witnesses pretrial).

99. *See id.* (noting that witness testimony used to occur exclusively at trial).

100. *Id.* at 532 (footnotes omitted).

101. *See, e.g., id.* at 545–46 (identifying the methods of discovery made available by the adoption of the Federal Rules of Civil Procedure).

102. *But see* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779–80 (2010) (arguing that some surveys indicate that discovery costs have not escalated, and actually constitute about 27% of total litigation costs).

103. *See, e.g.*, Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 312–13 (S.D.N.Y. 2003) (lamenting that the delay in the trial was caused by a dispute over discovery of electronic documents); *see also* John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 568 (2010) (illustrating that in certain instances it can take "100 people nearly 7 months and $20 million to conduct an initial review" of a case).

electronically stored information have only compounded the expense and delay.[104] Trial counsel feel compelled to turn over every stone. Ill will between either the litigants or counsel exacerbates the discovery skirmishes.

In order to address the rising costs of the discovery process, there has been renewed attention given to the concept of proportionality.[105] Federal Rule of Civil Procedure 26(b) states:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> . . .
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[106]

Although attention to this topic is widespread amongst commentators and academics, the same level of attention has not been given by the bench and bar. Most judges are hesitant to limit discovery. Many attorneys consider the costs of discovery to be the "right amount" in proportion to their clients' stakes in their cases.[107]

Absent more aggressive and early court intervention into the discovery process, limiting discovery will be difficult. Litigants will oftentimes believe that the other side is hiding the ball. Lawyers charging by the hour earn substantial fees during the discovery process.[108] There will be some cases where proportionality should be ignored (e.g., a sexual harassment

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104. *See, e.g.*, *Zubulake*, 217 F.R.D. at 311–12 (illustrating that the cost of restoring emails for electronic discovery could exceed $175,000, not including attorney's fees billed for time to review the emails); *see also* John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 565 (2010) (arguing that the cost of producing electronic documents for discovery is more substantial than producing the paper equivalent).

105. *See In re* Convergent Techs. Sec. Lit., 108 F.R.D. 328, 331 (N.D. Cal 1985) (recognizing the effects of proportionality in discovery); *see, e.g.*, Philip J. Favro & Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 MICH. ST. L. REV. 933, 934–35 (2012) (commenting on the now more frequent use of proportionality with regard to discovery).

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

107. *See* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 457 (2010) (quoting FED. R. CIV. P. 26(b)(2), which requires the court to "limit the frequency or extent of discovery").

108. *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (explaining that high discovery costs can be a huge burden to cost-conscious clients); Bahar Shariati, Note, Zubulake v. UBS Warburg*: Evidence That the Federal Rules of Civil Procedure Provide the Means for Determining Cost Allocation in Electronic Discovery Disputes?*, 49 VILL. L. REV. 393, 393–95 (2004) (recognizing that discovery is often very costly to a lawyer's client).

case or Section 1983 police brutality claim).[109] In addition, if we wish to reduce trial time, limiting discovery may result in the unwelcome prospect of longer, more tedious trials as counsel engage in discovery questioning during the trial.

I. *Corporate Counsel, Corporate Representatives, and Financial Incentives*

Although some business litigants take an aggressive defensive litigation strategy in the belief that such a tactic dissuades meritless litigation being filed against them, businesses in the United States measure performance by profits, and litigation costs decrease profitability.[110] In-house counsel, at the direction of their business managers, are incentivized to curtail expenditures (i.e., litigation costs and undetermined litigation liability). In addition, financial markets punish litigation exposure.[111] All these considerations direct litigation into a settlement mode.

J. *Hourly Rates and Staffing*

The average hourly rate for lawyers in Texas with ten or more years of experience is $250 per hour.[112] The median hourly rate for law firms with more than 60 attorneys increases to $331 per hour.[113] In the large metropolitan areas, large firms have a median hourly rate of approximately $375 per hour.[114] Experienced attorneys in complex cases, of course, demand higher rates.

The reality is that given current hourly rates, the demands of discovery,

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109. *See* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 60 (2007) (stating that courts often ignore the proportionality principle in certain types of cases); Katie M. Patton, Comment, *Unfolding Discovery Issues That Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 997 (2006) (analyzing the difficulties involved with discovery in sexual abuse cases).

110. *See* Andrew Blair-Stanek, Note, *Profits As Commercial Success*, 117 YALE L.J. 642, 644–45 (2008) (identifying that business success is often measured solely by profit). *Cf.* Irene Kim & Douglas J. Skinner, *Measuring Securities Litigation Risk*, 53 J. ACCT. & ECONS. 3 (2010), *available at* http://www.kellogg.northwestern.edu/accounting/papers/Skinne2.pdf (stating that success is often measured by stock performance and profit).

111. *Cf.* Michelle Lowry & Susan Shu, *Litigation Risk and IPO Underpricing*, 65 J. FIN. ECONS. 309, 310 (2002) (pointing out high exposure to litigation as a factor in a reduced IPO price); Irene Kim & Douglas J. Skinner, *Measuring Securities Litigation Risk*, 53 J. ACCT. & ECONS. 3 (2012), *available at* http://www.kellogg.northwestern.edu/accounting/papers/Skinne2.pdf (stating that exposure to litigation has an effect on corporate planning).

112. STATE BAR OF TEXAS, DEPARTMENT OF RESEARCH & ANALYSIS, 2009 HOURLY FACT SHEET (2009), http://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=11240.

113. *Id.*

114. *Id.*

and an increasing motion practice in federal and state courts, total fees paid by corporate defendants become an issue when considering whether to settle a case.[115] Although counsel for plaintiffs generally pursue cases on a contingency fee, they face the legal and financial obstacles discussed above.[116]

K. *The Unknown*

Despite that all of the above factors have played some role in the decline of civil jury trials, the fact remains that a decreasing trend began to occur before tort reform, the Supreme Court's trilogy of summary judgment cases, E-discovery, and *Twombly*.[117] As indicated above, "[b]y 1940, the proportion of cases tried declined to 15.2%. In 1952, the figure was 12%; in 1972, 9.1%; in 1982, 6.1%; in 1992, 3.5%."[118] Although the factors described above have contributed to the understanding of why the number of jury trials refuses to increase, additional research is needed in order to understand what factors led to the decline in the first instance.

IV. POTENTIAL REMEDIES

Although legal and economic conditions have changed dramatically since the 1960s, some measures can be implemented to help increase the number of meritorious civil trials that should be heard by a jury.

A. *Timeliness*

Most litigants want a timely resolution to their dispute. The Federal Rules of Civil Procedure, however, have built numerous delays into the system. For example, Rule 4(m) gives plaintiffs up to four months to serve a defendant with a copy of the complaint.[119] Rule 16(b) gives judges another four months after service of the complaint to issue a

115. *Cf.* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (recognizing that high discovery costs often lead to settlements).

116. In a recent breach of contract and breach of warranty jury trial that I tried, the prevailing plaintiff, a corporate entity, received a jury verdict of $306,500.00. The plaintiff sought $818,437.72 in attorney's fees. There were three primary attorneys on the case (1 partner and 2 associates) with additional work being performed by four additional attorneys. The plaintiff also sought attorney's fees for three paralegals, one trial services specialist, and seven legal technology specialists. We have simply created a system that is too complicated and too costly.

117. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 525 (2012) (investigating the movement in 1938 from trial to non-trial procedure).

118. *Id.* at 524 (reviewing statistics on the declining proportion of cases being tried).

119. *See* FED. R. CIV. P. 4(m) (allowing the plaintiff up to 120 days to serve the defendant after the complaint is filed).

scheduling order.[120] That is already eight months of inactivity on the file. Initial disclosures of any expert testimony under Rule 26 are allowed up to 90 days before trial.[121] This deadline merely provides the opposing party a reason to request a continuance based upon a newly disclosed expert or opinion.[122] Frankly, all the rules need to be re-visited with the goal of shortening the time it takes to bring a case to trial.[123]

B. *Discovery*

Three major issues require clarification in the discovery context to reduce costs.

1. Duty to Preserve

A number of cases have addressed when the duty to preserve exists and when a party should be sanctioned for failing to preserve.[124] In Texas, the duty to preserve exists, or is triggered, when there is a reasonable expectation of litigation.[125] That is sometimes difficult to ascertain and appears less difficult with the benefit of hindsight. Some commentators have advocated for a bright line, such as the service of a complaint as the trigger.[126] I am leery of that approach for fear that it will only trigger

120. *See id.* R. 16(b) (stating that the judge will be given 120 days to issue the scheduling order from the day the defendant is served).

121. *See id.* R. 26(a)(2)(D) (explaining that a party has up to 90 days to disclose expert testimony).

122. *See, e.g.*, Norquay v. Union Pac. R.R. Co., 407 N.W.2d 146, 156 (Neb. 1987) (questioning the appropriateness of granting a continuance when a new expert witness is disclosed); *Cf.* Memorandum from the Honorable David G. Campbell, Chair of Advisory Comm. on Fed. Rules of Civil Procedure to the Honorable Jeffrey S. Sutton, Chair of Standing Comm. on Fed. Rules of Civil Procedure 4 (May 8, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf (explaining how the current rules lead to undesirable delays).

123. *See* FED. R. CIV. P. 4–5 advisory committee's note (supporting the proposal that Rule 4(m) be revised to shorten the time to serve the summons and complaint to 60 days, and a proposal that Rule 16(b)(2) be revised to require a judge to issue a scheduling order within 90 days after any defendant has been served or 60 days after any defendant has appeared).

124. *See* Micron Tech., Inc. v. Rambus Inc., 917 F. Supp. 2d 300, 321 (D. Del. 2013) (examining the duty to preserve documents); Apple Inc. v. Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012) (stating that there is a common law duty to preserve evidence); Ashton v. Knight Transp., Inc., 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011) (analyzing when the duty to preserve arises); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) (exploring the spoliation of evidence and the duty to preserve).

125. *See* Wal-Mart Stores, Inc. v. Johnson, 106 S.W.3d 718, 722 (Tex. 2003) (revealing that the duty to preserve evidence "arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim").

126. Memorandum from the Honorable David G. Campbell, Chair of Advisory Comm. on Fed. Rules of Civil Procedure to the Honorable Jeffrey S. Sutton, Chair of Standing Comm. on Fed.

shredding parties. That said, I understand that some parties legitimately argue that it is difficult to anticipate what claim or claims will be brought. Preserving all documents may incur some expense, but searching for all responsive documents or electronically stored information (ESI) causes a great deal of expense. It may be that preserving the "reasonable anticipation of litigation" standard[127] is the best solution given that these inquiries will be very fact-specific, but the rules of civil procedure addressing sanctions also need to be reviewed in order to prevent lawsuits from degenerating into discovery skirmishes that eclipse the merits of the case.[128]

2. Proportionality

Earlier, I mentioned Rule 26(b)(2)(C)(iii), which states that the court must limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[129] I understand the desire to depose all individuals with knowledge of relevant facts and to gather as much documentation and ESI as possible. No attorney wants to be caught unprepared in supporting or opposing a dispositive motion or to find himself surprised at trial.

Perhaps clients and their counsel could achieve greater recoveries if the expense of discovery was minimized. The initial disclosures envisioned by Rule 26 require a party seeking damages to provide a computation of each category of damages claimed.[130] In addition, all parties are to provide a copy or description of all documents or ESI that may be used to support

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Rules of Civil Procedure 44 (May 8, 2013), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf ("[T]he early stages of litigation often take far too long.").

127. *See Johnson*, 106 S.W.3d at 722 (ruling that the duty to preserve evidence arises when there is a reasonable anticipation of litigation); Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 204 (Tex. 1993) (explaining that the standard for preserving evidence is when a reasonable person should expect litigation).

128. *See* FED. R. CIV. P. 37(e) (proposing rule 37(e) as an example of a new rule that would clarify the standard for sanctions). On June 3, 2013, the U.S. Judicial Conference's Standing Committee on Rules of Practice & Procedure approved for public comment a proposal that would revise Federal Rule of Civil Procedure 37. First, the proposal suggests that curative measures be available without any need to find fault in the failure to preserve. Second, sanctions would not be imposed on a party that acted reasonably, even though information was nevertheless lost. Finally, sanctions would be proper only when loss of information imposes substantial prejudice on a party and resulted from willful or bad-faith failure to preserve.

129. *See id.* R. 26(b)(2)(C)(iii) (highlighting the rules that govern discovery).

130. *See id.* R. 26(a)(1)(A)(iii) (mandating a computation of damages claimed by category).

their claims or defenses.[131] These disclosures are to be made without awaiting any discovery request.[132] In reality, lawyers give little attention to initial disclosures and fail to tender documents on a timely basis. Claimants fail to adequately compute their damages at this stage of the litigation. The initial disclosure rule needs to be strengthened. Once the amount in controversy is more discernible, counsel and judges need to start considering a proportionality analysis. There will be cases, however, where proportionality needs to be displaced by the issues at stake in the litigation.

In some cases, ESI, or at least some elements of ESI, may not be at issue. A proportionality analysis should be applied to determine if some forms of ESI should be exempted from preservation and discovery.[133]

The Advisory Committee on Civil Rules has proposed that Rule 26(b) be revised to restrict the defined scope of discovery to information that is "proportional to the needs of the case."[134] The scope of discovery would be further limited by deletion of the following two sentences currently in Rule 26(b)(1): "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[135] These proposals are helpful and should be adopted.

Some commentators have argued for a reexamination of the current system whereby a producing party is required to pay for the costs of any discovery production in favor of a scheme in which the requesting party would be required to pay for such costs.[136] If adopted, in many cases this approach will force litigants with the least amount of resources to bear such costs. Perhaps a less harsh measure would be to allocate any discovery expenses to the prevailing party at the end of litigation. This

131. *See id.* R. 26(a)(1)(A)(ii) (requiring all parties to provide a copy of documents supporting their respective claims).

132. *See id.* R. 26(a)(1)(A) (stating that disclosures must be made even without a discovery request).

133. *See* E-Discovery Model Order For Patent Cases in the Eastern District of Texas, *available at* www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22223&download=true (noting that certain ESI is presumptively exempted from discovery absent a showing of substantial need and good cause).

134. *See* FED. R. CIV. P. 26(b) advisory committee note (proposing to restrict what can be done during discovery).

135. *Id.* R. 26(b)(1).

136. *See* Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 521 (2013) (arguing for a system that "requires the requesting party to have some 'skin in the game'").

approach would still provide incentives to litigants and counsel to carefully evaluate their discovery requests and potential costs because they would have to calculate the probability of ultimate success into their discovery plan.[137]

3. Privilege Review

The third problem with our current discovery process is the excessive amount of attorney time spent ensuring that privileged documents are not produced. This may be unavoidable until technology simplifies the discovery review process with greater accuracy than human review. It is certainly unavoidable, for now, when trade secret documents are of concern. Otherwise, parties need to take greater advantage of Federal Rule of Evidence 502[138] (limiting waiver in the context of inadvertent disclosure), and judges need to give the rule greater effect (by not second-guessing whether the holder of the privilege took reasonable steps to prevent the disclosure and reasonable steps to rectify the error). The purpose of Rule 502 is to help lessen discovery costs.[139] Parties should

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137. *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 677–79 (2010) (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)) (dismissing the notion of case management as a working solution to the discovery process because judges lack the information needed to distinguish between "good" discovery and "bad" discovery and indicating that it really should be a process left up to the parties); Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 521 (2013) (suggesting that the current rules may actually create a perverse incentive to *purposefully* ask for excessively expensive and burdensome discoverable information in order to pressure the opposing party into settlement).

138. *See generally* FED. R. EVID. 502 (reducing the risk of forfeiting attorney–client privilege during the discovery process). One author aptly describes several major provisions of Federal Rule of Evidence 502:

> The first provision codifies the view of the majority of courts that inadvertent disclosure of privileged or protected information ordinarily does not waive the privilege or protection. The second provision limits the scope of a privilege waiver in most instances to the disclosed document, rather than to all documents dealing with the same subject matter as the disclosed document. The fourth provision permits parties in a federal proceeding to enter into an agreement that disclosure of privileged or protected information by one party to another shall not constitute a waiver for purposes of that proceeding.

Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, 676 (2009) (footnotes omitted).

139. The Judicial Conference Advisory Committee on Evidence Rules note for Federal Rule of Evidence 502 explains the rule's purposes:

> [(1) It] resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney–client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver. [And (2) i]t responds to the widespread complaint that litigation costs necessary to protect

also consider whether they could reach an agreement to not require the creation of a privilege log—another expensive endeavor with limited value in many cases.

C. *Modification of* FED. R. CIV. P. *12(b)(6)*

Although there are some who believe motions to dismiss for failure to state a claim upon which relief can be granted are helpful to disposing of meritless cases at an early stage, my observation is that the motion has only added another layer of expense and delay. Most of the *Twombly* motions filed lack merit or raise issues that can easily be resolved by obtaining information through initial disclosures.[140] Alternatively, parties should confer (prior to the filing of a *Twombly* motion), plaintiffs should consider merely filing an amended complaint, and defendants should consider not opposing the amendment. The Rules Committee should scrutinize *Twombly* and weigh whether Rule 12(b)(6) should be modified or abolished.[141]

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against waiver of attorney–client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.

FED. R. EVID. 502 Judicial Conference Advisory Committee on Evidence Rules note; *see also* Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 244 (D. Md. 2005) (revealing that electronic discovery may encompass "hundreds of thousands, if not millions" of documents, and that "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

140. *See* FED. R. CIV. P. 26(a) (naming three types of disclosures: initial disclosures, disclosures of expert testimony, and pretrial disclosures). With respect to the first category, initial disclosures, the adopted Rule 26(a)(1) requires disclosure of routine evidentiary and insurance matters. These matters comprise: (1) witnesses "likely to have discoverable information," (2) documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control, (3) a computation of each category of claimed damages, and (4) any insurance agreement under which an insurance business may be liable to cover part or all of an eventual judgment. *Cf.* John H. Beisner, *Discovering a Better Way: The Need For Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 578 (2010) (noting the changes that the 2000 amendments implemented to unify an approach to pretrial disclosures marked an arguably failed attempt "to rein in abusive discovery tactics").

141. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 579 (2007) (Stevens, J., dissenting) (lamenting the majority opinion in *Twombly* and cautioning the Court to "not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States"); *see also* John H. Beisner, *Discovering a Better Way: The Need For Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 584–85 (2010) (proposing a reform to "[t]he most pernicious problem with the American discovery system" whereby parties are incentivized to pursue overbroad and burdensome discovery); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 29 (2010) (determining that the expansion of pleading requirements under "Rule 12(b)(6) may well dissipate the supposed time and resource economies early termination is thought to achieve").

D. *Arbitration*

Legislative bodies should revisit the Federal Arbitration Act and the Texas Arbitration Act.[142] The prevalence of pre-dispute contractual arbitration agreements, buried in apartment leases, cellular phone agreements, or home and auto purchase agreements, etc., appear to be far afield from the original intent of these statutes.[143] If arbitration is to be recognized as a substitute for the judicial system, there should be some transparency into the process. At a minimum, claims should be posted on an open forum along with details of the resolution (settled, award given, or claim denied).

E. *Early Merits Evaluation*

In her recent article, Professor J. Maria Glover argues that the current rules of civil procedure fail to provide "meaningful merits-based guidance" before settlement or the imposition of large discovery costs.[144] I am not sure about the first conclusion. By and large, mediations take place after a meaningful exchange of discovery, and the parties have usually had ample time to conduct an evaluation of the merits. She is correct, however, that any meaningful merits evaluation is usually done after a very expensive discovery process has been exhausted.[145] Other than encouraging a voluntary, early case assessment by the parties after receipt of any Rule 26 initial disclosures, it is difficult to devise a procedural rule that would be acceptable to all parties. Plaintiffs generally want discovery, and defendants generally want a ruling on any dispositive motion before engaging in a settlement conference.

Nevertheless, Professor Glover argues that to achieve a "new vision of procedures designed for a world of settlement," discovery should be proportional to the value of the case, should be a "targeted discovery

142. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2012) (codifying arbitration law at the federal level); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 171 (West 2012) (stipulating the terms of arbitration in Texas).

143. *See* 9 U.S.C. §§ 1–14 (2012) (establishing the stay of proceedings on an issue referable to arbitration, but not revealing any intent to dictate arbitration agreements *for every type of dispute*, whereby such mechanisms are implemented to prevent the potential for trial).

144. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1778 (2012) ("The world of settlement is here to stay, and it is time to face it head-on. The Federal Rules of Civil Procedure, designed for a bygone world of trials, are increasingly unable to fulfill their animating goal that cases be resolved on their merits, as defined by the governing substantive law.").

145. *See id.* at 1730 (making note of the dramatic increase in pretrial litigation expenses); *cf.* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 533 (2007) ("[S]ummary judgment is more expensive than trial.").

regime" given the claims fully detailed in the complaint, and court-annexed arbitrators, mediators, and subject-matter experts should be deployed.[146] I agree with the use of a proportionality analysis in the discovery process. This is necessary regardless of whether the case is settled or tried.

Professor Glover's suggestion regarding the early deployment of neutrals and subject matter experts, however, could very well lead to additional expenses. This "robust pretrial evaluation of case merits"[147] may also be of limited value given the parties' reluctance to settle without an adequate understanding of the facts in a case. A possible tweak to Professor Glover's suggestion is the addition of a second "Rule 16" conference that would focus on a merits evaluation and tiered proportional discovery after the initial exchange of Rule 26(a)(1) disclosures.[148]

F. *Judicial Vacancies and the Necessity for Additional Judges*

In addition to cost considerations, litigants are concerned with how quickly their dispute can be resolved. Unfortunately, this second factor depends on where the lawsuit is being litigated. There is a great disparity in federal judicial caseloads.

As of December 31, 2012, the average-weighted filings per judgeship stood at 520 cases.[149] The following courts have exceeded that average for several years.

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146. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1755, 1775, 1777 (2012) (suggesting that this discovery regime designed for a world of settlement would curb "the potential for defendants to exploit informational advantages and impose significant costs through voluminous production"); *see also* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1088 (1984) (contending that the issues associated with settlement are not related "to the subject matter of the suit, but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for an authoritative interpretation of law").

147. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1777 (2012) (calling for a greater involvement of arbitrators, mediators, and experts to render services in the initial stages of discovery).

148. *Cf. id.* at 1778 (arguing that reform is needed to ensure that "the content of substantive law, and not an arbitrary and distorted settlement 'market price'" determines the course of discovery and litigation on the whole); Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2009) (discussing the great impact that procedure, as a preliminary matter, can have on parties' substantive rights).

149. *U.S. District Courts, Weighted Filings Per Authorized Judgeship*, U.S. CTS., http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx (last visited Nov. 22, 2013).

Courts with Three-Year Average Weighted Filings over 700 per Judgeship

District	Authorized Judgeships	FY 2010	FY 2011	FY 2012	FY 2010–2012
California, Eastern	6	1,122	1,098	1,132	1,117
Texas, Eastern	8	683	847	1,042	857
Delaware	4	550	696	1,165	804
Texas, Western	13	754	752	752	753
Arizona	13	653	815	712	727

There are ninety-four federal district courts in the country.[150] The busiest fifteen courts handle approximately one-third of the country's criminal cases and more than 28% of the nation's civil cases.[151]

Rank	District	Judgeships	Weighted Filings	Criminal Defts Filed	Civil Cases Filed
1	Delaware	4	1,165	107	1,704
2	California/Eastern	6	1,132	1,132	5,403
3	Texas/Eastern	8	1,042	1,208	3,480
4	Illinois/Southern	4	753	489	3,615
5	Texas/Western	13	752	8,387	3,420
6	Arizona	13	712	6,521	4,055
7	N.C./Eastern	4	697	814	2,192
8	California/Central	28	691	1,927	15,739
9	California/Northern	14	675	885	7,145
10	Colorado	7	663	669	3,435

150. *U.S. District Courts, Weighted Filings Per Authorized Judgeship*, U.S. CTS., http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx (last visited Nov. 22, 2013).

151. *Federal Court Management Statistics, June 2013, District Courts*, U.S. CTS., http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-june-2013.aspx (last visited Nov. 22, 2013); *Table X-1A, U.S. District Courts—Weighted and Unweighted Filings per Authorized Judgeship During the 12-Month Period Ending Sept. 30, 2012*, U.S. CTS. http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/X01ASep12.pdf (last visited Nov. 22, 2013).

11	Washington/West.	7	660	753	3,534
12	Indiana/Southern	5	642	442	2,585
13	Florida/Southern	18	639	2,526	8,133
14	Florida/Middle	15	634	1,505	7,690
15	West VA/Southern	5	627	272	6,443
		151	**11,484**	**27,637**	**78,573**

In contrast, several federal district courts are far less busy due to changing demographics.[152]

Rank	**District**	**Judgeships**	**Weighted Filings**	**Criminal Defts Filed**	**Civil Cases Filed**
1	Wyoming	3	179	205	290
2	Alaska	3	196	208	320
3	New Hampshire	3	232	171	501
4	District of Columbia	15	238	404	2,264
5	Maine	3	255	277	431
6	Louisiana	12	272	343	3,050
7	Rhode Island	3	272	178	966
8	Vermont	2	282	218	306
9	Hawaii	4	304	256	764
10	Oklahoma/Northern	3.5	311	248	758
11	Washington/Eastern	4	312	388	976
12	Kentucky/Eastern	5.5	319	568	1,445
13	Massachusetts	13	320	503	2,888
14	Pennsylvania/Western	10	329	537	2,551
15	Mississippi/Northern	3	335	194	780
		87	**4,156**	**4,698**	**18,290**

The federal judiciary has made periodic requests to Congress for the creation of new Article III judgeships, and generally, the requests have been ignored.[153] Requests that vacancies not be filled in districts with

152. *See id.* (demonstrating that the large, metropolitan areas of the United States contain the most filings per authorized judgeship).

153. *See, e.g.*, Stephen N. Zack, *More Than a Budget Line Item: An Adequately Funded Judiciary Is of Utmost Necessity to Ensure Access to Justice*, A.B.A. J. (Nov 1, 2010, 3:36 AM), http://www.abajournal.com/magazine/article/more_than_a_budget_line_item/ (describing how Congress declined a request from the Judicial Conference of the United States to create 69 new federal judgeships).

low-weighted caseloads have likewise been ignored. In the interim, in the districts with high caseloads, prompt resolution of motions and certain trial dates for civil cases are merely aspirational goals.

V. CONCLUDING REMARKS

This paper has attempted to argue that research into what types of civil cases are no longer being tried is scant. Where parties have reached a voluntary and informed settlement on cases involving personal injury or property damage, the decline of jury trials in these cases may be of less consequence. If civil jury trials are declining in cases addressing rights of assembly, free speech and expression, and denial of due process, that may be troubling.

Some argue that "[w]ithout widespread public participation in the jury system, public confidence in the system itself will fail. This endangers the rule of law, and is therefore a grave threat to the health of our democracy."[154] I do agree that jury participation is helpful in many respects. It fosters an understanding of the third branch of government and the workings of the judicial system. It offers the opportunity for individuals to serve in a unique role—neutral factfinder. Finally, in an age of declining voter participation, jury service provides individuals with the opportunity to directly participate in our governmental structure. Despite these positive attributes, the civil trial between private litigants deserves an efficient and prompt resolution.

Professor Langbein argues that the discovery mechanisms established in the 1938 Rules of Civil Procedure inadvertently created a "truth-revealing process so powerful that it would ultimately displace not only the older pleading-based pretrial, but also the trial. By so enhancing the information available to litigants about the evidence likely to be presented were trial to occur, discovery promoted settlement in place of trial."[155] He further states:

> Common law trial was never a particularly good way of resolving fact disputes, because the common law was never able to overcome the mistake that hobbled it from the outset in the Middle Ages, the failure to devise suitable means of investigating the facts. The discovery revolution of the

154. *See* Robert C. Walters, et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 320 (2005) (extolling the importance of the jury system in American jurisprudence).

155. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 570 (2012) (contending that, in the 1930s, the drafters of the Federal Rules did not foresee the transformative effect that the legislation would have on jury trials).

> Federal Rules, by overcoming that investigation deficit, set in motion changes that have made trial obsolete.[156]

I do agree that the discovery rules have effectively allowed the parties to understand the merits (and weaknesses) of their case and the potential range of damages that could be awarded. To that extent, the discovery rules have not "targeted" jury trials; rather, the jury trial is a collateral casualty of the rules.[157] To the extent that the discovery rules allow the parties to reach a mutual settlement, a significant curtailment of discovery solely because of the cost considerations should be avoided. Nevertheless, after some limited discovery, a structured early merits evaluation hearing before a judge could be beneficial.

Others have argued that the decline of the civil jury trial will result in a loss of experience for attorneys and judges.[158] Some have posed the question: Are fewer civil trials good or bad? Talmage Boston tweaks that question as follows: "A good thing or a bad thing for whom?"[159] Boston notes that he is "yet to have a client who truly wanted to proceed through the entire litigation process of going to trial and then proceeding through an appeal when an acceptable settlement became available."[160]

Change is always difficult for some to accept. Jury trials as we knew them are on the decline. That may or may not be problematic, depending on what types of cases are being impacted. But all professions and businesses are being challenged to do things differently, more efficiently, and to produce a greater return for the client. If voluntary mediations settle cases after informed decisions are made, why is this not a form of collaborative justice that is touted and praised in many legal circles? If

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156. *Id.* at 572.

157. *See id.* (charting the course of the rules since 1938 and acknowledging the shifting landscape of litigation away from the frequency of trials).

158. *See* Justice Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 181 (2005) (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 492–93 (2004)) (noting that fewer lawyers possess the requisite skills and experience to go to trial, which has lead to what is called "a fear of trialing"); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 855 (1990) (suggesting that, although "[p]rojected demographics indicate that the American bar will continue to absorb large numbers of new lawyers, . . . the prevailing rhetoric of reform promises no increase in opportunities for trial experience").

159. *See* TALMAGE BOSTON, RAISING THE BAR: THE CRUCIAL ROLE OF THE LAWYER IN SOCIETY 192 (2012) (asserting that the greatest factor in determining whether the decline in civil jury trial represents a good or bad trend may ultimately depend on whether you are a plaintiff or defendant).

160. *See id.* at 193 (attributing causes of "the vanishing civil trial" to the "development of discovery over the last few decades").

cases are not being tried because of the costs and delays attended in getting a case to a jury, then procedural reform of our system is imperative.