

# The Proportionality Principle and the (Amount in) Controversy

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As the foreword to this book suggests, the American legal system is unique in countless ways. Its system of civil procedure is no exception. Many practices, such as pleading rules and discovery norms, set the America apart from many foreign countries, including our common-law cousins. Over a decade ago, these differences prompted John Langbein to observe:

Americans operate a system of civil procedure whose excesses make it a laughing stock to the rest of the civilized world. Our system is truth-defeating, expensive, and capricious--a lawyers' tax on the productive sector. Some Americans do not want to admit the dimensions of our failure in civil justice. Powerful vested interests, especially at the trial bar, thrive from this dysfunctional system. They do not want it subjected to the searching critique that results from comparative study. Cultural chauvinism--the claim that cultural differences prevent us from adopting and adapting the superior procedural devices of other legal systems--is an effort to switch off the searchlight of comparative law. In truth, the cultural differences that touch on the basic choices in civil procedure are trivial. The real explanation

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for the tenacity of our deeply deficient system of civil justice is not culture, but a combination of inertia and the vested interests of those who profit from the status quo.<sup>1</sup>

Langbein did not mince words, and those words added fuel to the fire of criticism already directed at the American system of civil procedure.

Yet, as Langbein appreciated better than most critics, diatribes about any system of rules (civil procedure or otherwise) do little to advance academic understanding unless they first articulate a coherent theory of what normative principles should underlie that system and then acknowledge the costs of jettisoning it. Sometimes, comparisons may cause us to conclude that the most familiar is, indeed, the most optimal, as the Swiss concluded when they recently reformed their system of civil procedure and imported almost nothing from foreign practice.<sup>2</sup> Like the Swiss, proud defenders of the American system are quick to point out its virtues: that notice pleading lowers barriers to entry in the courthouse and liberal discovery has ensured greater accuracy in fact-finding than an inquisitorial system which does not guarantee one party access to relevant documents in its adversary's possession.

Against that background, this chapter, which focuses on matters of pleading and discovery, offers a frank assessment of some of the problems with the American system of civil

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<sup>1</sup> John Langbein, Cultural Chauvinism in Comparative Law, 5 *Cardozo J. Int'l Comp. L.* 41, 48 (1997). See also John H. Langbein, The German Advantage in Civil Procedure, 52 *U. Chi. L. Rev.* 823 (1985).

<sup>2</sup> See Samuel P. Baumgartner, Civil Procedure Reform in Switzerland and the Role of Legal Transplants ("Legal Transplants"), in *Common Law, Civil Law and the Future of Categories* 18-26, (Janet Walker and Oscar G. Chase, eds., forthcoming).

procedure and an original solution to those problems. My thesis may be summarized as follows: the system of pleading and discovery is in need of repair but not along the lines that most observers think. Rather than parsing the fine distinctions between notice and plausibility pleading or tweaking a party's initial disclosure obligations, we should instead ensure that the process costs of our system of dispute resolution are proportional to the amount in controversy. In the jargon of civil procedure, we need to reinvigorate the proportionality principle. We should do so by explicitly linking the parties' discovery entitlements to the amount in controversy (as established in the complaint and any counterclaim). Moreover, in order to give the parties adequate incentives to plead accurately the amount in controversies, parties seeking relief should be required to post a bond. The proceeds of this bond would be available to shift the costs of discovery compliance when a plaintiff propounds discovery requests that are not proportionate to the value of the controversy.

This article develops that thesis in four parts. It first articulates a normative vision of the goals toward which any system of civil dispute resolution should aspire. It then surveys the empirical landscape and measures the extent to which our civil justice system achieves – and fails to achieve – these goals. It also examines some of the current proposals for civil justice reform and identifies their weaknesses. Next, it lays out both wings of the proposal – (a) tying the discovery rights to the amount in controversy and (b) the bond requirement. Finally, it anticipates and responds to the major criticism that the proposal will invite.

### **To What Ends Should Our System of Civil Procedure Aspire?**

Far too frequently, our system of civil procedure is criticized (or defended) in acontextual manner. That is to say that its apologists (and detractors) describe the system without formally considering the underlying values that it espouses (or should espouse). In order to avoid that trap, I make explicit here such a normative vision at the outset. My goal is not to resolve the debate definitively but, rather, simply to establish a common ground for discussion and, thereby, avoid the sorts of acontextual critiques that plague the civil procedure literature.

The vision articulated here finds its roots in two streams of literature – (1) dispute resolution and (2) law and economics. The dispute resolution literature, especially the work of Lon Fuller, teaches us to think of the civil justice system as one of several “forms” of dispute resolution.<sup>3</sup> In other words, despite the salience of reported opinions in civil litigation, many disputes never reach the court.<sup>4</sup> They may be arbitrated; they may be mediated; they may be settled; or they may be resolved over a handshake and a beer. These forms of dispute resolution are socially desirable in two respects. First, they reduce social costs because the disputants do not need to call upon the resources of the state to resolve their dispute. Second, these alternative forms of dispute resolution also shorten the queue for litigants who are in the civil justice system and, thereby, enable those litigants to obtain results from the system more quickly.

As essential insight follows from the foregoing – namely that the civil litigation system serves as a default system when one of these other forms fails to resolve the dispute. This may be because the parties are not in privity of contract (and thus have not agreed to arbitrate). It

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<sup>3</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

<sup>4</sup> Not all see this development as salutary. See Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

may be because the parties' anticipated outcomes are too distant from each other (thereby precluding settlement). It may be because one of the parties possesses information bearing on the merits that it is reluctant to disclose to the other party (thereby precluding a mediated solution). It may be because the parties' incentives are so askew (think of a bet-the-company case) that the conditions for mutually agreement resolution are not possible. Or it may be because one (or both) of the parties believes that forcing their dispute into civil litigation will enhance its bargaining position. Whatever the cause, we need to be mindful of the types of disputes that end up in our civil litigation system rather than being resolved by some other form.

Law and economics literature teaches us that the system of civil litigation should have as its goal to promote lawsuits when such suits are socially desirable.<sup>5</sup> Social desirability can be measured by comparing the social costs of litigation when it is prohibited against the costs of litigation when it occurs.<sup>6</sup> Here, scholars teach us that any system of civil litigation must be vigilant about three potential social costs – false acquittals, false convictions and litigation costs.<sup>7</sup>

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<sup>5</sup> Hylton, *When Should a Case Be Dismissed?*, 16 *Sup. Ct. Econ. Rev.* 39, 44 (2008).

<sup>6</sup> Steven M. Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 *J. Legal Stud* 333 (1982).

<sup>7</sup> Hylton, 16 *Sup. Ct. Econ. Rev.* at 45; Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 *Wash U. J. L. Policy* 61 (2007); Bone, *Economics of Civil Procedure* at 146-48; Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy and Procedural Efficiency*, 87 *Geo. Wash. L. Rev.* 887, 911 (1999).

Any system of civil litigation that seeks to minimize these costs encounters an inescapable tension, namely that it is not possible to minimize all three costs simultaneously.<sup>8</sup> A system that seeks to avoid false acquittals likely will entail higher litigation costs (as the cost of truth-seeking will necessitate more intrusive discovery into information in the defendant's possession).<sup>9</sup> By contrast, a system that seeks to minimize false convictions may lead to lower litigation costs but also enhances the risk of false acquittals (as plaintiffs lack access to the information needed to prove their case).<sup>10</sup>

This normative backdrop helps to identify the exceptional features of the American system. Since the adoption of the Federal Rules of Civil Procedure, the American system generally has tolerated higher litigation costs in order to reduce the risk of an erroneous outcome (whether a false acquittal or a false conviction). Liberal notice pleading rules and generous discovery rules reflect this approach. Under that system, the purpose of a complaint is merely to put one's adversary on notice about the topic of the lawsuit; it does not have to set forth the factual basis for the claim. Unless the complaint is dismissed based on some obvious defect, the plaintiff then is entitled to receive copies of the defendant's relevant documents and to depose the defendant, his employees and other relevant witnesses (which may then provide or re-enforce the factual basis). By contrast, continental European and Asian systems have trended in the opposite direction – placing greater emphasis on reducing litigation costs (but thereby increasing

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<sup>8</sup> Bone, *Economics of Civil Procedure* at 2.

<sup>9</sup> *Id.* at 128-32.

<sup>10</sup> *Id.*

the risk of an erroneous outcome). Consequently, these systems tend to impose stricter fact-based pleading requirements and are miserly in their approach to discovery.<sup>11</sup> Under these systems, plaintiffs must set forth the factual basis for their claims already in their complaints; failure to do so result in dismissal. Moreover, even where the factual showing is sufficient, the plaintiff in most European and Asian systems does not have the same entitlement to receive copies of relevant documents from the defendant or to depose the defendant, his employees or other relevant witnesses before trial (meaning that the case often rises or falls on the facts that the plaintiff is able to adduce).

### **Has Our System Our Civil Procedure Achieved Those Ends?**

This section does two things. First, it tries to identify the precise failings of our current system of civil litigation. Second, it discusses the incompleteness of pleading reform as a solution to these problems.

#### *A. What Precisely Is Wrong With Our System of Civil Litigation?*

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<sup>11</sup> Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 *Am. J. Comp. L.* 905 (1997); IAALS Report (2009); Scott Dodson, *The Challenge of Comparative Civil Procedure: Civil Litigation in Comparative Context*, 60 *Ala. L. Rev.* 133 (2008); Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 *Tex. L. Rev.* 1165, 1671 (1998); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 *U. Pa. L. Rev.* 441 (2010); American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, *Final Report (“ACTL Report”)* App. A at 1 (Mar. 11, 2009).

Criticism of our system of civil litigation is nothing new. As Roscoe Pound famously observed over a century ago: “Dissatisfaction with the administration of justice is as old as law.”<sup>12</sup> Our experience under the Federal Rules of Civil Procedure has been no exception to Pound’s general observation. After a brief “golden age” following the rules adoption, some participants and observers began to complain that the new rules had made the barrier to entry too low and exposed defendants to costly and unjustified fishing expeditions.<sup>13</sup>

In the 1970’s and 1980’s, the rules architects sought to respond to these criticisms. These responses took two main forms.<sup>14</sup> First, the Rules were modified several times to impose

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<sup>12</sup> Pound, *The Causes of Dissatisfaction with the Administration of Justice*, 40 *Am. L. Rev.* 729 (1906).

<sup>13</sup> See, e.g., E. Barrett Prettyman, *Procedure in Anti-Trust and Other Protracted Cases*, 13 *F.R.D.* 41, 62. For a useful synopsis of the history of criticisms following the adoption of the Federal Rules of Civil Procedure, see *Lawyers for Civil Justice et al., Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure* (white paper delivered at the 2010 Conference on Civil Litigation at Duke Law School); Rebecca L. Kourlis et al., *Reinvigorating Pleadings*, 87 *Denv. U. L. Rev.* 245, 251 (2010).

<sup>14</sup> Stephen B. Burbank and Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 *Am. J. Comp. L.* 675 (1997). See also Edward D. Cavanagh, Twombly, *The Federal Rules of Civil Procedure and the Courts*, 82 *St. John’s L. Rev.* 877, 884-89 (2008); Richard L. Marcus, *Discovery Containment Redux*, 39 *B.C. L. Rev.* 747 (1998);

marginal limits on discovery (such as limits on the number of interrogatories and time limits on depositions). Second, the Rules were revised to encourage active case management by district judges, on the theory that early intervention by the judge could overcome protracted pretrial disputes.

Our current system of civil litigation must be addressed against this history of criticism and reform. The current consensus, according to one report at a major conference on the topic at Duke Law School, was that the current system was too expensive and took too long to bring cases to resolution.<sup>15</sup> Most data confirm this consensus. According to one recent survey of Fortune 200 companies, total litigation costs between 2000 and 2008 were approximately \$4.1 billion and average \$115 million per company, a 112 % increase over the reporting period.<sup>16</sup> The same study revealed that, measured as a percentage of corporate revenue, litigation expenses for these corporations had increased 78% over the same period.<sup>17</sup> (The time frame captured by the study is noteworthy, for the increases postdate many of the above-described efforts to rein in

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Linda Mullenix, *Discovery in Disarray: the Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 *Stan. L. Rev.* 1393 (1994).

<sup>15</sup> Institute for the Advancement of the American Legal System, *Preserving Access and Identifying Excess: areas of Convergence and Consensus in the 2010 Conference Materials* (“Preserving Access”).

<sup>16</sup> See generally Robert E. Litan, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* (Aug. 2007)

<sup>17</sup> *Id.*

costs in the civil litigation system.<sup>18)</sup> This steady increase in costs affects not simply the parties but the United States' long-run competitiveness.<sup>19</sup>

The advent of electronic discovery has exacerbated these problems.<sup>20</sup> This avenue of information gathering has grown increasingly popular as more corporate documents are generated electronically.<sup>21</sup> Nightmarish anecdotes abound, including one where a non-party

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<sup>18</sup> For a good overview of the economic impact of the civil litigation system at the time these reforms were being implemented, see Walpin, *America's Failing Civil Justice System: Can We Learn From Other Countries?*, 41 N.Y. L. Sch. L. Rev. 648 (1996-97).

<sup>19</sup> U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness By Reducing Legal Costs And Uncertainty ("Litigation Environment")* (Oct. 2008). This gels with earlier research from the American Tort Reform Association finding that the civil justice system generates direct and indirect costs of more than \$200 billion annually. See Walpin, 41 N.Y. L. Sch. L. Rev. at 648.

<sup>20</sup> See generally Rand Institute for Civil Justice, *The Legal and Economic Implications of Economic Discovery: Options for Future Research* (2008); Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* (2008) ("Front Lines") (discussing prevalence of electronically stored information and massive costs of compliance with electronic discovery orders).

<sup>21</sup> Victor E. Schwarz and Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 Harv. J.L. Pub. Policy 1107, 1143 (2010) (large organizations generate 250-300 million emails per month);

government agency incurred over \$6 million dollars (approximately 9% of its annual budget) complying with an electronic discovery order.<sup>22</sup> More recent research has sought to assess this phenomenon systematically and suggests that these nightmarish anecdotes are not entirely unrepresentative.<sup>23</sup> While 2006 amendments to the Federal Rules have sought to temper the financially crippling effects of electronic discovery,<sup>24</sup> their efficacy is questionable.<sup>25</sup> A recent

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Kourlis, 87 Denv. U. L. Rev. at 253 (claiming that 99% of information generated today by firms is electronic) 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, 893-94 (2009) (noting that 90% of corporate communications are electronic and that businesses exchange approximately 2.5 trillion emails annually); Lawyers for Civil Justice et al., *Reshaping the Rules of Civil Procedure for the 21<sup>st</sup> Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure (“Reshaping the Rules”)* at 46 nn. 199-200 (collecting research on electronic document production by companies).

<sup>22</sup> In re Fannie Mae (discussed in ILR Report). For a collection of anecdotes, see Martin A. Redish, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory (“Back To The Future”)* (2010) (manuscript on file with author).

<sup>23</sup> Emery G. Lee and Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis (“Multivariate Analysis”)* (Mar. 2010). See also Federal Judicial Center, *National Case-Based Civil Rules Survey Results* (2009).

<sup>24</sup> Under Federal Rule of Civil Procedure 26(b)(2)(B), “a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably

report of the Institute for the Advancement of the American Legal System found that the average costs of complying with electronic discovery obligations in a mid-size case were approximately \$3.5 million.<sup>26</sup>

Of course, an expensive system is not *a priori* undesirable. If the social value of the litigation is sufficiently high, then the high dispute resolution costs may be entirely justified. Moreover, empirical research suggests that some cases in federal court involve little to no discovery.<sup>27</sup> Nonetheless, the cost data should alert us to the possibility that, in cases that do involve discovery, the excessive costs of resolving disputes can force parties to settle even where they may have a meritorious position.<sup>28</sup>

So is this expense socially undesirable? Though more empirical research in this area is desperately needed, the available literature suggests the answer may be yes. Twenty years ago,

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accessible because of undue burden or cost.” If the requesting party shows good cause, the court may order discovery, taking into account the proportionality principle and subject to conditions (such as cost-shifting).

<sup>25</sup> Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies 25-55* (May 2010).

<sup>26</sup> *Front Lines* at 5.

<sup>27</sup> See Thomas E. Willging et al., *Discovery and Disclosure Practice, Problems, and Proposals for Change* (1997).

<sup>28</sup> See also Frank Easterbrook, *Discovery as Abuse*, 69 *B.U. L. Rev.* 635, 636-37 (1989).

the President's Council on Competitiveness found that discovery accounted for eighty percent of litigation costs in the United States, a figure supported by the reports of corporate in-house counsel.<sup>29</sup> A more recent study found that discovery comprises half of all litigation costs and, in the most expensive cases, equals 90% of litigation costs and 32% of the amount in controversy.<sup>30</sup> Most recently, research into the civil litigation system revealed strong correlations between litigation costs and factors such as the size of the controversy, longer processing times, and electronic discovery.<sup>31</sup> These results remain, however, quite preliminary.

Survey evidence supports the idea that our civil litigation system is too expensive relative to the amount in controversy. A recent survey by the ABA Section on Litigation typifies the survey data: 78% of plaintiffs' lawyers, 91% of defense attorneys and 94% of attorneys with mixed plaintiff/defense practices believe that litigation costs are not proportional to the value at least in small stakes cases (smaller percentages concur with the proposition in large-stakes cases).<sup>32</sup> To be sure, such survey evidence is not ideal thermometer by which to measure the ills

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<sup>29</sup> President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* at 1-3 (1991).

<sup>30</sup> Willging et al., *An Empirical Study of Discovery and Disclosure Practice under the 193 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 544-46, 548-49 (1998).

<sup>31</sup> *Multivariate Analysis*, supra note 23, at 11-14.

<sup>32</sup> ABA Section of Litigation, *Member Survey on Civil Practice: Summary* ("ABA Survey") (Dec. 2009). See also Institute for the Advancement of the American Legal System, *Civil Litigation Survey of Chief Legal Officers and General Counsel Belonging To The Association*

of our civil justice system. Nonetheless, in addition to supporting the general idea that our system of civil litigation is out of whack, survey evidence is valuable for a second, independent reason. It can capture users' *perception* of how the system operates. That perception is important for it can influence a party's behavior on matters such as whether to initiate litigation (in the hope of exploiting expensive discovery to extract settlement) and whether to settle it (even if a party's position is meritorious).

The American litigation system is unquestionably expensive. Moreover, both empirical and survey evidence suggests that these expenses are disproportionate to the value of a suit. Just as importantly, this state of affairs has fostered a broader perception about the disproportionate expense of the American litigation system, one that can affect party behavior and American competitiveness.

### *B. The Incompleteness of the Pleading Reform Project*

The current vogue prescription to these maladies has been pleading reform.<sup>33</sup> While the original federal rules were modeled largely on a system of notice pleading, recent changes have moved us closer toward (though certainly not to) a system of fact-based pleading. For example, specific statutes such as the Y2K Act and the Private Securities Litigation Reform Act require

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Of Corporation Counsel ("IAALS Survey") 19 (2010); ACTL Report. Easterbrook, *Discovery as Abuse*, B.U. L. Rev. at 637.

<sup>33</sup> For a thorough recent survey of the literature, see Steinman, *The Pleading Problem*, 62 Stan. L. Rev. 1293, 1296-97 nn. 10, 12 (2010).

plaintiffs to plead certain claims with an exceptional degree of factual specificity.<sup>34</sup> More generally (and more significantly), several recent Supreme Court decisions have required proof that the allegations in the case were at least “plausible.”<sup>35</sup>

These reforms have had some effect on disproportionately expensive litigation (despite criticism in the academic literature).<sup>36</sup> By raising the bar before a plaintiff has access to discovery, these reforms reduce the risk that cases will enter the stage where discovery is entirely out of proportion to the value of the dispute. Very preliminary empirical data indicate that heightened pleading standards can filter out cases lacking any substantive basis.<sup>37</sup> This evidence accords with comparative research showing that countries which require more detailed pleadings are better able to control the costs of their civil litigation system.<sup>38</sup>

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<sup>34</sup> 15 U.S.C. § 6601 et seq.; 15 U.S.C. §78u-4(b).

<sup>35</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

<sup>36</sup> See, e.g. A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1 (2009); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 411 (2008).

<sup>37</sup> See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. 553, 556 (2010) (presenting data to support the proposition that the post-Iqbal dismissal rate is significantly higher than the comparable pre-Twombly rate).

<sup>38</sup> Institute for the Advancement of the American Legal System, *A Summary of Comparative Approaches To Civil Procedure* (“Comparative Approaches”).

Nonetheless, pleading reform is a rather blunt tool for addressing the proportionality problem and cannot represent a complete answer to the difficulties that trouble current civil litigation practice. Even if the Supreme Court sorts out what it means by the “plausibility standard,” pleading reform does not address the underlying problem of what happens to a lawsuit that satisfies the plausibility (or other) standard. In other words, once a complaint surmounts the motion to dismiss, the parties are off to the races in discovery, at which point all of the above-described perils of the discovery process kick in. Given the extensive literature demonstrating how discovery costs (compared to, say, pleading practice) drive the costs of civil litigation, it is only when we directly link pleading reform with discovery reform that we can begin to get at the core difficulties ailing our system of civil litigation. The next section takes up that task.

### **A Proposal Premised on the Proportionality Principle**

An obvious solution to the proportionality problem would be to eliminate the system of party-controlled discovery entirely and replace it with an inquisitorial system where the judge controls the production and exchange of information. That solution, however, is not unproblematic. As a normative matter, this would elevate the risk of false acquittals in meritorious cases. Even if that cost were acceptable, as a practical matter, such an approach has not attracted a groundswell of support.

Instead, I offer an original proposal designed to address the imbalance in our current system of civil litigation and more compatible with the existing rules framework. That proposal expressly ties a party’s entitlement to discovery to the amount in controversy (and nothing else).

In order to ensure that parties do not exaggerate the amount in controversy, I defend a requirement that the plaintiff post a bond tied to the amount in controversy.

*B. Proportionality: A Primer*

The proportionality principle states that the degree of pretrial process should be proportional to the value of the controversy.<sup>39</sup> The principle links pleading practice and discovery practice.<sup>40</sup> A party's entitlement to discovery is directly correlated with what it pleads.<sup>41</sup> At a high level of abstraction and at its extreme poles, the principle is relatively easy to apply. High-stakes, complex cases such as antitrust disputes involving allegations of world-wide

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<sup>39</sup> See Bone, *The Economics of Civil Procedure* at 217-24.

<sup>40</sup> In *Twombly*, the Supreme Court recognized this essential relationship: "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence." 550 U.S. at 559. See also Steinmann, 62 *Stan. L. Rev.* at 1351 ("Discovery costs are, however, a crucial part of the debate over how strict or lenient federal pleading standards ought to be.").

<sup>41</sup> In its recent report on revisions to the federal rules, the American College of Trial Lawyers wrote that "[p]roportionality should be the most important principle applied to all discovery." ACTL Report at 7.

price fixing likely will necessitate extensive discovery. By contrast, low-stakes, simple cases like a garden-variety unpaid bill will not.

Like any good principle, though, the devil lies in the details. How does one measure the value of a case? How does one measure its complexity? How much discovery does a complex antitrust case require? How little discovery does a case about an unpaid bill really need?

The Federal Rules of Civil Procedure provide one approach. Rule 26(b)(2)(C)(iii) provides that a federal court must limit discovery when it determines that:

the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

In theory, the rule is unassailable. It requires judges to undertake a sort of cost-benefit analysis – weighing the value of the information against the cost of obtaining it. In practice, however, this Rule has not lived up to its expectations, and its operation has been substantially criticized in the academic literature.

Criticism comes from two corners. First, the rule is structurally flawed. It requires the judge to make an assessment about the case with incomplete information.<sup>42</sup> That is, the Rule forces the judge to determine the value of a particular category of information to the case before the judge fully understands what the case is about. Given that one party is seeking the information and knows the case better than the judge, the judge will be reluctant to second-guess that party's assessment about the importance of that information to the case.

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<sup>42</sup> Moss, 58 Duke L. J. at 920, 924.

Second, the rule has not been efficacious. It has largely failed to cabin runaway discovery disputes.<sup>43</sup> The basic problem is the multi-factor quality of Rule 26(b). Like most-multi-factor tests, it is far too malleable and fails to provide sufficient guidance to the judge on when he should refuse discovery on the ground that it's disproportionate to the value of the information.<sup>44</sup>

This assessment of the proportionality principle teaches us several important lessons. First, to overcome these difficulties, we need a version of the rule that allows the judge to apply the proportionality principle based on information easily available to him. Second, whatever standard the judge applies, it should be relatively simple and straightforward, not a squishy multi-factor balancing test that leaves parties and judges directionless.

### *C. Distinguishing off Rule 8(a)(3)*

Here, I propose replacing the multi-factored approach embodied in Rule 26(b)(2)(C)(iii) with a simpler approach tied more directly to the amount in controversy. That is, the parties'

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<sup>43</sup> See *Twombly*, 550 U.S. at 559; 8 *Wright and Miller Section 2008.1* at 121. See also Easterbrook, 69 *B.U. L. Rev.* at 638-39 (“[t]he portions of the Rules of civil Procedure that call on judges to trim back excessive demands have been ... and are doomed to be hollow.”); Richard A. Epstein, *The Risks of Risk/Utility*, 48 *Ohio St. L. J.* 469, 476 (1987) (blaming “malleable discovery tests for inexorable expansion of tort liability”); Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 *F.R.D.* 123, 127 (2005).

<sup>44</sup> *Back to The Future* at 10-14; Easterbrook, 69 *B.U. L. Rev.* at 640.

entitlement to engage in discovery should be directly – and exclusively – correlated with the value of the dispute -- and not any of the other factors currently set forth in Rule 26(b)(2)(C)(iii).

The idea of linking discovery entitlements to the amount in controversy finds support in both state practice and international practice.<sup>45</sup> The most familiar example, perhaps, is small-claims court – where parties in small stakes disputes forego many of the formalities of a trial (including discovery) in return for an expedited decision – their entitlement to that system of processes is explicitly linked to the amount in controversy. As an example of more general civil practice, Colorado Rule 16.1 peremptorily prohibits discovery in cases where the amount in controversy is under \$100,000.<sup>46</sup> On the international stage, several foreign courts including those in England, Scotland, certain provinces in Canada, and Spain all tailor the extent of discovery and disclosure to the amount in controversy.<sup>47</sup> For example, under the Expedited Litigation Pilot Program in British Columbia, where the amount in controversy is less than \$100,000, the parties are required to engage in expedited exchange of information, may take

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<sup>45</sup> The nexus between proportionality and discovery recently formed a core principle of the IAALS/ACTL Final Report on Discovery. See ACTL Report at 9.

<sup>46</sup> Colo. R. Civ. P. 16.1. For a recent report on the experience of bench and bar under the rule, see Corina Gerety, IAALS Surveys of the Colorado Bench and Bar on Colorado's Simplified Pretrial Procedure for Civil Actions (2010).

<sup>47</sup> Comparative Approaches at 22, 35-37, 54.

depositions only with the court's permission, must limit their depositions to two hours and may use only one expert witness.<sup>48</sup>

So how would we begin to adopt these models to practice under the federal rules? Rule 8(a)(3) provides a ready-made platform for this approach. Under Rule 8(a)(3), a plaintiff is asked to set forth the “demand for the relief sought.”<sup>49</sup> This is typically overlooked in the academic literature and, with the exception of cases premised on diversity jurisdiction, plays virtually no role in practice. This is hardly surprising. Once the dispute has begun, the value of the controversy set forth in the pleadings is wholly irrelevant to the proceeding.

How would discovery be tied to the amount in controversy? One might begin by drawing Professor Edward Cooper's proposed simplified rules of civil procedure.<sup>50</sup> While Cooper's proposal contains a good deal of nuance, its essential features may be briefly summarized: the simplified rules would fall into three different categories: (a) for all disputes under \$50,000; (b) for all disputes under \$250,000 if plaintiffs elect to opt in to the rules and no defendant objects; (3) in all cases where all plaintiffs offer and all defendants accept the option to proceed under the simplified rules.<sup>51</sup> Parties would have broad disclosure obligations tailored to their knowledge of

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<sup>48</sup> British Columbia Sup. Ct. R. Civ. P. 68, discussed in *Comparative Approaches* at 36.

<sup>49</sup> Fed. R. Civ. P. 8(a)(3).

<sup>50</sup> See Edward H. Cooper, *Simplified Rules of Federal Procedure*, 100 Mich. L. Rev. 794 (2002).

<sup>51</sup> Cooper did not pluck these figures out of thin air. Instead, they reflect detailed empirical research by the Federal Judicial Center about the value of disputes in federal court. *Id.* at 1797.

documents relevant to a fact disputed in the parties' pleadings. Discovery would be limited be presumptively limited to three depositions per side (not to exceed three hours), ten interrogatories, and ten requests for admission. Document requests would have to specify the precise documents sought unless a party obtained leave of the court to request a category of documents.

Cooper's proposal does not explicitly address the issue of electronic discovery, which, as noted above, has taken center stage in the complaints about the system of civil litigation. To take into account that development, I would modify Cooper's proposal so that a party would be able to propound an electronic discovery request only in two circumstances – (a) where the party specified the particular piece of electronic discovery sought (such as an email account or a particular party's or employee's electronic information) or (b) where the amount in controversy is sufficiently high as to justify the expense typically associated with searching for electronic information.<sup>52</sup>

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Moreover, the opportunity for parties to “opt in” to the simplified schedule reflects the reality that some cases involve little to no discovery at all.

<sup>52</sup> Admittedly, there may be instances in which the search for electronically stored information is cheaper and faster than searching paper files. Here, one might need to distinguish between readily searchable electronic databases and backup tapes where the extraction costs are higher. As e-discovery practices become more settled, it may become advisable further to modify these thresholds. For now, however, the simplicity and workability of the model proposed here outweigh the values of incorporating that nuance. I am especially grateful to Judge Kourlis and her colleagues at the IAALS for the comments on this point.

Initially, then the discovery schedule proposed here would work consist of three fields: (a) low-stakes (or voluntarily selected) cases that qualify for the above-described simplified rules, (b) higher-stakes cases that qualify for the traditional array of discovery tools (but with limited electronic discovery) and (c) highest-stake cases that qualify for this traditional array of tools and also qualify for electronic discovery. As courts and parties become acquainted with the rules (and empirical legal scholars study its operation), the schedule can be expanded and modified.

#### *D. Discouraging exaggerated claims*

If the parties' discovery entitlements are a function of the amount in controversy (and nothing else), this raises an obvious concern: how do we control the risk that a plaintiff will simply exaggerate the amount in controversy in an effort to invoke more generous discovery entitlements than the case really warrants? At least three alternatives are possible – a sanctions regime, a cost-shifting regime and a bond requirement.<sup>53</sup>

A sanctions regime presents one method for controlling exaggerated pleading of the amount in controversy requirement (in an effort to opt into a more favorable discovery regime). This approach would function in a manner not unlike current Rule 11, which sets forth certain obligations for counsel signing pleadings (like complaints). Adapted to this context, a sanctions regime would specify that, by signing the complaint, the plaintiff's counsel certifies that the

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<sup>53</sup> Another possibility, not explored here due to page constraints, would be a loser-pays rule as to costs.

alleged amount in controversy both is not designed to “needlessly increase the cost of litigation” and has “evidentiary support.”<sup>54</sup> A failure to abide by these obligations would result in a monetary sanction.<sup>55</sup>

A sanctions-based approach to the problem suffers from two main flaws. First, it distracts the court from the guts of the litigation. Defendants skeptical of the alleged amount in controversy would be encouraged to challenge the amount through a Rule 11 motion, which would then tie up the court in satellite litigation over the evidentiary basis for the alleged amount in controversy. Second, and more importantly, empirical evidence indicates that Rule 11 has not been a particularly effective vehicle to police pleading abuse.<sup>56</sup> Judges are reluctant to use it (perhaps because of the above distraction), and the penalties have not served as a particularly effective deterrent. For these reasons, we need to look elsewhere to identify an effective mechanism by which to control exaggerated valuations of the amount in dispute.

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<sup>54</sup> Fed. R. Civ. P. 11(b)(1), (3).

<sup>55</sup> Fed. R. Civ. P. 11(c).

<sup>56</sup> For articles collecting criticism of Rule 11’s efficacy, see Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 *Loyola L.A. L. Rev.* 765 (2004); Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 *Marq. L. Rev.* 313 (1992).

Cost-shifting presents a more promising alternative.<sup>57</sup> Under cost-shifting principles, each party would pay the costs of the other party's compliance with discovery requests and orders. Until recently, the Federal Rules were silent on the matter of cost-shifting. With the advent of electronic discovery, the idea gained some favor,<sup>58</sup> and the 2006 amendments to Rule 26, discussed above, have given courts a firmer footing to consider the option. Nonetheless, "the use of cost-shifting remains extremely limited – if not all but non-existent."<sup>59</sup>

Cost-shifting avoids many of the problems of the Rule 11 approach. It does not require the court to become tangled up in satellite concerns over the evidentiary basis for a party's allegations. Indeed, it should not require the court's involvement at all (unless disputes arise between the parties over whether the compliance costs incurred with a particular discovery request are themselves excessive – perhaps in an effort to pressure the party seeking discovery to settle).<sup>60</sup>

More significantly, cost-shifting offers the potential to address some of the problems identified above, namely the concern that the costs of resolving the dispute will be disproportionate to the value of the dispute. By placing the burden of paying for discovery

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<sup>57</sup> See Robert D. Cooter and Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 *J. Legal Stud.* 435 (1994); Edward H. Cooper, *Discovery Cost Allocation: A Reply to Cooter and Rubinfeld*, 23 *J. Legal Stud.* 465 (2004); *Back to the Future* at 13 note 37 (collecting literature).

<sup>58</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

<sup>59</sup> *Back to the Future* at 12.

<sup>60</sup> See Bone, *Economics of Civil Procedure* at 230.

squarely on the part seeking it, it encourages each party to calculate carefully the value of the information that it is seeking and, thereby, to limit its requests to those sources of information of core importance to its case. In a dispute involving only \$250,000, it would be irrational for a party to propound a discovery request requiring its adversary to conduct a massive search of electronic information if the costs of that search (and the consequent price to be paid by the requesting party) far outstrip the value of the relief sought.

Nonetheless, cost shifting does entail some problems. First, the effectiveness of cost shifting depends not on the quality of the dispute but, instead, the depth of a party's pockets. A party with substantial resources aligned against a party with relatively few resources may not greatly care about having to bear the costs of the other party's discovery compliance if it can afford it. This might happen, for example, when a major industry player sues a start-up competitor in an effort to drive it out of the history. The proposal here avoids this problem because it expressly links a party's discovery right to the value of the dispute; even a deep-pocketed plaintiff (or defendant) that is prepared to absorb its adversary's significant discovery-related costs could not abuse the discovery system.

Second, cost shifting enhances the risk that plaintiffs with meritorious claims either will be less likely to bring suit or less able to ferret out the information necessary to prove its case due to the cost that a plaintiff must bear in order to unearth that information.<sup>61</sup> By placing the full burden on the party seeking the information, a cost-shifting rule increases the cost of litigation to that party. In some cases, this will result in the true negative costs of false acquittals when meritorious claims are not pursued (even as imposing discovery costs on the defendant will

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<sup>61</sup> Id. at 204-15.

in some cases result in false positive costs when innocent defendant settle unmeritorious claims). Perhaps for this reason, most cost-shifting requests are denied (according to the available empirical research).<sup>62</sup> The challenge, then, becomes to find a solution that captures the benefits of cost shifting while minimizing this risk.

A bond requirement might fit the bill. Though perhaps more familiar in the criminal justice system, bonds can and do perform important functions in our civil litigation system as well. Parties seeking to obtain preliminary injunctions can be required to post bonds.<sup>63</sup> Similarly, parties appealing adverse judgments can be required to post bonds.<sup>64</sup> In both circumstances, the bond serves an important function: namely, it helps to ensure that the other party (the target of the injunction or the judgment creditor) has an opportunity to be made whole if the party seeking relief (the movant for the preliminary injunction, the appellant) fails in its effort. There is no principled reason why the bond cannot serve similar functions in other spheres of civil procedure.<sup>65</sup>

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<sup>62</sup> See Corince L. Giacobbe, Note, Allocating Discovery Costs in the Digital Age: Deciding Who Should Bear the Costs of Electronically Stored Data, 57 Wash & Lee L. Rev. 257, 290 (2000).

<sup>63</sup> Paul Stancil, Balancing the Pleading Equation, 61 Baylor L. Rev. 90, 195-96 (2009).

<sup>64</sup> Id. at 195-96.

<sup>65</sup> Id. Stancil explains how a bond requirement could be used to relax pleading requirements so that plaintiffs are not required to satisfy the plausibility standard of Twombly and Iqbal .

A bond requirement could operate as part of the proposal discussed here. The size of the bond would vary with the amount in controversy (and consequently the applicable discovery schedule). For example, in a relatively low-stakes case, the discovery schedule would authorize only a limited degree of discovery, and the plaintiff's bond would be correspondingly low. Depending on the percentage of the bond that would be cash-collateralized, the plaintiff's immediate out of pocket expense would only be a fraction of that amount. By contrast, in a larger-stakes case, the discovery schedule might entail much higher discovery costs, and the plaintiffs would be required to post a relatively larger bond, and its up-front cash obligation would be concomitantly higher.<sup>66</sup>

A bond holds the potential to control exaggerated claims about the amount in controversy (in an effort to obtain more generous discovery rights) while avoiding some of the drawbacks of a pure cost-shifting regime. Like the cost-shifting regime, it requires the plaintiff to assume some financial responsibility for the defendant's costs of compliance with the process costs of the dispute. Thereby, it helps to ensure that the defendant is made whole for the discovery costs that it incurs (much like the bond in the preliminary injunction and appeal contexts). However, it bears two significant differences from traditional cost-shifting proposals. First, the immediate financial burden on the plaintiff is relatively lower (posting only the collateralized portion of the bond). Second, the ultimate financial burden on the plaintiff may likewise be lower (in the event

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<sup>66</sup> Though space constraints prevent a complete elaboration of this idea, the principle would also operate in the case of counterclaims and cross-claims. In both instances, the counterclaimant/cross-claimant would be required to post a bond in order to trigger additional discovery rights.

that the bond proceeds are never paid to the defendant). As such, this approach reallocates a portion of the litigation costs while reducing the risk of false acquittals.

If one accepts the general idea of a bond as a means of controlling exaggerated claims about the amount in controversy, then it becomes important to flush out three details – (1) the trigger for when the bond requirement kicks in, (2) the standards for when the bond proceeds will be paid to the defendant, and (3) the size of the bond.

As to the trigger, the plaintiff should be required to post the bond at the time he propounds the first round of discovery. That is the moment when his actions are causing the defendant to incur search costs either to respond to or to contest the discovery requests. In order to standardize operation of the bond requirement, it may be advisable eventually to bar discovery entirely until the judge has ruled on any dispositive motions, as some statutes presently provide.<sup>67</sup>

As to the criteria, several options are theoretically possible. One would automatically entitle the defendant to draw down the bond as he incurs discovery costs (subject to any litigation over the reasonableness of the defendant’s cost estimate). Another would allow the defendant to draw down the bond when he prevails in the litigation (subject to elaboration on what it means to “prevail”). A third standard would permit the defendant to draw on the bond when he can demonstrate that the costs of complying with a particular discovery request are disproportionate to the value of the suit.

The third approach most faithfully advances the proportionality principle. The first approach is not really calibrated to proportionality so much as it is to cost-control and burden

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<sup>67</sup> See, e.g., Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(3).

allocation; the proper means of addressing that concern is through a cost-shifting rule. The second approach has some appeal but is also not calibrated to the proportionality principle. It goes to some length to make the prevailing defendant whole by compensating him for the costs of discovery, but, as the experience with fee shifting statutes demonstrates, it can be a complicated exercise to determine when a defendant prevails.<sup>68</sup> For example, how should a court decide whether to allow the defendant to draw on the bond when it dismisses some claims at summary judgment, but the jury returns a verdict for the plaintiff on claims that survive summary judgment? The third approach, in contrast to the other two, expressly links the defendant's entitlement to costs with the proportionality principle. It limits the defendant's recovery to situations where the discovery schedule does not adequately capture his search costs. This may be due to the plaintiff's design of the discovery requests. It might also be due to the defendant's structure (e.g., an interrogatory requesting detailed financial information may entail far higher costs for a multinational company like General Electric than for a private individual or a small business). This approach also encourages moderation by plaintiffs (and communication between the parties); when a particular discovery request prompts a defendant to request payment under the bond, the plaintiff can decide whether to stick with the request (and incur a financial obligation) or modifying the request in order to reduce the financial impact that the defendant must bear.

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<sup>68</sup> Cost-shifting may, however, supply an appropriate remedy in cases where the defendant is employing disproportionate discovery as a tactic designed to undermine a plaintiff's effort to bring a meritorious claim.

Finally, as to price, the amount of the bond should bear some relationship to the expectation that the discovery requests will entail disproportionate costs. For example, suppose that the underlying research into the discovery schedule suggested that disputes of a particular value (say \$100,000) entailed average discovery costs of \$5000. Suppose further that the *range* of discovery costs in disputes around this amount had a lower end of \$0 and an upper end of \$20,000. The bond might then be priced some standard deviation above the average cost (without forcing the plaintiff to insure against the full cost of the extreme case). So a plaintiff in such a case might be required to post a bond of \$5000-\$6000 (and, depending on the structure of the bond market, the plaintiff's actual out-of-pocket costs would only be a fraction of the total bond amount). While we do not yet have the empirical data to calculate that figure precisely, the theory suggests that the pricing would occur along these lines.

In sum, this part has introduced an original solution to the proportionality problem in civil litigation. First, the parties' discovery entitlements should be calibrated directly (and exclusively) with the amount in controversy. Second, the plaintiff should be required to post a bond, the amount of which would be tied to the discovery schedule. The proceeds of the bond could be allocated to the defendant when the discovery requests are disproportionate to the value of the suit. This approach harnesses some of the benefits of cost-shifting proposals (while avoiding some of its drawbacks) and taps into the benefits of bond requirements used elsewhere. Admittedly, though, the proposal is not immune from controversy or criticism. The next and final section of this article anticipates and responds to some of those criticisms.

## **Criticisms and Responses**

The preceding section has set forth a proposal that expressly linked the party's entitlement to discovery with the amount in controversy in the dispute. This represented a more sure-footed way to embed the proportionality principle in the civil rules, to overcome the shortcomings of Rule 26(b) and to address some of the failings (actual and perceived) in the civil litigation system, especially the concern that the costs of discovery, rather than the merits, would drive the resolution of the case. In this final section, I anticipate and respond to several potential criticisms of this proposal.

One criticism of the proposal might be that it will be too difficult for plaintiffs to measure the amount in controversy at the start of the suit. According to this argument, the plaintiff cannot accurately know the amount of her damages at the suit's commencement. In some cases, the amount of the damages will depend on information in discovery; in other cases, it will be necessary to retain experts, which only may occur after the case has commenced. Consequently, plaintiffs may either understate their damages (thereby depriving themselves of needed discovery) or overstate their damages (thereby incurring needless costs in terms of the bond).

Two responses to this criticism are possible. First, it overlooks the importance of pleading standards at the start of the case. Even under plausibility pleading, a court still assumes the plaintiff's version of the events to be true. Consequently, the plaintiff should be able to construct a relatively accurate assessment of the value of her case on the assumption that her account of events is correct.<sup>69</sup> Second, and more importantly, this criticism takes an unrealistic view of the work that plaintiffs' lawyers undertake before they take on a case. In arbitration, claimants must carefully calculate the amount in controversy, as the arbitrators' and arbitral

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<sup>69</sup> Hylton, 16 Sup. Ct. Econ. Rev. at 47.

institution's fees often depend on that amount.<sup>70</sup> Numerous reports have documented how plaintiffs' attorneys estimate the value of the case in order to decide whether to take the case and the likely financial investment necessary to pursue it.<sup>71</sup> Those accounts necessarily imply the fact that plaintiffs' attorneys have both the tools to ferret out the information necessary to assess a case's value and the ability to calculate that value.<sup>72</sup> The proposal suggested here simply requires them to make explicit a calculation that they already are undertaking.<sup>73</sup>

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<sup>70</sup> See, e.g., International Chamber of Commerce, Rules of Arbitration 26.

<sup>71</sup> ABA Survey at 5; Thomas A. Eaton and Harold S. Lewis, Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys, 241 F.R.D. 332 (2007).

<sup>72</sup> Indeed, in a few cases, federal statutes already require plaintiffs to make this sort of calculation. For example, the Y2K Act required a complaint to contain "a statement of specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation." 15 U.S.C. § 6607(b). Similarly, judges sometimes have to make this calculation when, for example, deciding whether a case satisfies the amount-in-controversy requirement. See 28 U.S.C. § 1332.

<sup>73</sup> One might, of course, turn this argument on its head. Supposing that plaintiffs know the actual value of their lawsuit, it might harm their settlement position to require them to disclose it. I personally do not find such a requirement objectionable, particularly if it results in settlements that approximate the actual value of the claim rather than ones based on an exaggerated claim.

Second, one might object that the amount in controversy does not adequately capture the complexity of the case. Relatively low-stakes disputes (like an injury claim with affirmative defenses) may entail relatively fact-intensive and complex questions of fault and causation. By contrast, relatively high-stakes disputes (like a breach of contract action in a large-scale investment project) may turn on relatively few factual propositions. According to this criticism, measures of complexity, rather than value, should drive the scope of discovery.<sup>74</sup>

This is a formidable objection but is not insurmountable. For one thing, tying discovery to the complexity of the case creates its own difficulties. It requires judges to figure out the meaning of complexity and then map it onto the discovery needs of the case. Moreover, while it certainly is true that the value of the controversy is not a perfect proxy for complexity, this argument ignores the essence of the proportionality principle. For it is precisely the point of the proportionality principle that low-stakes disputes should not entail excessive complex discovery, particularly where the costs of that discovery begin to butt up against the value of the case. Under those circumstances, litigation may well not be socially optimal, and the case may be a poor candidate for the civil litigation system. Admittedly, the current proportionality principle of Rule 26(b)(2) captures complexity more explicitly than the proposal I offer here, as part of the Rule's multi-factor test. Yet the problem, as already explained, is that the multi-factor test becomes so unworkable that the rule fails to perform its necessary filtering function in terms of shaving out excessive discovery requests. The clearer rule offered here, while perhaps not capturing all of the nuance, is far easier to apply.

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<sup>74</sup> For such a proposal, see Schwartz and Appel, 33 Harv. J.L. Pub. Policy at 1107.

If it were shown that the amount in controversy measure was ineffective in capturing the value and corresponding discovery needs, modifications of the proposal are possible.<sup>75</sup> For example, one might make any presumptions about values rebuttable. If a plaintiff believed that it had a low-stakes but discovery intensive dispute, it might petition the court for an adjustment to the case's classification in the discovery schedule (with a corresponding shift in the bond). This might compromise the workability of the proposal but could calibrate it slightly better to the difficulty flagged by this criticism.

A final criticism is that the bond requirement will discourage lawsuits. Since the bond requirement increases the up-front costs of plaintiffs (or their lawyers), this will discourage some otherwise meritorious claims. This is especially so in higher-stakes disputes, where the bond requirement would be concomitantly higher.

At a theoretical level, it certainly is true that the bond requirement raises the short-term costs of a party. To the extent this discourages nuisance suits, the outcome is not entirely undesirable.<sup>76</sup> To the extent it discourages suits more broadly, it should be emphasized that the effect is more one of degree rather than kind. Under any system of dispute resolution, a party must carry a degree of up-front costs (filing fees, attorney time, case preparation costs). While

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<sup>75</sup> Such modifications might be especially appropriate where, for example, nonmonetary factors better capture the public importance of the case (for example, a major constitutional challenge to a legislative enactment). See The Sedona Conference, *Commentary on Proportionality* (Oct. 2010).

<sup>76</sup> See Rosenberg and Shavell, *A Model in Which Suits Are Brought for their Nuisance Value*, 5 *Int'l Rev. L. Econ.* 3, 4-5 (1985).

this certainly adds to them, existing means can absorb that cost (just like it absorbs other costs). For example, an attorney operating on a contingency fee might simply factor those costs into his assessment of the case (as he factors in other case-preparation and case-maintenance costs). Moreover, to the extent other up-front costs that plaintiffs must bear can be reduced, the aggregate costs to the plaintiff might well be no different. Finally, if it proved that the bond requirement were systematically deterring categories of plaintiffs from maintaining particular categories of cases, one could imagine a system where a party could petition in a particular case for waiver of the bond requirement. Relaxation of the bond requirement would address the cost and access issues but might thereby eliminate one of the principal tools for avoiding excessive claims of the amount in controversy.